Introduction

This handbook is an in-depth survey of Virginia’s planning, zoning, and subdivision laws, as interpreted and applied by the courts, the Attorney General, and other bodies. This handbook also considers the significant role the United States and Virginia Constitutions play in land use regulation, as well as a range of federal laws that may affect local land use decisions, including the Americans with Disabilities Act, the Fair Housing Act, the Interstate Commerce Commission Termination Act, the Religious Land Use and Institutionalized Persons Act of 2000, and the Telecommunications Act of 1996. It also provides a review of many of the principles and laws that come into play in every land use decision, such as the Dillon Rule, the State and Local Government Conflict of Interests Law and the Virginia Freedom of Information Act. These topics, and others included in this handbook, were selected to provide a locality’s officers and employees, as well as the general public, a reference to allow the reader to understand the many legal issues faced each day on land use matters.

Albemarle County officers and employees who deal with land use matters and read this handbook from cover to cover will receive a broad understanding of Virginia land use law. It is useful to be familiar with these topics because, like it or not, matters pertaining to planning, zoning, and land development take place in very public and legal arenas. However, it is not necessary for every County officer and employee to fully understand all of the relevant legal issues arising from the wide variety of land use matters coming before the County. For example, a member of the Planning Commission need not necessarily understand the legal issues surrounding variances because variances are the domain of the Board of Zoning Appeals. Nevertheless, the range of topics addressed in this handbook is available as a reference when the need arises.

Both federal and state court decisions are analyzed in this handbook. Because it is first and foremost an educational document, this handbook includes Virginia circuit court (trial court) decisions, as well as opinions of the Virginia Attorney General, the Virginia Freedom of Information Advisory Council, and other resource materials intended to help the reader better understand the laws, rules, principles, and concepts discussed. See Appendix D for an explanation of the meanings of the case citations and the weight to be given to the sources.

This handbook is for educational purposes only and does not constitute legal advice.
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Chapter 1

The County and Its Boards, Commissions, and Officers:
Composition, Powers and Duties

1-100 The county

Counties, like cities, are subordinate agencies of the State government and are invested by the General Assembly with subordinate powers of legislation and administration relative to local affairs within their prescribed areas. Murray v. City of Roanoke, 192 Va. 321, 324, 64 S.E.2d 804, 807 (1951). Localities have “no elements of sovereignty.” Sinclair v. New Cingular Wireless, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012).

1-110 Powers

Under the Virginia Constitution, all county powers are delegations of authority granted by the General Assembly and, unless otherwise indicated by statute or the constitution, are vested in the board of supervisors. Constitution of Virginia, Art. VII, § 3; Virginia Code § 15.2-1401; see the discussion in section 1-220. With respect to the regulation of land use, the General Assembly has granted counties numerous powers to provide for comprehensive planning and to regulate the use and development of land by adopting zoning and subdivision ordinances. Virginia Code § 15.2-2200 et seq.

1-120 Limitations on powers

Of course, the county’s powers are not unlimited. One limitation on the county is that the exercise of its powers must not violate any constitutional principles. These principles include, but are not limited to, due process and equal protection. Another limitation is that the exercise of the county’s powers may not be inconsistent with the general laws of Virginia or of the United States. Virginia Code § 1-248. This means that the county’s exercise of its powers may not be contrary to any supreme law, and may be preempted by a supreme law. Finally, the county’s powers are limited by the rule of statutory construction known as the Dillon Rule. The Dillon Rule limits the county’s powers to those that are expressly granted by the General Assembly, those that may be necessarily or fairly implied from those powers expressly granted, and those that are essential and indispensable. Marble Technologies v. City of Hampton, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010). These issues are discussed in chapters 5, 6 and 7 of this handbook.

1-200 The board of supervisors

The board of supervisors is the governing body of the county. Its members are elected by the residents of the county.

1-210 Composition

As noted above, the county is governed by the board of supervisors, and the number of members may range between 3 and 11. Virginia Code § 15.2-1400. Some alternative forms of county government may specify a different range. For example, the county executive form of government requires that the number of members range between 3 and 9. Virginia Code § 15.2-502(A). Albemarle County operates under the county executive form of government, and its six-member board is elected by the qualified voters of single-member magisterial districts. See Virginia Code § 15.2-502; Albemarle County Code § 2-100 et seq. Board members are elected for four (4) year terms. Albemarle County Code § 2-201.

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1 Because this chapter emphasizes the County of Albemarle and counties generally, a discussion of cities, towns, and their governing bodies is not included.
1-220 Powers and duties

Unless expressly provided otherwise, all powers granted to localities are vested in their respective governing bodies. *Virginia Code § 15.2-1401* (applicable to all counties); *Miller v. Highland County*, 274 Va. 355, 365, 650 S.E.2d 532, 536 (2007) (“the governing body of a locality is a distinct legal entity authorized in Title 15.2 to exercise the statutory powers of that locality”). The powers of the county as a body politic and corporate are vested in the board of supervisors. *Virginia Code § 15.2-502* (applicable to counties such as the County of Albemarle that have adopted the county executive form of government). Albemarle County is one of two counties in Virginia that operates under the county executive form of government. *Virginia Code § 15.2-500 et seq.* Under this form of government, the board is the policy-making body of the county and is vested with all policy-making powers and responsibilities conferred by general law upon county governing bodies.

A board of supervisors can act only at authorized meetings as a corporate body and not by the actions of its members separately and individually. *Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922). An individual board member is a public officer whose duties are fixed by law. *Old v. Commonwealth*, 148 Va. 299, 302, 138 S.E. 485, 486 (1927). The chairman of the board has no significant substantive powers. The only special powers granted to the chairman are to “be the head of the local government for all official functions and ceremonial purposes.” *Virginia Code § 15.2-1423*. Otherwise, there do not appear to be any official powers conferred on an individual member of a board of supervisors. 1984-85 Va. Op. Atty. Gen. 23.

As the policy-making body of the county, the board is empowered to make all of the legislative decisions pertaining to land use, and this power may not be delegated to other boards, commissions or employees in the absence of express statutory authority. *Sinclair v. New Cingular Wireless*, 283 Va. 567, 581, 727 S.E.2d 40, 47 (2012). Thus, the board makes the final decision on those land use matters that are legislative in nature – comprehensive plan amendments, zoning text amendments, zoning map amendments, and special use permits. An example where the delegation of a legislative power is expressly authorized is found in *Virginia Code § 15.2-2309(6)*, which enables a governing body to authorize a board of zoning appeals (“BZA”) to review and approve special use permits. A board also may delegate the responsibility for non-legislative matters to subordinate bodies and officers, provided that the delegation does not run afoul of the Dillon Rule, as discussed in chapter 5, and the common law rules of delegation, as discussed in chapter 8, of this handbook.

1-300 The planning commission

A planning commission is an administrative entity established by the board of supervisors pursuant to *Virginia Code § 15.2-2210 et seq.*

1-310 Composition

A planning commission must consist of between 5 and 15 members. *Virginia Code § 15.2-2212*. The Albemarle County planning commission is composed of eight members appointed by the board of supervisors. *Virginia Code § 15.2-2212; Albemarle County Code § 2-401(A)*. The members of the commission must be residents of the county, and are qualified by knowledge and experience to make decisions on questions of community growth and development. *Virginia Code § 15.2-2212; Albemarle County Code § 2-401(A)*. At least one-half of the members of the commission must be owners of real property. *Virginia Code § 15.2-2212; Albemarle County Code § 2-401(A)*.

Seven members of the Albemarle County planning commission are voting members, and of those seven, six come from each of the county’s six magisterial districts and the other is appointed at-large. The eighth member is a non-voting member appointed by the board with the advice of the president of the University of Virginia. *Albemarle County Code § 2-401(B)*. The terms of the commissioners from each of the county’s magisterial districts are coterminous with the four-year terms of the board members in the district they serve; the term of the at-large member is two years; the term of the non-voting member is one year. *Albemarle County Code § 2-401(B)*.
1-320 Powers and duties


The planning commission has specific powers related to individual development applications. On legislative matters such as comprehensive plan amendments, zoning text amendments, zoning map amendments and special use permits, the commission is advisory to the board of supervisors and makes recommendations to the board. *(Virginia Code §§ 15.2-2223 (comprehensive plan), 15.2-2285 (rezonings), 15.2-2286 (rezonings and special use permits)).*

On ministerial matters such as subdivision plats and site plans, the subdivision and zoning ordinances may designate the planning commission as the decision-making body. When the commission is acting on a subdivision plat or on an appeal of the disapproval of a site plan, it is acting in a ministerial capacity, and its role is to determine whether the subdivision plat or site plan meets the minimum requirements of the applicable regulations.

The planning commission also has the following powers and duties:

- **Advisor to the board:** Serves as an advisory body to the board of supervisors to promote the orderly development of the county and its environs and to accomplish the objectives set forth in Virginia Code § 15.2-2200.

- **Comprehensive plan:** Prepares and recommends a comprehensive plan for the physical development of the county as provided in Virginia Code § 15.2-2223 et seq.

- **Official maps:** At the direction of the board of supervisors, or on its own initiative, makes or causes to be made an official map as provided in Virginia Code § 15.2-2233 et seq.

- **Capital improvement program:** At the discretion of the board of supervisors, or on its own initiative, annually prepares and revises a capital improvement program based on the comprehensive plan of the county for a period not to exceed the ensuing five years as provided in Virginia Code § 15.2-2239.

- **Subdivision ordinance:** At the request of the board of supervisors, or on its own initiative, prepares and recommends amendments to the subdivision ordinance as authorized by Virginia Code § 15.2-2253.

- **Zoning ordinance:** At the direction of the board of supervisors, or on its own initiative, prepares and recommends amendments to the zoning ordinance including a map or maps showing the zoning districts of the county as provided in Virginia Code § 15.2-2285.

- **Annual report:** Makes recommendations and an annual report to the board of supervisors concerning its operation and the status of planning within the county.

*Virginia Code § 15.2-2221.*

1-400 The architectural review board

An architectural review board (“ARB”) is an administrative entity that may be established by the governing body, pursuant to Virginia Code § 15.2-2306.

1-410 Composition

An ARB consists of five members who are appointed by the locality’s governing body to administer the Historic Districts Law. *Virginia Code § 15.2-2306.* In Albemarle County, this enabling authority is implemented through the entrance corridor overlay district. *Albemarle County Code §§ 18-30.6, 18-34A.* The members of the ARB must be
residents of the county and must have a demonstrated interest, competence or knowledge in architecture and/or site design. Albemarle County Code § 18-34.A.

In Albemarle County, ARB members are appointed for four-year terms and serve at the pleasure of the board of supervisors. Albemarle County Code § 18-34.A.

1-420 Powers and duties

An ARB is a creature of statute (Virginia Code § 15.2-2306), and it possesses only those powers expressly conferred by statute. Norton v. City of Danville, 268 Va. 402, 407, 602 S.E.2d 126, 129 (2004). An ARB has no implied powers.

In Albemarle County, the board of supervisors has granted the ARB the following express powers under Albemarle County Code § 18-34A:

• **Administer the regulations of the overlay district**: Administer the entrance corridor overlay district in accordance with the duties stated in Albemarle County Code § 18-30.6, which include promulgating appropriate design guidelines that must be ratified by the board of supervisors. The key duty of the ARB under Albemarle County Code § 18-30.6 is to consider requests for certificates of appropriateness, discussed below.

• **Consider requests for certificates of appropriateness**: Consider requests for certificates of appropriateness by determining whether a proposed building or structure, including signs, is architecturally compatible with the historic landmarks, buildings or structures within the entrance corridor overlay district.

• **Recommend areas to be included in overlay district**: Recommend areas to be included within the entrance corridor overlay district.

• **Act as an advisor to other bodies on land use matters**: Act as an advisor to the board of supervisors, the planning commission, and the board of zoning appeals on zoning map amendments, special use permits, site plans, subdivisions, variances and other matters pertaining to lands within the entrance corridor overlay district.

Under Albemarle County Code § 18-30.6, the scope of Albemarle County’s ARB’s authority may be defined by both the territory under the ARB’s authority and the extent of its review:

• **Physical reach of the ARB**: The entrance corridor overlay district exists along certain arterial streets in the county identified in the zoning ordinance. These streets are “significant routes of tourist access” to the county or to designated historic landmarks, buildings, structures or districts in the county or in a contiguous locality. Virginia Code § 15.2-2306(A)(1).

• **Regulatory reach of the ARB**: Within those lands subject to regulation by the ARB, the ARB may issue a certificate of appropriateness for any development requiring a building permit or a site plan for that part of the development that is visible from a designated entrance corridor street. Localities are enabled to require an applicant for a certificate of appropriateness to submit documentation that any development in an area of the locality of known historical or archaeological significance will preserve or accommodate the historical or archaeological resources. Virginia Code § 15.2-2306(A)(1). The ARB also reviews projects requiring a special use permit to allow outdoor storage or display within an entrance corridor, and, as noted above, acts in an advisory capacity when requested to do so.

The certificate of appropriateness is a certification that the proposed development is consistent with the ARB’s design guidelines. The ARB may issue a certificate if the proposed development satisfies the requirements for issuance and the design guidelines.

In issuing a certificate, the ARB may impose certain conditions or require modifications to the extent they are authorized in the design guidelines such as: (1) the appearance of any architectural feature including motif and style,
color, texture and materials; (2) limitations on the mass, shape and height of buildings and structures; (3) the location and configuration of parking areas; and (4) landscaping and buffering requirements. The certificate of appropriateness also may require any additional landscaping in order to ensure that the design guidelines are satisfied, and identify the existing trees, wooded areas, and natural features to be preserved.

1-500 The board of zoning appeals

A board of zoning appeals (“BZA”) is a public body established by the governing body pursuant to Virginia Code § 15.2-2308.

1-510 Composition

In most localities, the members of a BZA are appointed by the circuit court. Virginia Code § 15.2-2308(A). In localities within two judicial circuits, the court appoints the members with the concurrence of the locality. Virginia Code § 15.2-2308(A). In the City of Virginia Beach, the city council, rather than the circuit court, appoints the BZA. Virginia Code § 15.2-2308(E).

A BZA may consist of five or seven members. Virginia Code § 15.2-2308(A). Albemarle County’s BZA consists of five members. Albemarle County Code § 18-34.1. The members of the BZA must be residents of the locality, and are appointed for five-year staggered terms. Virginia Code § 15.2-2308(A). Members may be reappointed to succeed themselves. Virginia Code § 15.2-2308(A). A member whose term expires continues to serve until his successor is appointed and qualifies. Virginia Code § 15.2-2308(A).

Members may not hold any other public office in the locality, except that one member also may be a member of the locality’s planning commission. Virginia Code § 15.2-2308(A). A planning commissioner is not appointed to the BZA in Albemarle County.

By ordinance, localities may create a joint BZA consisting of two members who are residents of each participating jurisdiction, plus one member from the area at large. Virginia Code § 15.2-2308(B). The members are appointed by the circuit courts of the respective jurisdictions. A locality may request that the circuit court appoint up to three alternate members. Virginia Code § 15.2-2308(A).

A BZA member may be removed for malfeasance, misfeasance or nonfeasance in office, or for any other just cause, by the court that appointed him, following a hearing held after at least 15 days’ notice. Virginia Code § 15.2-2308(D). Malfeasance means doing an act which a person ought not do at all; misfeasance is the improper doing of an act that a person might lawfully do; nonfeasance means the omission of an act that a person ought to do.

1-520 Powers and duties

The BZA is a creature of statute and it possesses only those powers expressly conferred by statute. Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550, 552, 666 S.E.2d 315, 316 (2008) (holding that the BZA does not have the power to sue because that power is not expressly granted by statute); Board of Zoning Appeals of James City County v. University Square Associates, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc., 217 Va. 740, 743, 232 S.E.2d 767, 769 (1977). The BZA has no implied powers. The BZA’s powers and duties include the following:

- **Appeals of decisions by the zoning administrator or an administrative officer**: Hear and decide appeals from any order, requirement, decision, or determination made by the zoning administrator or an administrative officer in the administration or enforcement of the zoning ordinance.

- **Variances**: Hear and decide applications for variances.

- **Special use permits**: Hear and decide applications for special use permits if the power is delegated to the BZA by the governing body.
• Interpretations of the district map: Hear and decide applications to interpret the district map where there is any uncertainty about the location of a district boundary.

Virginia Code § 15.2-2309. The BZA also is required to keep a full public record of its proceedings and submit a report of its activities to the governing body or bodies at least once each year. Virginia Code § 15.2-2308(C).

The BZA does not have the power to rezone property. See Foster v. Geller, 248 Va. 563, 568, 449 S.E.2d 802, 806 (1994) (reversing trial court and upholding decision of the BZA, which determined that the decision of the director of planning and community development to issue a development permit was erroneous because it did not comply with the requirements of the zoning ordinance for development of substandard land). A BZA is authorized to interpret the zoning ordinance. Town of Jonesville v. Powell Valley Village Limited Partnership, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997). However, a BZA does not have the authority to rule on the validity of a zoning ordinance, which is a determination within the sole province of the courts. Powell Valley Village, supra.

1-600 The zoning administrator

The zoning administrator is an officer appointed by the board of supervisors. Virginia Code § 15.2-2286(A)(4).

The primary duty of the zoning administrator is to administer and enforce the zoning ordinance on behalf of the governing body, and the office has all necessary authority to do so. Virginia Code § 15.2-2286(4). The zoning administrator’s powers and duties include: (1) interpreting the zoning ordinance; (2) ordering in writing that a violation of the zoning ordinance be abated; (3) ensuring compliance with the zoning ordinance by bringing appropriate legal actions; (4) if authorized by the zoning ordinance, reviewing and approving modifications; and (5) in specific cases, making findings of fact and, with the concurrence of the locality’s attorney, conclusions of law, regarding vested rights under Virginia Code §§ 15.2-2307 and 15.2-2311(C). Virginia Code § 15.2-2286(A)(4).

Like the BZA, the zoning administrator does not have the authority to rule on the validity of the zoning ordinance. Town of Jonesville v. Powell Valley Village Limited Partnership, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997).

1-700 The subdivision agent; the site plan agent

A locality may designate an agent to review and act on subdivision plats and site plans. Virginia Code §§ 15.2-2259, 15.2-2260. The agent acts in lieu of the locality’s planning commission on these matters. Virginia Code §§ 15.2-2259, 15.2-2260.
### Roles of the Albemarle County Board of Supervisors, Planning Commission, and Architectural Review Board on Various Land Use Matters

<table>
<thead>
<tr>
<th>Land Use Matter</th>
<th>Board of Supervisors</th>
<th>Planning Commission</th>
<th>Architectural Review Board</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive plan amendments</td>
<td>Final action</td>
<td>Recommendation to BOS</td>
<td>Advisory on matters within the Entrance Corridor Overlay District (“ECOD”)</td>
</tr>
<tr>
<td>Zoning text amendments</td>
<td>Final action</td>
<td>Recommendation to BOS</td>
<td>Advisory on matters within the ECOD</td>
</tr>
<tr>
<td>Zoning map amendments (rezonings)</td>
<td>Final action</td>
<td>Recommendation to BOS</td>
<td>Advisory on matters within the ECOD</td>
</tr>
<tr>
<td>Special use permits</td>
<td>Final action (except those delegated to the BZA)</td>
<td>Recommendation to BOS (except those delegated to the BZA)</td>
<td>Advisory on matters within the ECOD</td>
</tr>
<tr>
<td>Special exceptions</td>
<td>Final action</td>
<td>Recommendation to BOS if referred to PC</td>
<td>Advisory on matters within the ECOD</td>
</tr>
<tr>
<td>Variances</td>
<td>None</td>
<td>None</td>
<td>Advisory (to BZA) on matters within the ECOD</td>
</tr>
<tr>
<td>Site plans</td>
<td>Final action if appealed from PC decision (if disapproved by PC)</td>
<td>Final action unless appealed to BOS (if disapproved by PC)</td>
<td>Advisory on matters within the ECOD</td>
</tr>
<tr>
<td>Subdivision plats</td>
<td>Final action if appealed from PC decision (if disapproved by PC)</td>
<td>Final action unless appealed to BOS (if disapproved by PC)</td>
<td>Advisory on matters within the ECOD</td>
</tr>
<tr>
<td>Certificates of appropriateness</td>
<td>Final action if appealed from ARB decision</td>
<td>None</td>
<td>Final action unless appealed to BOS</td>
</tr>
<tr>
<td>Approval of private street under Subdivision Ordinance</td>
<td>Final action if appealed from PC decision (if disapproved or approved with objectionable conditions)</td>
<td>Final action unless appealed to BOS (if disapproved or approved with objectionable conditions)</td>
<td>Advisory on matters within the ECOD</td>
</tr>
</tbody>
</table>

Note: Site plans and subdivision plats are approved administratively. Site plans and subdivision plats disapproved by the agent, or approved with objectionable conditions, may be appealed by the developer to the commission and thereafter to the board. Disapproved site plans and subdivision plats may be challenged in circuit court in lieu of pursuing administrative appeals.
Chapter 2

The Origins of the Zoning Power

2-100 Introduction

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

Understanding the history of the zoning power allows one to appreciate the stated purposes and objectives of zoning (see section 3-200), as well as the scope of the zoning power (chapter 4), expressed in the current law. Unfortunately, zoning’s historical evolution from nuisance law also partially explains its shortcomings in addressing all of the issues pertaining to modern land use and development (see section 2-300).

2-200 A brief history of zoning

In the years before zoning, land uses were regulated by not only actions seeking the common law remedy of nuisance, but also through building and fire codes and established minimum standards for construction and access. American Law of Zoning, §§ 1.13 and 1.16 (Patricia E. Salkin, 5th ed. 2011).

Even before challenges to zoning laws were making their way through the courts in the early 1900’s, the United States Supreme Court recognized that the police power could control how property was used: “[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.” Mugler v. Kansas, 123 U.S. 623, 665, 8 S. Ct. 273, 299 (1887) (holding that the state could claim that a brewery constituted a nuisance). This principle was adopted by the Virginia Supreme Court in 1926, when it said that the “legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare.” Gorieb v. Fox, 145 Va. 554, 560, 134 S.E. 914, 916 (1926), affirmed 274 U.S. 603, 47 S. Ct. 675 (1927) (zoning ordinance). Thus, the power of a locality to regulate the use of land through zoning and other regulations arises from the locality’s police power, which is a residual power, intrinsic in the sovereign, to protect the public health, safety and welfare.

2-210 The first zoning regulations

A number of localities had established building size and height restrictions by 1900 and the City of Los Angeles established use districts in 1909. American Law of Zoning, § 2.20 (Patricia E. Salkin, 5th ed. 2011). However, New York City is credited with adopting the first comprehensive zoning regulations in 1916. The New York City Department of City Planning explains the historical reasons for this event as follows:

Technical restraints that had traditionally limited building height vanished with the introduction of steel beam construction techniques and improved elevators. The Manhattan skyline was beginning to assume its distinctive form. Multifamily residences, particularly in Manhattan, were growing in popularity and new retail districts were springing up to meet new demands. Office space was expanding; by 1900, New York City had become the financial center of the country.

Although the concept of enacting a set of laws to govern land use was revolutionary, the time had come for the city to regulate its physical growth. The huge shadow cast by the 42-story Equitable Building, built in 1915 on lower Broadway, deprived neighboring properties of light and air. Warehouses and factories were intruding into fashionable retail areas on lower Fifth Avenue.

The pioneering 1916 Zoning Resolution, though a relatively simple document, established height and setback controls and separated what were seen as functionally incompatible uses – such as factories – from residential neighborhoods. The ordinance became a model for urban communities.
throughout the United States as other growing cities found that New York’s problems were not unique.

The issues that gave rise to the New York zoning resolution – building heights, conflicting uses, light and air – remain key issues in the purposes and objectives of conventional zoning regulations to this day.

2-220 Three landmark United States Supreme Court decisions

Following is an overview of three key United States Supreme Court decisions that have shaped zoning and other land use-related areas of the law.

In 1926, the United States Supreme Court validated the zoning ordinance adopted by the Village of Euclid, a suburb of Cleveland, Ohio, in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114 (1926). The term often used today to describe conventional zoning schemes – Euclidean zoning – takes its name from this case.

The ordinance and map adopted by the Village of Euclid created several use, height, and lot area zones within the village. The plaintiff in Euclid was the owner of 68 acres in the village and had planned to use its land for industrial uses. The plaintiff contended that the land’s value for those uses was approximately $10,000 per acre, but if used for residential purposes as zoned, its value was $2,500 per acre. The owner also contended that the land abutting Euclid Avenue if developed for industrial uses was worth $150 per foot, but if used for residential purposes was worth $50 per foot. The owner alleged that the ordinance attempted to restrict and control the lawful uses of its land so as to confiscate and destroy a great part of its value and was, therefore, unconstitutional. The owner sought an injunction preventing the village from enforcing its ordinance.

In validating the village’s zoning ordinance, the Euclid court’s opinion laid down several principles that govern to this day. First, the Court recognized that the police power of state and local governments must be flexible to allow changing conditions to be addressed. In the context of zoning, the court said:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Euclid, 272 U.S. at 386-387, 47 S. Ct. at 118.

The Euclid court then identified the standard of review under which local zoning ordinances should be considered to determine their validity:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. (italics added)

Euclid, 272 U.S. at 387-388, 47 S. Ct. at 118.
The fairly debatable standard is the applicable standard for legislative zoning decisions in Virginia. See chapters 10 (zoning map and zoning text amendments) and 12 (special use permits).

The *Euclid* court upheld the validity of the village’s ordinance that excluded entire classes of uses from specific zoning districts, even though a particular establishment might not have been dangerous or offensive. With respect to the exclusion of industrial uses, the court said:

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-prohibiting laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. . . [W]e are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect “passes the bounds of reason and assumes the character of a merely arbitrary fiat.”


Finally, in upholding the village’s regulations that excluded apartment houses, business houses, retail stores and shops, hotels, and other like establishments from single family residential districts, the Court was persuaded by decisions from state courts and various studies, which were summarized in part as follows:

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are – promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.

*Euclid*, 272 U.S. at 391-392, 394, 47 S. Ct. at 119-120.

As noted at the outset of the discussion of *Euclid*, one of the principles underlying the Court’s decision was its acknowledgement of the need for flexibility. *Euclid* was considered in the context of an American society that was shifting from agrarian to industrialized and the need to address the problems that came with that shift. The impacts from many of today’s industries and businesses bear little resemblance to the impacts from the industries and businesses from the 1920’s. Moreover, many localities now find benefits in integrating various types of use classifications and encourage mixed-uses, provided that development and performance standards are met. See section 2-300 for a discussion of the criticisms of Euclidean zoning and its future.
In *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98 (1954), the United States Supreme Court rejected a landowner’s challenge to the legality of the District of Columbia’s redevelopment plan on the ground that the District’s use of eminent domain violated the Due Process Clause and the Just Compensation Clause of the Fifth Amendment. *Berman* is not a zoning case, but it nonetheless warrants attention because the Court was considering issues related to planning and land use, the deference the courts are to give to legislative decisions, and what it means when the government acts to promote the public welfare.

The Court identified the essence of the landowner’s argument to be that, while taking property for ridding an area of slums was permissible, taking it merely to develop a better balanced, more attractive community was not. In the following excerpts, the *Berman* court declined to limit the concept of the public welfare that may be enhanced by land use regulations:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

*Berman*, 348 U.S. at 32-33, 75 S. Ct. at 102-103. The extent to which a Virginia locality may exercise its zoning powers to remedy a particular problem is, of course, constrained by the public purposes and the enabling authority established by the General Assembly.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974), the United State Supreme Court upheld the validity of the Village of Belle Terre’s zoning ordinance in the face of a challenge to its zoning regulations which restricted the permissible uses to single-family dwellings and prohibited the occupancy of a dwelling by more than two unrelated persons as a “family,” while permitting occupancy by any number of persons related by blood, adoption, or marriage. The Court described an expansive view of the police power to allow a community to be a desirable place to live and work. In noting that regimes of boarding houses, fraternity houses and the like presented urban problems with increased density, more traffic, more required parking, and noise, the Court said:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

*Boraas*, 416 U.S. at 9, 94 S. Ct. at 1541.

This examination of the history of zoning provides the context for much of the remainder of this handbook and, in particular, it explains the purposes and objectives of zoning identified in chapter 3 and the factors to be considered in a zoning decision discussed in chapter 10.

**2-300 The present and the future of zoning**

Today, it is well established that localities enjoy broad powers to implement land use controls to meet the increasing encroachment of urbanization on the quality of life. *See, e.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974). “The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.” *Schad v.*
2-310 Criticism of Euclidean zoning

Euclidean (i.e., conventional) zoning has not been entirely successful. As the successor to the doctrine of common law nuisance, it may have succeeded more as a way to protect the public health, safety and welfare rather than as an effective planning tool for creating balanced growth, good urban design, beautiful cityscapes, or affordable housing. Roger K. Lewis, *Traditional Zoning Can’t Meet the Challenge of Modern Development*, *The Washington Post*, July 24, 2004.

Lewis observed that “conventional zoning has produced patchwork quilts of single-use districts and private enclaves, often with minimal vehicular, pedestrian or visual connections between neighboring zones.” Others have leveled similar criticisms. Conventional zoning has been criticized because it separates land uses, decreases densities, and increases the amount of land devoted to car travel, “prohibiting the kind of urbanism that typifies our most beloved urban places.” Andres Duany & Emily Talen, *New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative*, 29 Fordham Urb. L.J. 1445, note 1145.


The type of zoning implemented in the [Standard Zoning Enabling Act], known as Euclidean zoning, favors strict separation of land uses into low-density single-use districts. These sorts of restrictions on land use represented a “significant departure from the way towns were built in the early 20th century,” but were nevertheless broadly adopted. As a result, the American landscape became fragmented along zoning district lines, and the places where people lived and where they worked grew farther apart.

Although suburban development was not new, the development of zoning codes forced the development to take on an entirely different character. As uses spread apart from each other, towns began to sprawl. The debate on urban sprawl has been extensive, but there is wide consensus that sprawl results in towns which are reliant on the automobile, with devastating environmental and emotional consequences. Euclidean zoning, which was an attempt to reconcile the competing pressures within a city, has in fact exacerbated those pressures. (footnotes omitted)


The shortcomings of conventional zoning have given rise to the New Urbanism movement, discussed in section 2-320.

2-320 New Urbanism

Form-based codes based on New Urbanism principles focus on the configuration and architectural quality of urban and suburban environments. Although these codes may be a solution, Lewis notes the difficulty in

New Urbanism has been described as an approach that addresses two of the problems with conventional zoning – spatial separation of land use and lack of mobility. “Remedies for the problem of spatial separation include mixing land uses and creating diverse environments similar to traditional, older cities. Possible solutions for the lack of mobility include compact development and the promotion of public transit.” Andres Duany & Emily Talen, New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative, 29 Fordham Urb. L.J. 1445, 1447 (2002).

New Urbanism is not without its critics and the criticisms range from not solving the automobile-centric lifestyle, causing sprawl similar to that under conventional zoning, only in a different form, where the developments are greenfields developments, failing to achieve the true mixed use community that is sought, failing to attract a diverse population because the residents in these developments tend to be affluent, and creating a faux urbanism that cannot match the organic urbanism of a true downtown.
Chapter 3

The Objectives, Purposes, and Nature of Zoning

3-100 Introduction

The purpose of zoning is “to promote the health, safety, morals, and general welfare of the community, to protect and conserve the value of buildings, and encourage the most appropriate use of the land.” City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 686, 101 S.E.2d 641, 646 (1958); see also Southern Railway Co. v. City of Richmond, 205 Va. 699, 707, 139 S.E.2d 82, 88 (1964) (“the purpose of zoning is in general two-fold: to preserve the existing character of an area by excluding prejudicial uses, and to provide for the development of the several areas in a manner consistent with the uses for which they are suited”).

Zoning regulations strive to achieve these purposes by regulating or restricting the use of property within the zoning area. Blankenship v. City of Richmond, 188 Va. 97, 105, 49 S.E.2d 321, 325 (1948); see also Northern Virginia Community Hospital, L.L.C. v. Loudoun County Board of Supervisors, 70 Va. Cir. 283 (2006) (in sustaining and overruling demurrers in an action challenging the board’s denial of various land use applications related to an acute-care hospital, the court said that “[z]oning is concerned, not only with the questions of needed services, but also with compatibility and orderly growth”).

3-200 The Objectives of Zoning

Virginia Code § 15.2-2200 delineates the Commonwealth’s objectives to be accomplished through not only zoning regulations, but also other land use regulations:

• Improve the public health, safety, convenience, and welfare of its citizens.

• Plan for the future development of communities to the end that transportation systems be carefully planned.

• Develop new community centers with adequate highway, utility, health, educational, and recreational facilities.

• Recognize the need for mineral resources and the needs of agriculture, industry, and business in future growth.

• Provide residential areas with healthy surroundings for family life.

• Preserve agricultural and forestal land.

• Assure that the growth of the community is consonant with the efficient and economical use of public funds.

These objectives are one of the sources that provide a framework for a locality’s comprehensive plan and its zoning and subdivision regulations. However, they are not a source of a locality’s zoning (or subdivision) power. See Board of Supervisors of Augusta County v. Countryside Investment Co., 258 Va. 497, 505, 522 S.E.2d 610, 614 (1999) (invalidating subdivision regulations that exceeded the authority under the State Subdivision Law and imposed standards which “effectively [allowed the county] to rezone property in a manner inconsistent with the uses permitted by the property’s zoning classification”). Virginia Code § 15.2-2200 “does not confer upon [a locality] the power to enact a [zoning or] subdivision ordinance which is more expansive than the enumerated” powers enabled elsewhere. Countryside Investment, supra. The zoning power must be found in specific enabling legislation. Those express enabled powers are discussed in chapter 4.
3-300 The purposes of zoning: how regulations are to achieve the objectives of zoning

In order to achieve the objectives of zoning delineated in Virginia Code § 15.2-2200, Virginia Code § 15.2-2283 requires that zoning regulations be designed to give reasonable consideration to each of the following purposes:

- Provide for adequate light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime, and other dangers.
- Reduce or prevent congestion in the public streets.
- Facilitate the creation of a convenient, attractive, and harmonious community.
- Facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports, and other public requirements.
- Protect against the destruction of or encroachment upon historic areas.
- Protect against the overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic, or other dangers.
- Encourage economic development activities that provide desirable employment and enlarge the tax base.
- Provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment.
- Protect approach slopes and other safety areas of licensed airports, including United States government and military air facilities.
- Promote the creation and preservation of affordable housing suitable for meeting the current and future needs of the locality, as well as a reasonable proportion of the current and future needs of the planning district within which the locality is situated.
- Provide reasonable protection against encroachment upon military bases, military installations, and military airports and their adjacent safety areas, excluding armories operated by the Virginia National Guard.
- Provide reasonable modifications in accordance with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 et seq.) or state and federal fair housing laws, as applicable.

Unlike Virginia Code § 15.2-2200, discussed in section 3-200, the purposes delineated in Virginia Code § 15.2-2283 are specific to zoning. Every regulation in a zoning ordinance and every zoning decision should strive to achieve at least one of these purposes. Note that many of these purposes are extensions of the justification for the exercise of the police power – the protection of the public health, safety, and welfare – embedded in the history of zoning discussed in chapter 2.

3-400 The relevant matters to consider when making a zoning decision

Virginia Code § 15.2-2284 states that zoning ordinances and districts must be drawn and applied by reasonably considering the following:

- The existing use and character of property.
• The comprehensive plan.

• The suitability of the property for various uses.

• The trends of growth or change.

• The current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies.

• The transportation requirements of the community.

• The requirements for airports, housing, schools, parks, playgrounds, recreation areas, and other public services.

• The conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestal land, and the conservation of properties and their values.

• The encouragement of the most appropriate use of land throughout the locality.

Virginia Code § 15.2-2284 informs localities, the applicant, and the public of the issues that are relevant when considering a zoning decision. Every proposed zoning text amendment and zoning map amendment should be accompanied by an analysis of how the amendment satisfies one or more of the purposes of zoning listed in section 3-300 and be based on one or more of the considerations in this section. Many of these considerations will likely be incorporated into the locality’s comprehensive plan.

The practical application of these factors is examined in detail in chapter 10.

3-500  The nature of the zoning power

Zoning is an important function, if not the most important function, of local government. The exercise of the zoning power is legislative in nature. This means that, notwithstanding any scientific analyses and data that may support a particular position on a zoning matter, a decision may be made on something other than a purely scientific, or objective, basis. In the end, the exercise of the zoning power may be a political exercise, and there is nothing wrong with that provided that there is some evidence to support the decision.

3-510  The exercise of the zoning power is legislative in nature

As explained in section 8-210, zoning text amendments, zoning map amendments, special use permits, and certificates of appropriateness issued by the governing body are legislative acts. As explained in section 8-220, legislative acts are presumed to be reasonable and valid.

For a further discussion of legislative acts, and a comparison of legislative acts to other kinds of acts, see chapter 8.

3-520  Zoning is an important function of local government

The crucial role that zoning, and zoning decisions, may play in a community’s local life is undeniable. A locality’s exercise of its zoning authority is “one of the most essential powers of government, one that is the least limitable.” Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 268 Va. 441, 446, 604 S.E.2d 7, 9 (2004).

“Land use planning and the adoption of land use restrictions constitute some of the most important functions performed by local government.” Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597, 603 (4th Cir. 1997) (upholding
the county’s denial of a permit to allow the expansion of a nursing home). “Zoning . . . may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.” Village of Belle Terre v. Boraas, 416 U.S. 1, 13, 94 S. Ct. 1536, 1543 (1974) (Marshall dissenting). “We can conceive of few matters of public concern more substantial than zoning and land use laws.” Pomponio v. Fauquier County Board of Supervisors, 21 F.3d 1319, 1327 (4th Cir. 1994) (overruled in part on other grounds by Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 116 S. Ct. 1712 (1996)).

3-530 The locality’s governing body is the best suited to determine the proper uses of land

A locality’s governing body is in the most advantageous position to determine the proper uses of land within its jurisdiction. City of Norfolk v. Tiny House, Inc., 222 Va. 414, 423-424, 281 S.E.2d 836, 841 (1981) (holding that the ABC Commission’s exclusive authority to license and regulate the sale and purchase of alcoholic beverages in Virginia does not preclude a locality from utilizing valid zoning ordinances to regulate the location of a establishment selling such alcoholic beverages); see also West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 282, 192 S.E. 881, 885 (1937) (“The city council of Alexandria is better acquainted with the necessities of that city than we are”).

“One local governing bodies, because of their knowledge of local conditions and needs of their individual communities, are allowed wide discretion in the enactment . . . of zoning ordinances.” Byrum v. Board of Supervisors of Orange County, 217 Va. 37, 39, 225 S.E.2d 369, 371 (1976).

3-540 Zoning is a political function

The political nature of zoning also has not escaped the courts’ observation. “Zoning is inescapably a political function. Indeed, it is the very essence of elected zoning officials’ responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and development in the community.” Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 828 (4th Cir. 1995) (affirming dismissal of developer’s action alleging substantive due process and other violations after its zoning application was denied). Moreover, it “is not pernicious per se for a zoning authority to be influenced by political pressure in the community.” Sylvia Development, supra.

One federal appellate court has explained:

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

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 67 (4th Cir. 1992) (affirming dismissal of developer’s action alleging substantive due process and other violations arising from the city’s application of its subdivision regulations).

3-600 Why good land use planning and zoning matters

The objectives and purposes of zoning listed in sections 3-200 and 3-300 seek to create and maintain healthy, attractive, livable, and prosperous communities.

In 2008, Gallup and the John S. and James L. Knight Foundation conducted the Knight “Soul of the Community” survey in order to determine what made a community a desirable place to live, what drew people to “stake their future” in the community, and whether communities with more residents “attached” to their community were better off. The survey interviewed 43,000 people in 26 communities over a three-year period. The study found that the three main attributes that attached people to their communities were: (1) social offerings, such as
entertainment venues and places to meet; (2) openness (how welcoming a place is); and (3) the area’s aesthetics (its physical beauty and green spaces). The Knight Foundation’s summary of the survey stated that attachment of the populace to a community is important because it is positively linked to local economic growth.

3-610 The link between economic development and good land use planning and zoning

The link between good land use planning and zoning and a community’s economic strength and success is evident in recurring themes from both the economic development and the land use planning perspective. From the economic development perspective, Christopher Lloyd, McGuireWoods Consulting (January 30, 2014) highlights three themes:

• Communities must have a vision for the future.

• Communities must develop a sense of place.

• Businesses want a place, not just a site.

From the land use planning perspective, the three themes identified above are discussed in Edward T. McMahon’s article The Secrets of Successful Communities (PlannersWeb.com, July 29, 2013), which summarizes the key elements of successful communities, including:

• Successful communities involve a broad cross-section of residents in determining and planning the future.

• Successful communities capitalize on their distinctive assets – their architecture, history, natural surroundings, and home-grown businesses, rather than adopting a new or a generic identity.

• Successful communities use a variety of regulatory and non-regulatory incentives to influence their development. The non-regulatory incentives include open-space easement and purchase of development rights programs, density bonuses, and expedited permit review processes.

• Successful communities pick and choose among development projects because some projects will make a community a better place to live, work, and visit; other projects will not. They reject generic designs from developers and insist on designs that are sensitive to local character. McMahon cites a development consultant who stated that “when a chain store developer comes to town they generally have three designs ranging from Anywhere USA to Unique.” The unique design is sensitive to local character.

• Successful communities cooperate with neighboring localities to address regional issues like water quality, green space, and traffic.

• Successful communities pay attention to aesthetics by controlling signs, planting street trees, protecting scenic views and historic buildings, and encouraging new construction that fits in with the existing community. McMahon explains why aesthetics are important: “The image of a community is fundamentally important to its economic well-being. Every single day in America people make decisions about where to live, where to invest, where to vacation and where to retire based on what communities look like.”

McMahon also states that when “it comes to 21st century economic development, a key concept is community differentiation. If you can’t differentiate your community from any other, you have no competitive advantage.” The Distinctive City, Urban Land Institute, April 2012. He notes in the same article that “education, technology, connectivity and distinctiveness have all become more important.” On the matter of distinctiveness, McMahon quotes Joseph Cortright, an authority on economic development: “the unique characteristics of place may be the only truly source of competitive advantage for communities.” Mc Mahon adds more recently: “Enlightened cities, towns, and counties are investing more in placemaking because they believe these features attract younger workers – especially the most sought-after segment, skilled Millennials.” Edward T. McMahon, Becoming a Place People Want to Live, Virginia
The following excerpts from various studies and commentaries sum up a range of reasons why good land use planning and zoning should matter to a locality interested in economic development:

- “Having a distinctive identity will help communities create a quality of life that is attractive for business retention and future residents and private investment. Community economic development efforts should help to create and preserve each community’s sense of uniqueness, attractiveness, history, and cultural and social diversity, and include public gathering places and a strong local sense of place.” Local Government Commission (California), Principle 14.

- “The best places to live, work and visit are those places that are willing to uphold their standards in the face of pressure to allow the lowest common denominator development” and “Too many communities delude themselves into thinking that it doesn’t really matter whether a project is good or bad . . . so long as it produces jobs and tax collection opportunities.” All Development is not Created Equal, Edward T. McMahon (1998).

- “Quality urban development . . . wants no part of an unstable, unplanned, uncontrolled environment as they know this is not a place to make a long-term investment.” Planning America’s Communities: Paradise Found? Paradise Lost? Herbert Smith (1991)

- “The states that do the most to protect their natural resources also wind up with the strongest economies and the best jobs.” Institute for Southern States Study (1994).

- Over a 15-year period, states with strong environmental standards experienced an average economic growth rate of 2.60%; states with moderate standards 2.29%; states with weak standards 2.15%. Bank of America Study (1993).

In a study published in 2006 on the effect of zoning on economic development in rural areas, the authors concluded that planning and zoning facilitated economic development rather than impeded it. The authors summarized the benefits of zoning to include: “(1) business and citizen preference for land use predictability; (2) assurance for business prospects and residents that their investment will be protected; (3) the ability to guide future development and prevent haphazard (e.g., patchwork), harmful, or unwanted development; and (4) the minimization of potential conflict between industry and residents.” Does Rural Land-use Planning and Zoning Enhance Local Economic Development? Economic Development Journal, Fall 2006, Joy Wilkins, B. William Riall, Ph.D., Arthur C. Nelson, Ph.D., with Paul Counts and Benjamin Sassman.

“In the end, economic development is, and always will be, about ‘place’.” Edward T. McMahon, Responsible Tourism: How to Preserve the Goose that Lays the Golden Egg, Virginia Town & City, May 2015.

3-620 The link between planning, zoning and tourism

Tourism is also a beneficiary of good land use planning and zoning. The Virginia Tourism Corporation reports that in 2016, domestic tourism in Virginia generated $23.7 billion in visitor spending, supported 229,300 jobs, and provided $1.6 billion in state and local taxes to Virginia’s communities. In Albemarle County and the City of Charlottesville, the Virginia Tourism Corporation reports that in 2016 tourism generated $600 million in direct visitor spending, supported over 5,850 jobs, and generated $20.9 million in local tax revenue for the County and the City. Needless to say, tourism is a significant part of economic development.

In discussing the role that a community’s image plays in tourism, Edward T. McMahon, in his article The Secrets of Successful Communities (PlannersWeb.com, July 29, 2013), writes: “The more any community in America comes to look just like every other community the less reason there is to visit. On the other hand, the more a community does to protect and enhance its uniqueness whether natural or architectural, the more people will want to visit. Tourism is about visiting places that are different, unusual, and unique. If everyplace was just like everyplace else, there would be no reason to go anywhere.” “This is the reason why local land use planning and urban design standards are so important.” Edward T. McMahon, Responsible Tourism: How to Preserve the Goose that Lays the Golden Egg, Virginia Town
Other writers have expressed a similar sentiment, which all go back to why good land use planning and zoning should matter to a community:

- “Tourism simply doesn’t go to a city that has lost its soul.” Arthur Frommer, *Travel Writer*.

- “The most central feature that needs protection is the natural beauty and setting of a place. Once lost, it can seldom be restored.” Leisure Travel: Making it a Growth Market . . . Again, Stanley Plog.

In summary, these excerpts advocate managed development and growth. They also caution localities to avoid losing their unique identity.
Chapter 4

The Scope of the Zoning Power

4-100 Introduction

If effectively used, the zoning power is broad, but it is not unlimited. This chapter explores the reach of that power. Chapters 5, 6 and 7 examine the limitations on the zoning power.

4-200 The extent of the zoning power over uses, structures and areas of use

Virginia Code § 15.2-2280 is the key enabling statute that establishes the scope of the zoning power over uses, structures, and areas of use. It authorizes a locality to regulate, restrict, permit, prohibit, and determine the following:

- **Uses**: The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses.

- **Physical characteristics of structures**: The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures.

- **Areas of use**: The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used.

- **Excavation**: The excavation or mining of soil or other natural resources.

The Virginia Supreme Court has described the authority delegated to localities in Virginia Code § 15.2-2280 as “broad authority.” *Trible v. Bland*, 250 Va. 20, 24, 458 S.E.2d 297, 299 (1995). Under a Dillon Rule analysis, Virginia Code § 15.2-2280 authorizes a locality to zone and regulate the territory within its jurisdiction, but does not delineate how the locality is supposed to implement the broad powers granted. In this situation, the choice of implementation by the locality will be upheld if the method selected is reasonable. *Advanced Towing Company, LLC v. Fairfax County Board of Supervisors*, 280 Va. 187, 193, 694 S.E.2d 621, 624 (2010) (county enabled to impose territorial restriction in towing regulation); *Arlington County Board of Supervisors v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (county not enabled to extend coverage to the newly defined category of domestic partners under its self-funded health insurance benefits plan). This is known as the “reasonable selection of method rule,” discussed in section 5-522.

Understanding the scope of a locality’s zoning powers under Virginia Code § 15.2-2280 and other sections is critical.

4-300 The physical reach of the zoning power: territory and airspace

A county has jurisdiction over all of the unincorporated territory in the county; a city or town has jurisdiction over all of the territory within that municipality. *Virginia Code § 15.2-2281; see Board of Supervisors of Loudoun County v. Town of Purcellville*, 276 Va. 419, 438, 666 S.E.2d 512, 521 (2008) (although planning processes may be extra-territorial between counties and towns under Virginia Code § 15.2-2231, a locality’s zoning authority is limited to its own territory).

A zoning ordinance also extends to the superjacent airspace of any privately-owned land. *Virginia Code § 15.2-2293(A)*. Superjacent airspace includes any use or structure on top of (e.g., a structure) or above (e.g., an antenna affixed to a pole) the ground. For publicly owned land, a zoning ordinance applies to:

- **Public travelways**: Airspace that is superjacent or subjacent to any public highway, street, lane, alley or other way
that is not required for the purpose of travel, or other public use, by the Commonwealth or other political jurisdiction owning it. Virginia Code § 15.2-2293(B).

• Other public land: Airspace that is: (1) not associated with a public travelway; (2) superjacent to any land owned by the Commonwealth or other political jurisdiction; and (3) occupied by a nonpolitical entity or person. Virginia Code § 15.2-2293(C).

Virginia Code § 15.2-2293 is an often overlooked regulation, even by the Commonwealth. The section is important because it provides that state-owned land not used for state purposes is subject to local zoning regulations. For example, if VDOT desired to allow a private wireless service provider to erect a pole, antennas and ground equipment within the public right-of-way, that private use would be subject to local zoning regulations.

Submerged lands also present an interesting issue. In Jennings v. Board of Supervisors of Northumberland County, 281 Va. 511, 708 S.E.2d 841 (2011), a landowner with riparian rights challenged the county’s zoning authority on those portions of proposed commercial piers and wharves that would lie beyond the mean low-water mark of a tidal, navigable waterway which, by law, was owned by the Commonwealth. The court held that the county’s zoning authority applied to the landowner’s proposed piers and marinas, and concluded that the county’s authority was not pre-empted by the Commonwealth’s authority under Virginia Code § 28.2-1204 to issue permits for uses of “State-owned bottomlands.” In 1985-86 Va. Op. Atty. Gen. 108, the Attorney General discussed in a footnote the question of whether private wharves, piers and docks were subject to local zoning regulations where the subaqueous beds of bays, rivers, creeks and shores were the property of the Commonwealth. Recognizing that private landowners had riparian rights, the Attorney General concluded that “the State’s use of State-owned bottom is not subject to local regulation, but the exercise of a riparian landowner’s property rights which encroach on State-owned bottom is validly subject to local regulation.”

4-400 The enabled subject matter of a zoning ordinance

The following is a list of the key elements that may be included in a zoning ordinance:

• Water protection: Reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and ground water as defined in Virginia Code § 62.1-255. Virginia Code § 15.2-2283.

• Variances: Variances, which are reasonable deviations from those provisions of a zoning ordinance regulating the size, shape, or area of a lot or parcel of land, or the size, height, area, bulk, or location of a building or structure. Virginia Code § 15.2-2286(A)(1).

• Special use permits: Special use permits, subject to suitable regulations and safeguards. Virginia Code § 15.2-2286(A)(3). This authority is also subject to limitations on the uses for which special use permits may be required and the scope and effect of the conditions that may be imposed. Virginia Code §§ 15.2-2288, 15.2-2288.1. For example, although a special use permit may not be required for production agriculture on agriculturally zoned lands, one may be required for the storage or disposal of nonagricultural excavation material, waste and debris on agriculturally zoned lands if the excavation material, waste and debris are not generated on the farm, subject to the provisions of the Virginia Waste Management Act. Virginia Code § 15.2-2288. A governing body may delegate the responsibility to act on special use permits to the board of zoning appeals. Virginia Code § 15.2-2309(6).

• Modifications: Modifications issued by the zoning administrator pertaining to the size, height, location or features of any building on a parcel. Virginia Code § 15.2-2286(A)(4).

• Administration and enforcement: Administering and enforcing the zoning ordinance, and appointing a zoning administrator. Virginia Code § 15.2-2286(A)(4) and (5) (authority to seek criminal fines); Virginia Code § 15.2-2208 (authority to enjoin violations); Virginia Code § 15.2-2209 (authority to seek civil penalties).

• Fees: Collecting fees to cover the cost of making inspections, issuing permits, advertising notices and other
expenses incident to the administration of the zoning ordinance or to filing or processing any appeal or amendment thereto. *Virginia Code § 15.2-2286(A)(6).* Virginia Code § 15.2-108.1 prohibits localities from charging any fee, other than fire prevention inspection fees, “to any church, synagogue, or other place of worship unless authorized by general law or special act of the General Assembly.” The fees enabled by Virginia Code § 15.2-2286(A)(6) are fees authorized by general law and, therefore, would not be subject to the prohibition in Virginia Code § 15.2-108.1.

- **Amending or repealing zoning text and maps:** Amending or repealing the regulations or district maps from time to time. *Virginia Code § 15.2-2286(A)(7).*

- **Plans of development:** Requiring the submission and approval of a plan of development prior to issuing building permits to assure compliance with regulations contained in the zoning ordinance. *Virginia Code § 15.2-2286(A)(8).*

- **Mixed use and planned unit districts:** Designating areas and districts for mixed use or planned unit developments. *Virginia Code § 15.2-2286(A)(9).*

- **Incentive zoning:** Administering incentive zoning. *Virginia Code § 15.2-2286(A)(10).* Incentive zoning means using bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features or amenities desired by a locality, including but not limited to, site design incorporating principles of new urbanism and traditional neighborhood development, environmentally sustainable and energy-efficient building design, affordable housing creation and preservation, and historical preservation, as part of the development. *Virginia Code § 15.2-2201.* Incentive zoning is different from conditional (proffered) zoning.

- **Consensual downzoning:** Entering into a voluntary agreement with a landowner that would result in a downzoning of undeveloped or underdeveloped lands in exchange for a tax credit equaling the amount of excess real estate taxes paid because of the higher zoning classification. *Virginia Code § 15.2-2286(A)(11).*

- **Clustering single family dwellings to preserve open space:** Requiring localities to allow clustering of single family dwellings and the preservation of open space developments in at least 40% of its undeveloped territory, subject to standards, conditions and criteria established by the locality, and which must be approved by the locality’s staff as a ministerial decision. Clustering regulations in effect on June 1, 2004 that allowed by-right clustering are grandfathered. *Virginia Code §15.2-2286.1.*

- **Airport safety zoning and airport noise attenuation:** Localities having an airport or which are within the approach slope or safety zone of an airport must regulate the height of structures and natural growth in accordance with the rules of the Virginia Aviation Board. *Virginia Code § 15.2-2294; see Virginia Code § 15.2-2295 for airport noise attenuation.*

- **Mountain ridge construction:** Localities having mountain ridges over a certain elevation may regulate the height and location of tall buildings on those ridges. *Virginia Code § 15.2-2295.1.* Note that localities also have this authority under Virginia Code §15.2-2280 (express authority to regulate the height of structures).

- **Conditional zoning:** The rezoning of land with proffers is referred to in Virginia Code § 15.2-2296 as conditional zoning. *Virginia Code §§ 15.2-2296 through 15.2-2303.3.* Proffers consist of reasonable conditions that are in addition to the regulations of the zoning district. See, e.g., *Virginia Code § 15.2-2298(A).*

- **Affordable dwelling units:** Establish an affordable housing dwelling unit program. *Virginia Code §§ 15.2-2304 (applicable to a limited number of localities, including Albemarle County) and 15.2-2305.* Under both sections, the program must address housing needs, promote a full range of housing choices, and encourage the construction and continued existence of moderately priced housing by providing for optional increases in density in order to reduce land costs for moderately priced housing. A developer’s participation in an affordable dwelling unit
program is voluntary. 1998 Va. Op. Atty. Gen. 35. However, once a developer decides to enter the program, a locality may impose mandatory requirements. 1998 Va. Op. Atty. Gen. 35; e.g., Virginia Code § 15.2-2305(B)(3) authorizes a locality to require “up to 17 percent of the total units approved . . . to be affordable dwelling units.”

- **Preservation of historical sites and architectural areas:** Regulations for certain historic sites and surrounding areas, as well as areas contiguous to arterial streets or highways found by the governing body to be significant routes of tourist access to the locality or to designated historic sites and areas. Virginia Code § 15.2-2306(A)(1). The regulations may require that structures and signs in the district be considered by a review board to determine architectural compatibility with the historic sites and areas. Virginia Code § 15.2-2306(A)(1). A locality is also enabled to adopt regulations prohibiting a historic landmark, building or structure within a district from being razed, demolished or moved until the proposed action is approved by the review board and certain other procedures are complied with. Virginia Code § 15.2-2306(A)(2) and (3). Prior to establishing a historic district, a locality is required to identify and inventory all structures being considered for inclusion in such a historic district and to establish written criteria to be used in making the determination. Virginia Code § 15.2-2306(C). However, districts composed of parcels contiguous to arterial streets or highways found by the governing body to be significant routes of tourist are not subject to this requirement. Virginia Code § 15.2-2306(C). One circuit court has described Virginia Code § 15.2-2306 as “a broad grant of legislative authority for localities to enact zoning provisions tailored to preserving the unique character of their historic areas.” Owens v. City Council of the City of Norfolk, 78 Va. Cir. 436 (2009) (upholding validity of district regulation allowing buildings taller than 35 feet with “authorized variations” determined to be architecturally compatible with the building’s surroundings).

- **Nonconformities:** Regulations providing that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as: (1) the then existing or a more restricted use continues; (2) the use is not discontinued for more than two years; and (3) so long as the buildings or structures are maintained in their then structural condition. Virginia Code § 15.2-2307. A locality also may require that the uses of buildings or structures conform to the current zoning regulations whenever they are enlarged, extended, reconstructed or structurally altered, and may prohibit a nonconforming building or structure from being moved on the same lot or to any other lot that is not properly zoned to permit the nonconforming use. Virginia Code § 15.2-2307.

- **Transfer of development rights:** Allowing the transfer of development rights from a parcel located in the locality (from a sending area) to another parcel located elsewhere in the locality (to a receiving area). Virginia Code §§ 15.2-2316.1 and 15.2-2316.2. See Johnson v. Arlington County, 292 Va. 843, 794 S.E.2d 389 (2016) (holding that Arlington County could tax a transferable development right only if it enacted an ordinance that complied with the specific requirements of Virginia Code § 15.2-2316.2).

- **Impact fees:** Localities with a population of 20,000 or more and a growth rate of 5% or more (between the next to last and last decennial census) or in localities with a growth rate of 15% or more may adopt regulations imposing transportation impact fees within impact fee services areas identified in the comprehensive plan. Virginia Code § 15.2-2319. Before an impact fee ordinance may be adopted, the locality must assess road improvement needs benefiting an impact fee service area and adopt a road improvements plan showing necessary road improvements and a schedule for those improvements. Virginia Code § 15.2-2321. The impact fees are “to fund or recapture all or any part of the cost of providing reasonable road improvements benefiting new development.” Virginia Code § 15.2-2322. The amount of the impact fees imposed on a specific development or subdivision must be determined before or at the time the site plan or subdivision plat is approved, and the fee must be “collected” when the building permit is issued, which may be paid in a lump sum, over a period of years, or as provided in an agreement between the owner and the locality. Virginia Code § 15.2-2323. The enabling legislation also provides the methodology for determining the maximum impact fees (Virginia Code § 15.2-2323), credits against the impact fees (Virginia Code § 15.2-2324), the use of proceeds (Virginia Code § 15.2-2326), and the refund of impact fees (Virginia Code § 15.2-2327). Counties having a population of more than 90,000 (2000 census) may establish urban transportation service districts and impose impact fees under separate impact fee enabling legislation. Virginia Code § 15.2-2328 et seq.

- **Collection of delinquent fees and charges before processing application.** Virginia Code §§ 15.2-2286 and 58.1-3700 authorize
localities to require an applicant to pay all nuisance charges, stormwater management utility fees, and any other charges that constitute a lien on the subject property before issuing a local business license or initiating an application for a rezoning, special use permit, special exception, building permit, erosion and sediment control permit, or any other land disturbing permit.

A zoning ordinance that includes matters not included in sections 4-200, 4-300 and 4-400 may be subject to a claim that the regulation is not enabled.

4-500  Overlay districts

A zoning ordinance may provide for overlay districts. An overlay district is a zoning district in which the requirements of the overlay district must be complied with, as well as the requirements of the underlying “base” zoning district; thus, one district overlays another. *Beacon Hill Farm Associates v. Loudoun County*, 875 F.2d 1081, fn. 1 (4th Cir. 1989).

The following are four common elements of an overlay district: (1) it affects lands that have common characteristics or features for which regulation beyond that provided by the underlying zoning district is desired; (2) it is a product of a long study and careful consideration to identify lands to be subject to the requirements of the overlay district; (3) it imposes requirements that are additional to those already required by the underlying zoning district; and (4) it may involve amendments to the ordinance text and/or the zoning map. These elements are similar to those of a comprehensive downzoning, discussed in section 10-320.

Albemarle County has established several overlay districts including the Airport Impact Area Overlay District (*Albemarle County Code* § 18-30.2), the Flood Hazard Overlay District (*Albemarle County Code* § 18-30.3), the Natural Resource Extraction Overlay District (*Albemarle County Code* § 18-30.4), and the Entrance Corridor Overlay District (*Albemarle County Code* § 18-30.6).

4-600  Statutory limitations on the zoning power

The Dillon Rule (chapter 5), the United States and Virginia Constitutions (chapter 6), and preemptive federal and state laws (chapter 7) impose limitations on a locality’s zoning power. In addition, the Virginia Code imposes a number of statutory limitations on the zoning power. Every zoning regulation pertaining to the subject matter below must be analyzed to be certain that the regulation complies with the applicable state law.

4-610  Uses that must be allowed by right; special use permit prohibited

The General Assembly has created a number of classes of uses or structures which a locality must allow by right rather than by special use permit or, in some cases, any other restrictions, provided that the use or structure meets the statutory requirements for eligibility. Some of these classes of protected uses are designed to further broad public policies, such as policies against discrimination in housing. Another group of classes exist solely to promote a particular industry or to exempt it from some or all local regulation.

4-611  Production agriculture or silviculture activity

A locality may not require a special use permit for any production agriculture or silviculture activity in an agricultural zoning district. *Virginia Code* § 15.2-2288; see also *Virginia Code* § 3.2-300 et seq. (*the Right to Farm Act*). Production agriculture and silviculture is the bona fide production or harvesting of agricultural or silvicultural products. This term does not include the processing of agricultural or silvicultural products or the above-ground application or storage of sewage sludge. *Virginia Code* § 15.2-2288.

A locality may impose setback requirements, minimum area requirements and other requirements that apply to land used for agricultural or silvicultural activity. *Virginia Code* § 15.2-2288.

4-612  Residential uses; no special use permit
A locality may not require a special use permit as a condition of approval of a subdivision plat, site plan or building permit for the development and construction of residential dwellings at the use, height, and density permitted by right under the zoning ordinance. Virginia Code § 15.2-2288.1.

However, special use permits may be required for: (1) a cluster or town center as an optional form of residential development at a density greater than that permitted by right, or otherwise permitted by ordinance; (2) use in an area designated for steep slope mountain development; (3) use as a utility facility to serve a residential development; or (4) nonresidential uses including, but not limited to, home businesses, home occupations, day care centers, bed and breakfast inns, lodging houses, private boarding schools, and shelters established for the purpose of providing human services to their occupants. Virginia Code § 15.2-2288.1.

4-613 Manufactured housing

Virginia Code § 15.2-2290(A) imposes a limitation on a locality’s zoning power by requiring that, in all agricultural zoning districts and other zoning districts where agricultural, horticultural, or forestal uses are the dominant use, manufactured houses on permanent foundations and on individual lots must be permitted as a matter of right. However, a manufactured house is subject to all of the development standards applicable to site-built single family dwellings within the same or equivalent zoning district.

A manufactured house, as used in Virginia Code § 15.2-2290, has the same meaning as a manufactured home under Virginia Code § 36-85.3. 1996 V.a. Op. Atty. Gen. 66. A manufactured home is a structure subject to federal regulation, which is transportable in one or more sections; is eight body feet or more in width and 40 body feet or more in length in the traveling mode, or is 320 or more square feet when erected on site; is built on a permanent chassis; is designed to be used as a single-family dwelling, with or without a permanent foundation, when connected to the required utilities; and includes the plumbing, heating, air-conditioning, and electrical systems contained in the structure. Virginia Code § 36-85.3. For zoning purposes, the language subject to federal regulation in the definition in Virginia Code § 36-85.3 means manufactured homes that satisfy the standards of quality, durability and safety established under federal law. 1996 V.a. Op. Atty. Gen. 66. One example of the effect of this limitation is that a locality is prohibited from allowing a site-built home to be located on a one-acre lot in an agricultural zoning district, while requiring a manufactured house to be sited on a five-acre lot. 1991 V.a. Op. Atty. Gen. 67.

The development standards for residential structures may not have the effect of excluding manufactured housing. Virginia Code § 15.2-2290(B).

4-614 Tents serving as temporary structures; no special use permit

A locality may not require a special use permit in order for a landowner to erect a tent on private property that: (1) is intended to serve as a temporary structure for a period of three days or less; and (2) will be used primarily for private or family-related events including, but not limited to, weddings and estate sales. Virginia Code § 15.2-2288.2.

4-615 Cemeteries

Effective January 1, 2013, Virginia Code § 15.2-2288.5 provides that cemetery buildings, including mausoleums, crypts and administrative buildings, are not subject to additional local legislative decisions, such as a special use permit, if the building or other structure was shown in a legislative approval for a specific cemetery previously obtained at the request of the owner.

4-620 Facilities to allow for the care of others

There are several classes of uses where varying types and levels of care are provided to others which a locality must allow by right as a residential use.

4-621 Group homes and small assisted living facilities of eight or fewer persons
Virginia Code § 15.2-2291(A) requires that a zoning ordinance consider a group home in which no more than eight persons with mental illness, mental retardation, or developmental disabilities reside with one or more resident counselors or other staff persons as a single-family residential occupancy. To qualify for this treatment, the group home must be licensed by the Department of Behavioral Health and Developmental Services. Virginia Code § 15.2-2291(A). Mental illness and developmental disability do not include the current illegal use of or addiction to a controlled substance as defined in Virginia Code § 54.1-3401. Virginia Code § 15.2-2291(A). A zoning ordinance may not impose any conditions on a group home that are more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. Virginia Code § 15.2-2291(A). A group home serving eight unrelated adults who do not meet these criteria does not qualify under Virginia Code § 15.2-2291(A) for treatment as a single-family residence insofar as zoning is concerned. 1995 Va. Op. Atty. Gen. 286.

Virginia Code § 15.2-2291(B) requires that a zoning ordinance consider an assisted living facility in which no more than eight aged, infirm or disabled persons with one or more resident counselors or other staff persons to be residential occupancy as a single-family residential occupancy. To qualify for this treatment, the assisted living facility must be licensed by the Department of Social Services. Virginia Code § 15.2-2291(B). Like group homes, a zoning ordinance may not impose any conditions on an assisted living facility that are more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. Virginia Code § 15.2-2291(B).

4-622 Family day homes

Virginia Code § 15.2-2292 requires that a zoning ordinance consider a family day home serving up to five children, exclusive of the provider’s own children and any children who reside in the home, as residential occupancy by a single family. A family day home is a child day program for children under the age of thirteen offered in the residence of the provider or the home of any of the children in care, exclusive of the provider’s own children and any children who reside in the home, when at least one child receives care for compensation. Virginia Code § 63.2-100 (also providing that only family day homes serving more than six children, who do not otherwise reside in the home, must be licensed). A zoning ordinance may not impose conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. Virginia Code § 15.2-2292(A).

A locality may by ordinance allow the locality’s zoning administrator to apply use an administrative process to issue zoning permits for a family day home five through 12 children, exclusive of the provider’s own children and any children who reside in the home. Virginia Code § 15.2-2292(B). The ordinance may contain standards the governing body deems appropriate but must include a requirement that notification be sent by registered or certified letter to the last known address of each adjacent property owner. Virginia Code § 15.2-2292(B). If the zoning administrator receives no written objection from a person so notified within 30 days of the date of sending the letter and determines that the family day home otherwise complies with the provisions of the family day home regulations and all other applicable ordinances, the zoning administrator must issue the permit. Virginia Code § 15.2-2292(B). If the zoning administrator receives a written objection from a person notified within 30 days of the date of sending the letter and determines that the family day home otherwise complies with the provisions of the family day home regulations (and, presumably, all other applicable ordinances), the zoning administrator must consider the objection and may: (1) issue or deny the permit; or (2) if required by the family day home regulations, refer the permit to the governing body for consideration. Virginia Code § 15.2-2292(B). The family day home regulations must also provide an appeal to the governing body if the zoning administrator denies the permit. Virginia Code § 15.2-2292(B).

4-623 Temporary family healthcare structures

Virginia Code § 15.2-2292.1 requires that a zoning ordinance allow by right temporary family healthcare structures of no more than 300 gross square feet as accessory uses in any zoning district permitting single family detached dwellings if the statutory prerequisites are satisfied. These structures are permitted to be used by a caregiver in providing care for a mentally or physically impaired person who occupies the structure, either alone or with his or her spouse, and may be located only on property owned or occupied by the caregiver as his residence.

4-630 Farm wineries, limited breweries, limited distilleries, and activities at agricultural operations
A locality’s regulation of the activities and events of licensed farm wineries designed to market and sell their products must be reasonable. Virginia Code § 15.2-2288.3(A). The regulations must take into account the economic impact the regulations will have on the farm wineries, the agricultural nature of the activities and events, and whether the activities and events are usual and customary throughout the Commonwealth. Virginia Code § 15.2-2288.3(A). If the events and activities are usual and customary throughout the Commonwealth, they may be regulated only if they impose a substantial impact on the health, safety or welfare of the public. Virginia Code § 15.2-2288.3(A).

A locality may regulate noise, other than amplified music, arising from events or activities at a farm winery, only to the extent that the locality otherwise regulates noise. Virginia Code § 15.2-2288.3(A). The regulation of amplified music at a farm winery must consider the effect on adjacent property owners and nearby residents. Virginia Code § 15.2-2288.3(A).

A locality may not treat private personal gatherings held by the owner of a farm winery differently from private personal gatherings by other citizens if the owner resides at the farm winery or on property adjacent to the farm winery, the wine is not sold or marketed at the gathering, and if neither the farm winery or its agents received consideration for the gathering. Virginia Code § 15.2-2288.3(D).

A locality also is prohibited from regulating any of the follow activities of a farm winery: (1) the production and harvesting of fruit and other agricultural products and the manufacturing of wine; (2) the on-premises sale, tasting, or consumption of wine during regular business hours within the normal course of business of the farm winery; (3) the direct sale and shipment of wine by common carrier to consumers under applicable state law; (4) the sale and shipment of wine to the Alcoholic Beverage Control Board, licensed wholesalers, and out-of-state purchasers under applicable state law; (5) the storage, warehousing, and wholesaling of wine in accordance with the law; and (6) the sale of wine-related items that are incidental to the sale of wine. Virginia Code § 15.2-2288.3(E).

Virginia Code § 15.2-2288.3:1 restricts the authority of a locality to regulate limited breweries in agricultural zoning districts, and Virginia Code § 15.2-2288.3:2 restricts the authority of a locality to regulate limited distilleries in agricultural zoning districts. The regulatory schemes for limited breweries and limited distilleries are similar to that established for farm wineries.

Virginia Code § 15.2-2288.6 restricts a locality’s regulation of a range of activities at agricultural operations, as that term is defined in Virginia Code § 3.2-300.

4-640 Helicopters

Virginia Code § 15.2-2293.2 prohibits localities from banning the departure and landing of private, noncommercial helicopters within their jurisdiction. However, a locality may require a special use permit for helicopter departures and landings subject to reasonable conditions for the protection or benefit of owners and occupants of neighboring parcels including, but not limited to, conditions related to compliance with applicable regulations of the Federal Aviation Administration.

4-650 Political signs

Virginia Code § 15.2-109 provides that:

No locality shall have the authority to prohibit the display of political campaign signs on private property if the signs are in compliance with zoning and right-of-way restrictions applicable to temporary nonpolitical signs, if the signs have been posted with the permission of the owner. The provisions of this section shall supersede the provisions of any local ordinance or regulation in conflict with this section.
The Attorney General has opined that localities may not limit political signs to a certain size while permitting larger signs, or impose any other burdens or restrictions, that do not apply to other categories of temporary signs under their zoning ordinance. 2012 Va. Op. Atty. Gen. LEXIS 23, 2012 WL 2063674.

4-660 Registered commercial fishermen and seafood buyers

Virginia Code § 15.2-2307.1 provides that registered commercial fishermen and seafood buyers who operate their businesses from their waterfront residences may not be prohibited by a locality from continuing their businesses, notwithstanding the provisions of any local zoning ordinance. This section only applies to businesses that have been in operation by the current owner, or a family member of the current owner, for at least 20 years at the location in question. The protection granted by this section continues so long as the property is owned by the current owner or a family member of the owner.
Chapter 5
The Dillon Rule and Its Limitations on a Locality’s Land Use Powers

5-100 Introduction

A locality’s governing body has only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from the express powers, and powers that are essential and indispensable. Jennings v. Board of Supervisors of Northumberland County, 281 Va. 511, 516, 708 S.E.2d 841, 844 (2011) (“a locality’s zoning powers are ‘fixed by statute and are limited to those conferred expressly or by necessary implication’”); Logan v. City Council of the City of Roanoke, 275 Va. 483, 659 S.E.2d 296 (2008); Norton v. City of Danville, 268 Va. 402, 602 S.E.2d 126 (2004). The principle, known as the Dillon Rule (also referred to as “Dillon’s Rule”), is a rule of strict construction – if there is a reasonable doubt whether the legislative power exists, the doubt must be resolved against the local governing body. Sinclair v. New Cingular Wireless, 283 Va. 198, 204, 720 S.E.2d 543, 546 (2012).

5-200 Who was Dillon and where did his rule come from?

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

By the 1860s, cities had become not only inefficient, but corrupt. Graft, in the form of kickbacks, was rampant for many public works and public utility projects, including the railroads. It was the era of “Boss Tweed” and the Tammany Hall gang who reportedly swindled between $75 and $200 million from New York City between 1861 and 1875.

Dillon understandably did not trust local government and wrote, “Those best fitted by their intelligence, business experience, capacity and moral character” did not go into local public service. He felt local government was “unwise and extravagant” (“Dillon’s Rule,” Clay L. Witt, Virginia Town and City, August 1989).

Virginia is one of a limited number of states that follow the Dillon Rule and the rule continues to stir debate. Clay and Bangs note that some complain that the rule continues to bind the ability of Virginia’s localities to respond to the priority needs of their localities and regions. The Dillon Rule limits a local governing body’s ability to address local issues using local strategies exercised under its police power. As a result, a locality’s ability to address local issues is at the mercy of the General Assembly unless a means to address the issue has already been enabled. A locality’s governing body does not have broad general authority to adopt whatever ordinance it deems appropriate or desirable. Lawless v. County of Chesterfield, 21 Va. App. 495, 465 S.E.2d 153 (1995). On the other hand, the Dillon Rule has the effect of assuring, at least to some extent, a certain amount of consistency for those who deal with Virginia’s localities. The Virginia Chamber of Commerce has stated that the Dillon Rule “represents a positive tradition of legislative oversight” and encourages economic growth through a consistency in laws throughout the state.”

States that do not follow the Dillon Rule are sometimes referred to as “home rule” states, in which localities are determined to have the inherent authority to exercise powers that promote the public health, safety or welfare, even if they are not expressly enabled.

5-300 The nature and purpose of the Dillon Rule

The Dillon Rule is a rule of statutory construction that was first recognized in Virginia in City of Winchester v. Redmond, 93 Va. 711, 25 S.E. 1001 (1896), a decision in which the Virginia Supreme Court quoted with approval...
from 1 John F. Dillon, Commentaries on the Law of Municipal Corporations, § 89 (3d ed. 1881). As explained in more depth in section 5-400, the Dillon Rule provides that localities and governing bodies have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. Jennings v. Board of Supervisors of Northumberland County, 281 Va. 511, 516, 708 S.E.2d 841, 844 (2011); Marble Technologies v. City of Hampton, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010); Board of Supervisors of Augusta County v. Countryside Investment Co., 258 Va. 497, 522 S.E.2d 610 (1999) (invalidating subdivision regulation that was not based on the enabling authority in Virginia Code §§ 15.2-2241 or 15.2-2242), City of Chesapeake v. Gardner Enterprises, Inc., 253 Va. 243, 482 S.E.2d 812 (1997) (upholding validity of a zoning regulation that prohibited the construction of additional buildings or structures to support a nonconforming use); Curzie Construction, Inc. v. Zoning Appeals Board of Front Royal, 63 Va. Cir. 416 (2003) (holding that town had implied authority to require in its zoning ordinance that the main or front building façade and entrance of a building be oriented toward the front yard of the property under its authority in Virginia Code § 15.2-2283 to “facilitate the creation of a convenient, attractive, and harmonious community.”)

5-400  The two-step Dillon Rule analysis

There are two steps in a Dillon Rule analysis. The first step determines whether the local governing body is enabled. If so, the second step determines whether the enabled power has been properly exercised.

5-410  Step 1: Whether the local governing body is enabled

The first step in a Dillon Rule analysis is whether the local governing body is enabled under any State law. Marble Technologies v. City of Hampton, 279 Va. 409, 418, 690 S.E.2d 84, 88 (2010) (city not enabled under Chesapeake Bay Preservation Act to rely on federal criterion when State law required localities to use State criterion). There is no presumption that an ordinance is valid; if the General Assembly has not authorized a particular act, it is void. Sinclair v. New Cingular Wireless, 283 Va. 198, 204, 720 S.E.2d 543, 546 (2012).

The Dillon rule applies “to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.” Commonwealth v. County Board of Arlington County, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977). The analysis considers whether the power exists at all, under any statute. Marble Technologies, 279 Va. at 417, 690 S.E.2d at 88. The plain terms of the legislative enactment are first examined to determine whether the General Assembly expressly granted a particular power. Marble Technologies, 279 Va. at 418, 690 S.E.2d at 88.

There is always a question as to how deep one must go to find the appropriate enabling authority. For example, when examining the zoning power, a question will often arise in a dispute whether the search ends upon finding the general power to regulate land uses (Virginia Code § 15.2-2280), or whether one must search for the power to regulate the specific activity in question. In Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County, 238 Va. 15, 380 S.E.2d 879 (1989), the issue was whether the board was enabled to prohibit private landfills under what is now Virginia Code § 15.2-2280. In upholding the validity of the ordinance, the Virginia Supreme Court held that the board acted well within its delegated authority, stating that “[w]hile the language does not specify a landfill as one of the uses that may be prohibited, such specificity is not necessary under even the Dillon Rule of strict construction.” In Advanced Towing Company, LLC v. Fairfax County Board of Supervisors, 280 Va. 187, 694 S.E.2d 621 (2010), the Virginia Supreme Court upheld a county regulation prohibiting the removal of towed vehicles outside of the county, finding that the regulation was a reasonable exercise of the authority granted under Virginia Code § 46.2-1232 to “regulate” the towing of vehicles. Advanced Towing, 280 Va. at 193, 694 S.E.2d at 625. On the other hand, despite Virginia Code § 15.2-2280’s broad grant of authority to localities to “regulate” as it may “deem best suited,” and Virginia Code § 15.2-2286(A)(4)’s broad grant of authority to provide for the administration of its zoning ordinance, the Virginia Supreme Court has held that a governing body may not delegate any administrative powers to its planning commission under the state zoning laws. Sinclair v. New Cingular Wireless, 283 Va. 198, 720 S.E.2d 543 (2012).

If the power is not expressly granted, then the courts determine whether the power is necessarily or fairly implied from the powers expressly granted by the statute, or is essential and indispensable. Marble Technologies, supra.

5-2

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This is the most difficult part of a Dillon Rule analysis. “To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied.” Arlington County, 217 Va. at 577, 232 S.E.2d at 42. “Questions concerning implied legislative authority of a local governing body are resolved by analyzing the legislative intent of the General Assembly.” Tabler v. Board of Supervisors, 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980). “Legislative intent is determined from the plain meaning of the words used.” City of Richmond v. Conferre Club of Richmond, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990). Thus, the “central focus of [a Dillon Rule analysis] is to ascertain and give effect to the General Assembly’s intent in enacting provisions.” Logan v. City Council of the City of Roanoke, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008).

The existence of another means to achieve a particular legislative goal may mean that a power may not be necessarily implied. Lawless v. County of Chesterfield, 21 Va. App. 495, 502, 465 S.E.2d 153, 156 (1995) (county did not have the implied power to criminally punish each day’s continuing violation of the zoning ordinance because the General Assembly had expressly provided other enforcement options to abate the violation). If there is a reasonable doubt as to whether a legislative power exists, the doubt must be resolved against the local governing body. Schefer v. City Council of Falls Church, 279 Va. 588, 593, 691 S.E.2d 778, 780 (2010); Board of Supervisors v. Reid’s Landing Corp., 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995).

When considering whether a power exists under the State subdivision laws, the search for the enabling authority likely will need to find an express grant of the specific power being challenged because localities have not been granted broad powers in that area. See Board of Supervisors of Augusta County v. Countryside Investment Co., 258 Va. 497, 522 S.E.2d 610 (1999), discussed in section 5-520.

5-420 Step 2: If it is determined that the local governing body is enabled to act as it did, whether it properly executed the power

If it is determined that the local governing body is enabled is enabled to act as it did, the second step in a Dillon Rule analysis considers whether it properly executed the power granted to it. There are two alternative rules that determine whether the governing body properly executed its power.

5-421 When the enabling authority specifies the manner to execute the power

If a power is granted and the enabling authority specifies the manner in which the authority is to be exercised, a local governing body may not select any other method. Marble Technologies v. City of Hampton, 279 Va. 409, 421, 690 S.E.2d 84, 90 (2010) (city’s zoning regulations that included lands in its resource protection areas on the basis of federal law were void where State law required that localities use the criteria developed by the Chesapeake Bay Local Assistance Board to determine the extent of the Chesapeake Bay Preservation Area within its jurisdiction); Kansas-Lincoln, L.C. v. Arlington County Board, 66 Va. Cir. 274 (2004) (affordable housing guidelines that required cash contributions to the county’s affordable housing fund or the contribution of affordable housing units as a condition of approval of the county’s unique “special exception site plan process” was a mandatory affordable housing program not enabled under Virginia Code §§ 15.2-2286(A)(3), 15.2-2286(A)(10) or 15.2-2304 (enabling a voluntary affordable housing program)); Logie v. Town of Front Royal, 58 Va. Cir. 527 (2002) (Virginia Code § 36-105 enables localities to enforce a property maintenance code and prescribes prosecution as a misdemeanor and fines as the method of enforcement; as a result, town regulation authorizing termination of electric service as a method of enforcement violated the Dillon Rule).

There are a number of statutes where the General Assembly has specified the manner in which the local governing body may exercise its zoning power with great specificity. These include: (1) clustering single-family dwellings under Virginia Code § 15.2-2286.1; (2) conditional zoning (proffers) under Virginia Code § 15.2-2296 et seq.; (3) affordable housing programs under Virginia Code § 15.2-2305 (compare Virginia Code § 15.2-2305 to the enabling authority for affordable housing programs in certain localities under Virginia Code § 15.2-2304); and (4) transfer of development rights under Virginia Code § 15.2-2316 et seq. Under the State Subdivision Law, the General Assembly has specified the required and optional provisions of a subdivision ordinance under Virginia Code §§ 15.2-2241 and 15.2-2242, often with great precision.
5-422  When the enabling authority is silent about the manner to execute the power

If the power is granted, but is silent about the method for implementing the power, the choice of implementation by the local governing body will be upheld as long as the method selected is reasonable. Advanced Towing Company, LLC v. Fairfax County Board of Supervisors, 280 Va. 187, 694 S.E.2d 621 (2010). This rule is known as the “reasonable selection of method rule.” Advanced Towing, 280 Va. at 193, 694 S.E.2d at 624. The rule applies regardless of whether the power is express or necessarily implied. Commonwealth v. County Board of Arlington County, 217 Va. 558, 574-575, 232 S.E.2d 30, 41 (1977).

In Advanced Towing, the issue was whether the county could require that towed vehicles be stored in Fairfax County instead of in an adjoining locality. The Virginia Supreme Court found that although Virginia Code § 46.2-1232 empowered localities to adopt local towing ordinances, and the enabling authority expressly prohibited imposing certain requirements and provided an extensive list of provisions that a local governing body could, at its option, include. However, with respect to the territory within which vehicles are to be stored after being towed, the Court held that Virginia Code § 46.2-1232 was silent and, therefore “localities may exercise reasonable discretion in prescribing, by ordinance, the territory within which towed vehicles” could be stored. Advanced Towing, 280 Va. at 193, 694 S.E.2d at 625.

Whether the method chosen to implement an express or implied power is reasonable will depend upon the circumstances of each case. City of Virginia Beach v. Hay, 258 Va. 217, 222, 518 S.E.2d 314, 316 (1999). The selected method is reasonable if it is consistent with the legislative intent; it is unreasonable if it is contrary to the legislative intent or inappropriate for the ends sought to be accomplished by the grant of the power. Arlington County v. White, 259 Va. 708, 528 S.E.2d 706 (2000) (county was not enabled to extend coverage to the newly defined category of domestic partners under its self-funded health insurance benefits plan). For example, in Logie, supra, the circuit court considered Virginia Code § 36-105, which enables localities to enforce a property maintenance code but does not prescribe the method of enforcement. The court concluded that the town’s program of periodic inspections, triggered by changes in tenancy after the passage of two years and not after every tenancy, was an inspection program on a periodic basis that was reasonable and did not violate the Dillon Rule. The selected method is also unreasonable if the implementation expands the power beyond rational limits necessary to promote the public interest. Hay, supra. Any doubt in the reasonableness of the method selected is resolved in favor of the locality. White, supra.

Virginia Code § 15.2-2280 is the classic example of state enabling authority that is silent about the manner in which a local governing body is to execute the power granted. The statute enables localities to “regulate, restrict, permit, prohibit, and determine” the use of land and structures, the size, height, area, bulk, location, and other features of structures, and the areas and dimensions land, water and air space to be occupied by structures and uses, and of yards and other open spaces to be left unoccupied by structures and uses. Virginia Code § 15.2-2280 stands in stark contrast to the State enabling authority summarized in section 5-510 in which the General Assembly provides with great specificity the manner in which the power must be exercised.

5-500  The Dillon Rule applied in land use cases

The following cases illustrate how the Dillon Rule has been applied in Virginia land use cases.

5-510  Under the zoning enabling authority

In Sinclair v. New Cingular Wireless, 283 Va. 198, 720 S.E.2d 543 (2012), the Albemarle County zoning ordinance authorized the planning commission to consider and act on what were commonly known as “critical slopes waivers.” Under the county’s regulations, critical slopes could not be disturbed unless the planning commission authorized their disturbance by applying specific criteria in the regulations and making certain findings. A neighbor challenged the planning commission’s approval of a critical slopes waiver that permitted 408 square feet of critical slopes to be disturbed that would allow a tree-top personal wireless service facility to be constructed in the landowner’s backyard. Although the Virginia Supreme Court rejected the neighbor’s assertion that the critical slopes waiver was a variance that could be granted only by a BZA, the Court nonetheless concluded that there was no
authority for the board of supervisors to delegate what the Court characterized as a “departure” from the zoning ordinance that was legislative in nature. The Court rejected the county’s argument that the broad authority granted to localities in Virginia Code §§ 15.2-2280 and 15.2-2286(A)(4) allowed the board to delegate this task to the planning commission, and rejected the argument that the board had delegated an administrative task under prescribed standards, as authorized in prior opinions of the Court (see section 8-400).

In Marble Technologies v. City of Hampton, 279 Va. 409, 690 S.E.2d 84 (2010), the city’s zoning ordinance used a federal criterion for designating lands to be included in a resource preservation area under the Chesapeake Bay Preservation Act. The issue was whether the city was authorized to use this criterion under the State enabling authority. The General Assembly had given localities broad authority in former Virginia Code § 10.1-2108 to “exercise their police and zoning powers to protect the quality of state waters consistent with the provisions” of the Act. However, that authority was limited because former Virginia Code §§ 10.1-2100(A)(ii) and 10.1-2109 required that localities use the criteria established by the State. Therefore, the Virginia Supreme Court concluded that the city’s reliance on a federal criterion exceeded the authority granted by the Chesapeake Bay Preservation Act.

In Kenyon Peck v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969), a zoning ordinance was upheld that had the effect of prohibiting advertising by means of outdoor moving signs or devices such as pennants, even though there is no specific mention of such a regulation in the Virginia Code. Thus, the failure of the zoning enabling legislation to mention specifically a particular subject that a local governing body wants to regulate is not necessarily fatal to the governing body’s exercise of its zoning power. 1984-85 Va. Op. Atty. Gen. 34.

A locality has a substantial governmental interest in preserving its aesthetic character. American Legion Post 7 v. City of Durham, 239 F.3d 601 (4th Cir. 2001); Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993). Nevertheless, under Virginia law, absent enabling authority, a local governing body cannot limit or restrict the use a person makes of his property under the guise of its police power where the exercise of the power is justified solely on aesthetic considerations. Board of Supervisors of James City County v. Rawe, 216 Va. 128, 216 S.E.2d 199 (1975). The ordinance considered by the Virginia Supreme Court in Rawe required that preliminary site plans within a particular zoning district be subjected to an architectural design review of the elevations of each façade, materials, colors, texture, light reflecting characteristics and other special features intended for each building. Each building was reviewed to determine whether it furthered the stated purposes for the review: to protect property values, to promote the general welfare by insuring buildings in good taste, proper proportion, and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture which was distinct from the Colonial Williamsburg architecture. The landowners challenging the ordinance asserted that the enabling legislation did not delegate authority to local government to impose restrictions on architectural design. In finding the ordinance to be invalid, the Rawe court relied on its earlier decision in Kenyon Peck, supra. Rawe is still the controlling law in Virginia on the question of whether a local governing body may consider solely aesthetic factors in rezoning matters or zoning restrictions. However, since Rawe the General Assembly has enabled localities to regulate aesthetics within historic districts established under Virginia Code § 15.2-2306.

In Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County, 238 Va. 15, 380 S.E.2d 879 (1989), the Virginia Supreme Court held that the express authority given to localities to prohibit a use of land included, by implication, the authority to prohibit landfills as a use of land. The Court said that even under the Dillon Rule of strict construction, “such specificity [i.e., identifying each type of use that may be prohibited] is not necessary.” Resource Conservation Management, 238 Va. at 20, 380 S.E.2d at 882.

In Capp v. Board of Supervisors of Fairfax County, 227 Va. 580, 318 S.E.2d 407 (1984), the Virginia Supreme Court found that the express authority given to localities to grant special use permits “under suitable regulations and safeguards” did not imply the power to require a citizen to turn land over to the county and build roads for the benefit of the public. Similarly, in Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, 220 Va. 435, 258 S.E.2d 577 (1979), the Virginia Supreme Court held that localities had neither express nor implied authority to require a subdivider to construct off-site roads as a condition of plat approval. In National Realty Corp. v. City of Virginia Beach, 209 Va. 172, 163 S.E.2d 154 (1968), the Virginia Supreme Court found that an ordinance that imposed a fee for the examination and approval of final subdivision plats and made payment of the fee a
prerequisite to the recording of the plat was invalid because it was not enabled under Virginia law (localities have since been so enabled).

In Staples v. Prince George County, 81 Va. Cir. 308 (2010), the landowners challenged the validity of a zoning regulation and special exception condition that established a 14-day maximum stay in campgrounds. The landowners claimed that there was no express or implied authority for regulating the stay of guests at campgrounds. The circuit court rejected this argument, finding that the power to adopt such a regulation is granted in Virginia Code § 15.2-2280, and finding that the power to include such a condition was within the “suitable regulations and safeguards” authority in Virginia Code § 15.2-2296(A)(3).

In Owens v. City Council of the City of Norfolk, 78 Va. Cir. 436 (2009), the court upheld the city council’s issuance of a certificate of appropriateness for a building in a historical district where the city council had granted a height variance under the city’s certificate of appropriateness procedure enabled by Virginia Code § 15.2-2306. The court held that the variable height limitations within the historic district fell within the permissible scope of Virginia Code § 15.2-2306.

5-520 Under the subdivision enabling authority

In Board of Supervisors of Augusta County v. Countryside Investment Co., 258 Va. 497, 522 S.E.2d 610 (1999), the Virginia Supreme Court found that two provisions of Augusta County’s subdivision ordinance were not enabled under Virginia law and, therefore, violated the Dillon Rule and were void. The first provision provided in part that the “size and shape of all lots shall be subject to approval of the Board of Supervisors.” The second provision prohibited land from being subdivided if, in the opinion of the board of supervisors, it was determined to be unsuitable for subdivision for various reasons, including the proposed subdivision not being conducive to the preservation of a rural environment. The Court stated:

The Board asserts that it has considerable discretion when deciding what to include in a subdivision ordinance. We disagree . . . [T]he Board does not have unfettered discretion when deciding what matters it may include in its subdivision ordinance. Rather, the Board must include those requisites which are mandated in Code § 15.2-2241 and may, at the Board’s discretion, include the optional provisions of a subdivision ordinance contained in Code § 15.2-2242. . . . The Board is not, however, permitted to ignore the requisites contained in Code §§ 15.2-2241 and -2242 and, under the guise of a subdivision ordinance, enact standards which would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property’s zoning classification.

Countryside Investment, 258 Va. at 504-505, 522 S.E.2d at 613-614. Along similar lines, in County of Chesterfield v. Tetra Associates, L.L.C., 279 Va. 500, 689 S.E.2d 647 (2010), the Virginia Supreme Court considered various subdivision regulations by which the county prohibited the subdivision of land for a residential use within the agricultural zoning district, where the proposed residential use and minimum lot sizes complied with the applicable requirements of the agricultural zoning district under the zoning ordinance. Relying on its previous holding in Countryside Investment, the Court concluded that the county could not use its subdivision regulations to prohibit a use permitted by the applicable zoning regulations, and directed that the county process the applicant’s subdivision plat.

5-600 A rule that is stricter than the Dillon Rule applies to statutory bodies such as boards of zoning appeals and architectural review boards

The Dillon Rule applies to a locality and its governing body. Because BZAs and ARBs are creatures of statute, they are subject to a rule that is stricter than the Dillon Rule. These bodies possess only those powers expressly conferred; they do not have the power to exercise powers that must be implied from expressly granted powers, or those that are perceived as essential and indispensable. Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550, 666 S.E.2d 315 (2008) (holding that the BZA does not have the power to sue because that power is not expressly granted by statute); Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach, 261 Va. 407, 544 S.E.2d 315 (2001) (BZA was enabled to grant a variance only for the purposes and under the requirements provided by law; the subject of entitlement to compensation for the alleged taking of or
damage to property as a result of zoning actions was not among the powers enumerated); *Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc.*, 217 Va. 740, 232 S.E.2d 767 (1977) (zoning administrator, who is charged with the administration and enforcement of the zoning ordinance, and not the BZA, could revoke a special use permit; BZA could consider the matter only on appeal of the zoning administrator’s decision).

5-700 Working with the Dillon Rule in its daily application

Following are the phrases that every local officer or employee hates hearing from its attorney: “You can’t do that,” “That’s not enabled,” and “There’s no enabling authority for us to do that.” When a locality’s attorney says those things, he or she has researched the enabling authority to determine whether the locality is enabled to do something and has determined that there is no express or necessarily implied enabling authority. In other words, the attorney has concluded that the proposed action is not enabled.

5-710 When the locality’s attorney determines that the proposed action is not enabled

If one assumes that laws are intended to promote the public health, safety and general welfare, the failure to find enabling authority means that the General Assembly has not (or has not yet) determined that the proposed action promotes these interests.

Once a determination is made that the necessary enabling authority is missing and the Dillon Rule applies, the locality’s attorney is obligated to proceed in the best interests of the locality. Rule 1.13(b) of the *Virginia Rules of Professional Conduct* states in part:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . .

Among other things, this rule means that once the attorney has determined that the locality has no authority to take the proposed action, he or she may decline to assist an officer or employee in violating the law by circumventing a prohibitory law or ignoring the absence of enabling authority.

5-720 When “other localities are doing it”

When word is received from the locality’s attorney that the locality is not enabled to take a proposed action, an officer or employee may be aware that “other localities are doing it.” When such a claim is made, the attorney will inquire to find out which localities are doing it, and what if any authority there is for doing it. Following is a list of the typical findings from such an inquiry:

- The person claiming that other localities are doing something doesn’t know what the other localities are actually doing.
- Other localities are not doing it, but are doing something similar that is enabled.
- The other localities that are doing it are either enabled through their charter, or have special legislation applicable to a class of localities of which your locality is not a member.
- The other localities are not enabled either, but haven’t been sued yet.
- The other localities are small rural localities, and the particular matter was never reviewed by their attorneys.
Of course, the locality’s attorney will not conduct such an inquiry if he or she knows that what the other localities are doing is obviously not enabled. He or she also knows that if five other localities are doing something, that means that over 100 Virginia localities are not doing it.

5-730 The search for alternative solutions

A locality’s attorney’s determination that a proposed action is not enabled does not end the inquiry. The attorney may advise the client of alternative solutions that will legally achieve, or achieve as closely as possible, the desired result. One of those alternatives may be to pursue a change in state law.
Chapter 6

Constitutional Principles Affecting a Locality’s Land Use Powers

6-100 Introduction

The power to regulate the use of land is a legislative power, residing in the state, which must be exercised in accordance with constitutional principles. Board of Supervisors of Fairfax County v. Southland Corp., 224 Va. 514, 297 S.E.2d 718 (1982). A locality’s exercise of its land use powers, particularly the zoning power, invokes numerous constitutional principles:

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<tr>
<th>Constitutional Principles That May Be Affected By the Exercise of Local Land Use Powers</th>
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<td>• Procedural due process</td>
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<td>• Substantive due process</td>
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<tr>
<td>• Equal protection</td>
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<td>• Just compensation or takings</td>
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The numerous constitutional principles that may be affected by local land use regulations may have 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, 661, 101 S. Ct. 1287, 1309, 579 fn. 26 (1981) (Brennan, J).

At bottom, in the land use context these constitutional principles seek to ensure: (1) fairness in the procedures; (2) fairness in the regulations; (3) fairness in the implementation of the regulations; (4) protection of certain individual activities; and (5) freedom from certain governmental activities.

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 . . .”

In the context of a zoning ordinance, the due process clause ensures 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


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 the city ultimately issuing the land use permits plaintiffs sought); Sylvia Development Corp. v. Calvert County, 48 F.3d 810 (4th Cir. 1995).

In delineating the scope of a landowner’s property interests, state law will play a key factor, and all property is taken subject to certain State law principles (in this case, the principle of public nuisance law) that ultimately
establishes the “bundle of rights” a landowner acquires. In *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013), six cottages, along with numerous others, had shifted from being landward of the vegetation line to seaward of the vegetation line as a result of beach erosion. After a coastal storm in late 2009, the houses were standing on what had become the beach. The town declared the cottages to be public nuisances under its public nuisance ordinance. At the time the town declared them to be nuisances, the cottages had been under repair. The town informed the landowners that no development permits would be issued to allow the repairs to be completed. When the landowners failed to timely abate the nuisance by demolishing the houses, the city began imposing $100 fines per day per cottage. After the fines had been imposed for several months, the landowners sued the town, alleging a violation of their procedural due process rights, equal protection and a taking without just compensation.

On their procedural due process claim, the landowners asserted two property interests that they were deprived: (1) the money that would be used to pay the fines imposed by the town; and (2) the right to use and enjoy the cottages as part of their fee simple ownership.

The Fourth Circuit Court of Appeals held that although money is a property interest, the town did not deprive the landowners of any money because they never paid the fines and the mere imposition of fines is not the equivalent of taking money. The court also held that, although the use and enjoyment as part of fee simple ownership is a property interest, the town’s actions did not deprive the landowners of any property right because: (1) the town’s actions were all legitimate governmental actions intended to enforce the public nuisance ordinance and these types of regulatory actions “represent limitations on the use of property that inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Sansotta v. Town of Nags Head*, 724 F.3d at 541. In other words, the landowner’s fee simple ownership rights were always subject to the State’s and the town’s laws of nuisance and the town could prohibit the cottages’ use in ways it determined to be a nuisance, even if the cottages were rendered valueless. The court remanded the case to the trial court because it concluded that the plaintiffs had sufficiently alleged a taking without compensation claim, to allow the case to at least proceed past the pleading stage.

In *Bell-Zuccarelli v. City of Gaithersburg*, 2015 U.S. Dist. LEXIS 42951 (D. Md. 2015), the court concluded that the plaintiff had no property interest in a structure that was not authorized under the city’s zoning ordinance, where the city had issued a permit for a shed as an accessory structure, and the plaintiff had converted the structure into a dwelling unit.

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<tr>
<td>The right to notice and the right to be heard</td>
<td>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, ensure that notice and hearing are provided before property or property interests are affected</td>
</tr>
<tr>
<td>The locality’s adherence to statutory time requirements</td>
<td>Adhere to the statutory time requirements in, e.g., 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)</td>
</tr>
<tr>
<td>Regulation may not be uncertain or vague; a person of ordinary intelligence must have a reasonable opportunity to know what is prohibited</td>
<td>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</td>
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</table>

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).

In the land use context, there are three areas where procedural due process rights exist: (1) the right to notice and the right to be heard in adjudicative or quasi-judicial proceedings; (2) the obligation of a locality to adhere to
statutory time requirements; and (3) the requirement that regulations not be uncertain or vague. These are each addressed below.

6-211 The right to notice and the right to be heard in adjudicative or quasi-judicial proceedings

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, 410 S.E.2d 674 (1991). Thus, principles of procedural due process apply to appeals of official determinations to the BZA and zoning enforcement actions, 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 or a property right 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, 70 S. Ct. 652 (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 pre-deprivation and post-deprivation 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.*

In *Ihaken v. Gardner*, 927 F. Supp. 2d 227 (D. Md. 2013), a concert promoter rented land from the owner of a farm for a 4-day music and arts festival. The landowner obtained a zoning permit from the county’s zoning administrator for the festival. On the first night of the concert, the police received numerous noise complaints. The next morning, a county commissioner received an angry email from a constituent about the noise the night before. After a meeting between the sheriff and the zoning administrator, and with the endorsement of the county commissioners, the zoning administrator revoked the permit and the remainder of the festival was cancelled. The promoter sued various county officials alleging, among other things, a violation of his procedural due process rights because the permit was revoked without a hearing. In rejecting the county’s request to dismiss the promoter’s complaint, the court found that the county officials had violated the promoter’s procedural due process rights when it revoked the permit without a hearing, because: (1) the revocation occurred in the morning when there was no violation of the noise ordinance; (2) the noise ordinance did not authorize summary revocations; instead it only provided that a violation of the noise ordinance was a misdemeanor; (3) although the zoning ordinance authorized the zoning administrator to revoke a permit for violating a condition of a permit, this provision addressed only the legal authority to revoke, but not the process to revoke; and (4) the zoning ordinance provided no summary process before revoking the permit.

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, 536 S.E.2d 913 (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 periods 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).

Note, however, that the failure to adhere to statutory time requirements is not a per se violation of procedural due process. “The use of the word ‘shall,’ in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent.” *Wilks v. Commonwealth*, 260 Va. 194, 199, 530 S.E.2d 665, 667 (2000) (Virginia Code § 19.2-386.3(A)’s requirement that the Commonwealth’s attorney “shall” file a notice of seizure for forfeiture with the clerk of the circuit court within 21 days was directory and procedural rather than mandatory and jurisdictional). “[A] statute directing the mode of proceeding by public officers is to be deemed
directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.” Commonwealth v. Rafferty, 241 Va. 319, 324-325, 402 S.E.2d 17, 20 (1991) (failure to attach certificate of refusal to warrant as required by former Virginia Code § 18.2-268(Q) was not fatal to proceeding).

An assessment of whether an individual has suffered prejudice resulting in a denial of due process must be made on a case-by-case basis. Wilks, supra; Tran, supra.

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 a 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, 410 S.E.2d 674 (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, 365, 218 S.E.2d 730, 733 (1975). “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, 498, 102 S. Ct. 1186, 1193 (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, 2004 WL 2538207 (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, 67 (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.” Gwinn, 62 Va. Cir. at 329-330. 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.” Gwinn, 62 Va. Cir. at 330.

In Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013), the plaintiff contended that the town’s definitions of “public art” (defined in part to be “intended to beautify or provide aesthetic influences to public areas”) and “holiday decorations” (defined in part to be “displays erected on a seasonal basis in observance” of a range of holidays) in its sign regulations were unconstitutionally vague. The court did not find the definitions to be unconstitutionally vague. The court said that if the definitions lacked the clarity the owner insisted was required, “it is because the concepts do not lend themselves to easy definition,” adding that because “laws are condemned to the use of words, we can never expect mathematical certainty from our language” and that “the vagueness doctrine does not prevent the government from regulating vague concepts – it only requires that they provide some guidance for citizens to understand the reach of the law’s application.” Brown, 706 F.3d at 306.

In Wag More Dogs v. Cozart, 680 F.3d 359, 373 (4th Cir. 2012), the plaintiff challenged the county’s definition of “sign” as being unconstitutionally vague. The definition was as follows: “Any word, numeral, figure, design, trademark, flag, pennant, twirler, light, display, banner, balloon or other device of any kind which, whether singly or in any combination, is used to direct, identify, or inform the public while viewing the same from outdoors.” Finding
that considering the term in the context of the sign ordinance as a whole was part of the vagueness analysis, the court concluded that the definition was not unconstitutionally vague.

6-220 Substantive due process

Land use regulations and actions must substantially advance legitimate governmental interests. *Jingle v. Chevron U.S.A, Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (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, 21, 778 N.E.2d 1116, 1122 (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”).

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<td>Regulation or decision may not be arbitrary or irrational, so unjustified by any circumstance, governmental interest, or facts</td>
<td>Confirm that zoning regulations and zoning decisions advance at least one of the purposes of zoning in Virginia Code § 15.2-2283 and are supported by at least one of the relevant factual considerations in Virginia Code § 15.2-2284 including, in particular, the comprehensive plan</td>
<td>Ensure that specific zoning actions are based on evidence in the record and are not arbitrary and capricious</td>
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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. 633, 107 S.E.2d 390 (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.” *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665 (1986). 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, 281 (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, 440 (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, plaintiffs must show that: (1) they had a protected property interest; (2) defendants deprived them 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); *Gum Springs, L.C. v. Loudoun County Supervisors*, 59 Va. Cir. 509 (2001) (upholding demurrer because contract purchaser failed to allege property interest in denied zoning classification and failed to allege that rezoning denial was so unjustified by any circumstance or governmental interest). Following is a brief examination of the three elements.

- The first element—a protected property interest: 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 issuing the permit or withholding approval. *Pulte Home Corporation v. Montgomery County, Maryland*, 909 F.3d 685
• The second element – a deprivation of that property interest: There must be a causal connection between the locality’s alleged action and the property interest deprivation. For example, the mere denial of a particular zoning application does not constitute a deprivation of that interest. *Gunn Springs*, 59 Va. Cir. at 515.

• The third element – governmental action beyond the outer limits of legitimacy: Here, the discussion is in the context of a zoning action involving property, it must be clear that the locality’s action “has no foundation in reason and is a mere arbitrary and irrational exercise of power” and the plaintiff must allege that the governing body’s action has “no conceivable rational relationship” to a legitimate public purpose. *Sylvia Development*, 48 F.3d at 827; *Gunn Springs*, 59 Va. Cir. at 514. 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 ensure 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, 82 S. Ct. 987 (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 courts rejected substantive due process claims in the following zoning cases.

In *Pulte*, the plaintiff alleged that it had a property interest under a 1994 Master Plan to develop its property as it had contemplated. However, 1994 Master Plan expressly stated that it would likely be revised after further studies in order to adequately protect a watershed. A later amendment to the 1994 Master Plan severely restricted the extent of development that would be allowed on Pulte’s 540 acres. The Fourth Circuit Court of Appeals held that Pulte’s due process claim was properly dismissed because it could not show that the County deprived it of any constitutionally protected property interest because the 1994 Master Plan placed large discretion in the hands of local authorities. “Any ‘significant discretion’ left to ‘zoning authorities defeats the claim of a property interest.” *Pulte*, 909 F.3d at 692.

In *Siena Corporation v. Mayor and City Council of Rockville, Maryland*, 873 F.3d 456 (4th Cir. 2017), Siena purchased industrially zoned land in the city with the intention to establish a self-storage facility, which was a use allowed by right under the zoning district’s regulations. In time, residents learned of Siena’s intention, became concerned that the storage facility would pose a threat to the students of a nearby elementary school. The safety concerns included traffic safety, the storage of illegal or hazardous materials which, in turn, would invite crime to the area, and the release of asbestos into the air during construction. In response, the city council amended the zoning ordinance to prohibit self-storage facilities within 250 feet of a public school. While the zoning text amendment was making its way to the city council, Siena had obtained “conditional site plan approval” from the planning commission. Siena did not comply with the conditions that would allow it to obtain final site plan approval, never applied for a building permit, and never started construction of a facility on its property. The 250-foot setback prevented Siena from building a self-storage facility on its property.

Siena claimed that it had a protected property interest to establish a self-storage facility and that the city council’s amendment creating the 250-foot setback deprived it of that interest. However, the Fourth Circuit Court of Appeals held that Siena did not have a property interest under Maryland law, and equated a “property interest” in the constitutional sense to “vested rights” under state law.

Even assuming for the sake of argument that Siena had a property interest affected by the new setback regulation, the court held that the regulation did not violate substantive due process. The court said that the
amendment did not “shock the conscience” in the constitutional sense because it was designed to protect elementary school students from the hazards the city council “believed to be associated with self-storage warehouses,” and these concerns fell “within the heart of the state’s police power.” The court added:

Whether one agrees or disagrees with the Council’s assessment of self-storage hazards is beside the point. As the local governing body, the Council was entitled to credit the concerns of the citizenry as to the safety of students and the welfare of children. The enactment represented nothing more than the ordinary exercise of the state’s residual power in land use and zoning . . .

The court also rejected Siena’s argument that the amendment was an arbitrary action targeting it alone, explaining:

A single facility may provide the impetus for a general zoning enactment, but that does not mean the enactment is aimed solely at that facility. Nor does every loser in a zoning dispute have by virtue of the unfavorable outcome a so-called ‘targeting’ claim. . . . Siena makes hay of the fact that no other developer was planning to build a self-storage facility near a public school, but that is hardly dispositive. What matters is that the zoning text amendment applied to all developers – both present and future – who might entertain plans similar to Siena.

The court concluded by stating that, while Siena did not relish the result of the city council’s zoning text amendment, “displeasure with state democratic outcomes does not ordinarily rise to the level of a federal constitutional violation.”

In Adams v. Village of Wesley Chapel, 2007 U.S. App. LEXIS 28621, 2007 WL 4322321 (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. The court noted that, at the public hearing on the adoption of the ordinance, concerns regarding 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.” Adams, 2007 U.S. App. LEXIS at 13.

In Cupp v. Board of Supervisors of Fairfax County, 227 Va. 580, 318 S.E.2d 407 (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 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.” Dawson, 59 Va. Cir. at 527.

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, 238, 198 S.E.2d 600, 602 (1973), the court held invalid a regulation that required certain developments having 50 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, 661, 107 S.E.2d 390, 396 (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.”
In a zoning enforcement case, the Fourth Circuit Court of Appeals held that the county’s padlocking of a salvage company’s site after years of failing to comply with the county’s zoning and environmental regulations did not violate its substantive due process rights. 

In another enforcement case, a county commission did not violate the plaintiffs’ substantive due process rights when it issued cease and desist orders against the plaintiffs’ gun range. The court concluded that the credibility determinations made by commission and the evidence of bias against the gun range did not rise to an unconstitutional level. The one and one-half years that the commission investigated the gun range before issuing the first cease and desist order, the limited duration of both cease and desist orders, and the fact that the second cease and desist order would end when the plaintiffs submitted to a safety inspection of the gun range, all showed the credibility of the commission’s safety concerns and against the plaintiffs’ arguments of irrationality and arbitrariness.

None of the factors that suggest illegitimacy are present: Quinn does not point to any procedural irregularity; the Grandfather/Merger Provision applies generally to all lots in the area; and it is
consistent with the County's longstanding desire to limit development on undersized lots. The evidence is overwhelming that the Grandfather/Merger Provision here is part of a comprehensive plan to address the serious public health and environmental problems arising from failing septic systems, obtain state funding for the sewer extension, and limit the subsequent potential for overdevelopment. These are legitimate government goals, and the Grandfather/Merger Provision is clearly related to them. There is no substantive due process violation.

*Quinn*, 862 F.3d at 44.

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, 375 S.E.2d 736 (1989). Equal protection rights are found in the anti-discrimination clause of the Virginia Constitution’s due process clause in Article I, Section 11, which provides that persons are guaranteed “the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin . . . .” 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. *See Schefer v. City Council of the City of Falls Church*, 279 Va. 588, 691 S.E.2d 778 (2010), discussed in section 6-310.

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, 102 S. Ct. 2382 (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*.

“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, 382, 121 S. Ct. 955, 972 (2001); see also *Sowers v. Powhatan County*, 2009 WL 3459204 (4th Cir. 2009) (unpublished). 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, 105 S. Ct. 3249 (1985), cited in *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621, 2007 WL 4322321 (4th Cir. 2007) (unpublished); *Advanced Towing Company, LLC v. Fairfax County Board of Supervisors*, 280 Va. 187, 191, 694 S.E.2d 621, 623 (2010) (“Unless a suspect classification or a fundamental constitutional right is involved, considerable deference must be accorded by the courts to legislative policy”).

In the zoning context, an equal protection challenge is reviewed in accordance with the following principles:

The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. *The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health,*
The [C]ourt will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.


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, 297 S.E.2d 810 (1982); *County Board of Arlington v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989); *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982); *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (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, 216 S.E.2d 199 (1975); *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983); *Town of Vienna Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (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, 544 S.E.2d 334 (2001).

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<td>Regulation may not unjustifiably discriminate in the manner in which uses are classified</td>
<td>Confirm that a rational basis exists for zoning classifications (e.g., “mini-mart” stores classified differently from supermarkets because traffic impacts are different)</td>
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<tr>
<td>Zoning map may not unjustifiably discriminate in the manner in which district boundaries are drawn</td>
<td>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</td>
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<tr>
<td>Zoning decision may not unjustifiably treat similarly situated applicants differently</td>
<td>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</td>
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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, 564, 120 S. Ct. 1073, 1074 (2000).

Finally, the reader should keep in mind that “[e]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification . . . [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 2101 (1993), quoted in *Advanced Towing, supra*.

6-310 Classifying and regulating 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 the denial of an application for a different use classification is alleged to be discriminatory.

In *Siena Corporation v. Mayor and City Council of Rockville, Maryland*, 873 F.3d 456 (4th Cir. 2017), Siena purchased industrially zoned land in the city with the intention to establish a self-storage facility, which was a use allowed by right under the zoning district’s regulations. In time, residents learned of Siena’s intention, became concerned that the storage facility would pose a threat to the students of a nearby elementary school. The safety concerns included traffic safety, the storage of illegal or hazardous materials which, in turn, would invite crime to the area, and the
release of asbestos into the air during construction. In response, the city council amended the zoning ordinance to prohibit self-storage facilities within 250 feet of a public school. While the zoning text amendment was making its way to the city council, Siena had obtained “conditional site plan approval” from the planning commission. Siena did not comply with the conditions that would allow it to obtain final site plan approval, never applied for a building permit, and never started construction of a facility on its property. The 250-foot setback prevented Siena from building a self-storage facility on its property. Siena claimed that the city council’s zoning text amendment that created a 250-foot setback between self-storage facilities and public school properties, thereby preventing Siena from establishing a self-storage facility on its property, violated its equal protection rights.

Because no fundamental right (e.g., Free Speech) or suspect classification (e.g., a classification based on race or religion) was in issue, the Equal Protection Clause allowed the city council “wide latitude in drawing classifications.” The text applied by the Fourth Circuit Court of Appeals was “whether the governmental end is legitimate and whether the means chosen to further that end are rationally related to it.” The court concluded that “the state interest in protecting schoolchildren is readily apparent.” Siena Corp., 873 F.3d at 465. The court also concluded that the zoning text amendment was rationally related to protecting schoolchildren because it prevented the danger arising from increased traffic and it “helps ensure that the many undeniably legitimate uses of self-storage do not serve as a cover for those who might stash the illegal or hazardous materials that the Council wished above all to keep away from students.” Siena Corp., 873 F.3d at 465.

Lastly, the court said that, although the zoning text amendment affected only the perceived dangers of self-storage facilities, “whether some alternative commercial use might present similar safety concerns is beside the point.” Siena Corp., 873 F.3d at 465. The court added that a state (or locality) “is perfectly within its rights to chip away at a problem piece-by-piece, so long as it does not unlawfully discriminate in the process.” Siena Corp., 873 F.3d at 465. Siena Corp., 873 F.3d at 465.

In Schefer v. City Council of the City of Falls Church, 279 Va. 588, 691 S.E.2d 778 (2010), the plaintiff owned 12 lots in the city, all of which were created prior to the then-current 7,500 square foot minimum lot size in the R1-B zoning district. The R1-B zoning district allowed a maximum building height of 35 feet on standard lots, and a maximum building height of between 25 and 35 feet on substandard lots as determined by applying a formula in the zoning regulations. The court upheld the different height standards by concluding that residential buildings on standard lots were different uses than residential buildings on substandard lots. Therefore, the height regulations did not violate the uniformity requirement of Virginia Code § 15.2-2282.

In City of Manassas v. Rosson, 224 Va. 12, 294 S.E.2d 799 (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, 297 S.E.2d 718 (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 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.

In Owens v. City Council of the City of Norfolk, 78 Va. Cir. 436 (2009), the court upheld the city council’s issuance of a certificate of appropriateness for a building in a historical district where the city council had granted a height variance under the city’s certificate of appropriateness procedure enabled by Virginia Code § 15.2-2306. The court held that the city’s zoning scheme of flexible building heights in its historic districts was not unreasonable, arbitrary, capricious or otherwise lacking a reasonable basis. The court found that the city had demonstrated the legislative bases for its regulations.

6-11
6-320 Drawing 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, 216 S.E.2d 199 (1975). In deciding 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 geometrical alignment. Board of Supervisors of Fairfax County v. Pyles, 224 Va. 629, 300 S.E.2d 79 (1983); Town of Vienna Council v. Kohler, 218 Va. 966, 244 S.E.2d 542 (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.” West Brothers Brick Co. v. City of Alexandria, 169 Va. 271, 284, 192 S.E. 881, 886 (1937), quoted in Rowe, supra, but see Kohler, supra (under the facts, there was no rational basis for the different treatment).

6-330 Zoning decisions

To state a claim for a violation of the Equal Protection Clause, plaintiffs must show: (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 rezoning, are sought.

Deference to those bodies making local zoning decisions is manifest in equal protection case law. In Pulte Home Corporation v. Montgomery County, Maryland, 909 F.3d 685 (4th Cir. 2018), the plaintiff contended that it was treated differently than other parcels within a watershed even though the parcels were similarly situated. However, the amended master plan in issue articulated in detail environmental concerns that were specific to Pulte’s parcel and gave reasons for imposing restrictions on the development of that parcel. The Fourth Circuit Court of Appeals said that the County’s decision-makers could conclude that Pulte’s parcel differed from the other parcels in several important ways, including size, location, and the fact that several sensitive tributaries originated on and flowed through Pulte’s parcel. The Court added that “[t]hese are rational distinctions, even if they were not the real reasons for treating Pulte’s land differently.” Pulte, 909 F.3d at 694. The Court added:

It is not this court’s place to second-guess the wisdom of elected local officials in making inherently discretionary zoning decisions. As the Supreme Court has explained,

There are some forms of state action, however, which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be ‘treated alike, under like circumstances and conditions’ is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Engquist v. Or. Dep’t of Agric., 553 U.S. 591, 603, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008). Local land use decisions are a quintessential example of subjective and individualized action by decision makers vested with the discretion needed to balance competing interests.

Pulte, 909 F.3d at 694-695. The Court concluded by stating: “The County and Commission provided rational reasons for treating Pulte’s land differently, and that is the end of our inquiry.” Pulte, 909 F.3d at 695.
If it is shown that a locality’s zoning standards are being applied in an inconsistent and discriminatory manner, a court may find that a legislative action, such as 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, 544 S.E.2d 334 (2001). In *McDonald’s*, 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 *Quinn v. The Board of County Commissioners of Queen Anne’s County, Maryland*, 862 F.3d 433 (4th Cir. 2017), Quinn bought over 200 undeveloped lots on south Kent Island between 1984 and 2002, but he could not develop the lots because they could not accommodate septic systems. Over time, many of the septic systems on those lots on the island that could accommodate septic systems failed.

In order to satisfy a number of state laws, the county developed a plan to: (1) extend sewer service to all streets with failing septic systems where both developed and undeveloped lots would receive sewer service; (2) in an effort to limit further development, sewer service would not be provided to streets with only vacant lots; (3) in a further effort to limit excessive development within the service area, the county would not grant a building permit on a lot that was smaller than the minimum size allowed by the zoning ordinance unless the lot was merged with any contiguous lots under common ownership; and (4) future sewer connections outside the initial service area were prohibited. The plan rendered hundreds of vacant lots undevelopable, including most of Quinn’s lots, and merged the limited number of lots Quinn owned within the service area.

Quinn claimed that the sewer extension plan and the merger provision violated his equal protection rights. The Fourth Circuit Court of Appeals rejected Quinn’s claim, holding that the County “plainly” had a rational basis for difference in treatment, explaining:

> The County will provide sewer service to streets with homes with failing septic systems and, in order to comply with a state statute, all vacant lots on those streets as well. The County will not provide sewer service to streets with only vacant lots for two reasons: one, in order to obtain state funding for and lower the cost of the aforementioned sewer extension; and two, to alleviate the threat of overdevelopment brought about by the earlier sewer expansion. Moreover, the County enacted the Grandfather/Merger Provision to limit development on sub-sized lots.

*Quinn*, 862 F.3d at 44. Therefore, the court said, any difference in treatment Quinn suffered was rationally related to a legitimate state interest.

In *Sunrise, supra*, the developer claimed that equal protection was denied because its application for a high rise building was disapproved 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:

> 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.

*Sunrise*, 420 F.3d at 329.
In *Sowers v. Powhatan County*, 2009 WL 3359204 (4th Cir. 2009) (unpublished), a developer whose application to rezone his property was first denied by the board of supervisors in January 2006, but thereafter approved by the board in May 2006. Sowers sued the county, alleging that the board’s failure to consider his late non-cash proffers, defer consideration of his application, or remand the application to the planning commission, when it instead denied his application in January 2006, deprived him of Equal Protection. One of the key issues in the application was that although the applicant had revised his application and his non-cash proffers during the application process, he had declined to increase his cash proffer to match board’s increased suggested cash proffer per residential unit. The suggested cash proffer had been increased while the applicant’s application was pending.

On appeal from the district court’s grant of summary judgment for the county, Sowers argued that he was similarly situated with other rezoning applicants whose applications had been approved and was therefore denied Equal Protection. The Fourth Circuit Court of Appeals disagreed and concluded that Sowers’ rezoning application was not similarly situated with other rezoning applications, noting that: (1) this application generated significant citizen opposition; (2) this application presented unique traffic concerns; (3) the applicant was a “tough negotiator”; (4) the applicant elected to “skirt typical procedures”; and (5) the recusal by one board member created a unique situation in which the residents most directly impacted by the proposed project were deprived of expected representation.

In *County of Lancaster v. Cowardin*, 239 Va. 522, 527, 391 S.E.2d 267, 270 (1990), the board denied special use permits for two boathouses. One of the landowners claimed that the denial of his permit was discriminatory because the board had approved a permit for a boathouse for a neighbor several months earlier. The Virginia Supreme Court rejected this argument, noting that a “claim of unlawful discrimination cannot prevail if there is a rational basis for the action alleged to be discriminatory.” The Court found a rational basis for the board’s decision, stating that the board could properly consider the effect of boathouses on local waters and distinguish the landowner’s request from that of his neighbors because the neighbor’s boathouse was on a different body of water and that there were no boathouses on the body of water this landowner sought to establish his boathouse.

In *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989), the board denied a special use permit to establish a two-family dwelling. The landowner claimed that the denial of the permit was discriminatory because the governing body had previously granted permits for two-family dwellings in situation “similar” to the landowner’s case. The Virginia Supreme Court rejected this argument, first noting that a claim of unlawful discrimination cannot prevail if there is a rational basis for the decision and finding a rational basis in that case in the board’s “effort to preserve the single-family character of the interior of the Neighborhood.” *Bratic*, 237 Va. at 230, 391 S.E.2d at 372.

In *Dawson, I.C. 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. The landowner had proceeded under the “class of one” theory recognized in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (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 Virginia Constitution 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.”

In *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 536-537, 125 S. Ct. 2074, 2080-2081 (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
The Fourteenth Amendment 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.”

The Takings Clause protects property rights as they are established under state law. **Stop the Beach Renourishment v. Florida Department of Environmental Protection**, 560 U.S. 702, 130 S. Ct. 2592 (2010). The following table summarizes the various classes of takings requiring just compensation.

<table>
<thead>
<tr>
<th>Type</th>
<th>Key Elements</th>
<th>Circumstances When Takings Claim Typically Raised (Not Necessarily Successful)</th>
</tr>
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<tbody>
<tr>
<td>Taking by physical invasion</td>
<td>Government requires an owner to submit to a permanent physical invasion</td>
<td>Law requiring landowners to allow cable companies to install cable facilities; waters behind government dam that flood private property</td>
</tr>
<tr>
<td>Regulatory taking</td>
<td>Regulation or decision deprives an owner of all or substantially all economically beneficial use of the property; generally, the diminution in value may need to exceed 90%</td>
<td>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</td>
</tr>
<tr>
<td>Temporary taking</td>
<td>Regulation or decision temporarily deprives an owner of all or substantially all economically beneficial use of the property</td>
<td>Moratoria that prohibit development; lengthy delays to obtain approvals</td>
</tr>
<tr>
<td>Categorical taking</td>
<td>Regulation or decision completely deprives an owner of “all economically beneficial use” of the property</td>
<td>Environmental regulations such as sand dune protection laws that prohibit all development and use of the property</td>
</tr>
<tr>
<td>Exaction</td>
<td>Locality requires dedication of land or fees as a condition of approval; the condition lacks a nexus and rough proportionality to the impacts</td>
<td>Conditions (proffers) associated with a rezoning or a condition to a special use permit, variance, site plan or subdivision plat</td>
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</table>

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, 102 S. Ct. 3164 (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, 112 S. Ct. 2886 (1992) (referred to as “categorical” takings). As explained in **Lingle, supra**, 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, 98 S. Ct. 2646 (1978).
<table>
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<tr>
<th>Takings Compared to Substantive Due Process Violations</th>
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<tr>
<td><strong>Takings</strong></td>
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<tr>
<td>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.</td>
</tr>
</tbody>
</table>

Generally, takings jurisprudence has not supplanted substantive due process and a governmental action that does not substantially advance a legitimate governmental interest is a substantive due process claim, not a takings claim. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005); but see *Acorn Land, L.L.C v. Baltimore County*, 2010 U.S. App. LEXIS 19582, 2010 WL 3736258 (4th Cir. 2010) (unpublished), where the court’s takings analysis considers the arbitrary and capricious actions of the county council in evaluating the factors for whether a regulatory taking has occurred.

Article I, Section 11 of the Virginia Constitution 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, 481 S.E.2d 460 (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*, 253 Va. at 72, 481 S.E.2d at 467; *City of Lynchburg v. Peters*, 156 Va. 40, 157 S.E. 769 (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, 61 S.E. 776 (1908). A risk or an expectation to develop one’s land in a particular manner is not a vested property right. *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, 657 S.E.2d 132 (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 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 conditions imposed in conjunction with special use permits or variances, referred to 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 and has the effect of depriving the land substantially all economically viable uses. *Sunrise Corporation v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005). The three-pronged test that governs a regulatory takings analysis is set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978):

- 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., Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005), the United States Supreme 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*, 544 U.S. at 539, 125 S. Ct. at 2082. 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.

Identifying that cognizable property interest should be the first step in the analysis before reaching the Penn Central factors. Hearts Bluff Game Ranch, Inc. v. United States, 669 F.3d 1326, 1329, 1331-32 (Fed. Cir. 2012) (landowners who purchased 4,000 acres with the expectation that they would be able to participate in a federal mitigation banking program and receive its related benefits had no cognizable property interest in a permit to participate in the program where it was undisputed that the Army Corps of Engineers had discretionary authority to deny access to the mitigation bank program, the program was run exclusively by the Corps, subject to its pervasive control, and no landowner can develop a mitigation bank absent Corps approval).

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, 121 S. Ct. 2448 (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, 121 S. Ct. 2448 (2001), and her analysis was adopted by the majority in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (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. A survey of the case law, particularly the more recent case law, reveals some prevailing themes which 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 taking. Board of Supervisors of Prince William County v. Omni Homes, Inc., 253 Va. 59, 481 S.E.2d 460 (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); Henry v. Jefferson County Commission, 673 F.3d 269 (4th Cir. 2011) (no diminution in value from
approval of conditional use permit allowing less density than requested where, among other things, appellant and his family sold parcels for $1.3 million; 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) (re zoning 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”); Carolinas 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”); Carney v. Town of Framingham, 2012 WL 1552964, at 2 (D. Mass. 2012) (town’s limitation on plaintiff’s ability to clear trees on a portion of his property under its wetlands regulations did not constitute a regulatory taking where plaintiff lived in the house he built on the property, and the plaintiff alleged only a diminution in use but not in value; the court noted that challenges to wetlands regulations as regulatory takings typically require significant diminutions in property value before a taking is found).

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 was developed as being used for 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 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; Bettendorf v. St. Croix County, 631 F.3d 421, 425 (7th Cir. 2011) (no taking even though plaintiff suffered as a result of losing the commercial zoning designation on his property to which he had grown accustomed because the property still retained the ability to be fully used for agricultural and residential uses).

However, for other uses to be considered, they must be more than just a possibility. For example, in Matter of Friedenburg 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, 492 S.E.2d 113 (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.

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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, 47 S. Ct. 114 (1926), where the diminution in value was 75% and in *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143 (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 *Pulte Home Corporation v. Montgomery County, Maryland*, 909 F.3d 685 (4th Cir. 2018) (“Even if we assume that Pulte has suffered an eighty-three percent diminution in the value of its property, that is not enough on its own to establish a taking”); *Rial 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 (2d 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); *MHC Financing Limited Partnership v. City of Rafael*, 714 F. 3d 1118 (9th Cir. 2013) (alleged 81% diminution in value (from $120 million to $23 million) resulting from city’s mobile home rent control ordinance would not have been sufficient economic loss or interference with the plaintiff’s reasonable investment-backed expectations to constitute a taking).

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 Friedenburg 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, 481 S.E.2d 460 (1997), Omni alleged that Prince William County’s purchase of property adjoining its proposed subdivision constituted an uncompensated taking. 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 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*, 253 Va. at 71, 481 S.E.2d at 466. 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.
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, 121 S. Ct. 2448 (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.

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, 481 S.E.2d 460 (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, 100 S. Ct. 2138 (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 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, 130, 98 S. Ct. 2646, 2662 (1978), does not result in a taking.

When evaluating reasonableness, the government’s right to amend its regulations 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, 2007 WL 4322321 (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”).

Lot merger provisions that reduce development for environmental reasons are not necessarily a taking, even if one of the pre-merged lots is undevelopable. In Marr v. Wisconsin, __ U.S. __, 137 S. Ct. 1933 (2017), the four landowners were siblings (the “petitioners”) who challenged state and local regulations that prevented the use or sale of adjacent lots under common ownership as separate building sites unless the lots each had at least one acre of land suitable for development. The purpose for the law was to limit development around the St. Croix River. The
petitioners had received two lots from their parents in two separate transactions. Although each lot was larger than one acre in size, neither had one acre of land suitable for development. Thus, the petitioners’ desire to sell one of the lots to get money to improve the other lot was thwarted by the law.

The critical issue in the case was: “What is the proper unit of property against which to assess the effect of the law in issue?” The United States Supreme Court held that the law did not result in a compensable taking and that it was appropriate to evaluate the petitioners’ two lots as a single piece of property because:

- The valid merger of the lots under the law informed the reasonable expectation that the lots would be treated as a single property;
- The lots were contiguous, and their terrain and shape made it reasonable to expect that their range of potential uses might be limited, and the petitioners could have anticipated that, because of their lots’ location along the St. Croix River, they could be regulated, and those regulations were in effect long before the petitioners became owners of the lots; and
- The lot that could not be developed nonetheless brought value to the lot that could be developed because it allowed increased privacy and recreational space.

In Greenspring Racquet Club, Inc. v. Baltimore County, 232 F.3d 887 (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. In Rodehorst Brothers v. City of Norfolk Board of Adjustment, 287 Neb. 779, 798, 844 N.W.2d 755, 770 (2014), the plaintiffs did not have a reasonable investment-backed expectation to continue the use of its nonconforming quadplex indefinitely where the use was discontinued for more than one year, where the law that terminated nonconforming status if the nonconforming use was discontinued for more than one year was in place when the plaintiffs bought the property. The only reasonable investment-backed expectation was that the quadplex could continue indefinitely if the use was not discontinued for more than one year, and that expectation was met.

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 commentators 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 SW. U. L. Rev. 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); *Henry v. Jefferson County Commission*, 637 F.3d 269 (4th Cir. 2011) (where appellant had received a significant return on his and his family’s investment even though the planning commission approved a conditional use permit for less density than the appellant requested, the court saw “no warrant for requiring the Planning Commission to exercise its discretion so as to most profit” the appellant). The *Henry* court added that the planning commission’s approval of a conditional use permit at a lesser density than what the appellant requested lacked the characteristics of a true regulatory taking, stating:

The Planning Commission’s decision, based as it was on density and other traditional zoning concerns, did nothing like [where the government directly appropriates private property or ousts the owner]. The Planning Commission was legitimately concerned about the project’s density compared to that of nearby parcels, its potential impact on a stream, and its possible harms to an adjacent park. In response to these concerns, the Planning Commission simply ‘adjust[ed] the benefits and burdens of economic life to promote the common good’ in a way that incidentally impact Henry’s ability to maximize the profit from the development of his land.

*Henry*, 637 F.3d at 277.

In *Reawlett/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 that 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 existing 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) (re zoning 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 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, 121 S. Ct. 2448 (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 re 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.


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, 481 S.E.2d 460 (1997); see LaSalle National Bank v. City of Highland Park, 344 Ill. App. 3d 259, 799 N.E.2d 781 (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 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 Virginia Supreme 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, 626 S.E.2d 357, (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.

Greengael, LLC, 271 Va. at 287, 626 S.E.2d at 369.

In Mehaffy v. United States, 499 F. App’x 18, 20 (Fed. Cir. 2012), plaintiff had no reasonable investment-backed expectation to obtain federal fill permit, despite his predecessor in interest reserving the right to place such fill in a deed granting an easement to the United States to flood parts of the land, where the deed granting the easement and reserving the right to fill preceded the federal Clean Water Act’s requirement for a fill permit, and the federal requirement for the fill permit was established before the plaintiff acquired the property.

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, 1998 WL 633900 (4th Cir. 1998) (unpublished) (in action brought by a 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); McAlester 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 furthered the 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 Ct. App., Stark County Aug. 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 Ins. Corp. v. Incorporated Village of Massapequa Park*, 798 N.Y.S.2d 712 (N.Y. Sup. Ct. 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).

“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, 69, 481 S.E.2d 460, 465 (1997) quoting *Atlas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704 (1995). Thus, 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. *Omni Homes, supra* (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).

However, when a landowner obtains a permit and then the locality thereafter reverses its position, its reasonable investment-backed expectations will be found to have been frustrated. In *Lockaway Storage v. County of Alameda*, 216 Cal. App. 4th 161, 185-186 (2013), the court found that a taking had occurred where the plaintiff purchased the property only after the county expressly confirmed that it could rely on a conditional use permit to develop a storage facility, the county worked closely with the plaintiff for a few years, plaintiff spent significant resources committing the property to a storage facility use, and then the county changed its position based on a voter-approved growth control measure that also generally prohibited storage facilities in the area and shut down the use) (under Virginia law, this case would be approached from the vested rights issue).

6-413 **The character of the government regulation**

In her concurring opinion in *Palazzolo v. Rhode Island*, 553 U.S. 606, 634, 121 S. Ct. 2448, 2466 (2001), Justice O’Connor explained the **character of the government regulation** prong 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”).


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 (2d 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, 379 S.E.2d 356 (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, 843 S.W.2d at 453.

A decision by a locality to not extend public sewer service to lots that cannot be developed without public sewer service is not a taking. In Quinn v. The Board of County Commissioners of Queen Anne’s County, Maryland, 862 F.3d 433 (4th Cir. 2017), Quinn bought over 200 undeveloped lots on south Kent Island between 1984 and 2002, but he could not develop the lots because they could not accommodate septic systems. Over time, many of the septic systems on those lots on the island that could accommodate septic systems failed.

In order to satisfy a number of state laws, the county developed a plan to: (1) extend sewer service to all streets with failing septic systems where both developed and undeveloped lots would receive sewer service; (2) in an effort to limit further development, sewer service would not be provided to streets with only vacant lots; (3) in a further effort to limit excessive development within the service area, the county would not grant a building permit on a lot that was smaller than the minimum size allowed by the zoning ordinance unless the lot was merged with any contiguous lots under common ownership; and (4) future sewer connections outside the initial service area were prohibited. The plan rendered hundreds of vacant lots undevelopable, including most of Quinn’s lots, and merged the limited number of lots Quinn owned within the service area.
Quinn claimed that the plan was a taking because it prohibited extending sewer service to most of his lots, rendering them undevelopable. The Fourth Circuit Court of Appeals rejected the claim. Summarizing existing case law, the court stated that the “Takings Clause protects private property; it does not create it”; the “property owner must show more than a mere hope or expectation; he must, instead, have a legitimate claim of entitlement.” The court found that Quinn could not “point to anything in the land records that would suggest that he has a right to obtain sewer service; he bought the land knowing that development would depend on septic systems.”

The court also rejected Quinn’s takings claim pertaining to the merger provision that applied to his undersized lots that would receive sewer service. More specifically, the court found that the merger provision did not “resemble a regulation that is pressing Quinn’s land ‘into some form of public service.’” Citing *Murr v. Wisconsin*, the Court added that the merger provision “resembles standard zoning tools – such as minimum lot sizes, setback requirements, or restrictions on subdividing lots – that local governments use all the time to temper density of development.” The court concluded its takings analysis by stating: “To find a taking here would revolutionize zoning law and severely constric[t] local governments’ ability to direct democratically the very nature and character of the community.”

**6-420 Temporary regulatory takings**

Temporary regulatory 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, 107 S. Ct. 2378 (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 proper test used to determine if a temporary taking is compensable is the three-pronged test announced in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978), not the categorical taking rule in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002). In *Tahoe-Sierra*, the Tahoe Regional Planning Agency decided that a comprehensive land-use plan was needed to address environmental concerns stemming from development around Lake Tahoe. While formulating a comprehensive plan, the Planning Agency enacted two moratoria on development in order to prevent further construction until the Planning Agency could study the impact of development on Lake Tahoe and design a plan that would implement “environmentally sound growth.” The moratoria lasted for a total of 32 months. The landowners affected by the moratoria claimed that the temporary prohibition on development amounted to a categorical taking, but the Supreme Court disagreed and held that a temporary taking had to be analyzed under the *Penn Central* analysis, not the categorical taking rule in *Lucas*. 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).

There are two types of temporary takings: (1) retrospective temporary takings; and (2) prospective temporary takings. A retrospective temporary taking occurs when a new regulation is enacted and is then repealed when it is determined to be a taking. When the government repeals the regulation, it must compensate the landowner for the time the regulation was in effect. An example of this type of temporary taking is *First English*, where the United States Supreme Court found a temporary taking where a Los Angeles County regulation prevented a church from rebuilding its recreational campground after a flood destroyed it. The regulation denied all use of the property for years and the Court held that “invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.” When *First English* 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. For more on the takings issue in the context of floodplain regulations, see Mandelker, *Land Use Law*, 5th ed., §§ 12.08 and 12.09 (2003). The value of the temporary taking is the difference between the fair market value of the property with and without the regulation multiplied by a rate of return for the period the property was taken.
A prospective temporary regulation is either explicitly temporary or is in the form of governmental delay during the development process. When conducting a *Penn Central* analysis for a prospective temporary taking, duration should be considered as part of the analysis and compensation is necessary only if a taking results from that analysis.

A temporary taking also may be claimed to have occurred 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)*. This conclusion is consistent with the distinction between substantive due process and takings jurisprudence discussed in section 6-400. Governmental action that does not substantially advance a legitimate governmental interest (i.e., is unlawful) may create a substantive due process claim, but not a takings claim.

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’s 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; Naegele 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, 43 S.E.2d 10 (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 regulatory takings

The three-pronged test announced in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (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, 112 S. Ct. 2886, 2893 (1992), cited in *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414 (1998); *Lost Tree Village Corporation v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (denial of wetlands permit, which resulted in diminution in value of property from $4,245,387.93, the value of Plat 57 at permitted and ready for preparation for use as a site for a home, to $27,500, which was the nominal value of Plat 57 without permit, was $4,217,887.93, or approximately 99.4%; this diminution was a categorical taking, and any residual value was not based on the property’s residual economic use but its environmental use as wetlands). In that circumstance, the governmental action has “gone too far” and a “categorical taking” has occurred.

In *Lucas*, the owner of two beachfront lots challenged a state law intended to protect the shoreline that precluded the owner from constructing any permanent structure on his lots. Even though the trial court held that the state law rendered the property valueless, the South Carolina Supreme Court held that the taking was not compensable because “no compensation is due a landowner whose private use threatens serious public harm.” The United States Supreme Court reversed and held that “total regulatory takings must be compensated.” *Lucas*, 505 U.S. at 1026, 125 S. Ct. at 2899. The *Lucas* categorical total takings rule only applies to regulations that render property
completely valueless. It does not apply to the loss of the ability to develop or use property as originally intended 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, 481 S.E.2d 460 (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*, 253 Va. at 68, 481 S.E.2d at 464. 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, 121 S. Ct. 2448 (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 have been developed 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*, 533 U.S. at 631, 121 S. Ct. at 2465.

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. This exception will apply if the regulatory action can be justified under “background principles of the State’s law of property and nuisance” existing when the owner purchases the property. *Lucas*, 505 U.S. at 1029, 125 S. Ct. at 2900. Under this rule, a property owner is 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, 498 S.E.2d 414 (1998). In *Lucas*, the owner purchased the beachfront 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 his purchase, included the right to develop his property freely. *Palazzolo* presented a different situation. 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*, 533 U.S. at 629-30, 121 S. Ct. at 2464. 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*, which was decided three years after *Bell*.

6-440 Exactions: ensuring that proffers and other conditions are reasonable conditions


[Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and [the Court has] long sustained such regulations against constitutional attack and conditions are permissible so long as there is a ‘nexus’ and ‘rough proportionality’ between the property that the government demands and the social costs [i.e., impacts] of the applicant’s proposal.

Stated another way, “the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development; but it may not leverage its legitimate interests in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” *Koontz*, 570 U.S. at 606, 133 S. Ct. at 2595.

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1 Virginia Code § 15.2-2303.4 establishes standards of reasonableness for proffers pertaining to new residential developments and new residential uses. Sections 6-440, 6-441, 6-442, and 6-443 apply to proffers that pertain to other types of rezonings, e.g., those that pertain to commercial rezonings. See Chapter 11 for a discussion of Virginia Code § 15.2-2303.4.
The statutory framework for proffers in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 requires that proffers be reasonable conditions, and sections 15.2-2297 and 15.2-2298 also expressly require that the rezoning give rise to the need for the conditions, and that the proffers have a reasonable relation to the rezoning. There is little Virginia case law shedding light on what each of these provisions means. However, these provisions have parallels in the body of Takings Clause jurisprudence pertaining to exactions which requires that conditions imposed in conjunction with land use approvals: (1) have an essential nexus that is related to the impact of the proposed development; and (2) be roughly proportional to the extent of the impact. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987) (essential nexus); Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994) (rough proportionality). The exactions analysis applies to all types of conditions.

The table below shows the relationship between the statutory requirements for proffers in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 and the Takings Clause principles related to exactions.

| The Relationship Between State Law Requirements for Proffers and the Takings Clause Principles Related to All Conditions |
|---|---|
| **State Law Requirements Applicable to Proffers** | **Parallel Constitutional Principles Related to All Conditions** |
| Proffers must be reasonable conditions that are in addition to the applicable zoning regulations | Conditions must be constitutional conditions which means that there must be an essential nexus and rough proportionality between the conditions and the impacts they seek to address |
| The rezoning itself must give rise to the need for the proffers | A condition must have an essential nexus to the impact it seeks to address |
| Proffers must have a reasonable relation to the rezoning | A condition must have rough proportionality to the impact it seeks to address |

Although the essential nexus and rough proportionality tests provide a helpful guide for evaluating whether any condition (hereinafter in section 6-440, all references to conditions include proffers) is lawful under State law, whether a condition is an unconstitutional exaction is primarily limited to conditions that require the applicant to dedicate real property or pay money. Koontz (extending the principles of Nollan and Dolan to apply to conditions requiring money payments). There are many other classes of conditions that, but for the condition being imposed in conjunction with a condition of a land use approval, would not otherwise be a taking of property, e.g., conditions in which the applicant offers to phase the development of its project in conjunction with the timing of planned improvements, or conditions in which the applicant offers to satisfy development standards that exceed what is otherwise required by local ordinance, such as enhanced sediment removal from stormwater.

**6-441 Ensuring that an approval and its impacts give rise to the need for the conditions by identifying an essential nexus**

There must be an essential nexus between the impacts arising from an approval and the conditions that are intended to address those impacts. For rezonings, State law requires that the rezoning must give rise to the need for proffers. Virginia Code §§ 15.2-2297 and 15.2-2298.

In Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987) (essential nexus), the California Coastal Commission demanded that the owners dedicate a public easement laterally across the beachfront of their property in return for a building permit to replace their bungalow with a larger house. The Coastal Commission believed the condition was appropriate because the Nollan’s new house would interfere with “visual access” to the beach, which would, in turn, make people unaware that a beach was nearby, and would result in a “psychological barrier” to “access.” The United States Supreme Court struck down the condition as an unconstitutional exaction. The Court held that the condition was not reasonably related to the burden imposed by the proposed larger house because the lateral access across the beach was not sufficiently related – it lacked an essential nexus – to the issues of “visual” and “psychological” access that the Coastal Commission had identified as impacts.

In Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994), the city conditioned the property owner’s proposed reconstruction and expansion of her commercial building on her dedicating land for a bicycle path and a greenway within the floodplain. The United States Supreme Court found that the city had established that a nexus
 existed between the impacts from the proposed expansion of Dolan’s business and the conditions the city sought to impose:

[T]he prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. [citation omitted]. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek’s 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city’s attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: “Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling ... remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow.”

Dolan, 512 U.S. at 387-388, 114 S. Ct. at 2317-2318 (but also holding that the city’s conditions lacked rough proportionality, discussed in section 6-442, below).

The table below compares the condition imposed by the Coastal Commission to a range of other conditions the Nollan court suggested that it would have considered to have the requisite nexus, assuming that the Coastal Commission had the power to impose the conditions.

<table>
<thead>
<tr>
<th>Impacts Identified by the Commission Resulting from the New, Larger House</th>
<th>Condition Imposed by the Commission, Lacking a Nexus to the Identified Impacts</th>
<th>Conditions that would have Protected the Public's Ability to see the Beach</th>
</tr>
</thead>
<tbody>
<tr>
<td>The house would increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would prevent the public psychologically from realizing that a stretch of coastline exists nearby that they have every right to visit. The house would increase private use of the shorefront, and this increase, along with neighboring development, would cumulatively burden the public’s ability to traverse to and along the shorefront.</td>
<td>Dedicate a public easement laterally across the beachfront of their property.</td>
<td>• A height limitation on the house. • A width restriction on the house. • A ban on fences on the property. • Provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.</td>
</tr>
</tbody>
</table>

What resources may a locality rely on to establish a nexus? They may be as broad as State statutes or as narrow as site-specific studies, including the following:

- The comprehensive plan.
- The six-year secondary road plan.
- The capital improvements program.
- Capital needs assessments.
- Local regulations, such as stormwater regulations.
• Traffic impact studies and analyses, including project-specific analyses.

• Environmental assessments of the site.

• Impacts identified by the locality’s planning or other staff and by members of the public.

However, it is not enough for any of the foregoing to merely articulate a public purpose or public need so as to justify a condition. If challenged in a lawsuit, the locality has the burden to establish an essential nexus by identifying the policy, rule, specific impact or some other identified legitimate public purpose creating the need for a condition, and ensuring that the condition directly addresses it. This link is vital, and should be made in the staff report or at least be part of the record for the application.

6-442 Ensuring that conditions have a reasonable relation to the application by establishing that they have rough proportionality to the impacts to be addressed

As summarized in section 6-441, in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), the city conditioned the property owner’s proposed reconstruction and expansion of her commercial building on her dedicating land for a bicycle path and a greenway within the floodplain, and the United State Supreme Court found that the city had established an essential nexus between the conditions and the impacts. The Court continued its constitutional analysis to evaluate the nature and extent to which the conditions addressed the identified impacts. In settling upon an appropriate standard, the Court examined the body of state court decisions and settled on the *rough proportionality* test, which it likened to the test used by those States applying a *reasonable relationship* standard (which is the standard imposed in Virginia Code §§ 15.2-2297 and 15.2-2298).

As for the condition imposed by the city requiring Dolan to dedicate land in the floodplain for the city’s greenway system, the court said:

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner’s property. [citation]. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner’s development. In fact, because petitioner’s property lies within the Central Business District, the CDC already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. [citation] But the city demanded *more*—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner’s property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control. The difference to petitioner, of course, is the loss of her ability to exclude others. (italics added)

*Dolan*, 512 U.S. at 392-393, 114 S. Ct. at 2320.

With respect to the city’s condition that Dolan dedicate a pedestrian/bicycle easement, the Court said:

We have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. Deductions for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway ‘could offset some of the traffic demand ... and lessen the increase in traffic congestion.’

*Dolan*, 512 U.S. at 395, 114 S. Ct. at 2321-2322. The Court was clear that it did not expect localities to establish that the condition was directly proportional to the specifically created need. *Dolan*, 512 U.S. at 389-390, 114 S. Ct. at 2319.
(rejecting a standard described as the “specific and uniquely attributable” test adopted by states such as Illinois). However, the rough proportionality test also expects more than the lower standard that requires merely “very generalized statements as to the necessary connection between the required dedication and the proposed development” adopted by State courts such as New York. *Dolan*, 512 U.S. at 389, 114 S. Ct. at 2318.

The rough proportionality test, therefore, is a middle standard, and in order for a locality to justify its conditions under this standard, an *individualized assessment* is required:

> No precise mathematical calculation is required, but the [locality] must make some sort of individualized determination that the required dedication is *related both in nature and extent* to the impact of the proposed development. *(italics added)*

*Dolan*, 512 U.S. at 391, 114 S. Ct. at 2319-2322.

The following provide a limited sampling of cases from Virginia that have considered the reasonable relationship between conditions and the impacts sought to be addressed:

- **National Association of Home Builders v. Chesterfield County**, 907 F. Supp. 166 (1995), affirmed 1996 U.S. App. LEXIS 18838, 1996 WL 423061 (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.” *National Association of Home Builders*, 907 F. Supp. at 169. 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.

- **Cupp v. Board of Supervisors of Fairfax County**, 227 Va. 580, 318 S.E.2d 407 (1984) (special exception conditions). This case precedes *Dolan* by 10 years, pertains to a special exception, not a rezoning, and it did not expressly consider the issue as an exaction issue. However, the Virginia Supreme Court’s analysis is illuminating. The applicants sought a special exception to expand their plant nursery. One of the conditions of approval required them to dedicate 100 feet of right-of-way from the centerline of Route 7 for a third eastbound lane and a standard service drive, and to construct those improvements when the site redeveloped. The evidence established that Route 7 handled approximately 35,000 vehicles per day, while the plant nursery average approximately 25 customers per day. Assuming that the county had the power to impose the conditions, the Court concluded that the county’s condition was not imposed as the result of any problem generated by the Cupp property, but because of general conditions prevailing on Route 7 and, therefore, the need for the condition was not substantially generated by the proposed project. *Cupp*, 227 Va. at 594, 318 S.E.2d at 414.

6-443  A locality may always deny an application on legitimate grounds, but that may not insulate it from a constitutional challenge

In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 133 S. Ct. 2586 (2013), the issue was whether a water management district acted unconstitutionally under the Takings Clause when it denied a permit, where the applicant refused to consent to the district’s proposed conditions of approval.\(^2\)

\(^2\) *Koontz* decided two key issues: (1) it extended the exactions analysis of *Nollan* and *Dolan* to monetary conditions; and (2) it extended the application of the exactions analysis to those cases when a public body denies a permit and the applicant refused to accede to conditions lacking an essential nexus and rough proportionality. The Court concluded its opinion stating that it
Coy Koontz was the owner of 14.9 acres of land in Florida at the intersection of two highways. He desired to develop his property and was required to obtain two water resources related permits from the water management district. To address impacts to water resources, the owner proposed to develop only the northern 3.7 acres and to install a dry-bed pond and gradually slope the land to the elevation of the southern portion, and offered to place the southern 11.2 acres in a conservation easement dedicated to the district. The district said it would approve the permits only if the owner either: (1) would develop only 1 acre, replace the dry-bed pond with a subsurface stormwater management system under the building, replace the slope with retaining walls, and dedicate a conservation easement over the remaining 13.9 acres to the district; or (2) develop the 3.7 acres as proposed with the dry-bed pond, the slope and the 11.2-acre conservation easement, and hire contractors to make $150,000 worth of improvements to district-owned land several miles away. The owner refused to accept either of the district’s demands and the district denied the permits because the owner refused to accede to either of the demands.3 The owner sued the district in state court under a Florida statute that provides monetary damages where a state agency action is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.” The owner prevailed in the trial court and the state intermediate appellate court, but the Florida Supreme Court reversed.

On appeal by the owner from the decision of the Florida Supreme Court, the United States Supreme Court held that a “government’s demand for property from a land-use permit applicant must satisfy the requirements of Nollan and Dolan even when the government denies the permit.” Koontz, 570 U.S. at 619, 133 S. Ct. at 2603. Thus:

- The nexus and rough proportionality tests apply to all conditions. Even when a locality denies a permit, the analysis of the constitutionality of the conditions will be the same – to determine whether they have a nexus and rough proportionality to the impacts sought to be addressed. Conditions requiring the contribution or the spending of money, i.e., monetary exactions, are subject to the nexus and rough proportionality as well. Koontz, 570 U.S. at 618-619, 133 S. Ct. at 2599, 2603.4

- A condition may be unconstitutional even if legitimate grounds exist to disapprove the application. In the absence of constitutionally grounded conditions having an essential nexus and rough proportionality, a legitimate basis to deny an application does not necessarily get the locality off the hook because “[e]ven if the [district] would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on [Koontz’] forfeiture of his constitutional rights.” Koontz, 570 U.S. at 608, 133 S. Ct. at 2596.

- The constitutional analysis does not change if the application is approved or disapproved. The requirement that proposed conditions have an essential nexus and rough proportionality to a proposed project’s impacts does “not change depending on whether the government approve[d] a permit on the condition that the applicant turn over property or deny[es] a permit because the applicant refuses to do so.” Koontz, 570 U.S. at 596, 133 S. Ct. at 2595. There is no constitutional significance between conditions precedent – approved if – and subsequent – denied until.

expressed no view on the merits of the petitioner’s claim that the water management district’s actions failed to satisfy the essential nexus and rough proportionality tests under Nollan and Dolan and remanded the case to the State court.

3 This summary is based on the facts summarized in the United States Supreme Court’s majority opinion. The facts summarized in the dissenting opinion, as well as in the Florida Supreme Court’s summary of the facts at 77 So. 3d 8 (2011), paint a different picture and should be read for a broader understanding of the case. The Florida Supreme Court’s summary includes the following: “Koontz agreed to deed his excess property into conservation status but refused St. Johns’ demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. Consequently, St. Johns denied his permit applications. In its orders denying the permits, [St. Johns] said that Mr. Koontz’s proposed development would adversely impact Riparian Habitat Protection Zone [“RHPZ”] fish and wildlife, and that the purpose of the mitigation was to offset that impact.”

4 Although not expressly analyzed in the constitutional context, the Virginia Supreme Court has ruled in considering conditions imposed on special exceptions that “[i]t is not a sufficient answer to say that once a use permit is granted, the Board could impose regulations and conditions upon that use, for the Board can only establish reasonable and fair regulations for the operation of the permitted activity. It cannot deny the permit indirectly by imposing unreasonable and impossible conditions on its use.” Byrum v. Board of Supervisors of Orange County, 217 Va. 37, 41, 225 S.E.2d 369, 373 (1976).
• A condition may be unconstitutional under the Takings Clause even if the application is disapproved and no property or money is actually taken. When an application is disapproved and the condition is never imposed, nothing is taken. However, “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.” Koontz, 570 U.S. at 596, 133 S. Ct. at 2596. This conclusion is based on the unconstitutional conditions doctrine.

• The unconstitutional conditions doctrine applies only if no alternatives satisfy Nollan and Dolan. Alternative solutions to address an impact need to be considered, because “so long as a permitting authority offers the landowner at least one alternative that would satisfy Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987) (essential nexus); Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994), the landowner has not been subjected to an unconstitutional condition.” Koontz, 570 U.S. at 612, 133 S. Ct. at 2598.

• The remedy is determined by State law. “While the unconstitutional conditions doctrine recognizes that [the government’s attempt to impose the condition] burdens a constitutional right, the Fifth Amendment mandates a particular remedy – just compensation – only for takings.” Koontz, 570 U.S. at 608-609, 133 S. Ct. at 2597. In cases where there is an excessive demand that is refused by the applicant, resulting in a denied approval, there is no taking and “whether money damages are available is not a question of federal constitutional law but of the cause of action – whether state or federal – on which the landowner relies.” Koontz, 570 U.S. at 609, 133 S. Ct. at 2597. The State remedy in Virginia is Virginia Code § 15.2-2208.1, effective July 1, 2014. See section 10.540 for a discussion of Virginia Code § 15.2-2208.1.

Can Cash Proffer Policies Satisfy Nollan, Dolan and Koontz?

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<tbody>
<tr>
<td>Establishment clause</td>
<td>Regulation may not prefer one religious denomination over another, or sponsor or interfere in a religion</td>
<td>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</td>
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<td>Confirm that the regulations treat religious and nonreligious assemblies and institutions equally, and do not discriminate on the basis of religion</td>
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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 Virginia Constitution 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 protections under the Virginia Constitution are parallel to those of the United States Constitution. Glassman v. Arlington County, 628 F.3d 140 (4th Cir. 2010); see College Building Authority v. Lynn, 260 Va. 608, 538 S.E.2d 682 (2000).

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.

The Establishment and Free Exercise Clauses

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<tr>
<td>Free exercise clause</td>
<td>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.</td>
<td>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. Confirm that the regulations do not make religious exercise effectively impracticable; and do not totally exclude religious assemblies, or unreasonably limit religious assemblies.</td>
</tr>
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</table>

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.

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, 105 S. Ct. 2479 (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, 90 S. Ct. 1409 (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, 760, 93 S. Ct. 2955, 2959 (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 *Glassman v. Arlington County*, 628 F.3d 140 (4th Cir. 2010), the court held that the county’s joint development of a site with a church did not violate the establishment clause where the church funded those portions of construction to be used for sectarian purposes and the county funded those portions of construction used for a secular purpose – the construction of affordable housing.

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 B.U. L. Rev. 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, 60 S. Ct. 900 (1940). Under *Church of the Lukumi Bahalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (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. A law is not “neutral” if “the object of [the] law is to infringe upon or restrict practices because of their religious motivation.” *Hialeah*, 508 U.S. at 533, 113 S. Ct. at 2227.

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

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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, 22 Va. Cir. at 543 (“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, 554 S.E.2d 63 (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 Virginia Constitution 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 |
|---|---|---|
| Principle | Rights Protected | How to Ensure Compliance |
| Free speech | 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.e., aesthetics, safety); (2) are narrowly tailored to further the interest; and (3) leave open ample alternative channels of communication |
| Free expression | 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 (e.g., hours of operation), place (e.g., certain zoning districts; spatial requirements) and manner (e.g., licensing requirements) |

6-610 Signs


With respect to aesthetics, localities “have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.” Taxpayers for Vincent, supra. As explained by Edward T. McMahon, “More enlightened communities recognize that community appearance is important . . . [C]ontrolling outdoor signs is probably the most important step a community can take to make an immediate visible improvement in its physical environment. . . . Almost all of America’s premier tourist destinations have strong sign ordinances because they understand that attractive communities attract more business than ugly ones.” Edward T. McMahon, Responsible Tourism: How to Preserve the Goose that Lays the Golden Egg, Virginia Town & City, May 2015.
The First Amendment’s Free Speech Clause and the important terms and concepts that apply to the governmental regulation of signs

The First Amendment to the United States Constitution provides:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The federal courts have identified two key functions of the First Amendment’s Free Speech Clause: (1) to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail; and (2) to ensure that the government has not regulated speech based on hostility – or favoritism – towards the underlying message expressed. Under the First Amendment’s Free Speech Clause, a locality “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286 (1972).

The federal courts also have created concepts that apply to the analysis of the government’s regulation of signs and the application of those concepts guides how the government may regulate signs, and how it must justify its regulations. The most relevant concepts pertain to: (1) whether the regulations apply to commercial speech or noncommercial speech; (2) whether the regulations apply depending on the content of the speech or some other criterion (i.e., whether the regulations are content based or content neutral); and (3) what the government must show to justify its regulations (i.e., whether the regulations are justified by a compelling governmental interest or a substantial governmental interest). These six highlighted concepts are briefly described below.

- **Commercial speech**: Speech that is related solely to the economic interests of the speaker and its audience; *i.e.*, advertising.
- **Noncommercial speech**: Speech that is not commercial speech; *e.g.*, political signs and protest signs.
- **Content based regulations**: Regulations that apply to a particular sign because of the topic discussed or the idea or message expressed, *i.e.*, regulations that target speech based on its communicative content. Regulations also are content based if it exempts certain objects from being subject to the locality’s sign regulations. *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (city’s sign regulations were content based because they exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems, and exempted “works of art” that did not identify or specifically relate to a product or service, but applied to art that referenced a product or service).
- **Content neutral regulations**: Regulations that apply to a particular sign and pertain only to when the sign may be erected, where it may be located, and the height, area, and other physical attributes of the sign.
- **Compelling governmental interest**: A governmental interest of the highest order; *e.g.*, the government’s interest in allocating and collecting taxes, maintaining the social security system, eradicating racial discrimination.
- **Substantial governmental interest**: A governmental interest of intermediate order; *e.g.*, the government’s interest in preserving aesthetics, promoting traffic safety, and protecting property values.

**6-612 The local regulation of noncommercial signs in the Fourth Circuit before Reed**

Before the United States Supreme Court’s decision in *Reed v. Town of Gilbert*, 576 U.S. __, 135 S. Ct. 2218 (2015), many localities’ regulations pertaining to noncommercial signs included distinctions based on the function or the message of the sign (*e.g.*, “political signs” that “pertain to a candidate or an issue in an upcoming election”). Regulations such as these, which neither promoted nor discouraged a particular viewpoint, were considered to be viewpoint neutral and were found by many courts to not be content based regulations that violated the First
Amendment. The Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, took this approach in a number of cases. Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013).

As explained by the Fourth Circuit Court of Appeals in Cahaly v. Larosa, 796 F.3d 399, 405 (4th Cir. 2015) (invalidating a South Carolina ban on certain robocalls):

This formulation conflicts with, and therefore abrogates, our previous descriptions of content neutrality in cases such as Brown v. Town of Cary. Brown, 706 F.3d at 303 (“[I]f a regulation is ‘justified without reference to the content of regulated speech,’ [citation omitted] ‘we have not hesitated to deem [that] regulation content neutral even if it facially differentiates between types of speech.’ ”) (quoting Wag More Dogs, Ltd. Liab. Corp. v. Cozart, 680 F.3d 359, 366 (4th Cir.2012) (last alteration in original)). Our earlier cases held that, when conducting the content-neutrality inquiry, “[t]he government's purpose is the controlling consideration.” Clatterbuck v. City of Charlottesville, 708 F.3d 549, 555 (4th Cir.2013) (quoting Ward, 491 U.S. at 791). But Reed has made clear that, at the first step, the government’s justification or purpose in enacting the law is irrelevant. 135 S. Ct. at 2228–29.

In sum, Reed rejected the principle of viewpoint neutrality in a facial analysis that had been applied by the Fourth Circuit Court of Appeals and other courts. The Reed Court explained that “the First Amendment’s hostility to content based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” [citation omitted] Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. [citation omitted].” Reed, 135 S. Ct. at 2230 (under the town of Gilbert’s sign regulations, ideological signs were given more favorable treatment than political signs, and both were given more favorable treatment than temporary directional signs).

6-613  Reed v. Town of Gilbert

In Reed v. Town of Gilbert, 576 U.S. ____, 135 S. Ct. 2218 (2015), the town’s sign ordinance regulated the duration and size of a number of noncommercial signs differently depending on their content. For example, temporary directional signs for a religious event could be up to 4 square feet in size and be posted no more than 12 hours before the event or 1 hour after the event; an ideological sign could be up to 20 square feet in size and be posted for an unlimited duration. When a small church was cited for zoning violations because its signs were being posted more than 12 hours before church events, it challenged the town’s zoning regulations, arguing that the town’s sign regulations violated the First Amendment.

The issue in Reed was whether the town’s sign ordinance was invalid as content based because it created categories of noncommercial signs that were based on the message of the sign. The Court held that the town’s sign regulations were content based on their face because, for example, temporary directional signs were defined on the basis of whether a sign conveyed the message of directing the public to church or some other “qualifying event”; ideological signs were defined on the basis of whether the signs “communicate[e] a message or ideas” that did not fit within the sign regulations’ other categories. Because the town’s sign regulations were content based, they were “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” Reed, 135 S. Ct. at 2226. The town failed to prove that its regulations were either narrowly tailored or served a compelling governmental interest.

Content based regulations must satisfy strict scrutiny by the courts and will be upheld only if the regulations are narrowly tailored to serve compelling governmental interests. A compelling governmental interest is an interest of “the highest order.” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566, 113 S. Ct. 2217, 2244 (1993) (regarding the free exercise of religion). Traditional examples of compelling governmental interests include the allocation and collection of taxes, maintaining the integrity of the social security system, eradicating racial discrimination in education, the operation of military conscription laws, enforcing child labor laws, and protecting public health and safety. Testimony of Steven K. Green, Legal Director, Americans United for Separation of Church and State, before the House Committee on the Judiciary, Subcommittee on the Constitution, July 14, 1998. Promoting traffic safety and aesthetics are generally considered to be substantial, but not compelling, governmental interests. Brown, 706 F.3d at 305.
In Reed, the town relied on aesthetics and traffic safety as justifications for its regulations. As for aesthetics, the Court said that temporary directional signs were “no greater an eyesore” than ideological and political signs, yet the town allowed unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller, temporary directional signs. The Court said, “The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.” Reed, 135 S. Ct. at 2231. As for traffic safety, the Court concluded that the town had failed to show that limiting temporary directional signs was necessary to eliminate threats to traffic safety, but limiting other types of signs was not. The Court observed that a “sharply worded” directional sign seemed more likely to distract a driver than a sign directing traffic to a church meeting. Reed, 135 S. Ct. at 2232.

The majority opinion in Reed indicated that it may find certain content-based sign distinctions to satisfy strict scrutiny:

[The] presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers – such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses – well might survive strict scrutiny.

Reed, 135 S. Ct. at 2232. The classes of signs referred to by the Court in the foregoing paragraph are presumably private signs because the messages on public signs erected by the government are “government speech” that escape the Free Speech Clause requirements under the First Amendment. Walker v. Texas Division, Sons of Confederate Veterans, Inc., ___ U.S. ___, 135 S. Ct. 2239, 2245-2246 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says”); see Rust v. Sullivan, 500 U.S. 173, 193–194, 111 S. Ct. 1759 (1991).

The Fourth Circuit Court of Appeals applied Reed in Central Radio Company, Inc. v. City of Norfolk, 811 F.3d 625, 633 (4th Cir. 2016) (concluding that the city’s sign regulations were “hopelessly underinclusive” because they restricted commercial flags but allowed an unlimited proliferation of governmental and religious flags and certain works of art, but restricted flags and works of art that referenced a product or service).

6-614 Content neutral time, place, and manner regulations are permitted for noncommercial signs under Reed and prior cases, provided they further a substantial governmental interest, are narrowly tailored, and leave open alternative forms of communication

If a regulation is determined to be content neutral, reasonable time, place, and manner restrictions may be imposed on commercial or noncommercial signs. Some examples of these types of restrictions are included in the table below. The following is a brief, and not exhaustive, list of sign qualities that may be regulated in a content neutral manner:

- The maximum square footage of a sign’s “face” and the aggregate square footage of all signs allowed on a parcel.
- The number of signs allowed on a parcel.
- The height of a sign.
- Where a sign may be located on a parcel, such as through setback regulations applicable only to signs.
- The physical nature of the sign, such as whether it may be a freestanding sign, a wall sign, or a sign affixed to another element of a building such as a canopy or awning.
- The materials that may be used in a sign.
- Whether a sign may have moving elements.
- Whether and how a sign may be illuminated.
- Whether the message on a sign must be fixed or whether it may have an electronic message that changes.
- If an electronic message may change, how frequently it may do so.
- Whether a sign must be permanently attached to the ground (e.g., a freestanding sign) or whether it may be portable and under what circumstances.
- Whether a sign may be permanent or temporary (duration) and under what circumstances.


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<th>Justifications</th>
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<td>Commercial (e.g., advertising)</td>
<td>Content based</td>
<td>“... a sign that advertises the sale, lease, rental, or development of the lot on which the sign is located...”</td>
<td>Substantial governmental interest</td>
<td>Preserve aesthetics; promote traffic safety; protect property values</td>
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<td>“... a sign that advertises an upcoming auction...”</td>
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<tr>
<td></td>
<td>Content neutral</td>
<td>“... a sign located on a lot that is for sale, lease, rental, or development...”</td>
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<td>“... a permanent sign that is supported from the ground and not attached to another structure...”</td>
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<td>“... the sign area shall not exceed 32 square feet...”</td>
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<td>“... the sign height shall not exceed 16 feet above the ground...”</td>
<td></td>
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<td></td>
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<td>“... a sign with flashing lights or moving parts is prohibited...”</td>
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</tr>
<tr>
<td>Noncommercial (e.g., protest signs, political signs, ideological signs)</td>
<td>Content based</td>
<td>“... a sign that advocates for a candidate for elected office or for an issue to be voted on in an upcoming election...”</td>
<td>Compelling governmental interest</td>
<td>Protect public safety by guiding vehicular and pedestrian traffic; identifying hazards</td>
</tr>
<tr>
<td></td>
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<td>“... a sign that protests the action of the county government or any elected official...”</td>
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</tr>
<tr>
<td></td>
<td>Content neutral</td>
<td>“... a sign containing copy this is exclusively noncommercial speech...”</td>
<td>Substantial governmental interest</td>
<td>Preserve aesthetics; promote traffic safety; protect property values</td>
</tr>
<tr>
<td></td>
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<td>“... a permanent sign that is supported from the ground and not attached to another structure...”</td>
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<td>“... the sign area shall not exceed 32 square feet...”</td>
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<td></td>
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<td>“... the sign height shall not exceed 16 feet above the ground...”</td>
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</tbody>
</table>

1Unlike noncommercial signs, under the current law, content-based regulations that apply to commercial signs may be justified by a substantial, rather than a compelling, governmental interest.

### 6-615  How content neutral commercial or noncommercial sign regulations are evaluated

Whether content neutral sign regulations applicable to commercial or noncommercial signs survive a First
Amendment challenge depends on whether they:

- **Further a substantial governmental interest**: Whether the government has a substantial interest in regulating the speech. A locality has a substantial governmental interest in preserving its aesthetic character and promoting traffic safety. *Brown v. Town of Cary*, 706 F.3d 294, 305 (4th Cir. 2013); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001).

- **Narrowly tailored to further that interest**: Whether the regulation is narrowly tailored to serve that compelling governmental 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, 109 S. Ct. 2746 (1989), cited in *American Legion Post 7* (preserving aesthetic character would be undermined by exempting flags or noncommercial entities from regulations).

- **Leave open ample alternative channels of communication**: Whether a regulation leaves open ample alternative channels of communication. Whether this factor is satisfied depends on the scope of the regulation and the nature and location of the sign. See *American Legion Post 7*, comparing the permissible regulation of signs on public property, on private property, and residential private property.

**6-616 How content based noncommercial sign regulations are evaluated**

Whether content-based sign regulations applicable to noncommercial signs survive a First Amendment challenge depends on whether they:

- **Compelling governmental interest**: Whether the government has a compelling governmental interest in regulating the speech. In the context of sign regulations, such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses – “well might survive strict scrutiny.” *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2232 (2015).

- **Narrowly tailored to further that interest**: Whether the regulation is narrowly tailored to serve that compelling governmental interest. *Reed*. The government must prove that “no less restrictive alternative” would serve its purpose. *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016). This requires an analysis of whether the sign regulations are either unconstitutionally overinclusive if it unnecessarily circumscribes protected expression, and is fatally underinclusive if it leaves appreciable damage to the government’s interest unprohibited. *Central Radio*, 811 F.3d at 633-634 (concluding that the city’s sign regulations were “hopelessly underinclusive” because it restricted commercial flags but allowed an unlimited proliferation of governmental and religious flags and certain works of art, but restricted flags and works of art that referenced a product or service).

**6-617 How content based commercial sign regulations are evaluated**

Under the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349 (1980), the regulation of a commercial sign is evaluated under the following factors:

- **Entitlement to First Amendment protection**: Whether the commercial speech was entitled to First Amendment protection, i.e., whether it concerns lawful activity and is not misleading.

- **Substantial governmental interest**: Whether the government has a substantial interest in regulating the speech. As also stated in section 6-615, a locality has a substantial governmental interest in preserving its aesthetic character and promoting traffic safety. *Brown v. Town of Cary*, 706 F.3d 294, 305 (4th Cir. 2013); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001).

- **Direct advancement of the interest**: Whether the sign regulations directly advance the governmental interest asserted.

- **Regulations not more extensive than necessary**: Whether the regulations are not more extensive than is necessary to
serve the governmental interest, i.e., whether there is a reasonable fit between the means and ends of the sign regulations.

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, 289, 120 S. Ct. 1382, 1391 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, (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, 93 S. Ct. 2607 (1973).

Obscene materials and expression are not protected speech under the First Amendment. Paris Adult Theater I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628 (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, 320, 108 S. Ct. 1157, 1163 (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, 101 S. Ct. 2176 (1981). Because of this impact, a regulation must satisfy the four-part test announced in United States v. O’Brien, 391 U.S. 367, 88 S. Ct. 1673 (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, 106 S. Ct. 925 (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).

6-630 Noise (loud music)

Music, as a form of expression and communication, is protected under the First Amendment. Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746 (1989). Even in a public forum (e.g., public streets, sidewalks and parks), the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information.

In Hellbender, Inc. v. Town of Boone, 2013 WL 1349286 (W.D.N.C. 2013), the plaintiffs were downtown food and beverage establishments that also were venues for live and recorded music. They challenged the town’s noise
Key Considerations When Regulating Noise

- Noise standards must be tailored to the particular circumstances to which they are going to be applied and the standards themselves must be realistic in light of those circumstances.

- Preambles or statements of purpose in particular areas of regulation are important. In *Hellbender, Inc. v. Town of Boone*, 2013 WL 1349286 (W.D.N.C. 2013), the court relied on the town’s statement of policy in its noise regulations, which referred to maintaining “a peaceful community” at all times but recognizing that “certain noises are generated by the expected and acceptable economic and recreational activity of a vibrant community.”

- Variability in noise regulations, such as the variability in permitted noise levels depending on the zoning district, the time of day, and the day of the week, will be compelling evidence that the regulations have been narrowly tailored.

- Reasonable regulation, rather than complete prohibition, is needed to ensure that alternative channels of communication are available. A regulation may impose a standard that is so restrictive that its effect is to prohibit the form of expression.

The district court first concluded that the noise regulation was not narrowly tailored to serve the city’s interest in protecting citizens from unwelcome noise because the regulation did not take into account where the regulation applied – in this case, the city’s boardwalk, its nature as a public forum, and the pattern of its normal activities. The...
boardwalk was a “robust, vibrant, bustling place for much of the year, and it caters to all forms – and volumes – of activity and expression. . . [it] is loud and crowded during the summer. It is not a destination for quiet pursuits that require a quiet atmosphere.” Thus, the court concluded that the level of sound allowed by the 30-foot audibility standard fell “well short of the noise created by the boardwalk’s customary usage, including normal human activity” and the effect of the regulation was a complete ban on the use of musical instruments and amplified sound on the boardwalk. The court also concluded that the regulation did not provide ample alternative channels of communication because playing music at a volume that complied with the regulation was not an adequate alternative means of communication because it could not be heard.

6-700 The right to bear arms

The Second Amendment to the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

6-710 A complete ban on shooting ranges violates the Second Amendment

In Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (“Ezell I”), the Seventh Circuit Court of Appeals invalidated the City of Chicago’s complete ban on shooting ranges within the city, which was part of a set of regulations that established a gun permit regime for lawful gun possession, and required one hour of range training as a requirement to obtain a permit. The court held that the complete ban on shooting ranges was incompatible with the Second Amendment.

6-720 Zoning regulations must accommodate the exercise of Second Amendment rights, and regulations restricting those rights must be justified by evidence

In response to the court’s holding in Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (“Ezell I”) discussed in section 6-710, the city adopted zoning regulations that allowed shooting ranges as special uses in manufacturing districts and prohibited them within 100 feet of another shooting range, or within 500 feet of a residential district, school, place of worship, and other specified uses. As a result of these regulations, only 2.2% of the city’s area was even theoretically available for shooting ranges and the commercial viability of those areas was “questionable.” To justify its regulations, the city asserted that they served important public health and safety interests, and the city cited three concerns: shooting ranges attract gun thieves, cause airborne lead contamination, and carry a risk of fire.

In Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) (“Ezell II”), the Seventh Circuit Court of Appeals invalidated these zoning regulations. The court stated that when a challenged law regulates activity protected by the Second Amendment, the government “bears the burden of justifying its actions under some heightened standard of judicial review.” Ezell II, 846 F.3d at 893. The court offered no evidentiary support for its assertion that its regulations served the important public health and safety interests that it identified. The city’s own witnesses admitted that they knew of no data or empirical evidence to support the city’s claims. Summarizing in its concluding remarks, the court said that the city “cannot defend its regulatory scheme with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance. To borrow from the free-speech [First Amendment] context, there must be evidence to support the city’s rationale for the challenged regulations; lawyers’ talk is insufficient. Here, . . . the City’s defense of the challenged zoning rules rests on sheer speculation about accidents and theft. That’s not nearly enough to satisfy its burden.” Ezell II, 846 F.3d at 896 (internal citations and quotation marks omitted).

6-800 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 Virginia Constitution 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.
6-900 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.*

Under Virginia law, no “ordinance, resolution, bylaw, rule, regulation, or order” of a locality may be inconsistent with the “Constitution and laws of the United States or of the Commonwealth.” *Virginia Code § 1-248.*

Preemption is discussed in chapter 7.
Chapter 7

The Preemption of Local Land Use Laws by State and Federal Laws: Total Preemption, Partial Preemption, and Laws That Are Not Preemptive

7-100 Introduction

At the federal level, preemption derives from the constitutional principle that the federal law is the supreme law of the land and trumps the laws of a state or locality that are inconsistent with a federal law. United States Constitution, Article VI. At the state level, a state law preempts the laws of a locality that are inconsistent with the state law. Virginia Code § 1-13:17; West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County, 270 Va. 259, 618 S.E.2d 311 (2005) (by-laws adopted by a board of supervisors must be consistent with the ordinances of the locality and the general laws of the Commonwealth). Ordinances are inconsistent with state law when they cannot coexist with a statute. West Lewinsville Heights, supra.

Federal preemption may occur in one of three ways: (1) the federal law expressly preempts state or local laws; (2) the federal law impliedly preempts a state or local law by occupying an entire field of regulation, so that no room is left for state regulation; or (3) state law is preempted to the extent it actually conflicts with federal law because compliance with both state and federal law is impossible, or when a state law stands as an impediment to a federal purpose. Rum Creek Coal Sales, Inc. v. Caperton, 971 F.2d 1148 (4th Cir. 1992). Congress’ enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. Cipolione v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S. Ct. 2608 (1992), quoted in Washington Gas Light Company v. Prince George’s County Council, 711 F.3d 412 (4th Cir. 2013) discussed in section 7-1800.

Preemption analysis under Virginia law is slightly different. When the state enacts laws in the exercise of its police power, a locality may, if it acts within its delegated powers, legislate on the same subject unless the General Assembly has expressly preempted the field. Ticonderoga Farms, Inc. v. County of Loudoun, 242 Va. 170, 409 S.E.2d 446 (1991); King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954). Thus, in determining whether a local law has been preempted by state law, Virginia courts consider whether: (1) the statute and ordinance address the same subject matter; (2) the potentially competing provisions can be harmonized; and (3) there is an express preemption clause. See, e.g., Klingbeil Management Group Co. v. Vito, 233 Va. 445, 357 S.E.2d 200 (1987). The fact that an ordinance enlarges on a statute’s provisions does not create a conflict with the statute unless the statute limits the requirements for all cases to its own terms. West Lewinsville Heights, supra.


Every local land use regulation must be analyzed to be certain that it is not preempted by state or federal law. Following is a list of some common subjects in which either state or federal law may have preempted local regulation in whole or in part.

7-200 Air pollution

Generally, the local regulation of air pollution is preempted. Virginia Code § 10.1-1321 provides that local ordinances adopted prior to July 1, 1972 continue in force provided that if there is a conflict between the ordinance and a state regulation, the state regulation governs unless the local ordinance is more strict.

If a locality wants to adopt or amend an air pollution ordinance after June 30, 1972, it must first obtain approval from the State Air Pollution Control Board. Other than open burning, a local regulation may not pertain to any emission source that is required to register with the Air Pollution Control Board or to obtain a permit under Virginia Code § 10.1-1300 et seq. and the applicable state regulations.
7-300  Alcoholic beverages

Virginia Code § 4.1-128 prohibits a locality, except in limited circumstances inapplicable to land use matters, from adopting an ordinance or regulation that “regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth.” Thus, the Attorney General opined that a town ordinance banning the sale of alcohol in dance halls was prohibited by Virginia Code § 4.1-128. 1981-82 Va. Op. Att'y Gen. 14.

However, a condition in a special use permit stating “[n]o alcoholic beverages shall be permitted” is not preempted by the Alcoholic Beverages Control Act, because it is a “valid zoning ordinance . . . regulat[ing] the location of an establishment selling . . . alcoholic beverages,” as permitted by the Act. County of Chesterfield v. Windy Hill, Ltd., 263 Va. 197, 205, 559 S.E.2d 627, 631 (2002). Likewise, an ordinance requiring a special use permit for adult uses (such as sellers of alcohol and adult movie theaters) within 1000 feet of one another does not violate Virginia Code § 4.1-128. City of Norfolk v. Tiny House, 222 Va. 414, 281 S.E.2d 836 (1981).

In the context of licensing farm wineries, the Virginia Alcoholic Beverage Control Board has no authority to determine whether a locality’s zoning regulations are reasonable or whether a landowner has vested rights in a particular land use. Virginia Alcoholic Beverage Control Authority v. Board of Supervisors of Fairfax County, 2018 Va. App. LEXIS 311 (2018) (unpublished).

7-400  Amateur radio communications

In 1985, the Federal Communications Commission issued a declaratory ruling pertaining to amateur radio preemption. This rule is known as “PRB-1.” The ruling announced a policy of limited, rather than complete, federal preemption of local zoning laws affecting amateur radio communications, and required that:

[L]ocal regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority’s legitimate purpose.

PRB-1 does not allow an amateur radio operator to build an antenna at any height he wants. Williams v. City of Columbia, 906 F.2d 994 (4th Cir. 1990). Absent a full federal preemption in this area, localities have the power to restrict antennas to heights below that desired by radio licensees, provided that they strive to strike a balance between the federal interest in amateur radio communications and local zoning concerns. Williams, supra. However, in 1998, the General Assembly stripped away much of the local zoning authority remaining on this issue when it enacted Virginia Code § 15.2-2293.1, which prohibits localities from restricting the height of amateur radio antennas to less than 200 feet (if the locality’s population density is 120 persons or less per square mile, 1990 United States Census) or 75 feet (if the locality’s population density is more than 120 persons per square mile, 1990 United States Census).

7-500  Americans with Disabilities Act

Title II of the Americans with Disabilities Act (“ADA”) provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Public entities include counties, cities and towns. 42 U.S.C. § 12131(A). Zoning qualifies as a public program or service and the enforcement of a zoning ordinance constitutes an activity of a locality within the meaning of Title II. A Helping Hand v. Baltimore County, 515 F.3d 356 (4th Cir. 2008); see also START, Inc. v. Baltimore County, 295 F. Supp. 2d 569 (D. Md. 2003) (the administration of zoning laws is a “service, program, or activity” within the meaning of the ADA).
A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against the disabled person. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

The ADA is further discussed in chapter 32.

**7-600 Biosolids (land application of sewage sludge)**

The local regulation of biosolids is a topic of concern in those localities having agricultural districts. “Biosolids” means “a sewage sludge that has received an established treatment and is managed in a manner to meet the required pathogen control and vector attraction reduction, and contains concentrations of regulated pollutants below the ceiling limits established in 40 CFR Part 503 and 9VAC25-31-540, such that it meets the standards established for use of biosolids for land application, marketing, or distribution . . . .” 9VAC25-31-10.

Since at least the 1990's, some localities have attempted to regulate in this field.

**7-610 Blanton v. Amelia County** concluded that local regulation of the land application of biosolids was preempted by State law

When considering former Virginia Code § 32.1-164.5, which expressly authorized the land application of biosolids under a permit issued by the State Board of Health, the Virginia Supreme Court held that a zoning regulation banning the land application of biosolids was preempted by the state law and the regulations promulgated by the State Board of Health. *Blanton v. Amelia County*, 261 Va. 55, 540 S.E.2d 869 (2001). In reaching this decision, the Court relied on its often-stated rule that “a local government may not ‘forbid what the legislature has expressly licensed, authorized, or required.’” *See also O’Brien v. Appomattox County*, 213 F. Supp. 2d 627, 635 (W.D. Va. 2002) (“O’Brien I”) (“it appears that counties have no authority to regulate biosolids beyond their powers to conduct testing and monitoring”), affirmed at 2003 U.S. App. LEXIS 14760 (4th Cir. 2003) (unpublished).

**7-620 The regulatory changes since Blanton**

Since the Virginia Supreme Court decided *Blanton v. Amelia County*, 261 Va. 55, 540 S.E.2d 869 (2001), Virginia Code § 32.1-164.5 has been repealed and Virginia Code § 62.1-44.19:3 has been substantially amended to require the State Water Control Board, with assistance from the State Department of Health and the Department of Conservation and Recreation, to promulgate regulations regarding the permitting, treatment, land application and analysis of biosolids.

One of the most significant regulatory changes since *Blanton* is the grant of certain powers to localities in the areas of testing, monitoring and storage. In particular, localities may provide for the testing and monitoring of the land application of biosolids using their own inspectors “to ensure compliance with applicable laws and regulations.” *Virginia Code § 62.1-44.19:3(I).* If the locality tests and monitors the land application of biosolids, it also has the authority to abate a violation. *Virginia Code § 62.1-44.19:3.2.* Virginia Code § 62.1-44.19:3(I) requires that a locality’s testing and monitoring program be established by ordinance. A locality adopting such a program is entitled to some reimbursement out of the required state permit fee.

With respect to the storage of biosolids, localities may, as part of their zoning ordinances, regulate the storage of biosolids and require a special use permit to begin the storage of biosolids, even in agricultural zoning districts. *Virginia Code § 62.1-44.19:3(R).* However, the storage of biosolids for 45 days or less on a farm for land application on that farm is exempt from local zoning regulation. *Virginia Code § 62.1-44.19:3(R).* At least in Albemarle County, the sewage sludge industry has avoided any local regulation by not storing biosolids for any period of time that
might trigger a local zoning regulation. Instead, the industry practice is to bring the biosolids to the site and apply it immediately.

As for whether a locality has any implied powers to regulate the application of biosolids, the answer is likely “no.” When the General Assembly expressly bestows certain powers in a statute, it intends to exclude those powers which have been omitted. Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992). Thus, the Attorney General and the courts have rejected various attempts by localities to regulate the land application of biosolids under its police and zoning powers.

In 2002 Va. Op. Atty. Gen. LEXIS 25, the Attorney General opined that Sussex County could not require a conditional use permit for the land application or the storage of biosolids, concluding that “it is apparent that the state occupies the field of sewage sludge disposal, treatment and management.”

In O’Brien v. Appomattox County, 293 F. Supp. 2d 660 (W.D. Va. 2003) (“O’Brien II”), the court rejected the county’s argument that it could regulate the land application of biosolids under its police and zoning powers because Virginia Code § 62.1-44.19:3 was intended to grant localities additional authority to adopt ordinances.

In Recyc Systems, Inc. v. Spotsylvania County, 64 Va. Cir. 68 (2004), the circuit court considered a challenge to the county’s zoning regulations that allowed the land application of sewage sludge in an “agricultural and forestal district,” prohibited the activity in certain overlay districts, and required a special use permit for the activity in other agricultural zoning districts. Because the agricultural and forestal district was not an existing district, any landowner would have to apply to create such a district. The overlay districts in which land application was prohibited comprised large parts of the county’s agricultural zoning districts. The circuit court found the county’s zoning regulations to be invalid, concluding that the state had occupied the field except for those specific matters in which localities were expressly enabled. Recyc Systems, 64 Va. Cir. at 72.

7-700 Building construction; manner and materials

The Virginia Supreme Court has stated that “when the General Assembly intends to preempt a field, it knows how to express its intention.” Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County, 238 Va. 15, 23, 380 S.E.2d 879, 884 (1989). A good example of an express preemption is found in Virginia Code § 36-98, which provides in part that the Uniform Statewide Building Code “shall supersede the building codes and regulations of [localities].” However, regulations in a locality’s zoning ordinance or other land use controls that do not affect the manner of construction or the materials to be used in the erection, alteration or repair of a building or structure are not preempted. Virginia Code § 36-97 (definition of building regulations).

Virginia Code § 36-98 also provides that the building code will supersede local regulations applicable to single family residential construction that: (1) regulates dwelling foundations or crawl spaces; (2) requires using specific building materials or finishes in construction; or (3) requires minimum surface area or numbers of windows. However, Virginia Code § 36-98 expressly provides that the building code does not preempt proffers, special use permit conditions, variance conditions, standards, conditions and criteria established for clusters of single family dwellings, or land use requirements in airport or highway overlay districts, or historic districts created under Virginia Code § 15.2-2306.

7-800 Chesapeake Bay Preservation Act

This section addresses two limited areas of the Chesapeake Bay Preservation Act.

A city’s zoning regulations that included lands in its resource protection areas on the basis of federal law were void where state law required that localities use the criteria developed by the Chesapeake Bay Local Assistance Board to determine the extent of the Chesapeake Bay Preservation Area within its jurisdiction. Marble Technologies v. City of Hampton, 279 Va. 409, 690 S.E.2d 84 (2010). The decision in Marble Technologies was based on the Dillon Rule, not directly on the issue of preemption.
Regulations for delineating resource protection areas under the Chesapeake Bay Preservation Act allow a locality to determine whether streams are perennial either by referring to the United States Geological Survey map or through the use of consistently-applied scientific criteria of perennial flow. 9 VAC 25-830-80(D). A locality does not have the authority to classify a stream as perennial in any other way, even under its zoning powers. Pony Farm Associates, LLP v. City of Richmond, 62 Va. Cir. 386, 390 (2003) (“[T]he General Assembly has set out the procedures applicable to determining whether a stream is or is not perennial and how [a Resource Protection Area] can be designated. If those procedures mean anything, they cannot be altered or amended by a municipality.”).

7-900  Condominiums

Neither a zoning ordinance nor any other land use ordinance may prohibit condominiums by reason of the form of ownership. Virginia Code § 55-79.43(A). In addition, condominiums must be treated the same under zoning, subdivision, site plan and other land use ordinances as would physically identical projects or developments under a different form of ownership. Virginia Code § 55-79.43(A) and (B).

7-1000  Fair Housing Act

Although the federal government has stated that the Fair Housing Act (“FHA”) does not preempt local zoning laws, the Act nonetheless can preempt the way a locality’s zoning regulations are administered.

Under the FHA, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of a person residing in or intending to reside in that dwelling. 42 U.S.C. § 3604(f)(1)(B). Discrimination under the FHA includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). A handicap under the FHA is the same as a disability under the Americans with Disabilities Act. Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001). See Virginia Code § 51.5-45, which pertains to the rights of persons with disabilities to housing accommodations.

The FHA is further discussed in chapter 32.

7-1100  Federal uses and buildings

Under the common law, federal uses and buildings are exempt from local zoning requirements. United States v. City of Chester, 144 F.2d 415 (3rd Cir. 1944); see Arizona v. California, 283 U.S. 423, 451, 51 S. Ct. 522, 525 (1931) (“The United States may perform its functions without conforming to the police regulations of a State”). As the Chester court succinctly stated: “A state statute, a local enactment or regulation or a city ordinance, even if based on the valid police powers of a state, must yield in case of direct conflict with the exercise by the government of the United States of any power it possesses under the Constitution. [citations omitted]” Chester, 144 F.2d at 420.

40 U.S.C. § 3312 codifies the limited obligation of federal building projects to comply with local building codes and zoning laws. The requirements of 40 U.S.C. § 3312 do not apply to a building for which the administrator of General Services or the head of the federal agency authorized to construct or alter the building decides that the application of the statute to the building would adversely affect national security. 40 U.S.C. § 3312(a)(2). In that case, the statute’s obligation on the administrator to consider and consult with the state and local laws as explained below does not apply.

- **Building code**: Each building constructed or altered by the General Services Administration or any other federal agency must be constructed or altered, to the maximum extent feasible as determined by the administrator or the head of the federal agency, in compliance with one of the nationally recognized model building codes and with other applicable nationally recognized codes, including electrical codes, fire and life safety codes, and plumbing codes, as the administrator decides is appropriate. 40 U.S.C. § 3312(b). The administrator or the head of the federal agency must use the latest edition of the nationally recognized codes. 40 U.S.C. § 3312(b)
• **Zoning ordinance**: 40 U.S.C. § 3312 amends the common law of complete preemption to a limited extent. For federal buildings, the federal General Services Administration and every other federal agency must consider a locality’s zoning laws and any other state or local laws relating to landscaping, open space, minimum distance of a building from the property line, maximum height of a building, historic preservation, and aesthetic qualities before it constructs or alters a building. 40 U.S.C. § 3312(a).

The head of the General Services Administration or the federal agency is required to consult with appropriate state and local officials in preparing the plans for the building; submit those plans to the state and local officials for their review, if requested; and allow the building to be inspected during construction or alteration if the locality provides a copy of the inspection schedule before the work is begun and reasonable notice of the intention to conduct the inspection is provided prior to each inspection. 40 U.S.C. § 3312(d). Federal regulations expand on these obligations. 41 C.F.R. § 102-76.10(c) requires in part that federal agencies, upon approval of the General Services Administration, be bound by several basic design and construction policies, including the obligation to follow “nationally recognized model building codes and other applicable nationally recognized codes that govern Federal construction to the maximum extent feasible and consider local building requirements.” 41 C.F.R. § 102-76.20(c) requires that, in providing site planning and design services, federal agencies must “consider requirements (other than procedural requirements) of local zoning laws and laws relating to setbacks, height, historic preservation, and aesthetic qualities of a building.”

State or local officials may make recommendations to the head of the General Services Administration or the federal agency concerning measures necessary to meet the requirements of the locality’s zoning ordinance or the other classes of laws listed above, and measures to take into account local conditions. 40 U.S.C. § 3312(e). The head of the General Services Administration or the federal agency is required to give due consideration to the recommendations of the local building and zoning officials. 40 U.S.C. § 3312(e).

A locality has no recourse if the General Services Administration or the federal agency fails to comply with the requirements of 40 U.S.C. § 3312. 40 U.S.C. § 3312(f).

**7-1200 Fire and explosion prevention**

Localities are authorized to regulate in the areas of fire prevention and minimizing the risk of explosion above and beyond the Fire Prevention Code. Virginia Code § 27-97 provides in part:

Local governments are hereby empowered to adopt fire prevention regulations that are more restrictive or more extensive in scope than the Fire Prevention Code provided such regulations do not affect the manner of construction, or materials to be used in the erection, alteration, repair, or use of a building or structure, including the voluntary installation of smoke alarms and regulation and inspections thereof in commercial buildings where such smoke alarms are not required under the provisions of the Code.

The term *fire prevention regulation* is defined in Virginia Code 27-95 to mean:

Any law, rule, resolution, regulation, ordinance or code, general or special, or compilation thereof to safeguard life and property from the hazards of fire or explosion arising from the improper maintenance of life safety and fire prevention and protection materials, devices, systems and structures, and the unsafe storage, handling and use of substances, materials and devices, including explosives and blasting agents, wherever located, heretofore or hereafter enacted or adopted by the Commonwealth or any county or municipality, including departments, boards, bureaus, commissions or other agencies.

Localities must be certain that its standards are more restrictive than, rather than alternatives to, the Fire Prevention Code. As to whether fire prevention is a permissible zoning purpose, the answer is found in Virginia Code § 15.2-2283, which provides in part that zoning ordinances be designed “to give reasonable consideration to each of the following purposes, where applicable: (i) to provide for adequate light, air, convenience of access, and
The powers of the Virginia Department of Game and Inland Fisheries and the zoning powers of a locality do not overlap and, therefore, a locality’s zoning authority is not preempted by the licensing requirements of the Department of Game and Inland Fisheries. *Tullidge v. Zoning Appeals Board of Augusta County*, 29 Va. Cir. 385 (1992).

### 7-1400 High voltage transmission lines

Any public utility is required to obtain a certificate of public convenience and necessity from the State Corporation Commission before it constructs, enlarges, or acquires, any facilities for use in public utility service, with limited exceptions. *Virginia Code § 56-265.2(A)(1)*.

Before a public utility constructs a transmission line of 138 kilovolts or more, *Virginia Code § 56-265.2(A)(2)* requires the utility to either: (1) obtain a certificate of public convenience and necessity from the State Corporation Commission; or (2) obtain approval from the locality pursuant to *Virginia Code § 15.2-2232* (that the proposed transmission line, if not already shown on the comprehensive plan, is in substantial accord with the comprehensive plan) and approval pursuant to any applicable zoning regulations. Effective July 1, 2017, *Virginia Code § 56-265.2(A)(2)* is amended to provide that if the public utility obtains a certificate of public convenience approving construction of a 138 kilovolt transmission line and any associated facilities, it is “deemed to satisfy the requirements of [Virginia Code § 15.2-2232] and all local zoning ordinances with respect to the transmission line and its associated facilities.” The term associated facilities includes any station, substation, transition station, and switchyard facilities to be constructed outside of any county operating under the county executive form of government that is located in Planning District 8 (i.e., Prince William County) in association with a 138 kilovolt transmission line. The amendment is significant because it appears to legislatively overturn the Virginia Supreme Court’s decision in *BASF Corporation and James City County v. State Corporation Commission*, 289 Va. 375, 770 S.E.2d 458 (2015) (applying *Virginia Code § 56-46.1(F)*), in which the Court held switching stations are not “transmission lines” and, therefore, were subject to local zoning regulations. The Court explained that “the plain language of Code § 56-46.1(F) does not reflect a manifest intent on the part of the General Assembly to exempt switching stations from local zoning ordinances.”

*Virginia Code § 56-46.1* requires that the State Corporation Commission conduct an analysis of the environmental impacts of electric utility facilities to be approved for construction. For electrical transmission lines of 138 kilovolts or more, *Virginia Code § 56-46.1(B)* requires a public notice and hearing procedure for the Commission to evaluate the adverse impacts on scenic assets, historic districts, and the environment, and to determine, among other things, whether the proposed corridor or line minimizes the impacts thereto. *Virginia Code § 56-46.1(F)* provides that approval of a transmission line by the State Corporation Commission “shall be deemed to satisfy the requirements of [Virginia Code § 15.2-2232] and local zoning ordinances with respect to such transmission line.” (italics added) This express preemption “not only evinces the General Assembly’s view that such construction should be governed by statewide uniform regulations but also takes into account the practicality that such lines often traverse several counties.” *Board of Supervisors of Fairfax County v. Virginia Elec. and Power Co.*, 222 Va. 870, 874, 284 S.E.2d 615, 617 (1981); see *BASF Corporation and James City County*, supra.

Transmission lines of 150 kilovolts or more are required to cooperate with localities in their preparation of their comprehensive plan. *Virginia Code § 15.2-2202(E)* (note the discrepancy in kilovolts between *Virginia Code §§ 15.2-2202(E) (150 kv)* and *Virginia Code § 56-46.1 (138 kv)*). *Virginia Code § 15.2-2202(E)* requires that every utility responsible for the construction, operation and maintenance of such lines must furnish reasonable information requested by a locality’s planning commission within the utility’s certificated service area where the lines may affect the locality’s comprehensive plan.

### 7-1500 Hospitals – certificates of public need

The state health commissioner’s issuance of a certificate of public need under *Virginia Code § 32.1-102.3* to authorize the construction of a hospital does not preempt a locality’s comprehensive plan policies and zoning.
regulations. See *Northern Virginia Community Hospital, LLC v. Loudoun County Board of Supervisors*, 70 Va. Cir. 283 (2006) (sustaining the county’s demurrer on this issue).

In *Northern Virginia*, the circuit court noted that the primary purposes of comprehensive planning and zoning are to determine the proper uses of land, to assure compatibility and orderly growth, to plan for adequate facilities, and to achieve the orderly use of land through zoning regulations. Although some of these factors are also considered by the health commissioner when considering a certificate of public need for a hospital, he “is not concerned with the impact that such a facility will have on the overall development of the community” and his primary function is “to determine a need for those facilities within a designated area to be served.” Citing *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981), the *Northern Virginia* court stated:

> There is evident nothing in the provisions of law governing the issuance of Certificates of Public Need that would suggest that the General Assembly ‘[intended] to usurp the police power of local governments or to prevent them from achieving the orderly use of land through zoning ordinances.’

*Northern Virginia*, 70 Va. Cir. at 286. The court concluded by observing that the Loudoun County board of supervisors “did not seek to undermine the Commissioner’s statutory authority to evaluate health needs or limit his authority to authorize the construction of health care facilities based upon findings of need.” *Northern Virginia*, 70 Va. Cir. at 287.

### 7-1600 Landfills and other solid waste disposal

The Waste Management Act (Virginia Code § 10.1-1400 et seq.) does not preempt a locality from prohibiting landfills as a land use under its zoning power. *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989). The Virginia Supreme Court also has held that the Act did not preempt a county ordinance that required all persons operating facilities for the disposal of solid waste to obtain a permit from the county. *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 174, 409 S.E.2d 446, 448 (1991) (the “power to prohibit includes the power to regulate”). The ordinance in *Ticonderoga Farms* imposed substantial fees, bond requirements, operational regulations, and construction standards upon the operators of solid waste facilities.

The trial court in *Virginia Electric & Power Co. v. City of Chesapeake*, 2017 Va. Cir. LEXIS 7 (2017) held that the savings provision in Virginia Code § 15.2-929(C) did not preempt the city from regulating the closure of the utility’s landfill and a bottom ash pond because the utility site would no longer produce new ash, but both the landfill and the bottom ash pond would indefinitely store existing ash.

### 7-1700 Lottery ticket sales

The State Lottery Law (Virginia Code § 58.1-4000 et seq.) does not preempt a locality from prohibiting the sale of lottery tickets on the premises of a retail store as a special use permit condition. 1995 Va. Op. Atty. Gen. 85. The Attorney General concluded that the most relevant provisions of the State Lottery Law related “to the licensing of agents, and not to the uses of land” and that the law did not evidence “a legislative intent to remove from local governments the authority to impose reasonable restrictions on the sale of lottery tickets at specific sites if the purpose of the restriction is to further a legitimate land use goal.” The Attorney General stated that he did not view “the prohibition of the sale of lottery tickets in a particular location under a locality’s special use permit authority as unreasonably infringing on the ability of the State Lottery to conduct its business, as might a general ordinance prohibiting the sale of lottery tickets within an entire commercial district.”

### 7-1800 Mining (including gas and oil extraction) and natural gas pipelines

With respect to mining, Virginia Code § 15.2-2280 provides in part that a locality “may, by ordinance . . . regulate, restrict, permit, prohibit, and determine” . . . [t]he excavation or mining of soil or other natural resources.”
The Attorney General has opined, in an opinion limited to the unconventional method of gas and oil drilling known as “fracking,” that the Virginia Gas and Oil Act (Virginia Code § 45.1-361.1 et seq.) does not preempt a locality’s zoning authority, and that localities have the authority to prohibit fracking. 2015 WL 2265418. Key to the Attorney General’s conclusion was the savings clause in Virginia Code § 45.1-361.5, which states that the Act does not “limit or supersede the jurisdiction and requirements of . . . local land-use ordinances.” In the absence of a total prohibition, however, other types of local control over fracking that do not relate to zoning, such as license or fee requirements, are entirely preempted by the Act. 2015 WL 2265418. Virginia Code § 45.1-361.5 provides in part that no locality “shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter.” In the absence of a total prohibition, whether a locality may control aspects of fracking such as the timing of drilling operations, traffic, or noise, under its zoning regulations will have to be evaluated in the context of the Act.

With respect to natural gas pipelines, in Washington Gas Light Company v. Prince George’s County Council, 711 F.3d 412 (4th Cir. 2013), Washington Gas Light operated a natural gas substation and sought approval from the county to expand its substation to add liquid natural gas storage tanks to its site. The county denied the request because its new zoning ordinance designated the area in which the site was located for transit-oriented development and prohibited all industrial uses. In the meantime, the Maryland Public Service Commission staff determined that Washington Gas’s proposal was consistent with the pertinent safety regulations.

The issue was whether the federal Natural Gas Pipeline Safety Act (“PSA”) and the Natural Gas Act (“NGA”) preempted local zoning regulations. The Fourth Circuit Court of Appeals concluded that neither the NGA nor the PSA preempted the county’s zoning regulations because: (1) the PSA preempted state and local law in the field of safety and the county’s zoning regulations were not safety regulations but were land use regulations designed to foster transit-oriented development around a metro station; and (2) although the NGA gave the Federal Energy Regulatory Commission (“FERC”) jurisdiction over the siting of natural gas facilities and the transportation of natural gas in interstate commerce, the NGA only regulated the interstate natural gas industry, but not all natural gas companies whose operations cross state lines, such as Washington Gas, are considered interstate for purpose of the NGA if they transport natural gas to ultimate consumers.

7-1900 Onsite sewage systems

Virginia Code § 15.2-2157 provides that when sewers or sewerage disposal facilities are not available, “a locality shall not prohibit the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.” An “alternative onsite sewage system” is defined in Virginia Code § 32.1-163 to be a “treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.” Thus, as of July 1, 2009, a locality may no longer require onsite sewage systems that include septic tanks.

The Virginia Attorney General has opined that a locality can adopt standards and requirements for alternative onsite sewage systems that are in addition to or more stringent than those promulgated in regulations by the Virginia Board of Health, provided that the standards or regulations do not relate to maintenance issues. 2012 Va. Op. Atty. Gen. LEXIS 10, 2012 WL 5816306.

7-2000 Private wells

The State Department of Health oversees permits for the construction of private wells. Virginia Code § 32.1-176.1 et seq. The State Board of Health is enabled to promulgate regulations pertaining to the location and construction of private wells. Virginia Code § 32.1-176.4.

In Miller v. Commonwealth of Virginia, 2005 Va. App. LEXIS 64, 2005 WL 350746 (2005) (unpublished), the Virginia Court of Appeals held that the King George County zoning regulations prohibiting more than two buildings from connecting to a single well without a special exception was not preempted by the state law. Specifically, the court found that although the state permit allowed Miller to have up to four connections to his well, that authorization did not supersede the county’s zoning regulations requiring a permit if three or more connections
were to be made. *Miller, supra.* The court distinguished the facts in this case to the locality’s prohibition of biosolids at issue in *Blanton v. Amelia County*, 261 Va. 55, 540 S.E.2d 869 (2001), discussed in section 7-600.

7-2100 Railroads

Congress and the courts long have recognized a need to regulate railroad operations at the federal level. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). A number of federal laws are controlling, but three commonly found to preempt state and local attempts to regulate railroad activities are the Interstate Commerce Commission Termination Act of 1995, the Federal Railroad Safety Act of 1970, and the Noise Control Act of 1972.

The federal laws applicable to railroads that affect a locality’s authority are discussed in chapter 33.

7-2200 Radiation

The state’s regulation of radiation under Virginia Code § 32.1-227 et seq. is limited to those radioactive materials and facilities, including nuclear reactors, that are not subject to exclusive licensing and regulation by the United States Regulatory Commission. *Virginia Code § 32.1-228.*

A locality’s regulation of the by-product, source and special nuclear materials is not preempted by state law provided that the regulations are consistent with Virginia Code § 32.1-227 et seq. and the applicable State regulations. *Virginia Code § 32.1-237.*

7-2300 The Religious Land Use and Institutionalized Persons Act of 2000

The religious liberties protected by the First Amendment (see section 6-500) also must be considered in light of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). There are four key provisions in RLUIPA that apply to localities and their zoning regulations and decisions:

- **Substantial burden on religious exercise prohibited:** “No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000cc(a)(1) (italics added).

- **Treatment on equal terms required:** “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1) (italics added).

- **Discrimination prohibited:** “No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” 42 U.S.C. § 2000cc(b)(2) (italics added).

- **Total exclusion and unreasonable limitations prohibited:** “No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” 42 U.S.C. § 2000cc(b)(3) (italics added).

RLUIPA is further discussed in chapter 34.

7-2400 Right to Farm

The Right to Farm Act (*Virginia Code § 3.2-300 et seq.; see also Virginia Code § 15.2-2288*) is a limited, express preemption of a locality’s zoning power which prohibits localities from requiring a special use permit for any production agriculture or silviculture activities in an agricultural zoning district. Although the Right to Farm Act

The Attorney General has opined that a locality does not have the authority to adopt an ordinance limiting the circumstances under which agricultural operations may be deemed to constitute a nuisance, trespass, or other interference with the reasonable use and enjoyment of land. 1998 Va. Op. Atty. Gen. 13.

7-2500 Satellite dishes and other video antennas


47 C.F.R. § 25.104(a) provides in part:

Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, except that nonfederal regulation of radio frequency emissions is not preempted by this section.

A reasonable local regulation is one that: (1) has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and (2) furthers the stated health, safety or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers. The trial court in Neufeld v. City of Baltimore, 863 F. Supp. 255 (D. Md. 1994) observed that most district courts have held that unless the local government explicitly states the reasons in regulating the installation of satellite antennas, the local regulations will be preempted.

47 C.F.R. § 25.104(b)(1) provides in part:

Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by non-federal land-use regulation shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2) of this section.

See 47 C.F.R. § 25.104(b)(2) for the showing required to justify a local regulation to which 47 C.F.R. § 25.104(b)(1) applies.

47 C.F.R. § 25.104(f) provides that a satellite earth station antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska is covered by 47 C.F.R. § 1.4000. That regulation has been in effect since October 1996, and it prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming. The rule applies to video antennas including direct-to-home satellite dishes that are less than one meter (39.37 inches) in diameter (or of any size in Alaska), television antennas, and wireless cable antennas. The rule prohibits most restrictions, including zoning and building regulations, that: (1) unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception
of an acceptable quality signal. The rule does not prohibit legitimate safety restrictions or restrictions designed to preserve designated or eligible historic or prehistoric properties, provided the restriction is no more burdensome than necessary to accomplish the safety or preservation purpose.

The simplest example of a prohibited zoning regulation would be one that prohibits the protected satellite dishes because the regulation would prevent viewers from receiving signals. Procedural requirements, such as those requiring permits prior to installation are likely prohibited as well because this process can unreasonably delay installation, maintenance or use of the satellite dish. Likewise, a permit fee would be an unreasonable expense.

7-2600 Silvicultural activities

Virginia Code § 10.1-1126.1 places several limitations on the local regulation of silvicultural activity, including a requirement that a local ordinance may not prohibit or unreasonably limit such activity, and may not impose a permit or fee requirement to engage in such activity.

In Dail v. York County, 259 Va. 577, 528 S.E.2d 447 (2000), the Virginia Supreme Court held that the county’s zoning regulations governing silvicultural activity were not preempted by Virginia Code § 10.1-1126.1. The court concluded that: (1) the provisions of the county’s forestry ordinance prohibiting the clear cutting of trees and regulating the thinning of forests were neither a prohibition nor an unreasonable limitation on silvicultural activity; and (2) the provisions of the county’s forestry ordinance requiring submission and approval of a forest management plan by the zoning administrator did not impose a permit requirement for silvicultural activities.

7-2700 State lands, uses and buildings

State-owned lands and buildings are exempt from local zoning regulations provided that they are used for public purposes and are not used or occupied by a nonpolitical entity or person. Virginia Code § 15.2-2293. State-owned lands and buildings are subject to zoning regulations in the following circumstances:

- **Public travelways:** Airspace that is superjacent or subjacent to any public highway, street, lane, alley or other way that is not required for the purpose of travel, or other public use, by the Commonwealth or other political jurisdiction owning it. Virginia Code § 15.2-2293(B).

- **Other public land:** Airspace that is: (1) not associated with a public travelway; (2) superjacent to any land owned by the Commonwealth or other political jurisdiction; and (3) occupied by a nonpolitical entity or person. Virginia Code § 15.2-2293(C).

*Superjacent airspace* includes any use or structure on top of or above the ground (e.g., an antenna affixed to a pole). Note that Virginia Code § 15.2-2293 insulates only state owned lands and buildings from compliance with a locality’s zoning regulations and only if neither of the exceptions in Virginia Code § 15.2-2293(B) or (C) apply. Privately owned but state occupied lands and buildings are not insulated from local zoning regulations under Virginia Code § 15.2-2293.

The State Department of Environmental Quality is required to distribute a copy of the environmental impact report (EIR) prepared for every major state project (as defined in Virginia Code § 10.1-1188; generally, if the estimated project cost is $500,000 or more) to the chief administrative officer of every locality in which the project is proposed to be located. Virginia Code § 15.2-2202(A). The purpose of distributing the EIR is to enable the locality to evaluate the proposed project for environmental impacts, consistency with the locality’s comprehensive plan, local zoning and subdivision ordinances, and other applicable laws and to provide the locality an opportunity to comment. Virginia Code § 15.2-2202(A). The Department of Environmental Quality is required to consider the locality’s responses “in substantially the same manner as the Department solicits and receives comments from state agencies.” Virginia Code § 15.2-2202(A).

In Jennings v. Board of Supervisors of Northumberland County, 281 Va. 511, 708 S.E.2d 841 (2011), the issue was whether the county’s zoning regulations extended to regulate the construction of additional mooring slips and piers
that would lie seaward of the mean low-water mark in the state’s tidal navigable waters. It was undisputed that the bottomland at issue was the property of the state under Virginia Code § 28.2-1200 and that the Virginia Marine Resources Commission (VMRC) had regulatory authority over the bottomland. The Virginia Supreme Court concluded that Jennings' proposed mooring slips and piers fell within the jurisdiction of the county and its zoning powers. First, the Court relied on Virginia Code § 15.2-3105, which provides in part that the boundaries of localities “bordering on the Chesapeake Bay, including its tidal tributaries . . . shall embrace all wharves, piers, docks and other structures . . . erected along the water front of such locality, and extending into the Chesapeake Bay, and its tidal tributaries.” Jennings, 281 Va. at 518, 708 S.E.2d at 845. Second, the Court held that VMRC’s jurisdiction was not exclusive because the regulatory authority granted to it by the General Assembly contemplated that authority of these structures would be concurrent. Jennings provides a reminder that local regulation is not necessarily preempted because the Commonwealth has regulatory authority over the same area. State and local regulation may, and often do, co-exist.

Jennings was preceded by 1985-86 Va. Op. Atty. Gen. 108, in which the Attorney General discussed in a footnote the question of whether private wharves, piers and docks were subject to local zoning regulations where the subaqueous beds of bays, rivers, creeks and shores are the property of the Commonwealth. Recognizing that private landowners had riparian rights, the Attorney General concluded that “the State’s use of State-owned bottom is not subject to local regulation, but the exercise of a riparian landowner’s property rights which encroach on State-owned bottom is validly subject to local regulation.”

In Board of Supervisors of Fairfax County v. Washington, D.C. SMSA, 258 Va. 558, 566, 522 S.E.2d 876, 880 (1999), the issue was whether privately owned personal wireless service facilities proposed to be located within a state-owned right of way were subject to county review for substantial accord with the county’s comprehensive plan under Virginia Code § 15.2-2232. The telecommunications companies and the Commonwealth contended that while VDOT’s rights-of-way may be “within” the county’s jurisdiction because the lands were its boundaries, the rights-of-way were not “under” its jurisdiction because the rights-of-way were the property of the state and, thus, the county’s comprehensive plan did not apply regardless of the use made of them. The Virginia Supreme Court rejected this argument. In holding that the proposed wireless facilities were subject to county review under Virginia Code § 15.2-2232, the Court explained:

In short, while VDOT would benefit from the ability to place its equipment on the towers, VDOT does not own the towers or have a primary right of use of the land subject to the leases during their terms. The telecommunications companies are in the same position with respect to the towers in question as they would be for any other such towers constructed on land leased or acquired for such purposes. The mere fact that the towers are conveniently, or even necessarily, located on state-owned rights-of-way is irrelevant to the question whether they fall within the regulatory authority of the planning commission granted under Code § 15.2-2232(A).

In reaching this conclusion, the Court declined to address the county’s alternative contention that it had the authority to regulate the wireless facilities under Virginia Code § 15.2-2293.

7-2800 Telecommunications Act of 1996 and related laws; wireless telecommunications

In the Telecommunications Act of 1996, Congress “struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions” over the siting of towers and other facilities that provide wireless services. 360 Communications v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000). While expressly preserving local zoning authority (47 U.S.C. § 332(c)(7)(A)), the Act requires that decisions denying wireless facilities be in writing and supported by substantial evidence (47 U.S.C. § 332(c)(7)(B)(iii)). The Act also prohibits localities from adopting regulations that prohibit or have the effect of prohibiting wireless services, or unreasonably discriminate against functionally equivalent providers. 47 U.S.C. § 332(c)(7)(B)(i). The only complete preemption contained in 47 U.S.C. § 332(c)(7)(B) is found in subparagraph (iv), which preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions if those facilities comply with the Federal Communications Commission’s regulations concerning emissions.
The Telecommunications Act of 1996 and related laws are further discussed in chapter 35.

7-2900 Water

Virginia Code 15.2-2283 expressly provides that water protection is an express purpose of zoning by providing that a zoning ordinance may “include reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and ground water as defined in § 62.1-255.”
Chapter 8

The Differences Among
Legislative, Administrative, and Quasi-Judicial Acts

8-100 Introduction

This chapter examines the nature of what have been delineated as legislative acts, administrative acts that do not include the exercise of discretion (hereinafter, “ministerial acts”), administrative acts that include the exercise of discretion, and quasi-judicial 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 presumptions of reasonableness and validity, and quasi-judicial acts are presumed to be correct. On the other hand, ministerial acts do not have such presumptions and may not be afforded the immunities provided to the other classes of actions. Various state and federal immunities exist that may follow from the consequences of these acts. The following table summarizes the varying nature and their key qualities.

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<td>Broad range of immunities attach to decision makers</td>
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<td>ZMAs</td>
<td>Balances private conduct against the public health, safety and welfare</td>
<td>Exempt from due process challenges (though statutory procedures must be complied with)</td>
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<td>Special exceptions</td>
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<td>Special use permits</td>
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<td>Certificates of appropriateness</td>
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<td>Exceptions under subdivision laws</td>
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<td>Administrative, which does not include the exercise of discretion, i.e., ministerial</td>
<td>Site plans</td>
<td>Implement policy or law by applying the facts in the particular circumstances to the law or policy</td>
<td>When the requirements of the law or policy have been satisfied, approval is required; there is no discretion to deny</td>
<td>No presumption that decision-maker acted correctly</td>
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<td>Subdivision plats</td>
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<td>Failure to act correctly will be found to be arbitrary and capricious</td>
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<td>Certificates of occupancy</td>
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<td>Administrative, which includes the exercise of discretion</td>
<td>Variances</td>
<td>Limited discretion delegated by governing body to lower body or officer to apply specific standards to a set of facts</td>
<td>Decision must be based only on the standards specified by the governing body</td>
<td>No presumptions</td>
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<td>Decisions determining whether performance standards are satisfied</td>
<td>Standards must be as reasonably precise as the subject matter requires or permits</td>
<td>Exercise of discretion must be reasonable</td>
<td>Exercise of discretion must be reasonable</td>
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<td>Quasi-judicial</td>
<td>Official determinations</td>
<td>Grants or denies a privilege or benefit</td>
<td>Factual determinations are critical, and findings of fact must be made to allow judicial review</td>
<td>Factual determinations presumed correct; no presumption of correctness for legal conclusions</td>
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<td>Appeals</td>
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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, 432, 410 S.E.2d 669, 672 (1991); see Mumpower v. Housing Authority, 176 Va. 426, 454, 11 S.E.2d 732, 743 (1940); Laird v. City of Danville, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983). Generally, a legislative function can be exercised only by a locality’s governing body. *Fleet Industrial Park*, supra. There are limited exceptions where State law allows certain functions of the zoning power to be delegated under specific circumstances. An example is the authority in Virginia Code § 15.2-2309(6) for the governing body to delegate the review of special exceptions or special use permits to the locality’s board of zoning appeals. Even when this authority is delegated, the exercise of the power continues to be considered a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (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, 49 S.E.2d 321 (1948). The exercise of legislative power involves the “balancing of the consequences of private conduct against the interests of public welfare, health, and safety.” *Helmick*, 254 Va. at 229, 492 S.E.2d at 114. In general, a legislative body exercises a legislative power when it prescribes a course of conduct. *Blankenship*, 188 Va. at 103, 49 S.E.2d at 323 (distinguishing legislative acts from quasi-judicial acts). In other words, legislative acts create new laws; ministerial acts generally implement existing laws. *Helmick*, 254 Va. at 228-229, 492 S.E.2d at 114.

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, 107 S.E.2d 445 (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, 487 S.E.2d 207 (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, 634 S.E.2d 352 (2006) (rezoning); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997); *City Council of Virginia Beach v. Harrell*, 236 Va. 99, 372 S.E.2d 139 (1988); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (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, 410 S.E.2d 648 (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 a legislative act. *Nesberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013); *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 581, 727 S.E.2d 40, 47 (2012); *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Bollinger v. Board of Supervisors*, 217 Va. 185, 227 S.E.2d 682 (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, 587 S.E.2d 570 (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, 602 S.E.2d 126 (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, 628 S.E.2d 298 (2006); *City of South Boston v. Halifax County*, 247 Va. 277, 441 S.E.2d 11 (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, 492 S.E.2d 113 (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.

• Variations or exceptions under subdivision regulations: Variations or exceptions by a governing body under the authority of Virginia Code § 15.2-2242(1) are legislative acts. *GIBC Golf, LLC v. Board of Supervisors of Loudoun County*, 77 Va. Cir. 287 (2006) (exception to requirement that lots front on public street; in acting on the exception, the board of supervisors was responding to the request by a private property owner seeking to maximize its expectations as to development densities permitted by existing zoning; these expectations were weighed against the public’s interest in how those private developmental requirements related to the overall transportation needs of the community).

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.

8-220 Effect of an act being classified as legislative

There are two key presumptions that attach to legislative acts:


• Presumption of validity: A legislative act is also presumed to be constitutionally valid. *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Cupps v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (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, 118 S. Ct. 966 (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, 410 S.E.2d 674 (1991) (procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings, not legislative proceedings).

8-300 Administrative acts that do not include the exercise of discretion, i.e., 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, 337 S.E.2d 737 (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, 221 S.E.2d 534 (1976).


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 site plan or a subdivision plat, but once the applicant has complied with all existing ordinances the function of approval becomes ministerial, and the plan or plat must be approved. Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc., 216 Va. 582, 221 S.E.2d 534 (1976); Planning Commission of City of Falls Church v. Berman, 211 Va. 774, 180 S.E.2d 670 (1971); compare Umstattd v. Centex Homes, 274 Va. 541, 650 S.E.2d 527 (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 disapproved, 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 disapproved as a policy matter, but whether the plan or plat will be approved or disapproved 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.

The granting of a certificate of occupancy is ministerial once all requirements are satisfied. DeCarlo v. Board of Zoning Appeals of the Town of Vienna, 78 Va. Cir. 88 (2009) (because the petitioner satisfied all applicable code requirements, the zoning administrator had no authority to deny a certificate of occupancy based upon uncodified safety concerns).

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 established standards that govern the decision. 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 Junesville v. Powell Valley Village Limited Partnership, 254 Va. 70, 487 S.E.2d 207 (1997) (once zoning requirements were satisfied, and building permit application otherwise satisfied USBC requirements, issuance of building permit was ministerial and mandatory).

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, 522 S.E.2d 610 (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 plat 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, 168, 380 S.E.2d 917, 921 (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, 292 S.E.2d 311 (1982). An arbitrary and capricious act is one that is “willful and unreasonable” and taken “without consideration or in disregard of facts or without determining principle,” or when the deciding body departs from the appropriate standard when making its decision. James v. City of Falls Church, 280 Va. 31, 42, 694 S.E.2d 568, 574 (2010). For example, the denial of a certificate of occupancy because the zoning administrator had fire and safety concerns was arbitrary and capricious because the petitioners had satisfied all of the requirements of the town code. Decarlo v. Board of Zoning Appeals of the Town of Vienna, 78 Va. Cir. 88 (2009).

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, 400 S.E.2d 190 (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, 118 S. Ct. 966 (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, 102 S. Ct. 2727 (1982); Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (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 site plan ordinance or whether the subdivision 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 site plan or subdivision ordinance may allow an applicant to request variations or exceptions of their respective requirements, and the regulations may confer some discretion on the decision-maker when acting on the request, 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 review of the site plan or subdivision plat itself.

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, 522 S.E.2d 610 (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 Administrative acts that include the exercise of discretion

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.” Umstattd v. Centex Homes, 274 Va. 541, 546, 650 S.E.2d 527, 530 (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, 107 S.E.2d 445 (1959). The nature of the power delegated has been described as “more essentially ministerial than legislative.” Ours Properties, Inc. v. Ley, 198 Va. 848, 852, 96 S.E.2d 754, 757 (1957); Thompson v. Smith, 155 Va. 367, 381, 154 S.E.2d 579, 584 (1930).

The delegation of authority to a subordinate officer or body is long-recognized in Virginia and has been described as “essential to carry out the legitimate functions of government.” Bell v. Dorey, 248 Va. 378, 379, 448 S.E.2d 622, 623 (1994). “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).

In Ours Properties, Inc. v. Ley, 198 Va. at 851, 96 S.E.2d at 756, the Virginia Supreme Court considered whether the Falls Church city council could delegate certain zoning authority to the city’s building official:

The modern tendency of the courts is liberal in upholding ordinances of this character, in order to facilitate their proper administration. Considerable freedom to exercise discretion and judgment must, of necessity, be accorded to officials in charge of administering such ordinances. A legislative body, such as a city council, must work through some instrumentality or agency to perform its duties, since it does not sit continuously. 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. Otherwise, the wheels of government would cease to operate. Of course, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits.

It would be next to impossible to designate in minute detail the various types and character of business which might or might not be permissive or offensive in certain areas, and it is necessary that the determination of such facts must be left to the honest judgment of some designated official or board. In Virginia, we have repeatedly held that an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by the general terms of a law, exist in the performance of their duties, and especially when the performance of their duties is necessary for the safety and welfare of the public.

The Ours Properties court went on to state that it was adopting the majority rule that “considerable freedom to exercise discretion and judgment must be accorded officials in charge under a zoning ordinance, and that the courts should be liberal in upholding such ordinances in order to facilitate their proper administration.” The Ours Properties court cited with approval the following passage from Thompson, 155 Va. at 381, 154 S.E.2d at 584:

Mere matters of detail within the policy, and the legal principles and standards established by the statute or ordinance, may properly be left to administrative discretion, for the determination of such matters of detail is more essentially ministerial than legislative. In declaring the policy of the law and fixing the legal principles and standards which are to control in the administration of the law, general terms, which get precision from the technical knowledge or sense and experience of men and thereby become reasonably certain, may be used; and an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by such general terms exist, and whether the provisions of the law so fixed and declared have been complied with in accordance with the generally accepted meaning of the words.
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Administrative acts that may require the exercise of discretion include variances and a broad range of decisions where the decision-maker must determine whether performance standards stated in the ordinance have been satisfied.

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, 639, 107 S.E.2d 445, 447 (1959); see also National Maritime Union v. City of Norfolk, 202 Va. 672, 680, 119 S.E.2d 307, 313 (1961) (“The courts, in passing on zoning ordinances, have firmly established the rule that where such ordinances grant discretionary power for their administration, there must be provided standards for the guidance of the administering authority”). 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 a subordinate officer or board 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, 96 S.E.2d 754 (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 was not of itself an arbitrary or capricious delegation. Ours Properties, 198 Va. at 852, 96 S.E.2d at 758.

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 WL 488696 (1987).

8-420 Acts that are administrative and include the exercise of discretion

Administrative acts that may require the exercise of discretion include variances (Chilton-Belloni v. Angle ex rel. City of Staunton, 294 Va. 328, 806 S.E.2d 129 (2017) (describing a variance as “essentially a discretionary opportunity for the BZA to accommodate an exception to existing law and so cannot be true ‘adjudication’”), Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004)) and a broad range of decisions where the decision-maker must determine whether performance standards stated in the ordinance have been satisfied.

The determination of whether an application is complete may also be discretionary. See Umstattd v. Centex Homes, 274 Va. 541, 650 S.E.2d 527 (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).

Waivers from, and modifications to, otherwise applicable regulations are not delegable administrative acts but are, instead, legislative acts that are more appropriately addressed through the special exception process. Sinclair v. New Cingular Wireless, 283 Va. 198, 720 S.E.2d 543 (2012).
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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 an administrative action involving the exercise of discretion, 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, 224, 492 S.E.2d 146, 150 (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 America, L.L.C. v. Loudoun County*, 59 Va. Cir. 504 (2001), the board of supervisors denied a waiver from a setback requirement under the county’s 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 setback 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.” *Recycle America*, 59 Va. Cir. at 507.

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 zoning administrator may determine the performance standards are satisfied if . . .” – confers broad discretion that trumps the delegated standards. This issue also arose in *Recycle America*, 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.

*Recycle America*, 59 Va. Cir. at 507.

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 WL 488696 (1987).

8-440 Legislative acts may not be delegated

Legislative acts may not be delegated to a subordinate officer or body. Legislative acts must be acted on by the governing body in the absence of express statutory authority otherwise (e.g., the authority for a BZA to be authorized to consider special use permits under Virginia Code § 15.2-2309(6)).

Thus, in *Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983), the Virginia Supreme Court held that the city council could not delegate the power to rezone property to its planning commission. In *Krisnathervin v. Board of Zoning Appeals for Fairfax County*, 243 Va. 251, 253, 414 S.E.2d 595, 596 (1992), the Court invalidated the administrative rezoning of a parcel by a county staff person who changed the zoning designation of a parcel from “convenience center” to “community facilities” by flipping its district designation with the adjoining parcel. In *Sinclair v. New Cingular Wireless*, 283 Va. 198, 720 S.E.2d 543 (2012), the Virginia Supreme Court held that the board of supervisors could not delegate the consideration of critical slopes waivers to its planning commission. Even though the waivers required that the planning commission consider prescribed criteria and standards, the Court characterized the waivers as legislative “departures.”
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 a public 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, 49 S. E. 2d 321 (1948).

8-510 Acts that are quasi-judicial


8-520 Effect of an 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. See chapter 15.
Chapter 9

The Comprehensive Plan

9-100 Introduction

This chapter examines the comprehensive plan, including its legal status, the required contents of a comprehensive plan, the need for internal consistency within a comprehensive plan, using the comprehensive plan as a tool for assuring that public facilities are adequate and growth is achieved in an orderly manner, and other related issues.

Since 1980, each Virginia locality has been required to have a comprehensive plan. A comprehensive plan is a plan for the physical development of the territory within the locality’s jurisdiction. Virginia Code § 15.2-2223. It provides “a guideline for future development and systematic change, reached after consultation with experts and the public.” Town of Jonesville v. Powell Valley Limited Partnership, 254 Va. 70, 76, 487 S.E.2d 207, 211 (1997). A comprehensive plan is a product of the state statutory scheme that assures that these changes are not “made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning.” Board of Supervisors of Fairfax County v. Snell Construction Corp., 214 Va. 655, 658, 202 S.E.2d 889, 892 (1974).

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

A comprehensive plan is general in nature, and with its accompanying maps, plats, charts, and descriptive information, shows the locality’s long-range recommendations for the general development of the territory. Virginia Code § 15.2-2223.

What Goes Into Developing a Comprehensive Plan

- The planning commission is directed to make “careful and comprehensive surveys and studies of existing conditions and trends of growth, and of the probable and future requirements of the territory and its inhabitants.” Virginia Code § 15.2-2223.
- The plan is developed in consultation with experts and the public. Town of Jonesville v. Powell Valley Limited Partnership, 254 Va. 70, 76, 487 S.E.2d 207, 211 (1997). It should be a very public process.
- A comprehensive plan is to be “made with the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory” in order to “best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities.” Virginia Code § 15.2-2223.
- A comprehensive plan is composed of “maps, plats, charts, and descriptive matter.” Virginia Code § 15.2-2223.

A comprehensive plan is adopted or amended only after careful and comprehensive surveys and studies of the existing conditions, trends of growth, and the probable future requirements of the area. Virginia Code § 15.2-2223. The subject of these surveys and studies may include the use of land, the preservation of agricultural and forestal land, characteristics and conditions of existing development, natural resources, dam break inundation zones, and other matters. Virginia Code § 15.2-2224(A)(1); see Huber v. Loudoun County Board of Supervisors, 55 Va. Cir. 318 (2001) (planning commission not required to survey and study all of the matters set forth in Virginia Code § 15.2-2224; only required to study “such matters as” those listed in the statute). But see Virginia Code § 15.2-2223, requiring that the planning commission survey and study road and transportation improvements and their costs.

The comprehensive plan must be reviewed by the planning commission once every five years. Virginia Code § 15.2-2230.
9-200 The contents of the comprehensive plan

A comprehensive plan is general in nature. It designates the general or approximate location, character, and extent of each feature, including any road improvement and any transportation improvement, shown on the plan. Virginia Code § 15.2-2223.

9-210 Required content

The Virginia Code requires that a comprehensive plan contain the following elements and plans:

- Long-range recommendations for general development of the locality: A comprehensive plan must show the locality’s long-range recommendations for the general development of the locality. Virginia Code § 15.2-2223.

- Transportation plan: A comprehensive plan must include a transportation plan that designates a system of transportation infrastructure needs and recommendations that may include the designation of new and expanded transportation facilities and that support the planned development of the territory covered by the plan. Virginia Code § 15.2-2223. See also section 9-700 for a comprehensive discussion of the requirements for transportation planning.

- Road and transportation map: A comprehensive plan must contain a map showing road and transportation improvements, including cost estimates, of the road and transportation improvements to the extent that information is available from VDOT. The plan must take into account the current and future needs of the residents in the locality while considering the current and future needs of the planning district within which the locality is situated. Virginia Code § 15.2-2223. See also section 9-700 for a comprehensive discussion of the requirements for transportation planning.

- Affordable housing: The comprehensive plan must designate areas in the locality for the implementation of measures to promote the construction and maintenance of affordable housing, sufficient to meet the current and future needs of residents of all levels of income in the locality while considering current and future needs of the planning district within which the locality is situated. Virginia Code § 15.2-2223.

- Strategies for broadband infrastructure: The comprehensive plan must consider strategies to provide broadband infrastructure that is sufficient to meet the current and future needs of residents and businesses in the locality. Virginia Code § 15.2-2223.

The Virginia Code also requires that a comprehensive plan include the following in the specific circumstances described below:

- Road impact fee service areas: If a locality adopts an ordinance to impose road impact fees, impact fee service areas must be designated in the comprehensive plan. Virginia Code § 15.2-2320. In addition, the comprehensive plan must include a road improvements plan showing the necessary road improvements within an impact fee service area and the schedule for those improvements. Virginia Code § 15.2-2321. Localities with a population of 20,000 or more and a growth rate of 5% or more (between the next to last and last decennial census) or in localities with a growth rate of 15% or more are eligible to adopt such an ordinance. Virginia Code § 15.2-2318.

- Traditional neighborhood design: If urban development areas are designated in the comprehensive plan, the comprehensive plan must incorporate principles of traditional neighborhood design in the urban development area, which may include but is not limited to: (1) pedestrian-friendly street design; (2) the interconnection of new local streets with existing local streets; (3) connectivity of street and pedestrian networks; (4) the preservation of natural areas; (5) mixed-use neighborhoods, including mixed housing types; (6) the reduction of front and side yard building setbacks; and (7) the reduction of subdivision street widths and turning radii at subdivision street intersections. Virginia Code § 15.2-2223.1(B)(6).
Planning for projected sea level rise and recurrent flooding. Any locality included in the Hampton Roads Planning District Commission must incorporate into the next scheduled and all subsequent reviews of its comprehensive plan strategies to combat projected relative sea-level rise and recurrent flooding. Virginia Code § 15.2-2223.3.

### Summary of the Required Content of a Comprehensive Plan

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Description</th>
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<tbody>
<tr>
<td>A transportation plan that designates a system of infrastructure needs and</td>
<td>recommendations that include designating new and expanded transportation facilities and that support planned development of the locality.</td>
</tr>
<tr>
<td>Long-range recommendations for general development, which may include</td>
<td>optional elements.</td>
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<tr>
<td>Designating areas and implementation measures for constructing,</td>
<td>rehabilitating, and maintaining affordable housing, sufficient to meet current and future needs of</td>
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<td>residents of all income levels.</td>
<td>residents of all income levels.</td>
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<td>Designating impact fee service areas, if the locality adopts an ordinance</td>
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<td>Planning for sea level rise and recurrent flooding in the Hampton Roads</td>
<td>area.</td>
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</table>

### 9-220 Optional content pertaining to the long-range recommendations for general development in the locality

The required long-range recommendations for general development in the locality may include, but need not be limited to, the following:

- **Land use:** A comprehensive plan may designate areas for various types of public and private development and uses, such as different kinds of residential, business, industrial, agricultural, mineral resources, conservation, active and passive recreation, public service, flood plain and drainage, and other areas. Virginia Code § 15.2-2223.

- **Community service facilities:** A comprehensive plan may designate a system of community service facilities such as parks, sports playing fields, forests, schools, playgrounds, public buildings and institutions, hospitals, community centers, waterworks, nursing homes, assisted living facilities, sewage disposal or waste disposal areas, and the like. Virginia Code § 15.2-2223.

- **Capital improvements program, land use regulations, maps of certain     | districts:** A comprehensive plan may include a capital improvements program, recommendations for subdivision and zoning ordinances, and maps of mineral resource districts and agricultural forestal districts. Virginia Code § 15.2-2223.

- **Historical areas and renewal:** A comprehensive plan may designate historical areas and areas for urban renewal or other treatment. Virginia Code § 15.2-2223.

- **Groundwater protection:** A comprehensive plan may designate areas for the implementation of reasonable measures to provide for the continued availability, quality, and sustainability of groundwater and surface water. Virginia Code § 15.2-2223.

- **Recycling centers:** A comprehensive plan may include the location of existing or proposed recycling centers. Virginia Code § 15.2-2223.

- **Military bases:** A comprehensive plan may include the location of military bases, military installations, and military airports and their adjacent safety areas. Virginia Code § 15.2-2223.

- **Utility line corridors:** A comprehensive plan may include the designation of corridors or routes for electric transmission lines of 150 kilovolts or more. Virginia Code § 15.2-2223.

- **Urban development areas:** Any locality may designate one or more urban development areas. Virginia Code § 15.2-2223.1(B). Urban development areas are areas designated by the locality that may be appropriate for higher density development specified in Virginia Code § 15.2-2223.1(B)(1) due to proximity to transportation facilities,
the availability of a public or community water and sewer system, or a developed area and, to the extent feasible, to be used for redevelopment or infill development. Virginia Code § 15.2-2223.1(A). Urban development areas may be sufficient to meet projected residential and commercial growth in the locality for an ensuing period of 10 to 20 years (40 years in Fairfax County), and may include the phasing of development. Virginia Code § 15.2-2223.1(B)(2).

### Summary of the Optional Content Pertaining to the Long-range Recommendations for General Development in the Locality

- Designating areas for various types of public and private development and uses.
- Designating a system of community service facilities such as parks, athletic fields, forests, schools, playgrounds, public buildings and institutions, hospitals, nursing homes, assisted living facilities, community centers, waterworks, sewage disposal areas, and waste disposal areas.
- Establishing a capital improvements program, land use regulations, and maps of districts.
- Designating historical areas and areas for urban renewal.
- Designating areas for implementing reasonable measures to provide for the continued availability, quality, and sustainability of groundwater and surface water.
- Designating the location of existing and proposed recycling centers.
- Identifying the location of military bases, military installations, and military airports and their adjacent safety areas.
- Designating corridors or routes for electric transmission lines of 150 kilovolts or more, in consultation with the electric utility.
- Designating one or more urban development areas.

A comprehensive plan may be more extensive than what is required by law.

**9-300 Ensuring that the comprehensive plan is internally consistent**

Internal consistency within a comprehensive plan is essential because, without it, a zoning ordinance can never be truly aligned with the comprehensive plan. Without consistency, the comprehensive plan “cannot effectively serve as a clear guide to future development. Decision-makers will face conflicting directives; citizens will be confused about the policies and standards the community has selected; findings of consistency of subordinate land use decisions such as rezonings . . . will be difficult to make; and land owners, business, and industry will be unable to rely on the general plan’s stated priorities and standards for their own individual decision-making. General Plan Guidelines, California Governor's Office of Planning and Research (2003).

### Comprehensive Plan Consistency

**Consistency Sought**

- **Equal status among the elements**: Resolve potential conflicts through clear language and policy consistency.
- **Consistency between the elements**: All of the elements of the comprehensive plan should be consistent with one another.
- **Consistency within the elements**: Each element’s policies, goals, and objectives should be internally consistent with one another, and the strategies should be consistent with and complement one another.
- **Community plan consistency with the comprehensive plan**: A community plan’s policies, goals, objectives, and strategies should be consistent with the comprehensive plan’s policies, goals, objectives, and strategies.
- **Text and map consistency**: Maps and any other illustrations in the comprehensive plan should be consistent with the text.

**Reasons for Seeking Consistency**

- Consistency allows the comprehensive plan to serve as a clear policy guide.
- Consistency reduces confusion about the locality’s policies, goals, and objectives and allows the public to rely on them.
- Consistency ensures that decision-makers will not have conflicting policies to consider, and this will result in better decisions.

For example, it makes no sense for a comprehensive plan’s land use element to plan for an increased population in a particular area of the locality, but then for its transportation element to fail to plan for the traffic impacts.
resulting from that increased population; or for one part of a transportation plan to state that county roads are sufficient to accommodate the projected level of traffic while another element of the same plan to describe a worsening traffic situation aggravated by continued subdivision activity.

9-400 Aligning the zoning ordinance with the comprehensive plan

The comprehensive plan should be one of the key sources, if not the key source, of guidance on every legislative zoning decision (see sections 9-800 and 9-900 for a discussion of the role of the comprehensive plan in rezoning and other legislative land use decisions). A comprehensive plan serves no purpose if it is relegated to a box in a storage room or the bookshelf and is never referenced except to extract the plan’s recommended density and land use designations.

If a comprehensive plan was adopted or amended after careful and comprehensive surveys and studies of the existing conditions and trends of growth, and of the probable future requirements of the area, then it should provide a wealth of ideas for how to foster change by amending existing zoning regulations.

In addition to stating goals and objectives, a comprehensive plan also should identify a number of strategies to implement those goals and objectives. Many of those strategies may be recommendations to amend the zoning regulations in order to implement the goals and objectives of the plan. In other words, the comprehensive plan should be viewed as one big legislative “to-do” list.

9-500 Amending the comprehensive plan

If the governing body desires to amend the comprehensive plan, it may prepare the amendment and refer it to the planning commission for public hearing or direct the planning commission to prepare the amendment and submit it to public hearing within 60 days or a longer timeframe as specified by the governing body. *Virginia Code § 15.2-2229*. Albemarle County allows the planning commission and landowners to initiate amendments. In fact, it is generally advisable for owners seeking to rezone their property to consider first obtaining an amendment to the comprehensive plan if their rezoning proposal is inconsistent with the existing plan. Landowner-initiated amendments in Albemarle County proceed only if either the planning commission or the board of supervisors adopts a resolution of intent to amend the comprehensive plan.

The planning commission reviews the proposed amendment, holds a public hearing, and approves, amends and approves, or disapproves the matter. Upon approval of the amendment, the planning commission then reports its recommendation to the governing body. *Virginia Code § 15.2-2225*. If the planning commission fails to make a recommendation on the amendment within the applicable timeframe, the governing body may conduct a public hearing on the amendment. *Virginia Code § 15.2-2229*. The governing body must thereafter act on the proposed amendment within 90 days of the date of the planning commission’s recommending resolution. *Virginia Code § 15.2-2229*.

Before an amendment to the comprehensive plan is adopted, the locality must submit the amendment to VDOT for review and comment. *Virginia Code §§ 15.2-2222.1*. VDOT must provide its comments within 90 days. *Virginia Code § 15.2-2222.1*.

The criteria applied by the planning commission and the governing body for considering an amendment to the comprehensive plan are not specified by state law. Rather, both the commission and the governing body must be guided by the purposes of the comprehensive plan itself in reaching their decisions.

Once a comprehensive plan is adopted or amended, it must be posted on the locality’s website, though the inadvertent failure of the planning commission or the governing body to do so does not invalidate the action. *Virginia Code §§ 15.2-2225 and 15.2-2226*.

9-600 Reviewing proposed public facilities for consistency with the comprehensive plan

Projects subject to 2232 review include, but are not limited to, privately constructed wireless facilities in the VDOT right-of-way (Board of Supervisors of Fairfax County v. Washington, D.C. S.M.A., 258 Va. 558, 522 S.E.2d 876 (1999)); sanitary landfills, whether publicly or privately owned (1983-84 Va. Op. Atty. Gen. 81; 1987-88 Va. Op. Atty. Gen. 212); school sites (1976-77 Va. Op. Atty. Gen. 237); parks (1976-77 Va. Op. Atty. Gen. 193); electric transmission lines of 138 kilovolts or more (Virginia Code § 56-265.2 (allowing an alternative procedure to obtaining a certificate of need from the State Corporation Commission)); and water impoundment projects proposed by a city, to be located in a county (Board of Supervisors of Roanoke County v. City of Roanoke, 220 Va. 195, 257 S.E.2d 781 (1979)). Businesses such as apartments, hotels, filling stations and stores are not public facilities subject to review under Virginia Code § 15.2-2232. 1964-65 Va. Op. Atty. Gen. 258. As of July 1, 2016, a proposed telecommunications tower or a facility constructed by an entity organized under Virginia Code § 56-231.15 is deemed to be substantially in accord with the comprehensive plan and planning commission approval is not required if the proposed telecommunications tower or facility is located in a zoning district that allows telecommunications towers or facilities by right. Virginia Code § 15.2-2232(G).

In a 2232 review, the planning commission may hold a public hearing, but is not required to do so unless the governing body directs that a public hearing be held. Virginia Code §15.2-2232(A). The commission then communicates its findings to the governing body, indicating its approval or disapproval with the written reasons for its decision. Virginia Code § 15.2-2232(B). The governing body may overrule the action of the planning commission. An owner may appeal the decision of the commission to the governing body. Virginia Code § 15.2-2232(B). Third parties have no right to challenge the decision in court. Miller v. Highland County, 274 Va. 355, 650 S.E.2d 532 (2007) (declaratory relief not available to a third party to challenge a 2232 decision because that remedy is available for preventive relief, but not to provide a right of appeal that does not exist by statute). The failure of the commission to act on a 2232 review within 60 days of a submission is deemed to be an approval, unless the governing body extends the time for the commission to act. Virginia Code § 15.2-2232.

As noted above, the issue for both the commission and the board is whether the proposed public facility is in substantial accord with the comprehensive plan. Virginia Code §15.2-2232, standing alone, does not anticipate a public facility being mentioned but later proposed to be constructed in a location significantly removed from the location shown on the plan. Board of Supervisors of Loudoun County v. Town of Purcellville, 276 Va. 419, 441, 666 S.E.2d 512, 523 (2008). The determination of whether a feature is already shown on the adopted plan “must be made in light of the requirement that the ‘general or approximate location’ of the feature” is required in Virginia Code § 15.2-2223. Town of Purcellville, supra. In Town of Purcellville, the Virginia Supreme Court held that the circuit court erred when it determined that a proposed high school was a feature shown on the area master plan where the plan area was approximately three miles wide and the proposed location of the high school was two miles from the location of the feature shown on the area master plan. If a public facility does not conform to the comprehensive plan, it may not be constructed. City of Roanoke, supra. The solution to this problem is to amend the comprehensive plan to show the proposed public facility.

Normal service extensions of public utilities and public service corporations are one class of public facilities exempt from review under Virginia Code § 15.2-2232 except in certain circumstances. Virginia Code § 15.2-2232(C). Normal service extension is not defined and it is left to the locality to establish criteria as to what a normal service extension is. Kernan v. Fairfax County Water Authority, 70 Va. Cir. 212 (2006) (rejecting claim by landowners that extension of water facilities by water authority required 2232 review).
9-700  Transportation planning under the comprehensive plan

Virginia Code § 15.2-2200 declares the legislative intent of the General Assembly in adopting the laws pertaining to planning, zoning, and the subdivision of land. The following passage highlights those statements most applicable to transportation:

This chapter is intended to encourage localities to improve public health, safety, convenience and welfare of its citizens and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway . . . facilities . . . and that the growth of the community be consonant with the efficient and economical use of public funds. (italics added)

In summary, Virginia Code § 15.2-2200 speaks to planning transportation systems for future development and assuring that new community centers have adequate highway facilities.

In recent years the General Assembly has amended and added key pieces of enabling authority to require that transportation planning be coordinated with a locality’s comprehensive plan and its zoning decisions. One of those key pieces of legislation was adopted as Chapter 896 of the 2007 Acts of Assembly. In Marshall v. Northern Virginia Transportation Authority, 275 Va. 419, 657 S.E.2d 71 (2008), the Virginia Supreme Court held that the portion of the legislation that vested taxing authority in a regional transportation authority that was not a county, city, town or regional government and was not an elected body, was unconstitutional.

Virginia Code §§ 15.2-2223 and 15.2-2224 require that the comprehensive plan designate the general or approximate location, character, and extent of each road and transportation improvement shown on the plan. In addition, the planning commission shall, in the preparation of a comprehensive plan, survey and study road and transportation improvements and their costs.

A comprehensive plan must include a transportation plan that designates a system of transportation infrastructure needs and recommendations that may include the designation of new and expanded transportation facilities and that support the planned development of the territory covered by the plan. Virginia Code § 15.2-2223(B)(1). The transportation plan must include, as appropriate, but is not limited to, roadways, bicycle accommodations, pedestrian accommodations, railways, bridges, waterways, airports, ports, and public transportation facilities. Virginia Code § 15.2-2223(B)(1). The transportation plan also must recognize and differentiate among a hierarchy of roads such as expressways, arterials, and collectors. Virginia Code § 15.2-2223(B)(1). In developing the plan, the locality shall take into consideration how to align transportation infrastructure and facilities with affordable, accessible housing and community services that are located within the territory in order to facilitate community integration of the elderly and persons with disabilities. Virginia Code § 15.2-2223(B)(1). Upon request by the locality, the Virginia Department of Transportation (“VDOT”) is required to provide the locality with technical assistance in preparing the transportation plan. Virginia Code § 15.2-2223(B)(1).

The transportation plan must include a map that shows road and transportation improvements, including the cost estimates of the road and transportation improvements from VDOT, taking into account the current and future needs of residents in the locality while considering the current and future needs of the planning district within which the locality is situated. Virginia Code § 15.2-2223(B)(2).

The transportation plan must be consistent with the Statewide Transportation Plan (VTRANS), the Six-Year Improvement Program (SYIP) and the location of routes that are part of the state highway system. Virginia Code § 15.2-2223(B)(3). The locality is required to consult with VDOT to assure that this required consistency is achieved. Virginia Code § 15.2-2223(B)(3). The transportation plan is required to reflect only those changes in the annual update of the Six-Year Improvement Program that are deemed to be significant new, expanded, or relocated roadways. Virginia Code § 15.2-2223(B)(3).

Before a transportation plan or any amendment to it is adopted by the governing body, the locality must submit it to VDOT to review and provide written comments to the locality on the consistency of the plan or amendment.
Virginia Code § 15.2-2223(B)(4). After a transportation plan or amendment is adopted by the governing body, the locality must submit it to VDOT for informational purposes. Virginia Code § 15.2-2223(B)(5). If VDOT determines that the transportation plan is inconsistent with VTRANS, the SYIP, or the location of routes that are part of the state highway system, VDOT will notify the Commonwealth Transportation Board so that it may take appropriate action as provided by statute. Virginia Code § 15.2-2223(B)(5).

Virginia Code § 15.2-2223.1(F) requires that, to the extent possible, localities direct federal, state, and local transportation funding for new and expanded facilities to the locality’s urban development area (or for grandfathered localities, to the area determined to accommodate growth).

Virginia Code § 15.2-2239 requires that capital improvement programs include estimates of the cost of each road and transportation improvement adopted as an amendment to a locality’s comprehensive plan.

See 24 VAC 30-155-30 for the regulations for a traffic impact analysis required for a comprehensive plan or a comprehensive plan amendment.

9-800  The role of the comprehensive plan in legislative zoning decisions

A comprehensive plan does not have the status of a zoning ordinance. Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975). It is advisory only and serves as a guide for the development and implementation of the zoning ordinance. Allman, supra; Board of Supervisors of Stafford County v. Safeco, 226 Va. 329, 310 S.E.2d 445 (1983); see Huber v. Loudoun County Board of Supervisors, 55 Va. Cir. 318 (2001) (as an advisory document, the comprehensive plan cannot be the basis for a declaratory relief action since no injury arises from its approval).

In guiding zoning decisions, the comprehensive plan is one of approximately ten relevant factors required to receive “reasonable consideration” by the planning commission and the locality’s governing body. Virginia Code § 15.2-2284; Board of Supervisors of Fairfax County v. Pyles, 224 Va. 629, 300 S.E.2d 79 (1983) (governing body must consider, among other things, the general boundary guidelines set forth in the comprehensive plan to determine the boundaries of a zoning district).

<table>
<thead>
<tr>
<th>The Comprehensive Plan as a Guide for Zoning Decisions</th>
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<tbody>
<tr>
<td>• Although the comprehensive plan is only one of several factors to be considered in making a zoning decision, it may be the most important and most commonly relied upon factor.</td>
</tr>
<tr>
<td>• Because a comprehensive plan is only advisory and serves as a guide in making a zoning decision, a zoning decision is not unreasonable simply because the governing body chooses not to follow the comprehensive plan.</td>
</tr>
<tr>
<td>• However, relying on the comprehensive plan facilitates reasonable and well-informed decisions, and decisions that conform to the comprehensive plan are more likely to be found reasonable and they reduce the potential for a claim of discrimination in the decision-making process by individual landowners.</td>
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<tr>
<td>• The comprehensive plan is not considered as a guide for ministerial actions such as subdivision plats and site plans.</td>
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A comprehensive plan may properly form the basis to approve or deny a rezoning or a special use permit. Board of Supervisors of Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980) (rezoning); National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County, 232 Va. 89, 348 S.E.2d 248 (1986) (special use permit). However, because the comprehensive plan is only a guide, it is not required that land only be rezoned or permitted in accordance with it. See Board of Supervisors of Fairfax County v. Robertson, 266 Va. 525, 587 S.E.2d 570 (2003); Lerner, supra; Clark v. Town of Middleburg, 26 Va. Cir. 472 (1990). In Lerner, the Virginia Supreme Court upheld the board’s decision to deny the landowner’s rezoning application because the proposed project failed to satisfy the minimum standards of the county’s comprehensive plan. In upholding the board’s authority to rely on its comprehensive plan to deny the application, the Court stated:

While the minimum standards of the Comprehensive Plan may be only guidelines and not requirements to be applied inflexibly by the Board, it was still a matter within the Board’s discretion.
to decide whether to adhere to those standards or to follow some other reasonable approach in determining whether to grant or to deny the rezoning application.

*Lerner*, 221 Va. at 37, 267 S.E.2d at 104.

This rule was repeated in *City Council of City of Salem v. Wendy’s of Western Virginia, Inc.*, 252 Va. 12, 18, 471 S.E.2d 469, 473 (1996): “[T]he City elected to adhere to the standards of its comprehensive plan, a matter within the council’s discretion.” *See also Robertson*, 266 Va. at 535, 587 S.E.2d at 577 (assuming the circuit court was correct that the comprehensive plan required one sound level and continuous 24-hour monitoring, the board “had the discretion to decide whether to adhere to the guidelines in the Comprehensive Plan or to follow some other reasonable approach in making its decision”).

Although the comprehensive plan is a guide, rather than a set of requirements, decision-makers should strive to assure that their decisions are consistent with the plan. Conformance to the comprehensive plan not only facilitates reasonable and well-informed decisions, but also removes the potential for discrimination in the decision process against individual landowners.

As a guide, the comprehensive plan does not supersede the existing zoning designation and its associated regulations for a particular parcel. Moreover, the comprehensive plan does not apply to ministerial acts such as the approval of a subdivision plat or a site plan. By that point in the development process, the policy decisions related to the use of the land – made in conjunction with the planning and zoning processes – have already been made. Thus, a subdivision plat cannot be denied because the future development that may result from the subdivision is inconsistent with the comprehensive plan. *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). Lastly, there is no requirement that the existing zoning designation for a particular parcel be consistent with the use called for in the comprehensive plan.

9-900  **The role of the comprehensive plan as a tool to control the timing of growth**

Planning for growth and, more specifically, planning for how and where growth should occur, should be a priority for all localities.

- Localities generally do not develop adequate capacity to plan for and manage growth until it is too late to effectively channel development.

- Urban growth processes are well understood, strategically directing development to the most favorable areas well in advance of urban pressures offers the greatest hope for controlling growth.

- Local governments should proactively plan to accommodate potential growth.


A comprehensive plan allows a locality to be both proactive and strategic in how it will physically develop. In addition, the comprehensive plan is one of the factors governing bodies are to consider in making a zoning decision. *Virginia Code § 15.2-2284*. The governing body is also directed to consider, among other things, the transportation requirements of the community and the requirements of the community for airports, housing, schools, parks, playgrounds, recreation areas and other public services. *Virginia Code § 15.2-2284*. All of these factors are analyzed in chapter 10. In addition, the zoning enabling authority requires that zoning ordinances be designed to give reasonable consideration “to protect against . . . overcrowding of land, undue density of population in relation to the community facilities existing or available . . .” *Virginia Code § 15.2-2283(vi).*

A governing body may deny a rezoning application or a special use permit if it is inconsistent with the comprehensive plan. *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980) (rezoning);
A locality may time or phase development to assure that adequate public facilities are in place if its comprehensive plan identifies specific, objective criteria as to when development may occur.

**9-910 Board of Supervisors of Fairfax County v. Williams:** a very general policy calling for undefined adequate public facilities before development occurs is insufficient

In *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975), the board of supervisors denied rezoning applications that would have increased the density from one to 2.9 single family dwelling units per acre. One reason cited by the board for its denial was inadequate public facilities, including roads. The county’s comprehensive plan included a statement that higher density development of the area in question “should not occur until public facilities are adequate.” The Virginia Supreme Court held that the county’s denial of the rezoning application was invalid for a number of reasons.

Although *Williams* may be unique to its facts, it is important to note that, as for the inadequacy of the roads, the Virginia Supreme Court found the evidence that the road system was being improved, and was slated for further improvement, to be persuasive. In fact, the Court said that it had “no quarrel with the Board concerning its contention . . . that in its zoning actions it must protect against ‘undue density of population in relation to the community facilities existing or available’ and must make provision for public facilities ‘consonant with the efficient and economical use of public funds.’” *Williams*, 216 Va. at 51, 216 S.E.2d at 36. However, the *Williams* court gave no consideration to the board’s argument that denial was appropriate because the rezoning was, at least facially, inconsistent with the comprehensive plan. One may surmise that the standard in the comprehensive plan, because of its vagueness, was no standard at all.

**9-920 Board of Supervisors of Fairfax County v. Allman:** relying on an unwritten policy for promoting development elsewhere first is insufficient

In *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), the board denied 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.

Although the comprehensive plan considered in *Allman* spoke to density, it was silent as to whether necessary public facilities should be provided in advance of higher density zoning. The *unwritten* policy of the county was to promote Reston for development first, followed by the lands on the periphery, such as the applicant’s land. The Court noted: “The obvious inference is that Allman and other property owners zoned RE-1 should await the full development of Reston before seeking a rezoning, even though the proposed zoning is in accordance with the County’s Master Plan.” *Allman*, 215 Va. at 441-442, 211 S.E.2d at 53.

*Allman* may be unique to its facts because, at the time the board was denying Allman’s rezoning application, it was approving other similar rezonings in the area. The Virginia Supreme 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* may be 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. *See more recent cases considering discrimination in land use decisions in section 6-330.* *Allman* also makes it clear that land use policies must be in writing as part of the comprehensive plan if they are to be relied upon (the policy to promote development in Reston first), and the policies must be internally consistent.
9-930  **Board of Supervisors of Loudoun County v. Lerner:** specific, objective, criteria in the comprehensive plan may support a decision that the requested rezoning is premature

In *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980), the board denied the applicant’s request to rezone its property from industrial park to shopping center. The board’s decision was based upon the proposed rezoning’s inconsistency with the comprehensive plan, which required that regional shopping centers have a minimum supporting population of 100,000 to 200,000 within a radius of 5 to 15 miles for a center containing 400,000 to 1,000,000 square feet. The Virginia Supreme Court concluded that the plan’s standard was a valid basis to deny the rezoning application, thereby supporting the county’s policy of timing or phasing development to a particular land use when the standards of the comprehensive plan are satisfied.

The principles that can be learned from *Lerner* are four-fold: (1) the decision to phase or time development should be expressed in the comprehensive plan; (2) the criteria for timing or phasing development should not be so vague so as to permit their discriminatory application; (3) the actual timing of development should be determined by the application of reasonably objective criteria, rather than by general statements that public facilities should be adequate; and (4) the comprehensive plan must likely provide the means for a locality to absorb, in reasonable measure, its fair share of growth.

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<tr>
<th>Distinguishing <em>Allman</em> and <em>Lerner</em></th>
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<tr>
<td><strong>Summary of Allman</strong></td>
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<tr>
<td>• Rezoning to higher density was denied, even though it was consistent with the density in the comprehensive plan.</td>
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<tr>
<td>• The comprehensive plan was silent as to whether necessary public facilities had to be provided in advance of higher density zoning.</td>
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<tr>
<td>• The unwritten county policy was to promote Reston development first; Allman’s property was on the periphery of Reston, but not in it.</td>
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<tr>
<td>• Denial was held to be unreasonable.</td>
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<td>• Denial was held to be unreasonable.</td>
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**How the cases are distinguishable from one another**

• The policy that thwarted the applicant in *Allman* (promote development in Reston first) was not a part of its comprehensive plan but was an unwritten policy of Fairfax County.

• To the extent that the Fairfax County board of supervisors was applying its comprehensive plan in *Allman*, it was not doing so in a consistent manner because it approved other similar rezoning applications, but not Allman’s, even though the applications raised the same issues and concerns.

• The Loudoun County board of supervisors in *Lerner* applied a comprehensive plan that articulated a specific requirement before development could occur.

In 2002 Va. Op. Atty. Gen. LEXIS 51, 2002 Va. Op. Atty. Gen. WL 1008350, the Attorney General issued an opinion concluding that a locality could adopt, as part of its comprehensive plan, a proffer policy that considers an adequate public facilities requirement. After a survey of the applicable Virginia law, including *Allman* and *Lerner*, the Attorney General recommended that the following criteria be used by a locality:

• The impact of the proposed development on public facilities.

• The protection against undue density of population with respect to the public facilities in existence to serve the proposed development.

• The planning by the locality to provide public facilities consonant with the efficient and economical use of public funds to serve the proposed development.
• The locality’s interpretation and application of its comprehensive plan concerning the timing of the development as determined by reasonably objective criteria.

From the foregoing, the implementation of an effective adequate public facilities policy must ensure that a locality’s comprehensive plan reasonably and objectively: (1) identifies all public facilities and their existing population capacities; (2) identifies the impacts of proposed developments on those facilities; (3) identifies the population threshold at which an existing public facility can no longer support without adversely impacting the public health, safety or welfare; and (4) quantifies the pro rata share (money, land or other) that a proposed development must contribute to allow the public facility to be expanded, enlarged or modified to accommodate the additional population arising from the proposed development, or to establish a new public facility to serve not only the proposed development but other new population.

9-1000 The role of the comprehensive plan in promoting economic development and tourism

Creating and maintaining a healthy, attractive, and livable community in a way that attempts to capitalize on local assets (in other words, “placemaking”) not only benefits a locality’s residents. It also promotes economic development and tourism.

9-1010 The link between good land use planning and economic development

The link between good land use planning and a community’s economic strength and success is evident in recurring themes from both the economic development and the land use planning perspectives. From the economic development perspective, these three themes arise:

• Communities must have a vision for the future.
• Communities must develop a sense of place.
• Businesses want a place, not just a site.


From the land use planning perspective, the three themes identified above are discussed in Edward T. McMahon’s article The Secrets of Successful Communities (PlannersWeb.com, July 29, 2013), which summarizes the key elements of successful communities, including:

• Successful communities capitalize on their distinctive assets – their architecture, history, natural surroundings, and home-grown businesses, rather than adopting a new or a generic identity.
• Successful communities pick and choose among development projects because some projects will make a community a better place to live, work, and visit; other projects will not. They reject generic designs from developers and insist on designs that are sensitive to local character. McMahon cites a development consultant who stated that “when a chain store developer comes to town they generally have three designs ranging from Anywhere USA to Unique.” The unique design is sensitive to local character.
• Successful communities pay attention to aesthetics by controlling signs, planting street trees, protecting scenic views and historic buildings, and encouraging new construction that fits in with the existing community. McMahon explains why aesthetics are important: “The image of a community is fundamentally important to its economic well-being. Every single day in America people make decisions about where to live, where to invest, where to vacation and where to retire based on what communities look like.”

McMahon also states that when “it comes to 21st century economic development, a key concept is community differentiation. If you can’t differentiate your community from any other, you have no competitive advantage.” The
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Distinctive City, Urban Land Institute, April 2012. He notes in the same article that “education, technology, connectivity and distinctiveness have all become more important.” On the matter of distinctiveness, McMahon quotes Joseph Cortright, an authority on economic development: “the unique characteristics of place may be the only truly source of competitive advantage for communities.” McMahon adds more recently: “Enlightened cities, towns, and counties are investing more in placemaking because they believe these features attract younger workers—especially the most sought-after segment, skilled Millennials.” Edward T. McMahon, Becoming a Place People Want to Live, Virginia Town & City, May 2015.

The following excerpts from various commentaries and studies sum up a range of reasons why good land use planning should matter to a locality interested in economic development:

- In a study on the effect of zoning on economic development in rural areas, the authors concluded that planning and zoning facilitated economic development rather than impeded it. The authors summarized the benefits of zoning to include: “(1) business and citizen preference for land use predictability; (2) assurance for business prospects and residents that their investment will be protected; (3) the ability to guide future development and prevent haphazard (e.g., patchwork), harmful, or unwanted development; and (4) the minimization of potential conflict between industry and residents.” Does Rural Land-use Planning and Zoning Enhance Local Economic Development? Economic Development Journal, Fall 2006, Joy Wilkins, B. William Riall, Ph.D., Arthur C. Nelson, Ph.D., with Paul Counts and Benjamin Sussman.

- “Having a distinctive identity will help communities create a quality of life that is attractive for business retention and future residents and private investment. Community economic development efforts should help to create and preserve each community’s sense of uniqueness, attractiveness, history, and cultural and social diversity, and include public gathering places and a strong local sense of place.” Local Government Commission (California), Principle 14.

- “Quality urban development . . . wants no part of an unstable, unplanned, uncontrolled environment as they know this is not a place to make a long-term investment.” Planning America’s Communities: Paradise Found? Paradise Lost? Herbert Smith (1991)

- “The states that do the most to protect their natural resources also wind up with the strongest economies and the best jobs.” Institute for Southern States Study (1994).

9-1020 The link between good land use planning and tourism

Tourism is also a beneficiary of good land use planning. The Virginia Tourism Corporation reports that in 2016, domestic tourism in Virginia generated $23.7 billion in visitor spending, supported 229,300 jobs, and provided approximately $1.6 billion in state and local taxes to Virginia’s communities. In Albemarle County and the City of Charlottesville, the Virginia Tourism Corporation reports that in 2016 tourism generated $600 million in direct visitor spending, supported over 5,850 jobs, and generated $20.9 million in local tax revenue for the County and the City. Needless to say, tourism is a significant part of economic development.

In discussing the role that a community’s image plays in tourism, Edward T. McMahon, in his article The Secrets of Successful Communities (PlannersWeb.com, July 29, 2013), writes: “The more any community in America comes to look just like every other community the less reason there is to visit. On the other hand, the more a community does to protect and enhance its uniqueness whether natural or architectural, the more people will want to visit. Tourism is about visiting places that are different, unusual, and unique. If everyplace was just like everyplace else, there would be no reason to go anyplace.” “This is the reason why local land use planning and urban design standards are so important.” Edward T. McMahon, Responsible Tourism: How to Preserve the Goose that Lays the Golden Egg, Virginia Town & City, May 2015.

Other writers have expressed a similar sentiment, which confirm why good land use planning matters:

- “Tourism simply doesn’t go to a city that has lost its soul.” Arthur Frommer, Travel Writer.
• “The most central feature that needs protection is the natural beauty and setting of a place. Once lost, it can seldom be restored.” Leisure Travel: Making it a Growth Market . . . Again, Stanley Plog.

In summary, these excerpts advocate managed development and growth. They also caution localities to avoid losing their unique identity. Creating and maintaining a healthy, attractive, and livable community not only benefits a locality’s residents. It also promotes economic development and tourism.

For additional information as to why good planning matters, see section 3-600.
Chapter 10
Zoning Map and Text Amendments

10-100  Introduction

The uses that may be allowed on land may be changed either by amending the regulations of the zoning district in which the land is situated (a zoning text amendment) or by amending the zoning map and changing the zoning district in which the land is situated (a zoning map amendment, more commonly referred to as a rezoning). This chapter primarily addresses zoning map amendments (rezonings).

The zoning and rezoning of land is wholly legislative, and cannot be accomplished in any fashion other than by an appropriate ordinance or map amendment. See Laird v. City of Danville, 225 Va. 256, 302 S.E.2d 21 (1983).

One who owns land always faces a possibility of it being rezoned. Cole v. City Council of City of Waynesboro, 218 Va. 827, 241 S.E.2d 765 (1978). There is “no vested property right in the continuation of the land’s existing zoning status. [citations omitted].” Board of Supervisors of Stafford County v. Crucible, Inc., 278 Va. 152, 160, 677 S.E.2d 283, 287 (2009). However, the policy that permissible land use should be reasonably predictable assures a landowner that the uses will not be changed suddenly, arbitrarily or capriciously, but only after a period of investigation and community planning, and only where circumstances substantially affecting the public interest have changed. Cole, supra. This “stability and predictability in the law serve the interest of both the landowner and the public.” Board of Supervisors of Fairfax County v. Snell Construction Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

Typically, a zoning map amendment either upzones or downzones the land. An upzoning is the rezoning of land that increases the permitted intensity of use or development by right, and it may include an increase in permitted density. A downzoning is the rezoning of property that reduces the permitted intensity of use or development by right, including a reduction in permitted density. Board of Supervisors of Culpeper County v. Greengael, LLC, 271 Va. 266, 626 S.E.2d 357 (2006). Though a Virginia case has not so held, land may theoretically be upzoned or downzoned by a zoning text amendment by significantly liberalizing or restricting, respectively, the by-right uses in the zoning district.

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<th>Eight Key Terms and Principles</th>
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<tr>
<td>• Zoning text amendments change the zoning regulations.</td>
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<td>• Zoning map amendments change the zoning district in which the land is situated; commonly referred to as a rezoning.</td>
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<tr>
<td>• Zoning text and map amendments are legislative acts of the governing body.</td>
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<td>• Upzonings are usually rezonings (though an upzoning may be achieved by a zoning text amendment) that increase the permitted intensity of use or development by right, including an increase in density.</td>
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<tr>
<td>• Downzonings are usually the rezoning of property (though a downzoning may be achieved by a zoning text amendment) that decreases the permitted intensity of use or development by right, including a reduction in permitted density.</td>
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<tr>
<td>• A denied upzoning is lawful if it is fairly debatable that the existing zoning is reasonable, even if the proposed zoning is also reasonable.</td>
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<tr>
<td>• Downzonings are lawful if they are comprehensive in their scope; piecemeal downzonings are lawful only where there is a change in circumstances, a mistake in fact, or fraud.</td>
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<tr>
<td>• Zoning decisions should be based on sound zoning principles, seeking to achieve the purposes of zoning listed in Virginia Code § 15.2-2283 and based on the factors articulated in Virginia Code § 15.2-2284.</td>
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Upzonings are by far the more common type of rezoning and are typically initiated by the landowner. The analysis beginning in section 10-300 is presented in the context of cases in which, in most cases, applications for upzonings were denied. Downzonings are less common and are typically initiated by the locality. The analysis beginning in section 10-400 examines those cases that have considered whether a downzoning was comprehensive or piecemeal. Section 10-500 re-examines the cases in section 10-300 in the context of the reasonableness of the zoning decision at issue under the fairly debatable test, which is the test by which the validity of a zoning decision (most often, a denied upzoning) would be considered by the courts.
10-200 Initiation of the process

Zoning text and zoning map amendments can be initiated by the locality or by a landowner or his or her authorized representatives.

10-210 Zoning text amendments

Zoning text amendments must be initiated by a resolution of intent adopted by the governing body or a motion adopted by the planning commission. Virginia Code § 15.2-2286(A)(7); Ace Temporaries, Inc. v. City Council of the City of Alexandria, 274 Va. 461, 649 S.E.2d 688 (2007) (multiple amendments of the same zoning text each require their own resolution or motion to initiate the process). The resolution or motion must state the public purposes for the proposed action. Virginia Code § 15.2-2286(A)(7). It is sufficient for the resolution to merely recite the purposes set forth in Virginia Code § 15.2-2286(A)(7) (public necessity, convenience, general welfare, or good zoning practices), rather than state specific, independent purposes. County of Fairfax v. Southern Iron Works, Inc., 242 Va. 435, 410 S.E.2d 674 (1991). However, it need not necessarily state the exact language of the statute provided that a statement of public purpose is given. In re Zoning Ordinance Amendments by the Board of Supervisors of Loudoun County, 67 Va. Cir. 462 (2004).

The text of the proposed zoning ordinance need not be available when the resolution of intent or the motion to initiate a zoning text amendment is adopted. Virginia Code § 15.2-2286(A)(7); see Ace Temporaries, supra, (the “General Assembly did not include a requirement in Code § 15.2-2286(A)(7) that the text of an amendment be in written format at the time of initiation”); In re Zoning Ordinance Amendments Enacted by the Board of Supervisors of Loudoun County, 67 Va. Cir. 462 (2004).

When adopting a zoning text amendment, the governing body need not have the full text of the proposed ordinance before it when it takes action if the materials before the governing body are sufficiently clear as to what it is adopting. Southern Iron Works, Inc., 242 Va. at 445–46, 410 S.E.2d 680-81 (holding the board of supervisors did not unlawfully delegate legislative power to staff in directing it to compile the text supplement setting forth the text amendment, where the staff made no substantive changes to what the board adopted).

10-220 Zoning map amendments

Zoning map amendments (rezonings) are initiated by petition of the owner of property, a contract purchaser with the owner’s consent, or the owner’s agent. Virginia Code § 15.2-2286(A)(7) provides in part that a zoning map amendment (“rezoning”) may be initiated:

(iii) by petition of the owner, contract purchaser with the owner’s written consent, or the owner’s agent therefore, of the property which is the subject of the proposed zoning map amendment, addressed to the governing body or the local planning commission, . . . (italics added)

Zoning map amendments also may be initiated by the governing body or the planning commission. Virginia Code § 15.2-2286(A)(7).

10-221 General requirements

Within business 10 days after a rezoning application is submitted, the locality must submit the proposal to VDOT if the proposal will substantially affect transportation on state-controlled highways. Virginia Code § 15.2-2222.1(B). The rezoning application must include a traffic impact statement if required by local ordinance or VDOT regulations. Virginia Code § 15.2-2222.1(B).

Within 45 days after its receipt of the traffic impact statement, VDOT must either provide written comment on the proposed rezoning to the locality or schedule a meeting with the locality’s planning commission or other agent (to be held within 60 days after VDOT received the traffic impact statement) and the applicant to discuss potential modifications to the proposal to address concerns and deficiencies. Virginia Code § 15.2-2222.1(B). VDOT must
complete its initial review of the rezoning proposal within 45 days, and its final review within 120 days, after it receives the rezoning proposal from the locality. *Virginia Code § 15.2-2222.1(B)*.

While the VDOT review is ongoing, the planning commission must make a recommendation to the governing body on the application within 100 days after the matter was referred to the commission, or a shorter period prescribed by the governing body. *Virginia Code § 15.2-2285(B)*. If the commission fails to timely act, the application is deemed “approved,” unless the proposed amendment or reenactment has been withdrawn by the applicant prior to the expiration of the time period. *Virginia Code § 15.2-2285(B)*. A county’s governing body must act upon and make a decision on the application “within such reasonable time as may be necessary which shall not exceed 12 months unless the applicant requests or consents to action beyond such period or unless the applicant withdraws his motion, resolution or petition for amendment to the zoning ordinance or map, or both.” *Virginia Code § 15.2-2286(A)(7)*. There is no similar requirement for the governing bodies of cities and towns.

**10-222 Consent requirements**

As noted in section 10-220, Virginia Code § 15.2-2286(A)(7)(iii) provides in part that a zoning map amendment may be initiated “by petition of the owner, contract purchaser with the owner’s written consent, or the owner’s agent therefore, of the property which is the subject of the proposed zoning map amendment.” What does that mean, especially when the parcel proposed to be rezoned is but one parcel that is subject to a single set of proffers or is part of a planned development?

In *Town of Leesburg v. Long Lane Associates*, 284 Va. 127, 726 S.E.2d 27 (2012), the Virginia Supreme Court held that a locality does not need to obtain the consent of a neighboring property owner to rezone a parcel that was originally part of an undivided property that was previously rezoned and subject to a single set of proffers. The Court concluded that the owner of the neighboring property has no vested right in its expectation that the neighboring property would continue to develop in accordance with the prior proffered zoning, which existed at the time the landowner purchased its property and developed it in accordance with the prior proffers. The Court also concluded that Virginia Code § 15.2-2303(A) does not require that all successors in title agree or consent to any portion of the subdivided land being thereafter rezoned.

Related to the issue before the Virginia Supreme Court in *Long Lane Associates*, Virginia Code § 15.2-2302 allows a landowner subject to proffered conditions to apply to amend the proffers after providing written notice of the application to the owners of other parcels subject to the same existing proffers. The notice must be provided within 10 days after receipt of the application as provided in Virginia Code § 15.2-2204(H). *Virginia Code § 15.2-2302. See also section 11-380*. The reasoning of the Virginia Supreme Court in *Long Lane Associates* would appear to apply to rezonings pertaining to planned developments as well.

**10-300 The relevant factors to be considered in a rezoning**

*Virginia Code § 15.2-2284* states that zoning ordinances and districts must be drawn and applied by reasonably considering the following:

- The existing use and character of property.
- The comprehensive plan.
- The suitability of the property for various uses.
- The trends of growth or change.
- The current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies.
• The transportation requirements of the community.

• The requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services.

• The conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestal land and the conservation of properties and their values.

• The encouragement of the most appropriate use of land throughout the locality.

Every proposed rezoning should be accompanied by an analysis of how the amendment satisfies one or more of the factors listed above. Some of these factors are closely related to one another and are considered together below. A locality is not required to consider all nine factors in each zoning decision. Many of these factors may be addressed in the comprehensive plan and, in that case, the locality’s analysis may focus on whether the proposed rezoning is consistent with the plan.

One of the central themes running through this section is that the reasonableness of the existing zoning is critical to the analysis and the application of these nine factors. No single factor is necessarily determinative. The cases cited below appear repeatedly throughout the various factors discussed.

| Summary of the Relevant Factors in a Rezoning and How Courts Have Looked at Those Factors |
|-----------------------------------------------|-----------------------------------------------|
| Factor                                                                 | Courts’ Perspectives                         |
| Existing use and character of the property   | Relevant to understanding whether existing use and zoning is reasonable; courts also will look at the abutting property |
| Consistency with the comprehensive plan      | Critical factor, not only as to use and density, but other elements of the plan; decision consistent with the plan likely to be found reasonable; decision inconsistent with the plan not necessarily unreasonable because other factors in play |
| Suitability of the property for various uses; encouragement of most appropriate uses | Both the relative value of the property under the existing and proposed zoning, and the economic feasibility of developing under the existing zoning were key factors in a number of older cases; though still relevant, factor appears to play a lesser role in more recent cases |
| The trends of growth or change                | The change in the character of an area since the existing zoning was established is a critical factor; courts have shown willingness to protect established neighborhoods even if change is occurring outside the neighborhood |
| Current and future requirements of the community for using land for various purposes as determined by population and economic studies and other studies | Reliance on this factor requires more than a decision-makers’ belief that “we have too much (e.g., commercial/industrial) zoning” or “we need more (e.g., commercial/industrial) zoning”; studies are required to show what the needs of the community are; cannot be relied upon to squelch competition |
| The transportation requirements of the community; the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services | Adequate public facilities are key factors in a zoning decision and the importance of these factors will only continue to grow, particularly with the new requirements that transportation planning be incorporated into the locality’s comprehensive plan and VDOT play a more direct role; if the existing zoning is reasonable, the courts are likely to affirm a denied upzoning on the ground that impacts to public facilities are not addressed |
| The conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land and the conservation of properties and their values | These factors have not been directly addressed in the case law; issues related to these factors have been discussed when considering the suitability of property for various uses and the trends of growth or change (see above) |
10-310 The existing use and character of the property

The existing use and character of the property is an important factor that is key to understanding whether the existing use and zoning is reasonable. The courts have considered the use and character of not only the property subject to the upzoning, but also of the abutting and nearby property.

If abutting parcels are zoned or used similarly to the subject parcel, the existing zoning may be found to be reasonable. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999) (abutting parcels, as well as the subject parcel, were zoned agricultural and in agricultural use, where residential zoning was sought); *Patrick v. McHale*, 54 Va. Cir. 67 (2000) (where residential zoning was sought, existing agricultural zoning was reasonable even though abutting properties on two sides were zoned residential, where two other abutting properties were zoned agricultural).

10-320 Consistency with the comprehensive plan

Whether a proposed rezoning is consistent with the comprehensive plan is perhaps the most important consideration in modern zoning decision-making. It is important to remember that consistency pertains not only to the use, but also to many other policies in the comprehensive plan. Note also that although this section breaks out each of the factors identified in Virginia Code § 15.2-2284, the breadth and scope of the Albemarle County comprehensive plan incorporates a number of the factors to be considered in a zoning decision. See chapter 9 for a discussion of the role of the comprehensive plan.

If the existing density or use is consistent with the comprehensive plan, a decision to deny an upzoning should be upheld. *Board of Supervisors of Roanoke County v. International Funeral Services*, 221 Va. 840, 275 S.E.2d 586 (1981) (adding that, where both the existing and the proposed uses are reasonable, the locality may retain the use permitted under the existing zoning even if the proposed use is more appropriate or even the most appropriate use of the land); *Atlantic Town Center Development Corp. v. Accomack County Board of Supervisors*, 94 Va. Cir. 35 (2016) (denial to rezone from agricultural to residential was upheld and not necessarily unreasonable, even though the application was consistent with the comprehensive plan; the “test for arbitrary and capricious is not wholly based upon compatibility with a comprehensive plan. The plan may create expectations in the mind of the landowner but it is the Board's acceptance or denial of the applicant’s specific plan that is at issue”); *Williams v. Board of Supervisors of Fairfax County*, 1996 Va. Cir. LEXIS 528 (1996) (even though the property was more valuable if developed under the proposed zoning and the proposed zoning better met the county’s demand for affordable housing, the existing zoning was consistent with the comprehensive plan and reasonable); *Turock Estate, Inc. v. Thomas*, 7 Va. Cir. 222 (1984) (upholding denial of rezoning from R-4 (multiple residence) to C-2 (limited commercial), even though land had previously been zoned C-2, because decision was reasonably based on the city’s plan for the neighborhood that recommended that revitalization be achieved by devoting as much land as possible to housing and concentrating commercial uses only to limited areas).

If the existing zoning is inconsistent with the use identified in the comprehensive plan, the existing zoning is not necessarily unreasonable if other factors justify the denial of the rezoning. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999); *City Council of City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996); *Patrick v. McHale*, 54 Va. Cir. 67 (2000) (where residential zoning sought, agricultural zoning was reasonable even though the comprehensive plan provided for residential zoning in the area, where a significant portion of the area within the plan area was still zoned agricultural).

If the existing zoning is inconsistent with the comprehensive plan, and the proposed density or use is consistent with the comprehensive plan, a decision to deny an upzoning should nonetheless be upheld if other factors delineated in Virginia Code § 15.2-2284 are not satisfactorily addressed, such as:

- The applicant fails to adequately address explicitly identified impacts from the project by not proffering cash as articulated in the comprehensive plan to address the pro rata share of impacts caused by the proposed zoning on the future cost of public facilities. *Gregory v. Board of Supervisors of the County of Chesterfield*, 257 Va. 530, 514 S.E.2d 350 (1999) (applicant failed to make cash proffer as outlined in the comprehensive plan; cash proffer intended
to address the per lot share of the county’s cost to provide public facilities such as schools, roads, parks, libraries and fire stations, existing zoning shown to be reasonable).

- The existing zoning is shown to be reasonable, based on specific and well-articulated evidence. Gregory, supra; City Council of City of Salem v. Wendy's of Western Virginia, Inc., 252 Va. 12, 471 S.E.2d 469 (1996).

- The proposed density or use would adversely affect the existing neighborhood. Board of Supervisors of Fairfax County v. Jackson, 221 Va. 328, 269 S.E.2d 381 (1980).

- The proposed density or use fails to satisfy other comprehensive plan guidelines for the rezoning, such as the minimum size of the zone. Hertz v. Fairfax County Board of Supervisors, 37 Va. Cir. 508 (1992).

- The proposed density or use is premature, based upon specific, objective timing criteria stated in the comprehensive plan. Board of Supervisors of Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980); see Cussen v. Frederick County Board of Supervisors, 39 Va. Cir. 561 (1990) (denial of upzoning upheld where the existing zoning was found to be reasonable and the comprehensive plan merely provided that new development in the urban area may be approved “when utilities and roads with sufficient capacity have been provided”).

- The proposed use or density is premature because the subject parcel is in an area whose uses are still devoted to the existing zoning. Patrick v. McHale, 54 Va. Cir. 67 (2000).

If the existing zoning is inconsistent with the comprehensive plan, and the proposed density or use is inconsistent with the comprehensive plan, a decision to rezone the property to a different use or density that is consistent with the comprehensive plan should be upheld. Board of Supervisors of Fairfax County v. Pyles, 224 Va. 629, 300 S.E.2d 79 (1983) (upholding rezoning to residential classification consistent with the comprehensive plan, where applicant sought rezoning to commercial use; unaddressed traffic and access issues).

**10-330 The suitability of the property for various uses; the encouragement of the most appropriate use of land throughout the county**

There appear to be two classes of cases that fall under these combined, related categories – those pertaining to the relative value and the potential development of the land under its existing zoning and the proposed zoning, and those that pertain to the economic feasibility of developing under the existing zoning. These combined categories are also related to certain elements of the trends of growth or change discussed in section 10-340.

**10-331 Relative value/potential development of the land under its existing zoning and the proposed zoning**

The Virginia Supreme Court has said that in judging the reasonableness of an existing zoning classification, consideration should be given to economic factors. Town of Vienna Council v. Kohler, 218 Va. 966, 244 S.E.2d 542 (1978). The relative value of the land under its existing zoning and the proposed zoning has been a factor considered by the courts to determine the reasonableness of the existing zoning, but it is a factor whose weight appears to have diminished over the past 30 years.

In Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975), one of several factors considered by the Virginia Supreme Court in concluding that the existing, lower-density residential zoning was unreasonable was evidence that the land would be worth $2,445,000 more if it was rezoned to the proposed zoning (the evidence also showed, however, that the owners could develop under the existing zoning and not lose money). In Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975), the Court observed that the existing residential zoning was unreasonable, where a more intensive residential zoning classification was sought, because the land would be worth $2,467,000 more if it was rezoned (“It was clearly established that the property is suitable for a more valuable use than RE-1 . . .”). However, in the more recent Gregory v. Board of Supervisors of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (1999), the Court found that the potential development of the 30-acre tract at issue under existing zoning into two or three lots was a reasonable use of the land, where an 81-lot
subdivision was sought under the proposed zoning.

In Runion v. Board of Supervisors of Roanoke, 65 Va. Cir. 41 (2004), a challenge to an approved upzoning, neighbors contended that the board’s upzoning of a 22.75-acre tract of land from agricultural rural (“AR”) to residential single family (“R-1”) was contrary to the community plan, bore no reasonable relation to the public health, safety or general welfare, and failed to address community impacts. The circuit court upheld the board’s decision as reasonable, finding that under the AR zoning, the tract could be developed with 38 units with multiple driveway connections to an existing public street, and with no proffers. Under R-1 zoning, the tract could be developed with 44 units, but with more controlled access to the public street, and with proffers for fencing, easements, dedication of land, design review and a limitation on logging. In addition, the court found that the R-1 zoning reasonably comported with the community plan and that it was in line with the scheme of development in the neighborhood.

10-332 Economic feasibility of developing land under existing zoning

In some older cases, the courts considered the economic feasibility of developing under existing zoning as evidence of the existing zoning’s unreasonableness. In Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975), the cost of development under the existing lower-density zoning was one of several factors considered by the Virginia Supreme Court in concluding that the existing zoning was unreasonable. The comparatively higher per-unit cost of development under the existing zoning made higher-density development extremely feasible and reasonable. Note, however, that there was also evidence that the owners could develop under the existing zoning and not lose money.

In Boggs v. Board of Supervisors of Fairfax County, 211 Va. 488, 178 S.E.2d 508 (1971), the Court found that it was economically unfeasible to develop the land under its existing residential zoning (the county conceded that the existing residential zoning in an emerging commercial area was inappropriate), noting that the owners would have to spend $185,000 to make extensive on-and-off site improvements, particularly for drainage, before they could develop under the existing zoning. See also City Council of the City of Fairfax v. Swart, 216 Va. 170, 217 S.E.2d 803 (1975) (uncontradicted evidence that it was economically unfeasible to develop 3.285 acre parcel under existing single family residential zoning where nearby parcels were zoned for high density residential or commercial uses); County Board of Arlington County v. God, 216 Va. 163, 217 S.E.2d 801 (1975) (developing parcels for single family residential use, where surrounding area zoned and devoted to apartment uses, was economically unfeasible).

10-340 The trends of growth or change

The case law makes it readily apparent that the trends of growth or change in the vicinity of the land subject to a rezoning application are a common and key consideration in a zoning decision.

10-341 The change in the character of an area

The change in the character of an area since the existing zoning was established is an important factor that may show the unreasonableness of the existing zoning. Boggs v. Board of Supervisors of Fairfax County, 211 Va. 488, 178 S.E.2d 508 (1971) (existing single family residential zoning was unreasonable where “fantastic” change had occurred in the character of the area, with more than 33 rezonings from single family residential to apartments and commercial); County Board of Arlington County v. God, 216 Va. 163, 217 S.E.2d 801 (1975) (existing single family residential zoning was unreasonable where the zoning was established in 1950 and since then the block on which the owner’s parcels were located were almost entirely zoned and devoted to apartment uses).

10-342 Protecting an established stable neighborhood may buck a perceived trend

Evidence that a specific neighborhood is an established and stable neighborhood may successfully counter evidence of the trends of growth or change over a broader area.

Thus, where the existing zoning is residential and the proposed zoning is commercial or industrial, or even a more intensive residential use, protecting the viability of an existing residential neighborhood is an important factor.
that will show the reasonableness of the existing zoning. *City Council of the City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996) (residential neighborhood was old, beautiful, tree-lined, with good housing stock, even though commercial and industrial development was occurring on its periphery); *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983) (expansion of commercial zoning would destabilize and disrupt stable residential communities); *Board of Supervisors of Fairfax County v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980) (existing residential zoning classification was reasonable in face of request for rezoning that would allow smaller residential parcel sizes, where the existing zoning reflected the land use in the area, there had been no major rezonings, subdivisions or resubdivisions of lands in the immediate area in over 20 years, and the rezoning would establish a precedent that would have an adverse impact on a stable, established residential subdivision).

10-343 How potentially conflicting evidence may be evaluated

Whether relied upon to support or overturn the decision of the locality, the character of the surrounding neighborhood is routinely identified by the courts to support their decision:

- Where the evidence describing the character of the existing neighborhood and current and future trends is such that the existing and the proposed zoning are both appropriate, the locality has the prerogative to choose the applicable classification. *City Council of the City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996); *Board of Supervisors of Fairfax County v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980).

- Where the evidence describing the character of the existing neighborhood is such that the parcel is in a transition area between different zoning districts, the governing body may draw a boundary line somewhere provided it does so in a reasonable manner. *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983) (reasonably drawn); *Town of Vienna Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978) (unreasonably drawn).

- Where the character of the neighborhood has changed to such an extent that the existing zoning is unreasonable and development of the parcel under the existing zoning is economically unfeasible, the existing zoning may be found to be unreasonable, especially where there is insufficient evidence produced by the locality of the existing zoning’s unreasonableness to make the issue even fairly debatable. *City Council of the City of Fairfax v. Swart*, 216 Va. 170, 217 S.E.2d 803 (1975); *County Board of Arlington County v. God*, 216 Va. 163, 217 S.E.2d 801 (1975); *Boggs v. Board of Supervisors of Fairfax County*, 211 Va. 488, 178 S.E.2d 508 (1971).

- Where the proposed zoning is consistent with the comprehensive plan, but the character of the neighborhood is such that it was consistent with the existing zoning, the existing zoning will be found to be reasonable. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999); *Patrick v. McHale*, 54 Va. Cir. 67 (2000); *Caster v. City of Harrisonburg*, 44 Va. Cir. 342 (1998) (existing residential zoning on parcel in a residential neighborhood was reasonable, even though it was cut off from any residential area by being in the middle of the conjunction of an interstate highway and a four-lane heavily traveled thoroughfare).

10-350 The current and future requirements of the community for using land for various purposes as determined by population and economic studies and other studies

Under modern zoning practices, the current and future requirements of the community for land uses should be identified in the comprehensive plan, based upon studies conducted for the comprehensive plan. This section considers the role the comprehensive plan and other studies may play in identifying the current and future requirements of the community and other relevant considerations. *See section 10-320 for a discussion of the comprehensive plan as a factor to be considered in zoning decisions generally.*

10-351 The role of the comprehensive plan as a tool to control the timing of growth

The board of supervisors may deny a rezoning application if it is inconsistent with the comprehensive plan. *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980). Therefore, if the comprehensive plan contains specific, objective standards for adequate public facilities and when land use may intensify within a
plan area, a locality may time or phase development according to its plan. See Lerner; see section 9-920 for additional discussion of this issue.

In Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975), the board denied the applicant’s request to rezone its property to a higher density that 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. Although the comprehensive plan considered in Allman spoke to density, it was silent as to whether necessary public facilities should be provided in advance of higher density zoning. The unwritten policy of the county was to promote Reston for development first, followed by the properties on the periphery, such as the applicant’s. The Court noted: “The obvious inference is that Allman and other property owners zoned RE-1 should await the full development of Reston before seeking a rezoning, even though the proposed zoning is in accordance with the County’s Master Plan.”

In Lerner, supra, the board denied the applicant’s request to rezone its property from industrial park to shopping center. The board’s decision was based upon the proposed rezoning’s inconsistency with the comprehensive plan, which required that regional shopping centers have a minimum supporting population of 100,000 to 200,000 within a radius of 5 to 15 miles for a center containing 400,000 to 1,000,000 square feet. The Court concluded that the plan’s standard was a valid basis to deny the rezoning application, thereby supporting the county’s policy of timing or phasing development to a particular land use when the standards of the comprehensive plan were satisfied. Lerner provides three important principles: (1) the decision to phase or time development should be expressed in the comprehensive plan; (2) the criteria for phasing development should not be so vague so as to permit discriminatory application; and (3) the actual timing of development should be determined by the application of reasonably objective criteria, rather than by general statements that public facilities should be adequate.

10-352 The need for certain housing stock or other uses

In overturning the county’s denial of a rezoning in Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 437, 211 S.E.2d 48, 50 (1975), the Virginia Supreme Court considered that the parties had “conceded that a critical housing need for low and moderate income families” existed in Fairfax County. The evidence showed that within the Upper Potomac Planning District (under Fairfax’s comprehensive plan), an overwhelming percentage of the land was zoned to require one or more acres of land per dwelling unit, and this resulted in the vast majority of housing built in the plan area being limited to those in a high-income bracket.

In Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975), one of several factors considered by the Virginia Supreme Court in overturning the county’s denial of a rezoning was evidence of a tremendous shortage of buildable lots in Fairfax County and that a developer would not attempt to develop at the existing zoning density, as opposed to the proposed, higher density, zoning.

10-353 Market need or market saturation

The decision to grant or deny a rezoning may be supported by studies showing that the current or future requirements of the community create a need for the particular class of uses proposed, or that show that the community’s needs are already satisfied. For example, a study showing that the locality has, or will have, a significant need for multi-family residential dwellings over the next decade may justify the granting of a rezoning that would allow that use; a study showing that the locality has a multi-family dwelling housing stock that satisfies current and/or future demand may justify the denial of the rezoning application.

On the other hand, if the basis for the locality’s decision to deny an upzoning is to restrict competition or to protect a previously approved commercial use, the decision will be overturned. Board of County Supervisors of Fairfax County v. Davis, 200 Va. 316, 106 S.E.2d 152 (1958) (board improperly denied rezoning to allow regional shopping center where primary reason was the perceived adverse economic effect it would have on previously approved smaller shopping center in vicinity; no study performed); compare, Northern Virginia Community Hospital v. Loudoun County Board of Supervisors, 70 Va. Cir. 283 (2006) (in sustaining board’s demurrer on issue and distinguishing itself from Davis, court refused to examine motives of board in denying rezoning and permit applications to allow hospital
in the face of claim by hospital that the board was trying to restrict competition; because the board’s acts were legislative in nature, the court said that it “may not generally explore whether the motive to act was inspired by a desire to restrict competition or by some other purpose”), citing Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948) and Helmick v. Town of Warrenton, 254 Va. 225, 492 S.E.2d 113 (1997). These are improper factors on which to base a zoning decision, and they bear no relation to the public health, safety or welfare of the community. Davis, supra; see also 1986-87 Va. Op. Atty. Gen. 124 (denial of pending application for rezoning to permit the construction of a shopping center based primarily on the desire to insulate existing retail businesses from competition is not a proper function of zoning; the opinion notes that the governing body’s concerns were based on what some members “believed,” rather than on studies showing the current or future requirements of the community).

10-360 The transportation requirements of the community; the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services

The transportation requirements of the community and the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services (collectively, “adequate public facilities”) are two very significant factors, particularly for large rezoning applications within urbanizing areas where traffic and other burdens on public facilities already exist or are emerging.

It does not appear that adequate public facilities issues must necessarily be set out in the comprehensive plan in order for a governing body to base a zoning decision on these factors because: (1) while it is desirable for a community to identify its public facilities requirements in the comprehensive plan, these requirements are delineated as separate factors under Virginia Code § 15.2-2284, so they may be considered in a zoning decision even though they are not set out in the comprehensive plan; and (2) the impacts of a proposed project on the public facilities within a community may not be known until studies of the specific project’s impacts are conducted.

In 2003 Va. Op. Atty. Gen. LEXIS 57, 2003 WL 23150084 (2003), the Attorney General was asked whether express enabling legislation was required for a local governing body to deny a rezoning request solely on the basis of the lack of adequate public facilities and services to meet the needs generated by development of rezoned property. The Attorney General concluded that there is “no express statutory authorization that expressly grants to localities an ability to specifically require developers to provide adequate public facilities or to defer development until such services are provided.” The Attorney General based its decision on Virginia Code § 15.2-2286, which delineates what a locality may include in its zoning ordinance. The Attorney General’s opinion, however, failed to consider Virginia Code § 15.2-2284, which delineates the factors that a governing body is to consider when adopting or amending its zoning ordinance or zoning map. The Attorney General’s opinion also failed to consider Gregory v. Board of Supervisors of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (1999), in which the Virginia Supreme Court upheld the denial of a rezoning to a use that was consistent with comprehensive plan because impacts to public facilities were not adequately addressed through proffers.

10-361 Existing zoning is reasonable; impacts to public facilities are identified, but not addressed or mitigated by the applicant

If the proposed rezoning will result in impacts to public facilities that are identified but are neither addressed nor mitigated, and the existing zoning is reasonable, the locality’s decision should be upheld. Gregory v. Board of Supervisors of the County of Chesterfield, 257 Va. 530, 514 S.E.2d 350 (1999); Hertz v. Fairfax County Board of Supervisors, 37 Va. Cir. 508 (1992); Cussen v. Frederick County Board of Supervisors, 39 Va. Cir. 561 (1990); Custer v. City of Harrisonburg, 44 Va. Cir. 342 (1988); Moulden v. Frederick County Board of Supervisors, 10 Va. Cir. 307 (1987). In other words, the proposed zoning will be found to adversely impact public health, safety and welfare, and be found to be unreasonable. Gregory, supra.

Following are summaries of cases where the locality’s decision to deny an upzoning was upheld and the existing zoning was found to be reasonable, and impacts to public facilities (primarily transportation) under the proposed rezoning were unaddressed or unmitigated by the applicant:

10-10

The Albemarle County Land Use Law Handbook
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In Gregory v. Board of Supervisors of the County of Chesterfield, 257 Va. 530, 514 S.E.2d 350 (1999), a proposed development would have added 47 school-age children to schools and added 850 daily vehicle trips on off-site streets to a traffic volume already exceeding the acceptable level; because the staff-identified impacts were $5156 per unit, and the applicant proffered only $1500, the impacts were not adequately mitigated.

In Hertz v. Fairfax County Board of Supervisors, 37 Va. Cir. 508 (1992), the proposed use on a 1.2 acre parcel would have had its sole access to a busy congested highway; the court said that the adverse traffic impact was a legitimate matter for the board to consider in denying the rezoning.

In Cussen v. Frederick County Board of Supervisors, 39 Va. Cir. 561 (1990), the court said that the board could properly consider the traffic impacts the rezoning would have on an area road that was already congested.

In Custer v. City of Harrisonburg, 44 Va. Cir. 342 (1988), the proposed use on a 1.053 acre parcel was one of the most highly traffic-intensive uses to which the parcel could be put and would impose an unreasonable burden on highly congested intersections.

In Moulden v. Frederick County Board of Supervisors, 10 Va. Cir. 307 (1987), the board denied the upzoning of a 1.310 acre parcel from a residential classification to a commercial classification that would have allowed a proposed convenience store; although the applicant’s expert testimony was that the proposed ingress and egress to the property would create no traffic dangers, the board was concerned of the danger of using a crossover to make left turns to enter and exit the site from Route 11, particularly because of existing congestion nearby.

The evidence in each case indicated that the requested change in use would make existing traffic congestion worse. Hertz, Custer and Moulden are noteworthy since those rezonings involved very small parcels, whose traffic impacts relative to the existing congestion would likely be minimal (though contributing), and whose size likely made mitigation of those impacts both practically and economically impossible.

The courts have never said that the failure or inability of an applicant to address or mitigate impacts on public facilities is evidence that the existing zoning is reasonable. It appears, however, that the courts may at least be more inclined to find that the existing zoning is reasonable if the proposed zoning would exacerbate existing undesirable conditions.

10-362 Existing zoning is unreasonable; impacts to public facilities are identified, but not addressed or mitigated by the applicant

The question of adequate public facilities is more easily considered when the existing zoning is reasonable. See section 10-361. As noted above, it appears that a proposed zoning’s impacts on public facilities may influence a court’s view of the reasonableness of the existing zoning in a proper case.

If the existing zoning is found to be unreasonable, the courts will then look to determine whether the proposed zoning is reasonable. A locality can anticipate having any decision denying a rezoning closely scrutinized for justification. In several key cases, the Virginia Supreme Court dealt with this issue, and the question of adequate public facilities was at the forefront of each case.

In Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975) and Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 21 S.E.2d 48 (1975), the impacts of the proposed rezonings on roads and schools were at issue. In both cases, the court rejected the board’s “inadequate public facilities” argument, noting that the necessary public facilities were either available or would become available by the time the project had been developed. The court also stated in Allman, 215 Va. at 439, 21 S.E.2d at 51 and reiterated the principle in Williams, that: “As a practical matter, and because of the ever-existing problem of finance, the construction and installation of necessary public facilities usually follow property development and the demand by people for services.”

Allman and Williams should be addressed by: (1) identifying the impacts the project would have on public facilities; (2) determining that the public facilities are inadequate to handle those impacts and that they will not be
satisfactorily addressed or mitigated by the applicant; and (3) confirming that the public facilities will not be available by the time the project is developed. Another lesson from these cases is that clearly articulated, relevant, and material evidence to support the locality’s claim of inadequate public facilities is essential. See also the discussion of 2003 Va. Op. Atty. Gen. LEXIS 57, 2003 WL 23150084 (2003) in section 10-360.

10-370 The conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land and the conservation of properties and their values

Of the nine factors delineated in Virginia Code § 15.2-2284, the conservation of natural resources has garnered little attention in the published court decisions. The conservation of properties and their values have been considered in different contexts and are discussed in sections 10-330 and 10-340.

10-400 Downzonings

As stated at the beginning of this chapter, a downzoning is the rezoning of property that reduces the permitted intensity of use or development by right, including a reduction in permitted density. See Board of Supervisors of Culpeper County v. Greengael, LLC, 271 Va. 266, 285, 626 S.E.2d 357, 368 (2006) (“the use of the land, rather than the profit expectation, is determinative of whether a rezoning is a downzoning”); Turner v. Board of County Supervisors of Prince William County, 263 Va. 283, 559 S.E.2d 683 (2002) (finding a piecemeal downzoning partly based on reduction of residential density); Virginia Code § 15.2-2286(A)(11) (defining downzoning in context of voluntary agreements between localities and landowners to mean an action resulting “in a reduction in a formerly permitted land use intensity or density”). In Greengael LLC, supra, the rezoning of land from R-4 (allowing high density multi-family residential use) to LI (light industrial) was not a downzoning because the LI designation allowed more intense coverage of land than the R-4 designation (50% versus 35%), and more expansive uses than R-4, including manufacturing and other industrial uses.

The key inquiry in determining the legality of a downzoning is whether it is comprehensive or piecemeal. Comprehensive downzonings are lawful provided that all other requirements for a lawful rezoning are satisfied and the downzoning itself does not result in a taking. Piecemeal downzonings are impermissible under Virginia law except where there is a change in circumstances, a mistake in fact, or fraud.

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<th>Summary of the Distinctions Between Comprehensive and Piecemeal Downzonings</th>
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<tr>
<td><strong>Comprehensive</strong></td>
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<td>• It affects all or a substantial part of the land within the community</td>
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<td>• It is the product of a long study and careful consideration</td>
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<td>• It is initiated by the locality’s governing body or planning commission, rather than a citizen</td>
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<td>• It regulates all uses within the zoned area</td>
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<tr>
<td><strong>Piecemeal</strong></td>
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<tr>
<td>• It affects less than a substantial part of the community and as little as a single parcel</td>
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<tr>
<td>• It is initiated by the locality on its own motion</td>
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<tr>
<td>• It reduces the permitted intensity of use or development by right, including reducing density, below that recommended and attainable in the comprehensive plan</td>
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10-410 Comprehensive downzonings

If the following four common elements exist, a downzoning will likely be found to be comprehensive and, therefore, valid provided all other requirements for a lawful rezoning are satisfied: (1) it affects all or a substantial part of the land within the community; (2) it is the product of a long study and careful consideration; (3) it is initiated by the locality’s governing body or planning commission, rather than a citizen; and (4) it regulates all uses within the zoned area. A comprehensive downzoning may be accomplished either by a zoning text amendment (e.g., by further restricting what uses, structures or activities are allowed in the zoning district) or a zoning map amendment (e.g., by changing the zoning district in which the land is located to one that is less intensive).

In Hennage Creative Printers v. City of Alexandria, 37 Va. Cir. 63 (1995), the downzoning of the plaintiff's property from an industrial to a mixed-use zoning district was held to be a comprehensive, rather than a piecemeal,
A request by a landowner for the downzoning of his or her property would not be an invalid piecemeal downzoning.

A piecemeal downzoning has occurred when: (1) the zoning change is initiated by the locality on its own motion; (2) the downzoning is addressed to less than a substantial part of the community and as little as a single parcel; and (3) the downzoning reduces the permitted intensity of use or development by right, including reducing density, below that recommended and attainable in the comprehensive plan. See Snell, supra; Turner, supra (although land was downzoned to a density consistent with the comprehensive plan, the downzoning was piecemeal because density was not attainable under applicable zoning regulations); Greengael LLC, supra (as for the second prong of the test, the court said that a piecemeal downzoning “selectively addresses the landowner’s single parcel”); Purcellville West LLC v. Board of Supervisors of Loudoun County, 75 Va. Cir. 284 (2008) (sustaining the county’s demurrer because the “pleadings, while they refer to decreasing densities on ‘only a very small remaining portion of the Rural Policy Area,’ do not support the necessary prerequisite of selective application necessary to support this claim”). Of course, a request by a landowner for the downzoning of his or her property would not be an invalid piecemeal downzoning.

An aggrieved landowner can make a prima facie case that a rezoning was a piecemeal downzoning upon a

10-420 Piecemeal downzonings

If a downzoning is not comprehensive, then it is piecemeal. Typically, a downzoning will be found to be piecemeal if it affects less than a substantial part of the community, and as little as a single parcel of land. See Turner v. Board of County Supervisors of Prince William County, 263 Va. 283, 559 S.E.2d 683 (2002) (downzoning of 492 of county’s 220,000 acres held to be piecemeal); City of Virginia Beach v. Virginia Land Investment Association No. 1, 239 Va. 412, 389 S.E.2d 312 (1990) (downzoning of 3,500 acres, which included one-fourth of the land zoned for development but only two percent of the city’s area, held to be piecemeal); Board of Supervisors of Fairfax County v. Snell Construction Corp., 214 Va. 655, 202 S.E.2d 889 (1974) (the board downzoned a portion of the plaintiff’s property from high density to medium density); see also Board of Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959) (though not analyzed as a downzoning case, the court held that the reduction in permitted density on lots in the western two-thirds of the county was arbitrary and capricious).

The use of the land, rather than the profit expectation, is determinative of whether a rezoning is a downzoning. Board of Supervisors of Culpeper County v. Greengael LLC, 271 Va. 266, 285, 626 S.E.2d 357, 368 (2006) (rejecting the landowner’s argument that its land was more valuable residential, R-4, and holding that the rezoning of the land to the light industry, LI, zoning district was not a downzoning because the LI district allowed more intense coverage of land than the R-4 district, and more expansive uses).

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<th>Whether permitted uses or profit expectations determine whether a rezoning is a downzoning</th>
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<td>In Board of Supervisors of Fairfax County v. Snell Construction Corp., 214 Va. 655, 202 S.E.2d 889 (1974), the Virginia Supreme Court said that barring mistake or fraud in the prior zoning regulations, a landowner’s “legitimate profit prospects will not be reduced by a piecemeal zoning ordinance reducing permissible use of his land until circumstances substantially affecting the public interest have changed.” The competing highlighted phrases appeared to some to leave the door open that a piecemeal downzoning could be established if the locality’s zoning action reduced a landowner’s profit expectations.</td>
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This issue was clarified by the Virginia Supreme Court in Board of Supervisors of Culpeper County v. Greengael LLC, 271 Va. 266, 626 S.E.2d 357 (2006) when it held that “the use of the land, rather than the profit expectation, is determinative of whether a rezoning is a downzoning,” adding that if downzonings were determined by their effect on profit expectations, governing bodies desiring to amend their zoning regulations would be required “to undertake speculative and costly analyses of the future profit potential of the affected properties under multiple development scenarios.” Greengael, 271 Va. at 285, 626 S.E.2d at 368 (re zoning from R-4 to Light Industry not a downzoning). |
showing that “since the enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare.” Snell, 214 Va. at 659, 202 S.E.2d at 893; see also Greengael, LLC, supra.

At that point, the burden shifts to the governing body to offer evidence of mistake, fraud or changed circumstances sufficient to make reasonableness fairly debatable. Greengael, LLC; see also Virginia Land Investment Association No. 1, supra (piecemeal downzoning is valid if there has been a change in circumstances substantially affecting the public health, safety, or welfare, or that the prior zoning was based on a mistake or fraud); Snell, supra (where the landowner makes out a prima facie case that the downzoning was piecemeal, the locality then must establish that the existing zoning was the product of fraud or mistake, or that there has been a change in circumstances substantially affecting the public health, safety or welfare).

A mistake is demonstrated when there is probative evidence to show that material facts or assumptions relied upon by the governing body at the time of the previous rezoning were erroneous. Board of Supervisors of Henrico County v. Fralin and Waldron, Inc., 222 Va. 218, 278 S.E.2d 859 (1981) (no evidence of mistake or changed circumstances). A mistake does not include judgmental errors. Fralin and Waldron, supra. Moreover, a difference of opinion or a change of heart is not a mistake. Conner v. Board of Supervisors of Prince William County, 7 Va. Cir. 62 (1981).


Changed circumstances mean a changed condition since the prior ordinance, as shown by objectively verifiable evidence that substantially affects the character of the neighborhood insofar as the public health, safety or welfare is concerned. Turner, supra (holding that the “prior ordinance” is the last ordinance adopted by the locality before it enacted the ordinance that downzoned the land); Fralin and Waldron, supra. In Seabrook Partners v. City of Chesapeake, 240 Va. 102, 393 S.E.2d 191 (1990), the Virginia Supreme Court held that the city’s downzoning of 9.88 acres of a neighborhood from multi-family to single family housing was valid where the city presented sufficient evidence of changed circumstances. The Court found that the neighborhood defined by the city had changed since 1969 when the multi-family zoning was established because the surrounding area had developed, or was planned to be developed, as single-family housing. If developed as multi-family housing as desired by the plaintiffs, the Court concluded that it was fairly debatable that the island of multi-family housing would substantially affect the public health, safety, or welfare.

10-430 A closer look at Turner v. Board of Supervisors of Prince William County

Turner v. Board of County Supervisors of Prince William County, 263 Va. 283, 559 S.E.2d 683 (2002) is a downzoning case that warrants a closer examination.

Despite various amendments from 1958 to 1998, the Prince William County zoning ordinance allowed the owners within the part of the county at issue to subdivide their property into parcels having a minimum size of 10,000 square feet. In 1998, the county downzoned this area – comprising only 492 of the county’s 220,000 acres, or 0.22% of the county’s total land area – by increasing the permitted minimum lot size for development.

Applying the factors from Board of Supervisors of Fairfax County v. Snell Construction Corp., 214 Va. 655, 202 S.E.2d 889 (1974) described in section 10-420, the Virginia Supreme Court held that the downzoning was piecemeal because it was initiated by the board of supervisors, targeted certain property, and effectively reduced the potential residential density in the targeted area below that recommended by the county’s comprehensive plan (the Court said that although the downzoning was to a density recommended in the plan, it was nonetheless piecemeal because the density was not attainable under applicable zoning regulations). Conversely, the Court said that the downzoning was not comprehensive because it did not include “a review of the entire County, [nor] of any known division of the County, such as a magisterial district, [nor] of any known region or zone or designated area of the County.”

As for the county’s claim that changed circumstances existed, the Court first determined that the proper baseline against which changes were to be measured was the last ordinance adopted by the board of supervisors prior to the downzoning. The Court determined that this last prior ordinance was the county’s 1991 zoning
ordinance, not the original 1958 ordinance relied on by the trial court. As for the changed circumstances — increased traffic — relied on by the county, the Court held that “the County failed to present sufficient evidence to support a finding of a change in circumstances regarding the impact of increased traffic between [the 1991 and 1998 ordinances].” The Court then held that the trial court erred when it relied upon the future impact of future residential development on traffic conditions because future impacts are not a permissible factor that a court may consider in a piecemeal downzoning case.

10-500 Evaluating the validity of a zoning decision under the fairly debatable test

The first inquiry in a challenge to a decision on a zoning decision is whether the decision was made in violation of or in compliance with the applicable zoning regulations. If the decision was made in violation of the zoning regulations (e.g., there was an express prerequisite for eligibility to obtain the zoning, such as having a specific pre-existing underlying zoning designation), the action will be found to be arbitrary and capricious and not fairly debatable, thereby rendering the decision void and of no effect. Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County, 285 Va. 604, 740 S.E.2d 548 (2013), quoting Renkey v. County Board of Arlington County, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006) and discussed in section 10-510; see Levine v. Town Council of Abingdon, 94 Va. Cir. 556 (2016) (failure of motion approving rezoning to identify any permitted public purposes for the rezoning did not invalidate the decision; the motion was made after full public hearings “that clearly considered the rezoning to be necessary to serve the ‘general welfare’ and ‘public necessity’” and other significant benefits).

Once it is shown that the decision was made in compliance with the applicable zoning regulations, it is reviewed under the fairly debatable test. Gregory v. Board of Supervisors of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (1999). For a succinct explanation of the fairly debatable test for ordinances generally, see Town of Leesburg v. Giordano, 280 Va. 597, 701 S.E.2d 783 (2010) (pertaining to surcharge on water and sewer rates imposed on non-residents).

The decision of a locality to deny an application for an upzoning is a legislative act that is presumed to be reasonable. Gregory, supra. This presumption will stand until the applicant presents probative evidence that the legislative act was unreasonable. Gregory, supra. If the applicant’s challenge is met by the locality with evidence of reasonableness that is sufficient to render the issue fairly debatable, then the legislative action must be sustained. Gregory, supra. An issue is fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. Gregory, supra; City Council of City of Salem v. Wendy’s of Western Virginia, Inc., 252 Va. 12, 471 S.E.2d 469 (1996); Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975).

The burden is on the denied landowner to first prove the unreasonableness of the current zoning classification. Gregory, supra; Board of Supervisors of Roanoke County v. International Funeral Services, 221 Va. 840, 275 S.E.2d 586 (1981). If the landowner produces probative evidence that the existing zoning classification is unreasonable, the governing body is required to produce sufficient evidence of reasonableness to make the issue fairly debatable. Gregory, supra. As part of its inquiry, the court also considers evidence of the reasonableness of the proposed zoning classification. Gregory, supra; Wendy’s, supra; Board of Supervisors of Fairfax County v. Pyles, 224 Va. 629, 300 S.E.2d 79 (1983); International Funeral Services, supra. The evidence to be sufficient for this purpose must meet not only a quantitative but also a qualitative test; it must be evidence that is not only substantial, but also relevant and material. Williams, supra.

If the issue is fairly debatable, the governing body’s decision must be sustained. If both the existing zoning and the proposed zoning are appropriate, it is the governing body, not the landowner or the court, who determines the appropriate use. Wendy’s, supra.

10-510 Void acts are never fairly debatable

When a governing body does not adhere to its own regulations, the action will be found to be arbitrary and capricious, not fairly debatable, and therefore void and of no effect.
Thus, a zoning action that ignores a regulatory prerequisite to the zoning action is void. In _Renkey v. County Board of Arlington County_, 272 Va. 369, 634 S.E.2d 352 (2006), the board of supervisors rezoned a portion of the property at issue from the R-5 to the C-R (Commercial Redevelopment) zoning district. The zoning regulations provided that to be eligible for the C-R zoning district, the site had to be zoned C-3. Thus, the residents challenging the board’s decision claimed that the board violated its own zoning ordinance. The county argued that the sentence referring to eligibility for the C-R zoning district was a general statement of intent or a preamble. The Virginia Supreme Court concluded that the language was not merely a preamble and that the provision providing only those sites zoned C-3 being eligible for C-R zoning was “an operative, essential, and binding part of the ordinance.” _Renkey_, 272 Va. at 375, 634 S.E.2d at 356. The Court concluded that “the County acted in direct violation of ACZO § 27A. When the County re-zoned a portion of FBCC’s property from “R-5” to “C-R” without complying with the eligibility requirement set out in its own ordinance, its action was arbitrary and capricious, and not fairly debatable, thereby rendering the re-zoning void and of no effect.” _Renkey_, 272 Va. at 376, 634 S.E.2d at 356.

In _Levine v. Town Council of Abingdon_, 94 Va. Cir. 556 (2016), the town council’s decision to approve a rezoning application was challenged on the ground that the motion approving the rezoning application failed to identify any permitted public purposes for the rezoning. The trial court held that the failure of the town council to identify a public purpose in the motion did not invalidate the decision. The court said that the motion was made after full public hearings “that clearly considered the rezoning to be necessary to serve the ‘general welfare’ and ‘public necessity’” and other significant benefits.

10-520 Factors relevant to the reasonableness or unreasonableness of the existing zoning

This section examines the most commonly considered factors delineated in Virginia Code § 15.2-2284 and discussed at length in section 10-300 but does so within the context of the fairly debatable test.

- **The zoning of abutting or nearby parcels:** Whether abutting parcels are zoned similarly to the subject parcel is a factor showing the reasonableness of the existing zoning. _Gregory v. Board of Supervisors of Chesterfield County_, 257 Va. 530, 514 S.E.2d 350 (1999). See section 10-310.

- **The actual land uses of abutting or nearby parcels:** Whether abutting parcels are used similarly to the subject parcel under its existing zoning is a factor showing the reasonableness of the existing zoning. _Gregory, supra_. See section 10-310.

- **Whether the existing use or the proposed use is consistent with the comprehensive plan:** If the existing zoning is consistent with the use identified in the comprehensive plan, the existing zoning should be found to be reasonable. _Board of Supervisors of Roanoke County v. International Funeral Services_, 221 Va. 840, 275 S.E.2d 586 (1981); _Williams v. Board of Supervisors of Fairfax County_, 1996 Va. Cir. LEXIS 528 (1996); _Tumuck Estate, Inc. v. Thomas_, 7 Va. Cir. 222 (1984). However, if the existing zoning is inconsistent with the use identified in the comprehensive plan, this inconsistency does not establish that the existing zoning is unreasonable where other factors exist. _Gregory v. Board of Supervisors of Chesterfield County_, 257 Va. 530, 514 S.E.2d 350 (1999); _City Council of City of Salem v. Wendy’s of Western Virginia, Inc._, 252 Va. 12, 471 S.E.2d 469 (1996). See section 10-320. The other factors most relevant are the existing zoning and actual uses of abutting or nearby parcels, the character of the area, and the potential impacts to public facilities.

- **Change in the character of the area since the existing zoning was established:** The change in the character of an area since the existing zoning was established is an important factor that may show the unreasonableness of the existing zoning. _Boggs v. Board of Supervisors of Fairfax County_, 211 Va. 488, 178 S.E.2d 508 (1971); _County Board of Arlington County v. God_, 216 Va. 163, 217 S.E.2d 801 (1975). See section 10-341.

- **The viability of an existing residential neighborhood:** Where the existing zoning is residential and the proposed zoning is commercial or industrial, or even a more intensive residential density, the viability of the existing residential neighborhood is an important factor that will show the reasonableness of the existing zoning. _Wendy’s, supra_; _Board of Supervisors of Fairfax County v. Pyles_, 224 Va. 629, 300 S.E.2d 79 (1983); _Board of Supervisors of Fairfax County v. Jackson_, 221 Va. 328, 269 S.E.2d 381 (1980). See section 10-342.
• Discriminatory zoning actions; other rezonings, close in time and space, of similarly situated parcels: Where some similarly situated lands are upzoned and others are not, the courts have found the existing zoning to be lacking a reasonable basis. Town of Vienna Council v. Kohler, 218 Va. 966, 244 S.E.2d 542 (1978); Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975); Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975); however, the reader should also consider more recent cases in which the Virginia Supreme Court considered discriminatory zoning actions in the context of special use permits and conditional use permits discussed in section 12-730.

• Economic feasibility of developing land under existing zoning: In some older cases, the Virginia Supreme Court considered the economic feasibility of developing the land under existing zoning as a factor showing its unreasonableness. Williams, supra; Boggs, supra; God, supra; City Council of the City of Fairfax v. Swart, 216 Va. 170, 217 S.E.2d 803 (1975). However, in the more recent Gregory case, the Court found that the potential development of the 30-acre tract at issue under existing zoning into two or three lots (where an 81-lot subdivision was sought under the proposed zoning) was a reasonable use of the land. See sections 10-331 and 10-332.

• The need for certain housing stock or other uses: An identified shortage of a certain type of housing stock or uses (such as lots for residential uses) is a factor that may show the unreasonableness of the existing zoning. Allman, supra; Williams, supra. See section 10-352.

10-530 Factors relevant to the reasonableness or unreasonableness of the proposed zoning

Because the fairly debatable test requires that the reasonableness of the existing zoning be the threshold analysis, the courts have spent much more time engaged in that analysis, rather than considering the reasonableness of the proposed zoning. Nonetheless, the courts have occasionally ventured to expressly describe the proposed zoning in terms of its reasonableness.

• Adverse impacts not addressed as prescribed in the comprehensive plan: The proposed zoning may be found to be unreasonable if the applicant fails to adequately address explicitly identified impacts from the project by not proffering cash as articulated in the comprehensive plan to address the pro rata share of impacts on the future cost of public facilities. Gregory v. Board of Supervisors of the County of Chesterfield, 257 Va. 530, 514 S.E.2d 350 (1999). See sections 10-361 and 10-362.

• Adverse impacts not otherwise addressed by project-specific solutions: The proposed zoning may be found to be unreasonable if the adverse impacts arising from the proposed use are not addressed by project-specific solutions. Caster v. City of Harrisonburg, 44 Va. Cir. 342 (1998) (re zoning to commercial district to allow gas station/convenience store/car wash would be unreasonable given that the proposed use of the property was one of the most highly traffic intensive uses to which the property could be put and would place an unreasonable burden upon an already congested intersection, and the proposed use’s hours of operation and signage would intrude on surrounding residential neighborhood on west side of freeway; existing zoning found to be reasonable). See sections 10-361 and 10-362.

• Proposed zoning is premature under the comprehensive plan: The proposed density or use is premature, based upon specific, objective timing criteria stated in the comprehensive plan, Board of Supervisors of Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980). See section 10-351.

• Proposed zoning is consistent with the comprehensive plan: The decision to deny a rezoning that is consistent with the comprehensive plan is not necessarily unreasonable. Atlantic Town Center Development Corp. v. Accomack County Board of Supervisors, 2016 Va. Cir. LEXIS 112 (2016) (the trial court added “The test for arbitrary and capricious is not wholly based upon compatibility with a comprehensive plan. The plan may create expectations in the mind of the landowner but it is the Board’s acceptance or denial of the applicant’s specific plan that is at issue”).

• Missing or incomplete information: An approved rezoning is not unreasonable merely because the decision-maker does not information that addresses every unknown or uncertainty. In Levine v. Town Council of Abingdon, 94 Va.
Cir. 556 (2016), the trial court held that the town council’s approval of a rezoning was not unreasonable even though the traffic study was not completed at the time of the first of two public hearings and the site plan submitted in conjunction with the rezoning application was only “substantially” complete. The evidence showed that the town council had sufficient information to make a reasonable decision on the rezoning application.

Undoubtedly, the factors applied to determine the reasonableness of the existing zoning are also relevant when determining whether the proposed zoning is reasonable. The most important factors in making this determination include: (1) whether the proposed zoning is consistent with the comprehensive plan; (2) the zoning and actual land uses of the abutting or nearby properties; (3) the change in the character of the area since the existing zoning was established; (4) rezoning actions of similarly situated properties; and (5) the impacts of the proposed zoning on the existing neighborhood.

10-540 Denial allegedly based on unconstitutional proffers; the right to damages

Virginia Code § 15.2-2208.1(A) provides that any rezoning approved that included an unconstitutional proffer, or any rezoning denied because the applicant refused to submit an unconstitutional proffer, is “entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to approve the rezoning without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs. Virginia Code § 15.2-2208.1 applies conditions attached to other types of land use applications as well, including special use permits. What may be an unconstitutional proffer is discussed in section 6-440.

Virginia Code § 15.2-2208.1(B) provides that if the aggrieved applicant proves that an unconstitutional proffer or condition has been a factor in the grant or denial of the application, the trial court must presume, absent clear and convincing evidence to the contrary, that the applicant’s acceptance of or refusal to accept the unconstitutional condition was the controlling basis for such impermissible grant or denial. An applicant must object to the condition in writing prior to the locality’s action. Virginia Code § 15.2-2208.1(B).

In Atlantic Town Center Development Corp. v. Accomack County Board of Supervisors, 94 Va. Cir. 35 (2016), the applicant sought to rezone its land from agricultural to residential. The board of supervisors denied the rezoning and the applicant challenged the decision. One of the issues was whether the board denied the rezoning because the applicant failed to proffer an alleged unconstitutional proffer under Virginia Code § 15.2-2208.1(B). The circuit court held that the board of supervisors did not deny the applicant’s rezoning because it failed to proffer an unconstitutional proffer. The county’s planning staff had discussed a phasing proffer with the applicant in an effort to ameliorate the county’s concern that the density proposed by the applicant (432 units) was excessive. There was no evidence that phasing the project was demanded either by the board or county staff, or that the board even considered the need for a phasing proffer.

10-600 Transportation planning in the rezoning process

Virginia Code § 15.2-2200 declares the legislative intent of the General Assembly in adopting the laws pertaining to planning, zoning and the subdivision of land. The following passage highlights those statements most applicable to roads:

This chapter is intended to encourage localities to improve public health, safety, convenience and welfare of its citizens and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway . . . facilities . . . and that the growth of the community be consonant with the efficient and economical use of public funds. (italics added)

In summary, Virginia Code § 15.2-2200 speaks to planning transportation systems for future development and assuring that new community centers have adequate highway facilities.

In recent years the General Assembly has amended and added key pieces of enabling authority to require that transportation planning be coordinated with a locality’s comprehensive plan and its zoning decisions. One of those key pieces of legislation was adopted as Chapter 896 of the 2007 Acts of Assembly. In Marshall v. Northern Virginia
Within 10 business days after a rezoning application is submitted, the locality must submit the proposal to VDOT if the proposal will substantially affect transportation on state-controlled highways. *Virginia Code § 15.2-2222.1(B)*. The rezoning application must include a traffic impact statement if required by local ordinance or VDOT regulations. *Virginia Code § 15.2-2222.1(B)*.

Within 45 days after its receipt of the traffic impact statement, VDOT must either provide written comment on the proposed rezoning to the locality or schedule a meeting with the locality’s planning commission or other agent (to be held within 60 days after VDOT received the traffic impact statement) and the applicant to discuss potential modifications to the proposal to address concerns and deficiencies. *Virginia Code § 15.2-2222.1(B)*.

VDOT must complete its initial review of the rezoning proposal within 45 days, and its final review within 120 days, after it receives the rezoning proposal from the locality. *Virginia Code § 15.2-2222.1(B)*. If the locality has not received any comments from VDOT within the specified periods, it may assume that VDOT has no comments. *Virginia Code § 15.2-2222.1(D)*.

See 24 VAC 30-155-40 for the regulations for a traffic impact analysis and traffic impact statement required for a rezoning, and 24 VAC 30-155-60 for the required elements of a traffic impact statement.

10-700 Zoning actions that may be susceptible to challenge

This section addresses several types of rezoning actions that may give rise to a challenge and may raise a variety of constitutional issues.

10-710 Spot zonings

A *spot zoning* is the upzoning (allowing more intensive uses) of land to a classification that is different than that of the surrounding land. The common element found in a spot zoning is the rezoning of a particular parcel from an original zoning classification that was identical to parcels similar in size and use and situated in close proximity to the parcel rezoned. *Guest v. King George County Board of Supervisors*, 42 Va. Cir. 348 (1997). However, the fact that adjacent land is not similarly zoned does not necessarily make a rezoning a spot zoning. *Clark v. Town of Middleburg*, 26 Va Cir. 472 (1990).

Illegal spot zoning occurs when the purpose of a zoning text or zoning map amendment is solely to serve the private interests of one or more landowners, rather than to further the locality’s welfare as part of an overall zoning plan that may include a concurrent benefit to private interests. *Riverview Farm Associates v. Board of Supervisors of Charles City County*, 259 Va. 419, 528 S.E.2d 99 (2000); *Board of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981); *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967); *Ranon v. Board of Supervisors of Roanoke*, 65 Va. Cir. 41 (2004) (rezoning land from AR to R-1 was not illegal spot zoning because the rezoning was part of a continuing plan of development for the county, the community plan recognized that development in the area was inevitable, granting the rezoning with proffers allowed the county to better protect the interests of the county than merely allowing the property to develop under its AR classification (particularly in this case where the increase in density went from 38 to 44), and the rezoning was compatible with the surrounding area).

A spot zoning that is consistent with the comprehensive plan should be found to be lawful since, by being consistent with the plan, it is furthering the locality’s welfare.

10-720 Zoning to depress land values

One of the purposes of zoning is to “encourage economic development activities that provide desirable employment and enlarge the tax base.” *Virginia Code § 15.2-2283*. One of the factors to be considered in any zoning
10-730 Contract zoning

A locality has no authority to enter into a private agreement with a property owner to amend a zoning ordinance, thereby contracting away its police power. Pima Gro Systems, Inc. v. Board of Supervisors of King George County, 52 Va. Cir. 241 (2000). “An agreement made to zone or rezone for the benefit of an individual landowner is generally illegal. It is an ultra vires act bargaining away the police power. Zoning must be governed by the public interest and not by benefit to a particular landowner.” Pima Gro, supra, citing 83 Am.Jur.2d, Zoning and Planning, § 46.

Localities are enabled to enter into a voluntary agreement with a landowner that would result in a downzoning of undeveloped or underdeveloped lands in exchange for a tax credit equaling the amount of excess real estate taxes paid due to the higher zoning classification. Virginia Code § 15.2-2286(A)(11). This, of course, is not illegal contract zoning.

10-740 Socio-economic zoning

For purposes here, socio-economic zoning attempts to achieve sociological or economic objectives not related to the regulation of land on issues that are not otherwise expressly enabled. Socio-economic zoning is invalid if its effect is to favor one sociological or economic interest over another. In Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973), the Virginia Supreme Court invalidated a regulation that required certain developments having 50 or more dwelling units to build at least 15 percent of the dwelling units for low and moderate income housing. The Court stated:

The amendment, in establishing maximum rental and sale prices for 15% of the units in the development, exceeds the authority granted by the enabling act to the local governing body because it is socio-economic zoning and attempts to control the compensation for the use of land and the improvements thereon.

Of greater importance, however, is that the amendment requires the developer or owner to rent or sell 15% of the dwelling units in the development to persons of low or moderate income at rental or sale prices not fixed by a free market. Such a scheme violates the guarantee set forth in Section 11 of Article 1 of the Constitution of Virginia, 1971, that no property will be taken or damaged for public purposes without just compensation.


The Court concluded “that the legislative intent [in the state enabling legislation] 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.” DeGroff Enterprises, Inc., 214 Va. at 238, 198 S.E.2d at 602. The General Assembly has since responded by enabling localities to establish voluntary affordable housing programs in their zoning ordinances. Virginia Code §§ 15.2-2304 and 15.2-2305. Affordable housing programs that comply with Virginia Code §§ 15.2-2304 or 15.2-2305 are not unlawful socio-economic zoning.

In Board of Zoning Appeals of Fairfax County v. Columbia Pike Ltd., 213 Va. 437, 192 S.E.2d 778 (1972), the Virginia Supreme Court held that a zoning regulation requiring that persons constructing office space in a commercial high rise office building zone construct four parking spaces for each 1000 square feet of office space: (1) did not require that the parking spaces be leased only with and as part of the lease or rental of office space; and (2) did not prohibit the landlord from charging employees and tenants in the building for using or reserving the parking spaces. Thus,
the Court held that the BZA could not prohibit the landlord from leasing parking spaces separate from the lease of office space. The Court stated that the BZA had “confused the use of property with compensation for use of property. These are two entirely separate and distinct things.” The Court added that:

Under Article 8 of Chapter 11 of Title 15.1 of the Code the General Assembly has authorized local governing bodies by ordinance to control the use and development of lands within their respective jurisdictions. There is no legislation, however, which enables these governing bodies to control the compensation of land or the improvements thereon.

(italics added) *Columbia Pike, Ltd.*, 213 Va. at 438, 192 S.E.2d at 779.

10-750 **Illegitimate or personal reasons not based on zoning principles**

A zoning action may be improper when an owner has been singled out for adverse treatment based on illegitimate or personal reasons. *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989). In *Marks*, a palmist sought a conditional use permit and the city initially supported granting the permit. However, after certain local citizens displayed overt religious hostility to the presence of the palmist, the city council denied the permit. Thus, the public’s negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible grounds for a land use decision. *Marks, supra.*
Chapter 11

Conditional Zoning: Proffers

11-100 Introduction

A proffer is an offer by a landowner during the rezoning process to perform an act or donate money, a product, or services to justify the propriety of a proposed rezoning. *Robin, Zoning & Subdivision Law in Virginia, a Handbook*, 71-72 (2nd ed.). Rezoning land where the governing body accepts proffers by the owner is referred to in Virginia Code § 15.2-2296 as *conditional zoning*. Conditional zoning means the allowing of reasonable conditions (proffers) governing the use of property, where the conditions are in addition to, or the modification of, the regulations provided for in a particular zoning district. *Virginia Code § 15.2-2201*. Given the purposes of conditional zoning discussed in the following paragraph, the “modification” clause in the definition of the term in Virginia Code § 15.2-2201 is not interpreted to mean that proffers may relax otherwise applicable zoning standards. When proffers are accepted by the locality's governing body, they become part of the zoning ordinance. *Jefferson Green Unit Owners Association, Inc. v. Gwinn*, 262 Va. 449, 551 S.E.2d 339 (2001).

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<th>Ten Essential Features of Proffers</th>
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<tr>
<td>• In a proffer, the owner promises to perform an act or donate money, land, services or products designed to address an impact arising from the rezoning.</td>
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<td>• Proffers impose additional requirements and restrictions, not alternative or lesser requirements or restrictions.</td>
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<td>• Proffers must be voluntary, which means that after the locality identifies the impacts arising from the rezoning, it is up to the owner to decide whether it wants to address the impacts through proffers or risk having the rezoning denied by the governing body because impacts were not addressed; it is improper for a locality to deny a rezoning simply because the owner did not proffer something requested by the locality.</td>
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<td>• Proffers must be reasonably related to the rezoning, either as a requirement of the applicable enabling authority or under constitutional principles (see section 11-200).</td>
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<td>• Proffers must be consistent with the comprehensive plan.</td>
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<td>• Once accepted by the governing body, proffers become part of the zoning regulations applicable to the land and they run with the land until it is rezoned (there are exceptions).</td>
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<td>• Proffers must be in writing.</td>
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<td>• Proffers must be submitted prior to the public hearing by the governing body and may not be materially amended once the public hearing begins without holding another public hearing, provided that the governing body may waive the requirement for a public hearing if the amendment does not affect conditions of use or density.</td>
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<td>• Proffers must be signed by the owner(s) of the land being rezoned.</td>
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<td>• Proffers to dedicate substantial land, make substantial cash payments, to construct substantial improvements, or which specify the permitted use or density, may create vested rights in the zoning of the land.</td>
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Conditional zoning was enabled to address the inadequacy of traditional zoning methods and procedures when competing and incompatible land uses conflict. *Virginia Code § 15.2-2296*. At least in theory, conditional zoning allows land to be rezoned that might not otherwise be rezoned because the proffers protect the community in which the land is located by imposing additional regulations or conditions on the land being rezoned to address impacts. *Virginia Code § 15.2-2296; Riverview Farm Associates v. Board of Supervisors of Charles City County*, 259 Va. 419, 528 S.E.2d 99 (2000); *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999). The Attorney General has stated that conditional zoning addresses the effects of changing land use patterns within communities, and that it permits differing land uses within those communities while protecting the community as a whole. *1997 Va. Op. Atty. Gen. 66*. In short, proffers allow the impacts resulting from a rezoning to be better addressed.

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1 As of July 1, 2016, the manner and extent to which impacts may be addressed through proffers accepted in conjunction with a rezoning for a new residential development or a new residential use, including the residential portion of a mixed-use development, is governed by *Virginia Code § 15.2-2303.4*, which is addressed in section 11-500 *et seq.*
The Albemarle County Land Use Law Handbook

Kamptner/July 2019

11-200 The enabling legislation

There are three sources of enabling authority for conditional zoning:

- **Old or original conditional zoning**: Virginia Code § 15.2-2303 is the enabling authority for conditional zoning in Fairfax County, those localities surrounding it, those counties east of the Chesapeake Bay, and those high growth localities otherwise subject to Virginia Code § 15.2-2298 opting to instead act under the enabling authority of Virginia Code § 15.2-2303. Proffers under this enabling legislation may include cash contributions. Albemarle County is a high growth locality, otherwise enabled under Virginia Code § 15.2-2298, that has opted to act under Virginia Code § 15.2-2303.

- **New conditional zoning (1978)**: Virginia Code § 15.2-2297 became the enabling authority for conditional zoning in those localities not enabled under Virginia Code § 15.2-2303. Section 15.2-2297’s most notable characteristics are that cash contributions and off-site improvements are prohibited.

- **New conditional zoning for high growth localities (1989)**: Virginia Code § 15.2-2298 is the newest enabling authority, and it applies to those localities otherwise subject to Virginia Code § 15.2-2297 whose population grew by at least 5% since the next-to-latest to latest decennial census year. Section 15.2-2298 allows both cash contributions and off-site improvements.

Each of these laws has its own requirements and conditions that must be satisfied in order for a proffer to be lawfully made and accepted. The following table shows the differences among the enabling authority:

<table>
<thead>
<tr>
<th>Comparison of Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle</td>
</tr>
<tr>
<td>General Qualities</td>
</tr>
<tr>
<td>Proffers must be voluntary (see section 11-310, below)</td>
</tr>
<tr>
<td>Proffers must be reasonable conditions that are in addition to the applicable zoning regulations (see sections 6-440 and 10-540)</td>
</tr>
<tr>
<td>The rezoning itself must give rise to the need for the proffers (see section 6-440)</td>
</tr>
<tr>
<td>Proffers must have a reasonable relation to the rezoning (see section 6-440)</td>
</tr>
<tr>
<td>Proffers must be consistent with the comprehensive plan</td>
</tr>
<tr>
<td>Proffers run with the land until the property is rezoned; proffers continue if the subsequent rezoning is part of the comprehensive implementation of a new or substantially revised zoning ordinance</td>
</tr>
</tbody>
</table>
### Comparison of Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303

<table>
<thead>
<tr>
<th>Principle</th>
<th>Virginia Code § 15.2-2297</th>
<th>Virginia Code § 15.2-2298</th>
<th>Virginia Code § 15.2-2303</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proffers may not be accepted unless the locality has adopted a capital improvements program</td>
<td>Not addressed.</td>
<td>§ 15.2-2298(A)</td>
<td>Not addressed. There is no requirement that improvements be included in the capital improvements program.</td>
</tr>
<tr>
<td><strong>Procedural Issues</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proffers must be in writing and signed by all owners (see section 11-330, below)</td>
<td>§ 15.2-2297(A)</td>
<td>§ 15.2-2298(A)</td>
<td>§ 15.2-2303(A)</td>
</tr>
<tr>
<td>Proffers must be submitted before the public hearing before the governing body on the rezoning to which the proffers pertain</td>
<td>§ 15.2-2297(A)</td>
<td>§ 15.2-2298(A)</td>
<td>§ 15.2-2303(A)</td>
</tr>
<tr>
<td>Amended proffers may be accepted once the public hearing has begun if they do not materially affect the overall proposal (note that material changes may increase or reduce the requirements) (see section 11-350, below)</td>
<td>§ 15.2-2297(A)</td>
<td>§ 15.2-2298(A)</td>
<td>§ 15.2-2303(A)</td>
</tr>
<tr>
<td><strong>Specific grants and limitations</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proffers may not require the owner to create a property owners’ association that requires its members to pay an assessment to maintain public facilities owned by a public entity not otherwise provided for in Virginia Code § 15.2-2241 (the enabling authority for mandatory subdivision ordinance provisions). Facilities that are not subject to this prohibition include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Virginia Department of Transportation.</td>
<td>§ 15.2-2297(A)</td>
<td>§ 15.2-2298(A)</td>
<td>§ 15.2-2303(A)</td>
</tr>
<tr>
<td>Proffers may provide for the timing or phasing of dedications, payments, or improvements (see section 11-340, below)</td>
<td>§ 15.2-2297 (last paragraph)</td>
<td>§ 15.2-2298 (last paragraph)</td>
<td>§ 15.2-2303(E)</td>
</tr>
<tr>
<td>Reasonable conditions pertaining to the payment of cash for off-site road or off-site transportation improvements must be included in the comprehensive plan and incorporated into the capital improvements program (see section 11-400, below pertaining to cash proffers)</td>
<td>§ 15.2-2297(A) (limited only to those expressly permitted under Virginia Code § 15.2-2241)</td>
<td>§ 15.2-2298(A)</td>
<td>§ 15.2-2303(A) (within the broad scope of “reasonable conditions”)</td>
</tr>
<tr>
<td>If proffers include the dedication of land or the payment of cash, the land may not transfer and the payment of cash may not be made until the facilities for which the land is dedicated or the cash is tendered are included in the capital improvements program (see section 11-400, below pertaining to cash proffers)</td>
<td>Not addressed</td>
<td>§ 15.2-2298(A); note however, that this limitation does not prevent high growth localities from accepting proffers related to projects that are not normally included in a capital improvements program.</td>
<td>Not required. Because it is not required, localities would have more flexibility in the timing of land dedications and cash contributions.</td>
</tr>
</tbody>
</table>
### Comparison of Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303

<table>
<thead>
<tr>
<th>Principle</th>
<th>Virginia Code § 15.2-2297</th>
<th>Virginia Code § 15.2-2298</th>
<th>Virginia Code § 15.2-2303</th>
</tr>
</thead>
<tbody>
<tr>
<td>If proffers include the dedication of land or the payment of cash, the proffers shall provide for the disposition of the land or the cash if it is not used for the purpose for which it was proffered (see section 11-400, below pertaining to cash proffers)</td>
<td>Not addressed</td>
<td>§ 15.2-2298(A)</td>
<td>Not required. Because it is not required, localities would have more flexibility in how cash received for proffers is used if it cannot be used for the stated purpose. However, the spending, tracking, alternative use, and accounting requirements now imposed by Virginia Code § 15.2-2303.2 have reduced the practical distinctions between sections 15.2-2298 and 15.2-2303 on this issue.</td>
</tr>
<tr>
<td>If proffers include the dedication of land of substantial value or substantial cash payments for, or construction of substantial public improvements, certain vested rights may attach. See chapter 19.</td>
<td>§ 15.2-2297(B) (not pertaining to substantial cash payments)</td>
<td>§ 15.2-2298(B)</td>
<td>§ 15.2-2303</td>
</tr>
</tbody>
</table>

There are some other general principles that apply to proffers:

- **Proffers must be valid and consistent with state law and local ordinances**: When the governing body accepts proffers, and their terms become the terms of the rezoning, they must be valid and consistent with state law and local ordinances. *Sterrett v. Board of Supervisors of Loudoun County*, 26 Va. Cir. 83 (1991). A proffer that creates a violation of a zoning ordinance is *per se* unreasonable. *Clark v. Town of Middleburg*, 26 Va. Cir. 472 (1990).

- **Proffers may not require the locality to assume any obligations**: Proffers may not require the locality to undertake any affirmative obligations it is not otherwise required to do because they may be found to be impermissible contract zoning. For an explanation of contract zoning, see section 10-730.

- **Proffers may not include a promise not to contest their enforceability**: A promise contained in proffers not to contest their enforceability is itself unenforceable. 1989 Va. Op. Atty. Gen. 96.

A proffer that is invalid because it is beyond the permissible scope of the enabling authority may invalidate the rezoning, depending on the facts of the particular case and whether the rezoning is otherwise reasonable under the fairly debatable test. *Sterrett v. Board of Supervisors of Loudoun County*, 23 Va. Cir. 153 (1991).

### 11-300 A closer look at selected issues

This section examines several selected issues regarding proffers.

#### 11-310 Proffers must be voluntary


The requirement that proffers be voluntary does not mean that a locality is powerless to engage the applicant and its representatives in a meaningful dialogue to ensure that the applicant either addresses the identified adverse impacts through proffers or makes a conscious decision not to address those impacts through proffers.
The two cases below illustrate the nuances in dealing with the concept of voluntariness.

11-311 **Board of Supervisors of Powhatan County v. Reed’s Landing Corp.**

In *Board of Supervisors of Powhatan County v. Reed’s Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995), the developer sought to rezone approximately 233 acres from the Agricultural (A-1) district to the Residential (R-1) district. The county’s planning staff and planning commission recommended approval of the rezoning. A week after the planning commission’s consideration of the rezoning, the board of supervisors adopted proffer guidelines which established a “recommended proffer” of $2,439 per residential lot “to help defray costs of capital facilities.”

When the rezoning was first considered by the board, the applicant proffered a cash payment under protest but the board deferred action for a month. When the rezoning returned to the board for a public hearing, no member of the public spoke in opposition, but “[i]t was apparent, however, that the Board would not approve the rezoning request unless the Developer agreed to pay $2,439 per lot.” The applicant refused to contribute the county’s “recommended” cash proffer.

At the trial, the county’s director of planning and community development testified that the per lot cash proffer amount was “expected,” and that since the board had adopted its proffer guidelines, virtually no R-1 rezonings had been approved without the cash proffer. The trial court ruled that the board unlawfully conditioned approval of the rezoning upon the proffering of the cash payment.

The Virginia Supreme Court affirmed, holding that the county’s recommended cash proffer was not voluntary and that the Powhatan board of supervisors imposed an unlawful condition precedent on the developer. In sum, the Virginia Supreme Court saw that Powhatan County required the cash proffer in order for it to approve a rezoning. This *quid pro quo* for a zoning approval violated the requirement that proffers be voluntary.

11-312 **Gregory v. Board of Supervisors of Chesterfield County**

Proffer guidelines adopted by a locality do not make proffers involuntary *per se*, however, and *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999) provides a good example as to why that is so.

In *Gregory*, Chesterfield County had a written policy concerning cash proffers. The policy established a methodology for calculating the cost to the county of providing public facilities for each new residence in a proposed subdivision, including schools, roads, parks, libraries, and fire stations. In 1995, the policy provided that “residential rezoning applicants are being asked to proffer $5,083 per lot.”

The applicant applied to rezone a 30-acre parcel from “Agricultural A” to “Single-Family Residential R-12” which, if approved, would allow for a proposed 81-lot development that would result in approximately 227 new residents. The county’s planning staff estimated that this development would add approximately 47 school-age children and would generate approximately 850 vehicle trips per day, primarily on Newby’s Bridge Road. The staff concluded that some of the resulting traffic impacts would increase traffic volumes on certain nearby subdivision streets beyond acceptable levels. The staff estimated that the per-lot fiscal impact from the project would be $5,156 per lot. The applicant originally proffered $5,043 per lot, but its amended application proffered $1,500 per lot. The rezoning was otherwise consistent with the comprehensive plan.

The planning commission recommended denial of the rezoning “citing concerns regarding the impact that the rezoning would have on traffic, drainage, schools, and fire and rescue service.” At the board public hearing, the planning staff recommended that the board approve the rezoning “only if the Board determined that the County’s ‘capital needs’ would be met.” Sixteen citizens spoke in opposition to the rezoning, raising concerns about the road infrastructure and the development’s impact on schools. The board denied the rezoning and the applicant and the owners sued.

At trial, the county’s planning director testified that a rezoning applicant could proffer, in lieu of cash, the construction of road or sidewalk improvements, or other ways to address the impacts of the proposed development.
on public facilities and infrastructure. There also was evidence that, since Chesterfield County adopted its voluntary proffer policy, about 5,500 new lots had been created through rezoning approvals, and that about 51% of those lots were either approved with no cash proffer or cash proffers of less than the recommended amount.

Despite evidence that the absence of maximum cash proffers played a key factor in the board's decision to deny the rezoning, and that cash proffers were expected, the trial court found that the evidence of the development's unaddressed impacts on health, safety and welfare made the reasonableness of the board's decision fairly debatable and not arbitrary or capricious.

The Virginia Supreme Court affirmed, finding that the rezoning request was not denied solely because of the owner's failure to submit cash proffers in a particular amount. The Court found that there was evidence that the rezoning was also denied because the proposed development would adversely impact public health, safety, and welfare in the area of the proposed development – adverse impacts from the proposed rezoning that were not being addressed.

11-313 What Reed's Landing and Gregory tell us

Board of Supervisors of Powhatan County v. Reed's Landing Corp., 250 Va. 397, 463 S.E.2d 668 (1995) and Gregory v. Board of Supervisors of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (1999) instruct that rather than making a particular proffer or set of proffers the quid pro quo for obtaining a rezoning (Reed's Landing), a locality needs to identify all of the impacts resulting from the proposed rezoning and identify what needs to be done to address those impacts through proffers. These impacts need to be substantiated and documented in the record before the planning commission and the governing body. It is then up to the owner to decide whether it wants to provide proffers to address some or all of those impacts. The owner may elect not to address all of the impacts, and instead try to persuade the governing body that the impacts need not be addressed or that the proposed project has other public benefits that would justify approving the rezoning, even if some or all of the impacts go unaddressed (Gregory).

<table>
<thead>
<tr>
<th>What Does It Mean That Proffers Must Be “Voluntary”?</th>
</tr>
</thead>
<tbody>
<tr>
<td>- The locality must identify all of the impacts that could result from the rezoning so that the owner may decide which impacts it will address through proffers.</td>
</tr>
<tr>
<td>- It is up to the owner to decide whether to address the impacts that could result from the rezoning through proffers.</td>
</tr>
<tr>
<td>- If the locality denies the rezoning and the owner did not volunteer proffers to address all of the identified impacts, the decision must be based on sound zoning principles (including unmitigated impacts), and not simply on the fact that the owner did not proffer something.</td>
</tr>
<tr>
<td>- It does not mean that the locality is powerless to engage the applicant and its representatives in a meaningful dialogue to ensure that the applicant either addresses the identified adverse impacts through proffers or makes a conscious decision to not address those impacts through proffers.</td>
</tr>
</tbody>
</table>

If the proffers fail to address those impacts and the governing body denies the rezoning, the governing body’s decision must be based on the impacts of the rezoning and the fact that some or all of those impacts are not being sufficiently addressed, and any other legitimate reasons to deny a rezoning, such as the rezoning’s inconsistency with the comprehensive plan. The decision may not properly be based on the mere failure of the applicant to proffer any particular land or money.

The decision to deny a rezoning application because the owner failed to proffer to contribute the cash proffer amount recommended in a locality’s cash proffer policy, even if unlawful under state law, “does not necessarily yield an Equal Protection violation.” Sowers v. Powhatan County, 2009 WL 3359204 (4th Cir. 2009) (unpublished) (board of supervisors could differentiate this application from others where there also was significant citizen opposition, unique traffic concerns, and the applicant was a “tough negotiator” who elected to “skirt typical procedures).”

See section 9-920 for a discussion of using the comprehensive plan to establish proffer policies to assure that impacts to public facilities are addressed.

11-6
11-320  Proffers must be reasonable conditions

Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 require that proffers be reasonable conditions, and sections 15.2-2297 and 15.2-2298 also expressly require that the rezoning give rise to the need for the conditions, and that the proffers have a reasonable relation to the rezoning. Beyond Board of Supervisors of Powhatan County v. Reed's Landing Corp., 250 Va. 397, 463 S.E.2d 668 (1995) and Gregory v. Board of Supervisors of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (1999), which deal with the issue of whether the proffers in those cases were voluntary, there is little Virginia case law shedding light on what each of these provisions means. However, these provisions have parallels in the body of Takings Clause jurisprudence pertaining to exactions which requires that conditions imposed in conjunction with land use approvals: (1) have an essential nexus that is related to the impact of the proposed development; and (2) be roughly proportional to the extent of the impact. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987) (essential nexus); Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994) (rough proportionality).

The table below shows the relationship between the statutory requirements for proffers in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 and the Takings Clause principles related to exactions.

<table>
<thead>
<tr>
<th>The Relationship Between State Law Requirements for Proffers and the Takings Clause Principles Related to Exactions</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Law</td>
</tr>
<tr>
<td>Proffers must be reasonable conditions that are in addition to the applicable zoning regulations</td>
</tr>
<tr>
<td>The rezoning itself must give rise to the need for the proffers</td>
</tr>
<tr>
<td>Proffers must have a reasonable relation to the rezoning</td>
</tr>
</tbody>
</table>

Although the essential nexus and rough proportionality tests provide a helpful guide for evaluating whether any proffer satisfies State law requirements, whether a proffer is an unconstitutional exaction is primarily limited to proffers that require the applicant to dedicate real property or pay money. Koontz v. St. Johns River Water Management District, 570 U.S. 595, 133 S. Ct. 2586 (2013) (extending the principles of Nollan and Dolan to apply to conditions requiring money payments). There are many other classes of proffers that, but for the condition being imposed in conjunction with a condition of a land use approval, would not otherwise be a taking of property, e.g., proffers in which the applicant offers to phase the development of its project in conjunction with the timing of planned improvements, or proffers in which the applicant offers to satisfy development standards that exceed what is otherwise required by local ordinance, such as enhanced sediment removal from stormwater. The Court also held that the available remedy is a function of state law. Virginia Code § 15.2-2208.1 provides the state remedy.

The constitutional issue and Koontz are discussed in depth in section 6-440; see section 10-540 for a discussion of Virginia Code § 15.2-2208.1, which applies to both proffers and special use permit conditions.

11-330  The owners of the land being rezoned must sign the proffer statement

Only the owner of the property that is the subject of the rezoning may proffer conditions. Virginia Code §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A). If the proffers are not submitted by all of the owners of the land, then the governing body cannot accept them. Miller and Smith Land, Inc. v. Board of Supervisors of Loudoun County, 1989 WL 646301 (Loudoun County Cir. Ct. 1989). In the most general sense, the term owner includes any person or entity with an interest in the land. However, as applied to proffers, the term owner means “one who owns the fee and who has the right to dispose of the property” and includes “one having a possessory right to land.” Miller and Smith Land, Inc., supra. Thus, for example, a holder of a fee interest or a life estate is an owner for purposes of Virginia Code § 15.2-2298, a secured creditor is not.
Of course, an owner must have the authority to submit proffers. Covenants, restrictions imposed by creditors, and other limitations may restrict or eliminate the authority of an owner to submit proffers. Thus, a proffer statement should contain a representation that the owner has the authority to make the proffers.

Proffers do not need to be signed when they are submitted, so the governing body can hold its public hearing even though it does not have signed proffers before it. However, it cannot accept the proffers until they are signed.

**11-340 The timing or phasing of proffers; a statutory delay**

Proffers may provide for the timing or phasing of dedications, payments, or improvements. However, any proffer related to new residential or commercial development valid and outstanding as of January 1, 2011 that requires the owner or developer to incur significant expenses upon an event related to a stage or level of development (e.g., upon the issuance of the building permit for the 100th dwelling unit) is extended until July 1, 2017 or later as agreed to by the locality. *Virginia Code § 15.2-2209.1(C)*. This extension does not apply: (1) to proffered land or right-of-way dedications; (2) if the completion of the event related to the stage or level of development has occurred; or (3) to events required to occur on a specified date certain or within a specified time period.

**11-350 When proffers may be amended at the public hearing without holding another public hearing**

Proffers must be submitted prior to the public hearing before the governing body on the rezoning to which the proffers pertain. *Virginia Code §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A).*

Localities may accept amended proffers once a public hearing has begun only if the amended proffers do not materially affect the overall proposal. *Virginia Code §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A).* If the proposed amendment would materially affect the proposal, either because the amendment would remove or reduce proffered restrictions or commitments or impose additional restrictions or commitments, the amended rezoning application must be properly readvertised under Virginia Code §§ 15.2-2204 and 15.2-2285 and an additional public hearing must be held. If an amendment is not material, another public hearing is not required because Virginia Code § 15.2-2285(C) enables localities to consider comments that citizens or property owners articulate during public hearings and to exercise legislative prerogatives to respond to those comments by amending proposed proffers. *See Arogas, Inc. v. Frederick County Board of Zoning Appeals, 280 Va. 221, 698 S.E.2d 908 (2010) (applying pre-July 1, 2006 law and county ordinance).*

However, the governing body may waive the requirement for a public hearing if the amendment does not affect conditions of use or density. *Virginia Code § 15.2-2302* (not applicable to localities subject to Virginia Code § 15.2-2297).

**11-360 The governing body is not required to accept all proffers if it rezones the property**

The governing body is not required to accept every submitted proffer when it rezones land. Because valid proffers only impose additional zoning requirements on the land, it is within the governing body’s legislative prerogative to determine that the rezoning not be subject to them.

However, the rejection of certain proffers, particularly those pertaining to the intensity of the use, such as density restrictions or use prohibitions, may require that the rezoning be re-advertised under Virginia Code §§ 15.2-2204 and 15.2-2285 because the result is an intensification of the proposed use. An additional public hearing also would have to be held. *Virginia Code § 15.2-2285(C).*

**11-370 Administering and enforcing proffers**

The zoning administrator is vested with all necessary authority to administer and enforce proffers. *Virginia Code § 15.2-2299.* This authority includes issuing written orders and initiating legal actions to require compliance, and
requiring a guarantee to assure that all proffered physical improvements are constructed. Virginia Code § 15.2-2299. It also includes interpreting proffers to assure that they are being properly implemented.

If enforcement is necessary, the violation of a proffer is equivalent to the violation of a zoning ordinance, and is enforced as such. Barton v. Town of Middleburg, 27 Va. Cir. 20 (1992). The zoning administrator may bring actions in injunction, abatement or other appropriate actions (such as actions for civil penalties). Virginia Code § 15.2-2299. Perhaps the most effective and efficient enforcement tool is found in the last sentence of Virginia Code § 15.2-2299, which provides that the failure to comply with all proffers is cause to deny the issuance of any required use, occupancy or building permits, as may be appropriate.

Any person aggrieved by a decision of the zoning administrator made under Virginia Code § 15.2-2299 may petition the governing body – not the board of zoning appeals – to review the zoning administrator’s decision. Virginia Code § 15.2-2301. The petition must be filed with the zoning administrator and the clerk of the governing body within 30 days from the date of the zoning administrator’s decision. Virginia Code § 15.2-2301. The petition must specify the grounds upon which the petitioner is aggrieved. Virginia Code § 15.2-2301. The governing body’s decision may be appealed to the circuit court. Virginia Code § 15.2-2301.

If the governing body, rather than the zoning administrator, determines that an approved final subdivision plat or site plan is in compliance with the applicable proffers, the recorded final subdivision plat or the approved final site plan controls, even if the plat or plan actually conflicts with the proffers. Virginia Code § 15.2-2261.1. To the extent that such a determination by the governing body effectively amends the proffers, Virginia Code § 15.2-2261.1 provides that the notice requirements for a zoning map amendment under Virginia Code § 15.2-2204 are deemed to have been satisfied.

11-380 Tracking proffers

Virginia Code § 15.2-2300 requires that proffered rezonings be identified on a locality’s zoning map by an appropriate symbol. It also requires that the zoning administrator maintain for public inspection a conditional zoning index that provides the ordinance creating the proffers and the regulations provided for in the particular zoning district or zone. The index also must provide ready access to all proffered cash payments and expenditures disclosure reports prepared under Virginia Code § 15.2-2303.2. The index must be updated each year, no later than November 30. Virginia Code § 15.2-2300.

11-390 Subsequent amendments to proffers

In Town of Leesburg v. Long Lane Associates, 284 Va. 127, 726 S.E.2d 27 (2012), the Virginia Supreme Court held that a locality does not need to obtain the consent of a neighboring property owner to rezone a parcel that was originally part of an undivided property that was previously rezoned and subject to a single set of proffers. The Court concluded that the owner of the neighboring property has no vested right in its expectation that the neighboring property would continue to develop in accordance with the prior proffered zoning, which existed at the time the landowner purchased its property and developed it in accordance with the prior proffers. The Court also concluded that Virginia Code § 15.2-2303(A) does not require that all successors in title agree or consent to any portion of the subdivided land being thereafter rezoned.

Effective July 1, 2017, no special notice of a proposed amendment to proffers is required to be given to the owners of other parcels subject to the same existing proffers. Instead, Virginia Code § 15.2-2302(A) requires only the notice required by Virginia Code Virginia Code § 15.2-2204(B). The prior law required written notice of the application to the other owners within 10 days after receipt of the application.

If the proposed proffer amendment does not affect conditions of use or density, the governing body may waive any otherwise applicable requirement for a public hearing. Virginia Code § 15.2-2302(B). Under Virginia Code § 15.2-2302(E), the governing body may waive the written notice requirement in order to reduce, suspend, or eliminate outstanding cash proffer payments for residential construction calculated on a per-dwelling-unit or per-home basis that have been agreed to, but unpaid, by any landowner.
There are several rules pertaining to cash proffers. The reader should be aware that this area of the law is evolving and annual amendments by the General Assembly can be expected, particularly in the area of reporting and spending.

**11-410 Timely expenditure of cash payments**

Virginia Code § 15.2-2303.2(A) requires that each locality accepting a cash proffer on or after July 1, 2005, pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1 must, within 12 years after receiving full payment, begin construction or other improvements for which the cash payment was proffered. A locality that does not begin construction of the improvements for which the cash payment was proffered within 12 years after receipt of the proffered cash payment, or make other authorized alternative improvements, must pay the amount of that proffered cash payment to the Commonwealth Transportation Board for allocation to the appropriate construction program.

Localities may award contracts to entities willing to construct a more extensive improvement using the cash proffers of others as well as other available funds, upon a written determination by the governing body stating the basis for awarding one construction contract to extend the limits of the road improvement. *Virginia Code § 15.2-2303.2.*

A locality must include proffered cash payments in its capital improvements program, and include in its annual capital budget the amount of proffered cash payments projected to be used for expenditures or appropriated for capital improvements in the ensuing year. *Virginia Code § 15.2-2303.2.*

**11-420 Timing of demand for cash payment**

Virginia Code § 15.2-2303.3 prohibits localities from requiring a payment of a cash proffer prior to issuance of a building permit; however, a landowner may voluntarily agree to an earlier payment. Also, no locality may either request or accept a cash proffer whose amount is scheduled to increase annually, from the time of the proffer was accepted until tender of payment, by a percentage greater than the annual rate of inflation, as calculated by referring to the Consumer Price Index published by the United States Department of Labor, Bureau of Labor Statistics or the Marshall and Swift Building Cost Index.

Virginia Code § 15.2-2303.1:1(A) delays the collection of cash proffers for residential construction that are on a per dwelling unit or per home basis until completion of the final inspection and prior to the issuance of a certificate of occupancy for the subject property. For various reasons, collecting cash proffers at that point in the development process can create a number of problems for the locality, the home builder, and the home buyer. It is suggested that the home builder be put on notice of the cash proffer when the building permit is issued. In addition, localities must be certain that the cash proffers are collected “prior to the time of the issuance of any certificate of occupancy” because after that point, the locality arguably no longer is authorized by section 15.2-2303.1:1 to collect the cash proffer. *Board of Supervisors of James City County v. Windmill Meadows, LLC*, 752 S.E.2d 837 (2014) (in ruling that Virginia Code § 15.2-2303.1:1 applied retroactively, the Virginia Supreme Court also concluded that section 15.2-2303.1:1 was plain and unambiguous and that it was bound by the plain meaning of that statute).

Virginia Code § 15.2-2303.1:1(A) applies to proffers accepted before and after July 1, 2010, when the statute became effective. *Windmill Meadows, supra.* To encourage localities to adhere to the Attorney General’s opinion, Virginia Code § 15.2-2303.1:1(B) provides that a developer’s assertion of a right to delayed payment of cash proffers is not cause for an enforcement action under Virginia Code § 15.2-2299. Virginia Code § 15.2-2303.1:1(B) also allows the court to award reasonable attorneys’ fees, expenses, and court costs to any party successfully challenging a locality’s implementation of the statute. Virginia Code § 15.2-2303.3 prohibits a locality from requesting or accepting a proffer in which the profferor purports to waive future legal rights against the locality, and voids any such proffer accepted on or after January 1, 2012 without affecting the validity of the rezoning or any other proffers.
Applying cash payments for capital improvements for purposes other than the purpose proffered

Virginia Code § 15.2-2303.2 provides some flexibility to localities in applying cash payments received for capital improvements.

If cash payments were received for road or transportation improvements that are incorporated into the locality’s capital improvements program, Virginia Code § 15.2-2303.2(C) allows the locality to use the cash payments as its matching contribution under Virginia Code § 33. If cash payments were received for road or transportation improvements that are incorporated into the locality’s capital improvements program, Virginia Code § 15.2-2303.2(C) allows the locality to use the cash payments as its matching contribution under Virginia Code § 33. For the purposes of this statute, road improvement includes the construction of new roads or the improvement or expansion of existing roads to meet increased demand attributable to new development. A transportation improvement means any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any: (1) public mass transit system; or (2) highway, or portion or interchange thereof, including parking facilities located within a district created under Title 15.2 of the Virginia Code. The improvements include, but are not limited to, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals, and all related equipment and fixtures.

If cash payments were received for capital improvements, Virginia Code § 15.2-2303.2(C) allows the locality to use the cash payments for “alternative improvements of the same category” within the locality “in the vicinity of the improvements for which the cash payments were originally made.” This authority applies to proffers accepted under Virginia Code §§ 15.2-2298 or 15.2-2303, regardless of the date of the rezoning. Before using the cash payments for alternative improvements, the locality’s governing body must give 30 days’ notice to the party that made the cash payment or the owner, hold a public hearing, and then make the following findings: (1) the improvements for which the cash payments were proffered cannot occur in a timely manner or the functional purpose for which the cash payment was made no longer exists; (2) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (3) the alternative improvements are in the public interest.

There are two exceptions to how cash payments for capital improvements may be applied. First, Virginia Code § 15.2-2303.2(C) provides that these provisions do not apply if the proffer statement expressly prohibits the cash payment from being used for any other purpose. Merely designating the purpose for which the cash payment is to be applied does not prohibit it from being applied to other purposes in compliance with Virginia Code § 15.2-2303.2(C). Second, Virginia Code § 15.2-2303.2(D) provides that a cash payment may be used for a capital improvement to an existing facility, such as a renovation or a technology upgrade, only if it expands the capacity of the facility, and the cash payment may not be used for any operating expense of any existing facility such as ordinary maintenance or repair.

Virginia Code § 15.2-2303.4: proffers for residential developments

As of July 1, 2016, the law applicable to proffers accompanying residential rezonings was significantly revised. Virginia Code § 15.2-2303.4 imposed limitations on the scope of proffers, increased the standard by which proffers must be connected to impacts, and imposed new rules and remedies if a locality violates section 15.2-2303.4. The enactment of Virginia Code § 15.2-2303.4 was controversial; it also was neither opposed by every locality nor supported by every developer. It also appears that, since it became effective on July 1, 2016, the law has dramatically reduced the number of applications for residential rezonings.

Virginia Code § 15.2-2303.4 applies only to residential rezonings; exemptions

Virginia Code § 15.2-2303.4 applies only to rezonings for new residential development or a new residential use, including the residential portion of a mixed-use development.

Virginia Code § 15.2-2303.4(E) provides three exemptions, one of which may apply in Albemarle County. Virginia Code § 15.2-2303.4(E)(i) provides that the section does not apply within an approved small area comprehensive plan.
plan\(^2\) in which the delineated area is designated as a revitalization area\(^3\), encompasses mass transit\(^4\) as defined in Virginia Code § 33.2-100, includes mixed use development, and allows a density of at least 3.0 floor area ratio in a portion thereof.

11-520 **Virginia Code § 15.2-2303.4(A): definitions**

Virginia Code § 15.2-2303.4(A) defines a number of terms, including the following:

- **Offsite proffer**: A proffer “addressing an impact outside the boundaries of the property to be developed and shall include all cash proffers.”
- **Onsite proffer**: A proffer “addressing an impact within the boundaries of the property to be developed and shall not include any cash proffers.”
- **Public facility improvement**: A proffer may pertain only to a public facility improvement, which is an “offsite transportation improvement, a public safety facility improvement, a public school facility improvement, or an improvement to or construction of a public park.” The term includes capital improvements that expand the capacity of existing facilities, and excludes operational expenses.

11-530 **Impacts may be addressed only by proffers that are reasonable; the criteria that make a proffer reasonable or unreasonable**

The requirement that proffers be reasonable conditions has always been the law. What changed under Virginia Code § 15.2-2303.4 when it was adopted in 2016 was a new standard for reasonableness that significantly raised the standard. The 2019 amendments to Virginia Code § 15.2-2303.4 allow an applicant to elect to proceed under the traditional standards for reasonableness discussed in section 11-320. The 2019 amendments establish that signed proffers are conclusive evidence that they are reasonable and appropriate.

If an applicant does not elect to proceed under the traditional standards, then the standards established in Virginia Code § 15.2-2303.4 apply. The remainder of this section focuses on these new standards.

Virginia Code § 15.2-2303.4 provides that a proffer is unreasonable unless it is specifically attributable to an impact. For proffers addressing impacts to off-site public facilities, including cash proffers, the rezoning must create a need, or an identifiable portion of a need, for one or more public facility improvements in excess of existing public facility capacity at the time of the rezoning, and the “new residential development or new residential use applied for receives a direct and material benefit from a proffer made with respect to any such public facility improvements.” The italicized terms are not defined.

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2 Virginia Code § 15.2-2303.4 defines “small area comprehensive plan” to mean “that portion of a comprehensive plan adopted pursuant to § 15.2-2223 that is specifically applicable to a delineated area within a locality rather than the locality as a whole.” Albemarle County’s master plans satisfy this definition.

3 Under Virginia Code § 36-55.30-2, the Board of Supervisors may designate a revitalization area that it determines: (i) is blighted, deteriorated, deteriorating or, if not rehabilitated, likely to deteriorate by various reasons set out in the statute; and (ii) private enterprise and investment are not reasonably expected, without assistance, to produce the construction or rehabilitation of decent, safe and sanitary housing and supporting facilities that will meet the needs of low and moderate income persons and families in such area and will induce other persons and families to live within such area and thereby create a desirable economic mix of residents in such area.

4 Virginia Code § 33.2-100 defines “mass transit” to mean “passenger transportation by rubber-tired, rail, or other surface conveyance that provides shared ride services open to the general public on a regular and continuing basis.” “Mass transit” does not include “school buses, charter or sight-seeing services, vehicular ferry service that serves as a link in the highway network, or human service agency or other client-restricted transportation.” CAT is a mass transit system under this definition; JAUNT should also qualify as a mass transit system under this definition because its shared ride services are open to the public on a regular and continuing basis, even though it also provides specialized transportation services.
The examples provided in this section may appear to be worst-case scenarios, but they also are real possibilities under the language in Virginia Code § 15.2-2303.4.

- The phrase specifically attributable is not defined and requires a level of certitude that may not be achievable in studies. In the context it is used in Virginia Code § 15.2-2303.4, specifically attributable likely means “with exactness and precision.” Webster's Third New International Dictionary. Proffers in which the applicant proffers to do or provide any more, even 1% more, than necessary to address the impact from the rezoning may jeopardize the validity of the proffer. Put another way, the validity of any proffer that may provide any benefit to the public that lives outside of the development is jeopardized.

- The phrase in excess of existing public facility capacity prohibits a locality from addressing the incremental impacts of development if there is any existing capacity. For example, if the impact studies show that a rezoning will generate 100 elementary school-age children, and the elementary school that would serve the development has capacity for 99 children, the applicant need only address the impact from that 100th child. Existing capacity in schools may be the easiest to quantify of the four areas for which off-site and cash proffers may be accepted (the others being transportation, public safety, and parks).

- The phrase direct and material benefit is not defined and there is no guidance as to how that benefit is to be measured. Like the phrase strictly attributable, it requires a level of certitude that may not be achievable in practical application. This requirement also fails to acknowledge the lag time between the payment of a cash proffer and when the public facility for which the cash was contributed is constructed, thereby exposing the County to applications to amend proffers if, at some point in time after the development begins to be occupied, that residential development or use is not receiving a direct and material benefit at that particular time.

11-540 Off-site and cash proffers are limited to four issues

Virginia Code § 15.2-2303.4 creates two classes of proffers: on-site proffers and off-site proffers. Virginia Code § 15.2-2303.4 limits the scope of off-site proffers to addressing four areas of impacts from a rezoning: public facility improvements for transportation, schools, public safety, and parks.

Cash proffers pertaining to issues such as supporting public libraries, providing affordable housing, enhancing stormwater management, and other issues are no longer allowed for rezonings subject to Virginia Code § 15.2-2303.4.

11-550 Communications between the applicant and the locality’s representatives

The 2016 version of Virginia Code § 15.2-2303.4 imposed draconian consequences on localities and their representatives for requesting, or even suggesting an unreasonable proffer in conjunction with a rezoning application. An applicant (the landowner) challenging the denial of its rezoning application could claim that the denial was based on the locality’s representative’s mere suggestion that the applicant submit an unreasonable proffer which the applicant refused to do. That request or suggestion could be made by any representative of the locality such as a staff member, a member of the governing body, the planning commission, or any other representative, regardless of whether the request or suggestion was made to the applicant in a public meeting or in another situation. Of course, until all studies were completed, submitted, and its contents were verified for accuracy, any discussion about proffers with an applicant exposed the locality to risk.

The 2019 amendments relax these requirements. The applicant and the locality may discuss the potential impacts of the proposed residential development and on public facilities, and potential voluntary onsite or offsite proffers, that might address those impacts. Virginia Code § 15.2-2303.4(H). The verbal discussions may not be used as the basis that an unreasonable proffer or proffer condition amendment was required by the locality. Virginia Code § 15.2-2303.4(H). These amendments create a safe harbor for the parties to discuss impacts and the proffers to address them.
<table>
<thead>
<tr>
<th>Virginia Code § 15.2-2303.4</th>
<th>The Original 2016 Requirements</th>
<th>The 2019 Amendments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Virginia Code § 15.2-2303.4(B)</strong></td>
<td>No locality shall request or accept an unreasonable proffer.</td>
<td>No local governing body shall require an unreasonable proffer.</td>
</tr>
<tr>
<td><strong>Virginia Code § 15.2-2303.4(C) and (D)</strong></td>
<td>An applicant may proceed under these standards of reasonableness: A proffer is unreasonable unless it addresses an impact that is specifically attributable to the proposed residential development; and, if it is an off-site proffer (e.g., cash), it addresses an impact from the residential development that such that the existing capacity of an offsite public facility (transportation, public safety facilities, school, parks) is exceeded, and the residential development will receive a direct and material benefit from the proffer.</td>
<td>An application may elect to proceed under the 2016 standard or proceed under a standard of reasonableness based on the impact giving rise to the need for the proffer and that it be reasonably related to the impact: A proffer is reasonable if the rezoning gives rise to the need for the proffer and the proffers have a reasonable relation to the rezoning’s impacts. Signed proffers are conclusive evidence that they are reasonable and appropriate.</td>
</tr>
<tr>
<td><strong>Virginia Code § 15.2-2303.4(E)(1)</strong></td>
<td>Action against the locality alleging a violation of Virginia Code § 15.2-2303.4 must be brought within 30 days.</td>
<td>Action against the local governing body alleging a violation of Virginia Code § 15.2-2303.4 must be brought within 30 days, provided that the applicant must have objected in writing to the governing body regarding a proposed proffer prior to the governing body acting on the rezoning application.</td>
</tr>
<tr>
<td><strong>Virginia Code § 15.2-2303.4(E)(3)</strong></td>
<td>In a lawsuit, the successful applicant may be entitled to an award of reasonable attorney fees and costs and to an order remanding the matter to the governing body with a direction to approve the rezoning or proffer condition amendment without the inclusion of any unreasonable proffer.</td>
<td>In a lawsuit, the successful applicant may be entitled to an award of reasonable attorney fees and costs and to an order remanding the matter to the governing body with a direction to approve the rezoning or proffer condition amendment without the inclusion of any unreasonable proffer or to amend the proffer to bring it into compliance with Virginia Code § 15.2-2303.4.</td>
</tr>
<tr>
<td><strong>Virginia Code § 15.2-2303.4(H) (new)</strong></td>
<td>A locality is in jeopardy of violating Virginia Code § 15.2-2303.4 by suggesting an unreasonable proffer.</td>
<td>The applicant and the locality may discuss the potential impacts of the proposed residential development and on public facilities, and potential voluntary onsite or offsite proffers, that might address those impacts. The verbal discussions may not be used as the basis that an unreasonable proffer or proffer condition amendment was required by the locality. Comment: These amendments create a safe harbor for the parties to discuss impacts and the proffers to address them.</td>
</tr>
<tr>
<td>(Uncodified)</td>
<td>The law is prospective only and shall not be construed to apply to any application for rezoning filed prior to July 1, 2016, or to any application for a proffer condition amendment amending a rezoning for which the application was filed prior to that date.</td>
<td>Applications filed before July 1, 2016: The applicant may proceed under the pre-July 1, 2016 law in effect. Applications filed between July 1, 2016 and June 30, 2019: The applicant may proceed under the law as it existed during that period (i.e., the current version of Virginia Code § 15.2-2303.4). Applications filed on or after July 1, 2019: The applicant proceeds under the new law.</td>
</tr>
</tbody>
</table>
11-560  The rules and remedies if the governing body’s decision is challenged

An action against the locality’s governing body alleging a violation of Virginia Code § 15.2-2303.4 must be brought within 30 days, provided that the applicant must have objected in writing to the governing body regarding a proposed proffer prior to the governing body acting on the rezoning application. Virginia Code § 15.2-2303.4(E)(1). The italicized text was added in the 2019 amendments.

In a lawsuit, the successful applicant may be entitled to an award of reasonable attorney fees and costs and to an order remanding the matter to the governing body with a direction to approve the rezoning or proffer condition amendment without the inclusion of any unreasonable proffer or to amend the proffer to bring it into compliance with Virginia Code § 15.2-2303.4. Virginia Code § 15.2-2303.4(E)(3). The italicized text was added in the 2019 amendments.

11-600  Assisting an owner with drafting proffers

Proffers are typically drafted, at least initially, by the owner. As a result, the initial style and content of proposed proffers may vary widely. A locality’s planning staff and attorney must review and comment on the proffers and suggest revisions. For residential rezonings subject to the requirements of Virginia Code § 15.2-2303.4 (discussed in section 11-500), extra caution is advised. Following are some suggestions for assisting in writing, reviewing and revising proposed proffers.

11-610  Develop the language as though it was a zoning regulation

Because proffers have the force and effect of zoning regulations, it is vital that they be written in clear language that is easily understood:

- **State each proffer clearly**: Each proffer should be a declaratory statement, using clear and concise language as to what must be performed, when it must be performed, when it must be completed, and, if applicable, how it must be performed.

- **Write each proffer with the dignity of a zoning regulation**: A proffer becomes part of the zoning regulations applicable to the property. Therefore, it should be written with the dignity of a zoning regulation, using terminology found in the zoning ordinance.

- **Select words carefully**: The words in a proffer must be carefully selected. Insist that the word “shall” be used when something is mandatory, rather than “should” or “may.” If, for example, a proffer requires that the owner cannot proceed until the county engineer approves a plan, the proffer needs to state that “the owner shall obtain approval of the plan from the county engineer before . . .,” rather than stating that the owner “shall submit a plan.” Never use “etc.” in a proffer.

- **Consistently use the same word to refer to the same person, place or thing**: A person, place or thing always should be described or identified by the same word.

- **Use complete sentences**: Proffers should be written in complete sentences.

- **Ensure that each proffer is comprehensive**: A proffer should be written in comprehensive language that addresses the reasonably foreseeable issues that may arise from the proffer.

- **Ensure that each proffer imposes standards that are enforceable**: Every proffer must be reviewed by the zoning administrator’s office to ensure that the proffer imposes standards that are enforceable. Part of the issue of enforceability pertains to the clarity of the language used, but the other part pertains to whether the language actually imposes a standard that can be enforced. Because the zoning administrator will have the task of enforcing the proffers, be certain that she has the opportunity to provide comments as to not only the language, but the subject matter (e.g., a proffer that restricts a restaurant use to between the hours of 5:00 a.m.
and 1:00 a.m. may require a zoning inspector to be in the field between 1:00 a.m. and 5:00 a.m. if the hours of operation become an enforcement issue).

- **Be careful not to make the proffer too specific:** In providing clarity, proffers can become too specific so that they become overly restrictive. Examples of being too specific include referring to the owner by name (because proffers run with the land and referring to a specific owner may create confusion to some), providing a specific measurement for height, distance, or something similar in an absolute when you intend to establish a minimum or a maximum.

- **Use similar language for similar situations:** Language that is similar to language previously approved for a similar type of proffer should be used, if possible.

- **Be certain that the time of performance is clearly stated:** Be certain that the language clearly states when the owner must do the promised or required acts.

- **Ensure that the proffers are well-organized:** Ensure that the proffers are well-organized by having proffers that are related to one another located next to one another.

- **Be certain that referenced documents are properly identified:** References to plats or plans should identify the title, last revision, and the entity preparing the plat or plan. References to ordinances should be identified by section number and include language such as “as the section was in effect on [date of special use permit].” References to letters, memos, staff reports, and similar documents should clearly identify the recipient, the author, and the date.

- **Attach copies of referenced regulations:** If an owner desires to restrict the uses allowed to only some of those allowed in the zoning district, or to otherwise refer to a specific zoning regulation, the referenced regulation should be attached so that there is no question about the content of the referenced regulation.

**11-620 Ensure that unique proffer-related issues are addressed or avoided**

Proffers raise some unique issues since they are proposed and submitted by the owner, and are often written by the owner as well:

- **Identify the owners of the property:** Identify all of the owners of the property who will be required to sign the proffers, any peculiar ownership status (e.g., will be signing as a trustee), and obtain required documentation that the person signing on behalf of the owner is authorized to do so (e.g., by one person on behalf of another, or on behalf of a corporation, partnership or other entity). Consider including a statement that the owner has the authority to make the proffers.

- **Encourage owners to either delete or separate from their proffers those statements that do not impose additional regulations or conditions:** Owners may seek to include preambles, statements of intent and desire, restatements of what is already required by existing regulations, and other matters that are not proffers. Encourage owners to either delete this unnecessary text or to at least separate it from the proffers themselves. Statements that explain why a particular proffer is being submitted (i.e., to satisfy a provision of the comprehensive plan) may be retained.

- **Ensure that the proffers do not impose, or would not be perceived to impose, an obligation on the locality, VDOT, or any other public entity:** Proffers address impacts resulting from a rezoning and they should be drafted so as not to impose, or be perceived to impose, an obligation on the locality, VDOT, or any other public entity to do something. This problem often arises in the context of establishing the timing for performance. For example, a proffer stating that the “final site plan shall be approved by the site plan agent prior to commencing the use” could be read to mean that the director must approve the site plan. Alternative wording to address this issue would be, for example, “The applicant is required to obtain approval of the final site plan by the site plan agent prior to commencing the use.”
• Consider requiring that proffers be satisfied before the application for a needed approval is submitted. When an owner requires additional approvals in the process, such as a site plan, there may be some proffers where it is best to require that a proffer be satisfied before the owner even applies for the site plan rather than some later point in the process, such as prior to issuance of a certificate of occupancy. This suggestion does not apply to proffers requiring the payment of cash tied on a per unit (residential) basis. See Virginia Code § 15.2-2303.1:1.

• Avoid conditional proffers. Try to avoid proffers that arise only under certain circumstances and are speculative in nature (i.e., if/then scenarios, such as “if the state widens Jackson Boulevard to 8 lanes within the next 5 years, the owner will pay for the installation of a signal at the intersection of . . .”). In some cases, if/then scenarios (particularly those pertaining to matters internal to the proposed project) may be an indication that there are important issues that remain unresolved at the rezoning stage – in the example above, the proffered signal may be required as a result of the rezoning, regardless of whether the boulevard is first widened. Unless all of the possible scenarios have been completely evaluated, the governing body may be faced with considering a rezoning application that is a moving target. This issue is different from the proffer that requires the owner to do something when a specific, foreseeable event occurs (e.g., “The owner shall construct Pocket Park No. 2 as shown on the Plan before requesting the city to issue the 100th building permit for a dwelling unit within the Project.”).

• Use proffer forms or an acceptable alternative. Proffers should be submitted on a standard proffer form that states the legal prerequisites for granting and accepting proffers. The proffer form need not be used if the proposed proffers include the information contained on the proffer form.

11-630 Be certain the language makes sense

Once a proffer has been put to writing, the locality’s planning staff and attorney must make certain that it is understandable, unambiguous, and enforceable:

• Review draft proffers with a critical eye. The locality’s planning staff must ignore its insider’s understanding of the application and put itself in the position of a reader who knows nothing about the project and: (1) ask whether the proposed proffers are clear, concise, and comprehensive in a way that a future reader will easily understand; (2) drop all assumptions and preconceived notions and be critical; (3) identify the ambiguities and eliminate them; (4) identify all superfluous text and eliminate it; and (5) ask whether each proffer would make sense to somebody ten years from now.

• Have a peer review the proffers. The planning staff should ask others not directly involved with the application to review the proffers. It is important to have someone without an insider’s knowledge of the application to see if he or she can understand the proffers and identify ambiguities.

• All appropriate departments review the proffers. The planning staff must ensure that all departments that will have an interest in the proffers as well as the locality’s attorney, review and comment on the proffers. For example, if land for a public park, library, or school is proffered to be dedicated, ensure that the locality’s parks and recreation, library, and schools officials have an opportunity to review and comment on the proffers.
Chapter 12

Special Use Permits

12-100  Introduction

Under Virginia Code § 15.2-2286(A)(3), a governing body is authorized to grant special exceptions “under suitable regulations and safeguards.” Special exceptions are also known as special use permits or conditional use permits (the term special use permit is used in this chapter, except as otherwise noted), though they may not all necessarily serve the same purpose in a particular locality, as discussed in section 12-200. See Virginia Code § 15.2-2201 (definition of special exception).

A governing body may delegate the authority to grant special use permits to the BZA. Virginia Code § 15.2-2309(6). For example, a BZA could be delegated the authority to consider special use permits for off-site signs. A governing body may also withdraw that authority. Chesterfield Civic Association v. Board of Zoning Appeals, 215 Va. 399, 209 S.E.2d 925 (1974) (BZA had no power or authority to consider an application for a special use permit where, after the application was filed but before it was considered by the BZA, the county’s zoning regulations were amended to withdraw the authority of the BZA to consider special use permits and to reserve that power in the board of supervisors).

### Key Principles to Know About Special Use Permits

- Whether granted by the governing body or the BZA, special use permits are legislative in nature.
- Uses allowed by special use permit are considered to have a potentially greater impact than those allowed as a matter of right.
- Special use permits must be evaluated under reasonable standards, based on zoning principles.
- Impacts from special uses are addressed through conditions.
- Conditions must be reasonably related to the impacts to be addressed, and the extent of the conditions must be roughly proportional to the impacts.
- Decisions by a governing body granting or denying special use permits are presumed correct and reviewed under the fairly debatable standard; decisions by a BZA granting or denying special use permits are also presumed correct, but the presumption may be rebutted by showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong, was in violation of the purpose and intent of the zoning ordinance, and is not fairly debatable.

12-200  The nature of special use permits

Zoning district regulations typically delineate a number of uses that are allowed as a matter of right, and a number of uses that are allowed by special use permit. Uses allowed only by special use permit are those considered to have a potentially greater impact upon neighboring properties or the public than those uses permitted in the district as a matter of right. Board of Supervisors of Fairfax County v. Southland Corp., 224 Va. 514, 297 S.E.2d 718 (1982). The special use permit procedure, by its very nature, presupposes that a given use may be allowed in one part of a zoning district, but not in another. Bell v. City Council of City of Charlottesville, 224 Va. 490, 297 S.E.2d 810 (1982) (rejecting claim that city’s zoning ordinance violated the uniformity requirement of Virginia Code § 15.2-2282).

Although by definition special exceptions pertain to uses (Virginia Code § 15.2-2201 (definition of special exception)), it appears that the meaning of use in this context may be broader. In Board of Supervisors of Fairfax County v. Robertson, 266 Va. 525, 587 S.E.2d 570 (2003), the county’s zoning ordinance allowed “deviations” from certain setback regulations with conditions, if approved by the board of supervisors. The deviation was an alternative procedure to obtaining a variance from the BZA. The Virginia Supreme Court classified the deviation as a special exception, “analogous” to a special use permit or a conditional use permit, and analyzed it the same way as it would those types of permits. In Town of Occoquan v. Elm Street Development, Inc., 2012 Va. LEXIS 104 (2012) (unpublished), the Virginia Supreme Court characterized a special exception to disturb steep slopes as a density-related permit.
A special use permit is different from a variance. *See chapter 13.* A special use permit cannot alter the provisions of a zoning ordinance. *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation,* 277 Va. 198, 671 S.E.2d 160 (2009); *see also Board of Supervisors of Washington County v. Booher,* 232 Va. 478, 352 S.E.2d 319 (1987), discussed in the following paragraph; *Sinclair v. New Cingular Wireless,* 283 Va. 567, 727 S.E.2d 40 (2012) (though not deciding whether a county’s regulations allowing the disturbance of steep slopes was a special exception, the waiver regulations were analogous to a special exception and were legislative in nature).

A special use permit also cannot be granted by implication. *Board of Supervisors of Washington County v. Booher,* 232 Va. 478, 352 S.E.2d 319 (1987). In *Booher,* the landowner obtained a rezoning of his land in 1975 from A-2 to B-2, and informed the board of supervisors of his intention to establish an automobile graveyard and junkyard. Neither of those uses was allowed by right or by special use permit in the B-2 zoning district. In 1981, the county amended its zoning regulations requiring a conditional use permit for those uses, but only in the M-2 zoning district. The board denied Booher’s application to rezone his property to M-2 and ordered him to discontinue the use and remove the vehicles from his property. The Virginia Supreme Court concluded that the Booher’s use did not have nonconforming status, adding that “[i]t may be that the Board intended . . . to grant Booher a special exception. But an automobile graveyard was not then and is not now a permitted use in the B-2 zone. Booher did not apply for a special exception in that zone [and] the Board had no power to grant an exception by implication. . . .” *Booher,* 232 Va. at 481-482, 352 S.E.2d at 321.

Whether granted by the governing body or the BZA, special use permits are legislative in nature. *Board of Supervisors of Fairfax County v. McDonald’s Corporation,* 261 Va. 583, 544 S.E.2d 334 (2001); *Richardson v. City of Suffolk,* 252 Va. 336, 477 S.E.2d 512 (1996); *Ames v. Town of Painter,* 239 Va. 343, 389 S.E.2d 702 (1990) (when granted by a BZA); *Koebne v. Fairfax County Board of Zoning Appeals,* 62 Va. Cir. 80 (2003).

Although zoning regulations may require that an approved special use begin within a certain period of time, *Virginia Code § 15.2-2209.1(B)* extends the period of validity for special use permits outstanding on January 1, 2017 until July 1, 2020 if the special use permit is related to “new residential or commercial development.” This statutory extension pertains only to the date by which the use must be started and does not apply to any requirement that a special use be terminated or ended by a certain date or within a specified number of years (see *discussion of that issue in section 12-510*).

A locality’s special use permit regulations may allow the permit to be revoked if the use is found to be in violation with the permit’s conditions, at least on activities directly connected to the permit. *Alexandria City Council v. Mirant Potomac River, L.L.C.,* 273 Va. 448, 643 S.E.2d 203 (2007); *see Lawless v. Board of Supervisors of Chesterfield County,* 18 Va. Cir. 230 (1989). In *Mirant,* the Virginia Supreme Court held that the city could not revoke a special use permit for purported violations of certain emission control limits in its state-issued stationary source permit to operate because those purported violations were beyond those having a nexus to the purpose of the special use permit.

BZA’s have express statutory authority to revoke a special use permit under the procedures provide by statute. *Virginia Code § 15.2-2309(7).*

### 12-300 Limitations on the uses for which special use permits may be required

A special use permit may not be required within an agricultural zoning district for any production agriculture or silviculture activity (*Virginia Code § 15.2-2288*) and qualifying small scale biofuels production (*Virginia Code § 15.2-2288.01*). In the absence of a substantial impact, a special use permit also may not be required within an agricultural zoning district for *usual and customary* activities at farm wineries (*Virginia Code § 15.2-2288.3*), usual and customary activities at limited breweries (*Virginia Code § 15.2-2288.3:1*), usual and customary activities at limited distilleries (*Virginia Code § 15.2-2288.3:2*), and usual and customary activities at agricultural operations (*Virginia Code § 15.2-2288.6*). Activities as farm wineries, limited breweries, limited distilleries and agricultural operations that are not usual and customary may otherwise be subject only to *reasonable restrictions,* which may or may not warrant a special use permit.
A special use permit also may not be required for the following uses, provided that statutorily prescribed circumstances exist: (1) cluster developments (Virginia Code § 15.2-2286.1); (2) manufactured housing in agricultural zoning districts (Virginia Code § 15.2-2290(A)); (3) group homes of 8 or fewer persons or residential facilities for 8 or fewer aged, infirm or disabled persons, which must be allowed by right in zoning districts where single family residential use is allowed by right (Virginia Code § 15.2-2291); and (4) family day homes of five or fewer persons, which must be allowed by right in zoning districts where single family residential use is allowed by right (Virginia Code § 15.2-2292).

A special use permit also may not be required as a condition of approval of a subdivision plat, site plan or building permit for the development and construction of residential dwellings at the use, height and density permitted by right under a zoning ordinance. Virginia Code § 15.2-2288.1. These limitations do not prevent a locality from requiring a special use permit for: (1) a cluster or town center as an optional form of residential development at a density greater than that permitted by right, or otherwise permitted by local ordinance; (2) a use in an area designated for steep slope mountain development; (3) a use as a utility facility to serve a residential development; or (4) nonresidential uses including, but not limited to, home businesses, home occupations, day care centers, bed and breakfast inns, lodging houses, private boarding schools, and shelters established for the purpose of providing human services to the occupants thereof. Virginia Code § 15.2-2288.1.

### Summary of the Uses for Which a Locality May Not Require a Special Use Permit

- Production agriculture, silviculture and small scale biofuels production, and certain activities at farm wineries, limited breweries, limited distilleries, and agricultural operations in an agricultural zoning district.
- Cluster developments except where a cluster or town center is allowed as an optional form of residential development at a greater density than that permitted by right (see discussion of Virginia Code § 15.2-2288.1, below).
- Manufactured housing in an agricultural zoning district.
- Group homes of 8 or assisted living facilities for 8 or fewer aged, infirm or disabled persons in a zoning district where single family residential use is a by right use.
- Family day homes of 5 or fewer persons in a zoning district where single family residential use is a by right use.
- Tents serving as a temporary structure for 3 days of less used for activities such as weddings and estate sales.
- As a condition of approval of a subdivision plat, site plan or building permit for a residential development where the dwellings meet the use, height and density requirements allowed by right, with exceptions in Virginia Code § 15.2-2288.1.
- Temporary family health care structures established in compliance with Virginia Code § 15.2-2292.1.
- To address solely aesthetic considerations outside of a historic district established under Virginia Code § 15.2-2306.

In *Town of Occoquan v. Elm Street Development, Inc.*, 2012 Va. LEXIS 104 (2012) (unpublished), the developer was the contract purchaser of a 3.68 acre parcel zoned R-3, which allowed up to 16 multi-family units per acre. Approximately one-half of the parcel had slopes greater than 20% and the town regulations required a special use permit to disturb or develop on those slopes. Although staff recommended approval of the special use permit with 12 conditions, to which the developer agreed, the town council denied the permit. The developer sued. The town contended that Virginia Code § 15.2-2288.1 did not apply to the town’s steep slopes regulations and that the entire parcel was not developable by right because the by right density could be calculated only in compliance with the steep slopes regulations.

The Virginia Supreme Court rejected the town’s arguments, concluding that Virginia Code § 15.2-2288.1 “expressly prohibits a locality from requiring a special use permit as a precondition to development that is otherwise permitted under a zoning ordinance,” and that the town’s steep slopes regulations interfere “with residential development that is otherwise permitted within the zoning district.” The Court also rejected the town’s argument that the developer had no right to disturb the steep slopes in the absence of a special use permit, concluding that the town “cannot permit this development by right and simultaneously require an SUP as a condition of development on the property. . . By requiring an SUP, the Town has politicized what should be a ministerial decision . . . [T]he steep slopes SUP requirement . . . has no bearing on any density calculation in this instance.” To reach that conclusion, the Court characterized the special exception as a density-related permit which was therefore prohibited by the statute. Lastly, the Court rejected the town’s argument that the Chesapeake Bay Preservation Act gave it the power to require a special use permit.
The requirement for a special use permit also may not be based solely on aesthetic considerations. *Allstate Development Co. v. City of Chesapeake*, 12 Va. Cir. 389 (1988) (finding that requirement for special use permit for modular houses in a district, but not for stick-built houses, arose solely because the neighbors did not like the appearance of modular houses); *but see* Virginia Code § 15.2-2306, allowing localities to require architectural compatibility within districts established under that section.

12-400 Procedural requirements prior to and during a hearing on a special use permit application

A number of procedural rules apply to the conduct of a hearing on a special use permit application, but the procedures differ depending on whether the special use permit is granted by the governing body or the BZA.

12-410 Special use permits considered by the governing body

Special use permits considered by the governing body are subject to “suitable regulations and safeguards” established by the governing body. Virginia Code § 15.2-2286(3). These suitable regulations and safeguards should include the requirement that the planning commission, if its review and recommendation is required, and the governing body, take timely action. One approach is to impose the same timelines required for zoning map amendments, e.g., requiring a recommendation from the planning commission within 100 days (Virginia Code § 15.2-2285(B)) and requiring the governing body to act within 12 months. Virginia Code § 15.2-2286(A)(7).

In addition, notice must be provided as required by Virginia Code § 15.2-2204(C). See chapter 28.

12-420 Special use permits considered by the BZA

Special use permits considered by the BZA are subject to the following procedures:

- **Scheduling the hearing on the special use permit application.** The BZA must “fix a reasonable time for the hearing” on a special use permit. Virginia Code § 15.2-2312.

- **Notice of the hearing.** The BZA must “give public notice thereof as well as due notice to the parties in interest.” Virginia Code § 15.2-2312. Notice of the hearing must be provided as required by Virginia Code § 15.2-2204. Virginia Code § 15.2-2309(6).

- **At the hearing: the right to equal time for a party to present its side of the case.** The BZA must offer an equal amount of time in a hearing on the case to the applicant and the staff of the local governing body. Virginia Code § 15.2-2308(C).

- **Decision.** If the BZA decides to grant a special use permit, it may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Virginia Code § 15.2-2309(6). *See section 12-500 for a discussion of the minimal standards that must guide the decision-making process; see section 12-600 for a discussion of conditions.*

- **Time for the decision.** The decision must be made within 90 days. Virginia Code § 15.2-2312. This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the time period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

- **Required vote.** The concurring vote of a majority of the BZA’s members present and voting is necessary to grant a special use permit. Virginia Code § 15.2-2308.

- **Findings to support the decision.** Findings are not required unless they are required by the zoning ordinance. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013).
A use allowed by special use permit is permitted “only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public.” Board of Supervisors of Fairfax County v. Southland Corp., 224 Va. 514, 521, 297 S.E.2d 718, 721-722 (1982); Daniel v. Zoning Appeals Board of Greene County, 30 Va. Cir. 312 (1993). An application for a special use permit must be examined by public officials, and be guided by standards set forth in the zoning ordinance, to determine the impact the proposed use will have if carried out on the property. Southland Corp., supra.

Special use permit regulations adopted pursuant to Virginia Code § 15.2-2286(A)(3) “need not include standards concerning issuance of special use permits where local governing bodies are to exercise their legislative judgment or discretion.” Jennings v. Board of Supervisors of Northumberland County, 281 Va. 511, 520, 708 S.E.2d 841, 846 (2011), quoting Bollinger v. Board of Supervisors of Roanoke County, 217 Va. 185, 186, 227 S.E.2d 682, 683 (1976). Thus, in Jennings, the Virginia Supreme Court upheld the county’s granting of “special exception permits” “subject to such conditions as the governing body deems necessary to carry out the intent of this chapter.”

In Bollinger, the Court upheld the county’s granting of a conditional use permit for a landfill under a zoning regulation that simply stated: “The location of commercial amusement parks, airports, borrow pits and sanitary fill method garbage and refuse sites shall require a conditional use permit. These permits shall be subject to such conditions as the governing body deems necessary to carry out the intent of this chapter.” In affirming the granting of the permit, the Bollinger Court was persuaded by the thorough review conducted by the county, even though the standard for granting the special use permit was broad, stating: “it appears the Board acted only after it had the benefit of thorough studies, numerous tests, and after due deliberation on its part. These studies and tests revealed that the land is suitable for landfill purposes. The terms and conditions imposed by the Board indicate that it was well aware of the uses of surrounding land and the characteristics of the property involved.”

In Cole v. City Council of City of Waynesboro, 218 Va. 827, 832, 241 S.E.2d 765, 769 (1978), the city’s zoning regulations allowed the city council to issue special use permits “whenever public necessity and convenience, general welfare or good zoning practice justifies such special exception or use permits which may be granted by the council adopting an ordinance granting the same after considering the recommendations of the city planning and zoning commission.” In holding that a special use permit for a 151-unit apartment complex on a 3/4-acre parcel was invalid, the Virginia Supreme Court said that the above-cited standards in the ordinance were “an open invitation for a special exception to be granted without any consideration being given to certain basic principles of law applicable in the zoning field. It permits a lack of adherence by City Council to a fundamental rule that zoning regulates the use of land.” Cole, 281 Va. at 833, 241 S.E.2d at 769. The critical distinction between Jennings/Bollinger and Cole is that the standard in Cole was stated in the disjunctive – the city council could consider “public necessity and convenience, general welfare or good zoning practice.” In other words, the city council was not tied to the zoning statutes or good zoning practice when it considered a special use permit, and this rendered the city’s regulations invalid.

At bottom, all that a zoning ordinance must provide is that the governing body’s consideration of a special use permit be taken within the framework of the zoning statutes and the principles that apply to zoning. In granting a special use permit, specific findings are not required unless mandated by the zoning ordinance. Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County, 285 Va. 604, 740 S.E.2d 548 (2013) (“While a zoning ordinance must set forth standards under which applications for special exceptions are to be considered when local governing bodies delegate that legislative power, the ordinance need not do so when the local governing body has reserved the power unto itself”). Typical standards applicable to special use permits include consideration of: (1) the impacts of the special use on the character of the district; (2) the impacts of the special use on the welfare of the landowners and occupants of land in the district, see Bell v. City Council of City of Charlottesville, 224 Va. 490, 297 S.E.2d 810 (1982); and (3) consistency with the comprehensive plan. National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County, 232 Va. 89, 348 S.E.2d 248 (1986) (upholding denial of special use permit to operate crematory based on the negative impact of the proposed use on neighboring properties and inconsistency with comprehensive plan). Other factors that may be considered include: (1) the character of the property; (2) the general welfare of the public; and (3) the economic development of the community. Bell, supra. These factors are also akin to those delineated in Virginia Code §§ 15.2-2283 and 15.2-2284. See Laffoon v. Board of Zoning Appeals, 91 Va. Cir. 391 (2015) (invalidating the
board of zoning appeals’ approval of a special exception pertaining to setbacks where the board failed to make the required findings and, instead, based its decision on the fact that the city’s commission of architectural review had approved the project; the zoning ordinance required that “the board shall be satisfied” that, among other things, “the departure from the applicable yard and/or lot coverage requirements is the minimum necessary to accommodate the intended purpose of the dwelling”) (italics in original).

If specific standards are adopted, deference should be given to the governing body in determining whether the standards were considered when the action was taken. In Shenandoah Mobile Co. v. Frederick County Board of Supervisors, 83 Va. Cir. 113 (2011), the applicant challenged the board’s denial of a conditional use permit containing that the board failed to give adequate consideration to the standards in the zoning ordinance. The circuit court rejected this argument, noting that the motion maker “touched on” four of the six standards and that it knew of no requirement that each individual Board Member express the reasons for voting for or against the motion.” Shenandoah, 83 Va. Cir. at 116. The court otherwise found substantial evidence in the record to support the board’s decision. Another circuit court has held that the governing body is not required to make specific findings with respect to each and every potentially relevant clause in the comprehensive plan, nor each and every clause of the purpose and intent section of the zoning ordinance. Koehne v. Fairfax County Board of Zoning Appeals, 62 Va. Cir. 80 (2003) (county’s special use permit regulations that the proposed special use be “in harmony with the adopted comprehensive plan” and “in harmony with the general purpose and intent of the applicable zoning district regulations”). Part of that analysis will depend on the language of the zoning ordinance.

As shown in Bollinger, the courts will look at the decision maker’s analysis of the facts and how they are applied to the standards, even if the standards are broad as were in Bollinger and Jennings. Compare to Mutter v. Washington County Board of Supervisors, 29 Va. Cir. 394 (1992), where a circuit court concluded that a special use permit issued without consideration to the locality’s comprehensive plan and whose justification was devoid of any meaningful studies or analysis was unreasonable. In Mutter, the court concluded that the county’s approval of a solid waste convenience station in an environmentally sensitive location with traffic safety issues was unreasonable, arbitrary and capricious. The court noted that the board failed to consider the county’s comprehensive plan, conduct any site testing, consult with various environmental and other state agencies, and failed to even consult with the county’s landfill manager for his assessment of the suitability of the site.

Lastly, a proposed special use permit need not necessarily be granted merely because an applicant adheres to the applicable zoning regulations. County Board of Arlington County v. Bratic, 237 Va. 221, 377 S.E.2d 368 (1989). Rather, a special use is prohibited unless an applicant obtains a permit. Amoco Oil Co. v. Zoning Appeals Board of the City of Fairfax, 30 Va. Cir. 159 (1993) (upholding the denial of special use permit because a number of the applicable special use permit criteria were not met).

12-600 Impacts from special uses are addressed through conditions

If a special use permit is granted, the potential impacts are addressed through reasonable conditions. Byrum v. Board of Supervisors of Orange County, 217 Va. 37, 225 S.E.2d 369 (1976). Under Virginia law, the conditions imposed must bear a reasonable relationship to the legitimate land use concerns and problems generated by the use of the property. Capp v. Board of Supervisors of Fairfax County, 227 Va. 580, 318 S.E.2d 407 (1984). A special use permit may not be denied indirectly by approving the special use permit but imposing unreasonable and impossible conditions on its use. Byrum, supra; see also, Virginia Code § 15.2-2208.1. See section 10-540 for a discussion of Virginia Code § 15.2-2208.1, which applies to both proffers and special use permit conditions.

A BZA is authorized to “impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.” Virginia Code § 15.2-2309(6).

12-610 Conditions imposed by the governing body are to address impacts and are not voluntary

Unlike proffers that accompany a rezoning considered by the locality’s governing body, special use permit
conditions are not volunteered by the landowner and need not be developed through negotiation. Conditions may be imposed as the governing body or the BZA determines to be appropriate as “suitable regulations and safeguards” for special use permits. *Virginia Code § 15.2-2286(A)(3).* As explained by John H. Foote, Planning and Zoning, *Handbook of Local Government Law,* § 1-10.03, p. 1-61, (2015), the phrase “suitable regulations and safeguards” is “uniformly understood to mean that the locality may unilaterally impose reasonable conditions on the issuance of such permits or exceptions, in contrast to proffers that must come voluntarily from the applicant.” See also *Staples v. Prince George County,* 81 Va. Cir. 308, 320-321 (2010) (condition imposing 14-day limit stay rule on campground was upheld because there is a reasonable basis to distinguish campgrounds from sites with permanent dwellings; a “local governing body is permitted to impose involuntary conditions on the grant of a special exception”).

Special use permit conditions also may require administrative approvals by others. *Fuentes v. Board of Supervisors of Fairfax County,* 2000 Va. Cir. LEXIS 130, 2000 WL 1210446 (2000) (conditions imposed that required Health Department review and approval of a sewage treatment/disposal system and a groundwater monitoring system were not unlawful delegations of legislative authority; the board was authorized to delegate these administrative functions in a special use permit condition).

In connection with residential special use permits, if a landowner proposes affordable housing, any conditions imposed must be consistent with the objective of providing affordable housing; when imposing conditions on residential projects that specify the materials and methods of construction or specific design features, the governing body must consider the impact of the conditions upon the affordability of housing. *Virginia Code § 15.2-2286(A)(3).*

Special use permit conditions pertaining to uses involving alcoholic beverages have been the subject of both judicial review and additional legislation. In *County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 200, 559 S.E.2d 627, 628 (2002), the Virginia Supreme Court held that a condition in a special use permit stating “[n]o alcoholic beverages shall be permitted” was not preempted by the Alcoholic Beverages Control Act (see *Virginia Code § 4.1-128*) because it was a “valid zoning ordinance . . . regulat[ing] the location of an establishment selling . . . alcoholic beverages,” as permitted by the Act. Similarly, in *City of Norfolk v. Tiny House,* 222 Va. 414, 281 S.E.2d 836 (1981), the Court held that an ordinance requiring a special use permit for adult uses (such as sellers of alcohol and adult movie theaters) within 1,000 feet of one another did not violate *Virginia Code § 4.1-128.* The governing bodies of the cities of Norfolk and Richmond also are enabled under *Virginia Code § 15.2-2286(A)(3)* to impose other conditions on retail alcoholic beverage control licensees. Norfolk may impose conditions providing that the special use permit will automatically expire upon a change in the ownership, possession, management or operation of the property. Richmond may impose conditions requiring automatic review of the permit upon a change of ownership or possession of the property, or a transfer of majority control of the business, and may revoke the permit after notice and a public hearing.

One recurring issue of interest is whether a governing body may impose limitations on the life of a special use permit. BZAs have express authority to impose limitations on the life of a special use permit (*Virginia Code § 15.2-2309(6))*, local governing bodies do not have such express authority. The governing body of the City of Norfolk is enabled to impose a condition on any special use permit relating to retail alcoholic beverage control licensees which provides that the permit will automatically expire upon the passage of a specific period of time. *Virginia Code § 15.2-2286(A)(3).* No similar express authority exists for other governing bodies for general purposes, and a number of localities have accordingly concluded that they do not have implied authority to impose such a condition. Some localities conclude otherwise. Under a Dillon Rule analysis, governing bodies are enabled to grant special use permits under “suitable regulations and safeguards.” *Virginia Code § 15.2-2286(A)(3).* The General Assembly has not directed how or what those suitable regulations and safeguards must be. Therefore, if a time limitation (or the authority in the zoning ordinance to impose such a condition) is reasonable, the condition should be considered to be within a governing body’s authority. An alternative solution to this question is to obtain the agreement of the applicant for such a condition. *See Board of Supervisors of Prince William County v. Sie-Grey Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985) (subdivider may voluntarily agree to make improvements to existing access roads and will be bound to that agreement, even if the county did not have the authority to otherwise require such improvements as a condition of subdivision approval).
12-620  Conditions must be reasonably and proportionally related to the impacts resulting from the use

When a locality seeks the dedication of land or other property (such as fees) as a condition of a land use approval, such as a condition to a special use permit, 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. Koontz v. St. Johns River Water Management District, 570 U.S. 595, 133 S. Ct. 2586 (2013); Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987); Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994); see also Virginia Code § 15.2-2208.1 (creating monetary remedy for imposition of unconstitutional conditions).

If this two-pronged test is not satisfied, the locality has imposed an unconstitutional exaction. This principle applies even when the locality denies the permit because the applicant is unwilling to agree to or accept such a condition. Koontz, supra. See section 6-440 for further discussion of exactions.

12-630  Developing condition language

Special use permit conditions typically originate from the locality’s staff. Following are some suggestions for writing, reviewing, and revising proposed conditions:

•  *State each condition clearly*: Each condition should be a declaratory statement, using clear and concise language as to what must be performed, when it must be performed, when it must be completed, and, if applicable, how it must be performed.

•  *Write each condition with the dignity of a zoning regulation*: A condition becomes part of the zoning regulations applicable to the property. Therefore, it should be written with the dignity of a zoning regulation, using terminology found in the zoning ordinance.

•  *Select words carefully*: The words in a condition must be carefully selected. Use the word “shall” rather than “should” or “may.” If a condition requires that the owner cannot proceed until the county engineer approves a plan, the condition needs to state that “the owner shall obtain approval of the plan from the county engineer before . . . ,” rather than stating that the owner “shall submit a plan.” Never use “etc.” in a condition.

•  *Consistently use the same word to refer to the same person, place or thing*: A person, place or thing always should be described or identified by the same word.

•  *Use complete sentences*: Conditions should be written in complete sentences.

•  *Ensure that each condition is comprehensive*: A condition should be written in comprehensive language that addresses the reasonably foreseeable issues that may arise from the condition.

•  *Ensure that each condition imposes standards that are enforceable*: Every condition must be reviewed by the zoning administrator’s office to ensure that the condition imposes standards that are enforceable. Part of the issue of enforceability pertains to the clarity of the language used, but the other part pertains to whether the language actually imposes a standard that can be enforced. Because the zoning administrator will have the task of enforcing the conditions, be certain that the zoning administrator has the opportunity to provide comments as to not only the language, but the subject matter (e.g., a condition that restricts a restaurant use to between the hours of 5:00 a.m. and 1:00 a.m. may require a zoning inspector to be in the field between 1:00 a.m. and 5:00 a.m. if the hours of operation become an enforcement issue).

•  *Be careful not to make the condition too specific*: In providing clarity, conditions can become too specific so that they become overly restrictive. Examples of being too specific include referring to the applicant by name (because the special use permit runs with the land), providing a specific measurement for height, distance, or something similar in an absolute when you intend to establish a minimum or a maximum.
• Ensure that each condition imposes only requirements that address identified impacts: Conditions may only address impacts resulting from the use. Ensure that the conditions do not modify, waive, substitute or relax otherwise applicable zoning regulations.

• Use similar language for similar situations: The locality’s staff should propose language that is similar to language previously approved for a similar type of condition.

• Be certain that the time of performance is clearly stated: Be certain that the language clearly states when the owner must do the promised or required acts.

• Ensure that the conditions are well-organized: Ensure that the conditions are well-organized by having conditions that are related to one another located next to one another.

• Ensure that the conditions do not impose, or would not be perceived to impose, an obligation on the locality, VDOT, or any other public entity: Conditions address impacts from a special use and they should be drafted so as not to impose, or be perceived to impose, an obligation on the locality, VDOT, or any other public entity. This problem often arises in the context of establishing the timing for performance. For example, a condition stating that the “final site plan shall be approved by the site plan agent prior to commencing the use” could be read to mean that the director must approve the site plan. Alternative wording to address this issue would be, for example, “The applicant is required to obtain approval of the final site plan by the site plan agent prior to commencing the use.”

• Consider requiring that conditions be satisfied before the application for a needed approval is submitted: When a permittee requires additional approvals in the process, such as a site plan, there may be some conditions where it is best to require that a condition be satisfied before the permittee even applies for the site plan rather than some later point in the process, such as prior to issuance of a certificate of occupancy.

• Be certain that referenced documents are properly identified: References to plats or plans should identify the title, last revision, and the entity preparing the plat or plan. References to ordinances should be identified by section number and include language such as “as the section was in effect on [date of special use permit].” References to letters, memos, staff reports, and similar documents should clearly identify the recipient, the author, and the date.

12-640 Ensure that the conditions make sense

Once a condition has been put to writing, the locality’s staff must make certain that it is understandable, unambiguous, and enforceable:

• Review draft conditions with a critical eye: The locality’s planner must ignore his or her insider’s understanding of the application and put himself in the position of a reader who knows nothing about the project and: (1) ask whether the proposed conditions are clear, concise, and comprehensive in a way that a future reader will easily understand; (2) drop all assumptions and preconceived notions and be critical; (3) identify the ambiguities and eliminate them; (4) identify all superfluous text and eliminate in; and (5) ask whether each condition would make sense to somebody ten years from now.

• Have a peer review the conditions: The planner should ask others not directly involved with the application to review the conditions. It is important to have someone without an insider’s knowledge of the application to see if he or she can understand the conditions and identify ambiguities.

• All appropriate departments review the conditions: The planner must ensure that all departments and the locality’s attorney review and comment on the conditions. Because the zoning administrator will have the task of enforcing the conditions, be certain that the zoning administrator has the opportunity to provide comments as to not only the language, but the subject matter (e.g., a condition that restricts a restaurant use to between the
hours of 5:00 a.m. and 1:00 a.m. may require a zoning inspector to be in the field between 1:00 a.m. and 5:00 a.m. if the hours of operation become an enforcement issue).

- **Attach copies of referenced regulations:** Zoning regulations referenced in a condition should be attached so that there is no question about the identified regulation.

### 12-700 Consideration of a special use permit application; reasonable and unreasonable grounds on which to base a decision

A decision on an application for a special use permit is a legislative act and, as such, the governing body or the BZA has wide latitude in making a decision. The cases discussed below discuss reasonable and unreasonable grounds on which to base a decision.

#### 12-710 Reasonable grounds to deny a special use permit

The decision to deny a special use permit is reasonable if the landowner fails to meet all of the requirements of the zoning ordinance for the granting of a permit. *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990), discussed below. Adverse impacts on the character of the neighborhood resulting from a proposed use are a common reason to deny a special use permit. *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989), discussed below. Even if the landowner satisfies all of the technical requirements for the issuance of the special use permit, the decision-making body nonetheless retains discretion to approve or deny the permit. *Bratic*, supra. A special use permit also may be denied because the proposed use is inconsistent with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986). The decision-maker also should consider the factors delineated in Virginia Code § 15.2-2284.

In *Board of Supervisors of Rockingham County v. Stickle*, 263 Va. 1, 556 S.E.2d 748 (2002), the board of supervisors denied a special use permit that would have allowed the applicant to raise and release game birds on his farm. The board was concerned about the risk posed by these birds carrying contagious diseases and transmitting them to poultry. In what boiled down to a battle of conflicting expert witnesses, the Virginia Supreme Court held that the board’s denial of the special use permit was proper because its evidence demonstrated a “significant risk” to poultry from the release of pen-raised game birds, and that this evidence was amply sufficient to make that issue fairly debatable.

In *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), the board of supervisors denied a special exception that would have allowed the applicant to construct three houses within a 200-foot setback on his property. The applicant was required to submit a study addressing projected noise levels or projected traffic. The purpose for the study was to identify impacts and how to address them. The applicant’s acoustical engineer based his conclusions on a noise study performed in 1997, but the study failed to address projected (future) noise levels. As a result, the applicant’s proposed conditions failed to include measures to reduce exterior noise on the property. The county’s acoustical engineer analyzed future noise levels and concluded that on some parts of the applicant’s property, future noise levels would exceed those provided in the comprehensive plan by 2010. Not surprisingly, the Virginia Supreme Court found sufficient evidence of reasonableness to make the board’s denial of the special use permit fairly debatable.

### Five Reasonable Grounds to Deny a Special Use Permit

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<thead>
<tr>
<th>Reasonable Grounds to Deny a Special Use Permit</th>
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<tbody>
<tr>
<td>• The landowner fails to meet all of the requirements for the granting of the permit; even if all of the requirements satisfied, the decision-maker retains authority to deny the permit if sound zoning principles justify the decision.</td>
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<tr>
<td>• The proposed use is inconsistent with the comprehensive plan.</td>
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<td>• The proposed use would have adverse impacts on the character of the neighborhood.</td>
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<td>• The proposed use would have adverse impacts on roads or create a hazardous traffic situation.</td>
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<td>• The proposed use would have an adverse impact on the abutting property.</td>
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In *Cowardin*, one of the county’s prerequisites to obtaining a special use permit for two boathouses was the
issuance of a certificate of occupancy for the structures. Since the certificates had not been issued, the Virginia Supreme Court concluded that the board had established a reasonable basis to justify its denial of the permit.

In Bratic, the landowner claimed that he had satisfied all of the technical requirements for the granting of a special use permit to allow a two-family dwelling on his property and, therefore, the county board could not deny his application. The Virginia Supreme Court rejected this argument, stating that a governing body “is not stripped of all discretion in the issuance of a use permit merely upon a showing that the technical requirements of a zoning ordinance have been met.” Bratic, 237 Va. at 226, 377 S.E.2d at 370 (1989). In reaching that decision, the Court emphasized the legislative nature of special use permits. The Court found that even if the county's technical requirements were satisfied, the board's denial was supported by probative evidence that the area in question in the interior of a neighborhood was predominantly single family, though there was a mix of single family, two-family, triplexes, and even commercial, on the edge. The board's evidence also explained that the area in question was “fragile,” meaning that it was subject to change, because of requests for two-family dwellings.

In CAH Holdings LLC v. City Council of the City of Chesapeake, 89 Va. Cir. 505 (2014), the trial court upheld the city council's denial of a conditional use permit for a car wash even though the city’s planning staff and planning commission recommended approval, and the applicant’s noise expert stated that the car wash could comply with the city’s noise regulations. The trial court held that the city council based its decision on the conclusion that the proposed use was incompatible with the nearby residential neighborhoods.

In Gittins v. Board of Zoning Appeals, 55 Va. Cir. 495 (2000), a neighbor’s testimony that a proposed playground structure was an “eyesore” that detracted from the value of her property, and that a realtor had told her that the existence of the structure would affect the marketability of her home, was sufficient for the circuit court to sustain the BZA's denial of a special use permit. In order to grant the permit, the BZA would have had to find that the structure would have had no detrimental impact on other properties in the immediate vicinity.

In In re Hurley, 2001 Va. Cir. LEXIS 64, 2001 WL 543793 (2001), the circuit court held that the BZA properly denied the applicants’ special use permit for a home business on the ground that the proposed use would be disruptive to a low density residential neighborhood. The home business was a commercial label-printing business with six employees that produced between 100,000 and 500,000 mailing labels per day on 30 computers. The court held that the BZA properly determined that the home business did not meet the requirements for a special use permit, including the requirement that the use not “constitute sufficient non-residential activity as might modify or disrupt the predominantly residential character of the area.”

Adverse impacts on roads resulting from the proposed use also may be a reasonable basis to deny a special use permit. In Freeland Orchard Co. v. Warren County, 61 Va. Cir. 548 (2001), the circuit court upheld the board of supervisors’ denial of a special use permit. The circuit court held that the fact that the applicant obtained VDOT approval of its entrances onto a public road did not preclude the board from exercising its legislative judgment in determining that the proposed use of the road would be “hazardous or in conflict with the existing and anticipated traffic in the area,” one of its criteria for evaluating special use permits. The court noted that the board received extensive public input at the public hearings. Similarly, in Heater v. Warren County Board of Supervisors, 59 Va. Cir. 487 (1995), the circuit court upheld the board of supervisors’ denial of a special use permit for a small subdivision in an agricultural zoning district on the ground that the proposed use would be hazardous or in conflict with the existing and anticipated traffic in the area. The fact that the applicant had obtained VDOT approval for the proposed entrances onto a public street because they met the minimum standards for sight distance did not preclude the board from exercising its legislative judgment.

12-720 Unreasonable grounds to deny a special use permit

The denial of a special use permit will be reversed if the governing body or BZA ignores its standards and then fails to present any evidence to justify its decision. In Daniel v. Zoning Appeals Board of Greene County, 30 Va. Cir. 312 (1993), the circuit court reversed the BZA’s denial of a special use permit for a mobile home park where the applicant produced evidence that the county’s applicable standards were satisfied and the county presented virtually no evidence and failed to demonstrate that the BZA’s decision was consistent with the applicable standards.
Apparently, the only “evidence” to support the BZA’s decision was the opposition of the citizens, but the court said that although the opponents “may be justified in their fears, . . . angry complaints and vague concerns cannot, standing alone, be enough. The [BZA] must be able to point to some evidence of its own to confront [the applicant’s] uncontroverted presentation.”

The denial of a special use permit is arbitrary if the decision is not related to any zoning interest, but is instead motivated principally by the heavy opposition of neighbors expressing concerns not related to any zoning interest. See, e.g., Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989) (where city council denied permit to allow palmistry and fortune telling solely to placate neighborhood opposition, which was based on religious and moral grounds, rather than zoning grounds, its decision was arbitrary).

12-730 The claim of discrimination based on prior approvals

If it is shown that the 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, 544 S.E.2d 334 (2001). However, the Virginia Supreme Court has rarely found a rational basis to be lacking. Because special use permits are evaluated on a case-by-case basis and the facts in each case are unique, the bar for a party challenging a decision to establish that a decision lacks a rational basis is high. See section 6-300 for a discussion of the equal protection clause.

In EMAC, LLC v. County of Hanover, 291 Va. 13, 781 S.E.2d 181 (2016), EMAC, the owner of land that would be part of a proposed development, challenged the board of supervisors’ denial of the extension of a conditional use permit for a sign along Interstate 95 at the southern end of a proposed outlet mall on its property, but extended the portion of the same conditional use permit for a sign on a separate parcel owned by another developer (Northlake) at the northern end of the proposed outlet mall. EMAC claimed that the denial was discriminatory. The Virginia Supreme Court rejected EMAC’s claims because EMAC and Northlake were not similarly situated since: (1) Northlake was an applicant for the conditional use permit but EMAC was not, even though EMAC was a landowner on which one of the signs would be located; (2) the county code required that an application for a conditional use permit include permission from the owner to the county to allow county representatives to enter its land to inspect, which EMAC, not being the applicant, never granted and, as a result, the conditional use permit was void ab initio as to the southern sign that was to be on EMAC’s property; and (3) unlike Northlake, EMAC did not have an agreement with the outlet mall developer to operate the sign on its property.

In McDonald’s, the restaurant sought a special use permit to allow a drive-through window; the board 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 County of Lancaster v. Cowardin, 239 Va. 522, 391 S.E.2d 267 (1990), the board denied special use permits for two boathouses. One of the landowners claimed that the denial of his permit was discriminatory because the board had approved a permit for a boathouse for a neighbor several months earlier. The Virginia Supreme Court rejected this argument, noting that a “claim of discrimination cannot prevail if there is a rational basis for the action alleged to be discriminatory.” The Court found a rational basis for the board’s decision, stating that the board could properly consider the effect of boathouses on local waters and distinguish the landowner’s request from that of his neighbors because the neighbor’s boathouse was on a different body of water and that there were no boathouses on the body of water that this landowner sought to establish his boathouse.

In County Board of Arlington County v. Bratic, 237 Va. 221, 377 S.E.2d 368 (1989), the board denied a special use permit to establish a two-family dwelling. The landowner claimed that the denial of the permit was discriminatory
because the governing body had previously granted permits for two-family dwellings in situations “similar” to the landowner’s case. The Virginia Supreme Court rejected this argument, first noting that a claim of unlawful discrimination cannot prevail if there is a rational basis for the decision and finding a rational basis in that case in the board’s “effort to preserve the single-family character of the interior of the Neighborhood.”

In Hopkins v. Council of the City of Norfolk, 2014 WL 8187041, the petitioner challenged the city council’s decision denying his application for a special exception that would have allowed him to re-establish an apartment use for his 8-unit building that had, over the years, become nonconforming. If allowed by special exception, the petitioner’s building would be subject to new development standards. Although the city council had recently approved two special exceptions for other nonconforming apartment buildings, the circuit court concluded that the city council’s denial of the special exception in this case was fairly debatable and not discriminatory. The key distinction between the petitioner’s application and those of the two special exceptions that were approved was that the two special exceptions approved reduced the density otherwise allowed, where the petitioner’s application would not have reduced the density.

12-740  Reasonable grounds to approve a special use permit

A review of the Virginia case law reveals that very few approved special use permits have been challenged. In Campbell v. Fairfax County Zoning Appeals Board, 41 Va. Cir. 155 (1996), one of the requirements at issue for a special use permit to allow a club to establish a swimming pool and increase its size and boat slips was whether the club’s membership was “limited to residents of nearby residential areas.” Both the objecting neighbors and the county presented evidence of the makeup of the club’s membership, and the court concluded that because there was no established definition of “nearby residential areas,” the meaning of the term was fairly debatable and the BZA’s approval of the special use permit was upheld.

12-750  Unreasonable grounds to approve a special use permit

Of course, a governing body cannot approve a special use permit if the underlying zoning district regulations do not authorize the proposed use.

In Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation, 277 Va. 198, 671 S.E.2d 160 (2009), the board granted a special use permit for a condominium development and, under the zoning ordinance, “Condominium-type ownership (VA Code)” was allowed by special use permit. The zoning administrator disapproved the site plan because the landowner proposed apartment buildings, a prohibited use in the zoning district. The BZA affirmed. The landowner argued that the special use permit for the “condominium” use referred to multiple unit structures such as apartment buildings. The Court analyzed the district regulations and rejected the landowner’s argument, finding that the purpose of the zoning district was to limit residential density and that various prohibited classifications, which included apartment buildings, referred to the physical structure of buildings. By contrast, the special use that allowed “Condominium-type ownership (VA Code)” applied to the legal form of land tenure to be adopted. Thus, the Court concluded that the board of supervisors could not have granted a special use permit that would allow apartment buildings, stating: “Although the board of supervisors might have amended the zoning ordinance after following the proper procedure, it was not at liberty to disregard it. Acts of a local governing body that are in conflict with its own ordinances exceed its statutory authority and are void and of no effect. Thus, the County’s granting of a special use permit was not effective to alter the provisions of the zoning ordinance.” Northampton, 277 Va. at 203, 671 S.E.2d at 163. In other words, the county’s and the BZA’s interpretation of the zoning ordinance was correct – the special use permit granted by the board of supervisors allowed “Condominium-type ownership (VA Code),” not apartment buildings, because the board did not have the authority under its own regulations to grant a special use permit for apartment buildings.

In Bennett v. Nelson County Board of Supervisors, 75 Va. Cir. 474 (2004), the board approved a conditional use permit for a vegetative rubbish recycling facility to allow the grinding of stumps by a stump-grinding machine on property in an agricultural zoning district. The staff report noted that the proposed use was contrary to the comprehensive plan and that it was “an industrial use and is not permitted by right or by a conditional/special use permit” in the district. Nonetheless, the board granted the permit. Not surprisingly, the court found that the board’s action was
invalid, explaining that not only was the use not allowed by permit, but also that the use would create noise, smoke, particulate matter, and the possibility of spontaneous combustion that was incompatible with the surrounding residential and business properties, and that the proposed industrial use in an agricultural district was surround be single-family residential properties, multi-family residential properties, businesses and a resort. The court concluded by stating that “[r]easonable minds cannot differ that this is inappropriate.”

In Laffoon v. Board of Zoning Appeals, 91 Va. Cir. 391 (2015), the trial court invalidated the BZA’s approval of a special exception pertaining to setbacks because the board failed to make the required findings. The zoning ordinance required that “the departure from the applicable yard and/or lot coverage requirements is the minimum necessary to accommodate the intended purpose of the dwelling”) (italics in original). Rather than adhere to the standard in the zoning ordinance, the BZA based its decision on the fact that the city’s commission of architectural review had approved the project.

12-800 Appeals of decisions to the circuit court

Decisions to grant or deny a special use permit may be appealed to the circuit court.

12-810 Timeliness, standing, and compliance with applicable zoning regulations

A person aggrieved by a decision of the governing body may appeal the decision to the circuit court within 30 days. Virginia Code § 15.2-2285(F). A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA’s decision to the circuit court by filing a petition for writ of certiorari within 30 days. Virginia Code § 15.2-2314.

Persons challenging a decision as a person aggrieved must allege that they are aggrieved within the meaning of the Virginia Supreme Court’s decision in Friends of the Rappahannock v. Caroline County, 286 Va. 38, 743 S.E.2d 142 (2013).

Once timeliness and standing are addressed, the next issue is whether the decision was made in compliance with the applicable zoning regulations. If the decision was made in violation of the zoning regulations (e.g., there was an express prerequisite for eligibility to obtain the permit, such as having a specific pre-existing underlying zoning designation), the action will be found to be arbitrary and capricious and not fairly debatable, thereby rendering the decision void and of no effect. Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County, 285 Va. 604, 740 S.E.2d 548 (2013), quoting Renkey v. County Board of Arlington County, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006).

12-820 Evaluating a special use permit decision under the fairly debatable test

If it is shown that the decision was made in compliance with the applicable zoning regulations, the decision to grant or deny a special use permit is valid if the decision is reasonable, i.e., whether there is any evidence in the record sufficiently probative to make a fairly debatable issue of the decision to approve or deny a special use permit. Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County, 285 Va. 604, 740 S.E.2d 548 (2013) (upholding approval of a special exception for a transit authority bus maintenance facility even though, among other arguments, the applicant failed to submit a list of hazardous or toxic substances as required by the county’s application requirements; the zoning regulations did not require the board to consider hazardous or toxic substances when considering a special exception); Board of Supervisors of Rockingham County v. Stickley, 263 Va. 1, 556 S.E.2d 748 (2002) (upholding denial of special use permit), followed in Board of Supervisors of Fairfax County v. Robertson, 266 Va. 525, 587 S.E.2d 570 (2003) (upholding denial of special exception); CAH Holdings LLC v. City Council of the City of Chesapeake, 89 Va. Cir. 389 (2014) (upholding denial of conditional use permit for a car wash even though the city’s planning staff and planning commission recommended approval, and the applicant’s noise expert stated that the car wash could comply with the city’s noise regulations, where the city council based its decision on the conclusion that the proposed use was incompatible with the nearby residential neighborhoods). This standard applies even if an applicant has produced evidence that a denial was unreasonable. Robertson, supra.
As applied to a denied special use permit, the courts will assume that the request for the special use permit is an appropriate use of the property and that the denial of the application is probative evidence of unreasonableness. Board of Supervisors of Fairfax County v. Robertson, 266 Va. 525, 587 S.E.2d 570 (2003); County of Lancaster v. Cowardin, 239 Va. 522, 391 S.E.2d 267 (1990); County Board of Arlington County v. Bratic, 237 Va. 221, 377 S.E.2d 368 (1989). At that point, “the dispositive inquiry is whether the [locality] produced sufficient evidence of reasonableness” to make the governing body’s denial of the permit fairly debatable. Robertson, 266 Va. at 533-534, 587 S.E.2d at 576; Cowardin, supra; Bratic, supra.

The fairly debatable test should be relatively easy to satisfy since the determination is not whether the applicant or the locality had more evidence supporting its position, but simply whether the locality’s decision was based on probative evidence. It is critical, therefore, that the legislative record contain evidence supporting the decision, and that the decision be based on probative evidence rather than opinion, fears, desires, speculation or conjecture.
Chapter 13

Variances

13-100 Introduction

By statute, a variance is a “reasonable deviation from” certain provisions of a locality’s zoning ordinance. *Virginia Code § 15.2-2201; Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). Specifically, a *variance* is defined as:

[A] reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

*Virginia Code § 15.2-2201.*

The 2015 amendments to the definition replaced the phrase “unnecessary or unreasonable hardship to the property owner” with “unreasonably restrict the utilization of the property” It is an open question whether the amended definition effects a material change in how variances are reviewed by BZA’s and by the courts. The concepts of regulations that unreasonably restrict utilization of the property or cause hardship remain in the standards for granting variances in *Virginia Code § 15.2-2309(2).* Moreover, an *unreasonable* restriction on the utilization of property, even if it is not joined with the concept of hardship to the owner, remains a very high bar to satisfy.

A variance “allows a property owner to do what is otherwise not allowed under the ordinance.” *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982); *Sinclair v. New Cingular Wireless*, 283 Va. 567, 727 S.E.2d 40 (2012) (county’s regulations which allowed the disturbance of steep slopes only if a “waiver” was obtained after county review to ensure that the disturbance would not create adverse effects was not a variance; therefore, the criteria for variances in *Virginia Code § 15.2-2309(2)* did not apply); *Horner v. Board of Zoning Appeals of Fairfax County*, 74 Va. Cir. 124 (2007) (variance is not required to expand a structure that is located within the otherwise applicable setbacks under a previously approved variance where the proposed expansion would not be located in the setbacks to which the variance pertained). As the *Bell* court explained, variances allow someone to do something “in violation of the ordinance.”

In contrast, special use permits (which include special exceptions and conditional use permits) do not allow a landowner to do something in violation of the zoning regulations but, instead, allow the property to be developed in a way consistent with those regulations, but only with approval of the locality after specified conditions are met. Therefore, a locality desiring to allow for flexibility in its zoning regulations, or in how they are administered, may do so by expanding the use of special use permits.

13-200 The nature of variances

Because a facially valid zoning ordinance may prove to be unconstitutional in its application to a particular property, some device is needed to protect landowners’ rights without destroying the viability of zoning ordinances. *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980). The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an “escape hatch,” or “escape valve.” *Packer, supra.* The variance process furnishes “elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner.” *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 767, 222 S.E.2d 570, 573 (1976).
Thus, a variance is simply an authorized deviation from certain zoning requirements because of the special characteristics of a property (Snow v. Amherst County Board of Zoning Appeals, 248 Va. 404, 448 S.E.2d 606 (1994)) or because the ordinance imposes an unreasonable restriction. A variance ensures that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. Hendrix v. Board of Zoning Appeals of City of Virginia Beach, 222 Va. 57, 278 S.E.2d 814 (1981).

### Five Key Principles to Know About Variances

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<td><strong>•</strong></td>
<td>Variances should be granted only to achieve parity with other properties in the district; they should not be granted to allow the applicant to do what others in the zoning district may not do without a variance.</td>
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<td><strong>•</strong></td>
<td>Variances should be sparingly granted; a high number of variance applications on a recurring issue indicates problems with the zoning ordinance, and the solution is to amend the regulations, not to keep considering variance applications.</td>
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<td><strong>•</strong></td>
<td>Variances run with the land, and the consequences of a BZA’s decision to grant a variance may last for years.</td>
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<td><strong>•</strong></td>
<td>Each variance must be considered on its own merits, not on prior variance decisions by the BZA; thus, although a BZA should be consistent in its decision-making within the limits of Virginia Code § 15.2-2309(2), it is not compelled to grant a variance because a prior BZA granted a similar variance in the same neighborhood.</td>
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<td><strong>•</strong></td>
<td>If there is an existing reasonable use of the property, neither an unreasonable restriction nor a hardship exists and a variance may not be lawfully granted; applications for variances to expand an existing structure, or to add more structures to a parcel, should fail if the use of the existing structure is reasonable.</td>
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The grant of a variance cannot confer upon a landowner greater rights than could be afforded by the enactment of a zoning ordinance. Snow, supra. It also does not relieve the owner from having to comply with other aspects of the zoning ordinance that were not directly addressed by the approved variance. Goyonaga v. Board of Zoning Appeals for the City of Falls Church, 275 Va. 232, 657 S.E.2d 153 (2008) (grant of variance did not immunize the owners from the city’s regulation that a nonconforming structure cannot be removed or demolished or damaged). In addition, a variance may not allow a change in use, which only may be accomplished by a rezoning or a conditional zoning. Virginia Code § 15.2-2201; Tolman v. Richmond Board of Zoning Appeals, 46 Va. Cir. 359 (1998) (where the variance allowed the expansion of a nonconforming property from three to seven apartments, the variance allowed an increase in the intensity and the number of dwellings but did not allow a change in use). Given the nature and purpose of variances, they should be granted only to elevate a property to parity with similarly situated properties, rather than to confer a special privilege over other property in the district.

Special rules apply to variances related to condominium conversions with nonconformities and variance applicants who are disabled or for facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act, and these are addressed in section 13-800.

### 13-300 The authority of a BZA to consider applications for variances

One of the powers expressly conferred on BZAs is the power to hear and decide applications for variances. Virginia Code § 15.2-2309(2).

When considering an application for a variance, a BZA is acting in an administrative capacity and, under applicable constitutional principles, it is empowered to act only in accordance with the standards prescribed by Virginia Code § 15.2-2309(2). Croghan v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004); Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals, 70 Va. Cir. 91 (2005).

### 13-400 The application

Applications for variances may be made by any property owner, tenant, government official, department, board or bureau. Virginia Code § 15.2-2310. Applications are made to the zoning administrator. Virginia Code § 15.2-2310. Before a variance application is considered by the BZA, the application and accompanying maps, plans or other information must be transmitted to the secretary of the BZA, who must place the matter on the docket. Virginia Code § 15.2-2310.
13-500 Procedural requirements prior to and during a hearing on a variance application

A number of procedural rules apply to the conduct of a hearing on a variance application:

• **Scheduling the hearing on the variance application.** The BZA must “fix a reasonable time for the hearing” on a variance. *Virginia Code § 15.2-2312.*

• **Notice of the hearing.** The BZA must “give public notice thereof as well as due notice to the parties in interest.” *Virginia Code § 15.2-2312.* Notice of the hearing must be provided as required in *Virginia Code § 15.2-2204.* *Virginia Code § 15.2-2310.*

• **Prior to the hearing; contact by parties with BZA members.** The non-legal staff of the governing body, as well as the applicant, landowner, or its agent or attorney, may have *ex parte* communications with a member of the BZA prior to the hearing but may not discuss the facts or law relative to the variance. If any *ex parte* discussion of facts or law in fact occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited *ex parte* communications do not include discussions that are part of a public meeting or discussions prior to a public meeting to which the applicant, landowner or his agent or attorney are all invited. The non-legal staff of the governing body is “any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542.” *Virginia Code § 15.2-2308.1(A) and (C).* The legal staff of a governing body is not similarly prohibited from having *ex parte* communications with BZA members.

• **Prior to the hearing; sharing of locality-produced information.** Any materials relating to a variance, including a staff recommendation or report furnished to a BZA member must be available without cost to the applicant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the applicant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (*Virginia Code § 2.2-3700, et seq.*). *Virginia Code § 15.2-2308.1(B).*

• **At the hearing; the right to equal time for a party to present its side of the case.** The BZA must offer an equal amount of time in a hearing on the case to the applicant and the staff of the local governing body. *Virginia Code § 15.2-2308(C).*

• **At the hearing; the burden of proof is on the applicant.** The applicant has the burden of proof to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in *Virginia Code § 15.2-2201* and the criteria in *Virginia Code § 15.2-2309(2).* *Virginia Code § 15.2-2309(2).*

• **Decision.** The BZA must grant a variance if the evidence shows that the strict application of the terms of the zoning ordinance would “unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance” and “(i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application.” *Virginia Code § 15.2-2309(2).* See section 13-600 for further discussion.
• **Time for the decision.** The decision must be made within 90 days. *Virginia Code § 15.2-2312.* This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the time period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

• **Required vote.** The concurring vote of a majority of the BZA’s membership is necessary to grant a variance. *Virginia Code § 15.2-2312.* This means that a five-member BZA may grant a variance only if at least three members vote for granting the variance. Thus, if only three members of the BZA are present for the vote, all three must vote in favor of granting the variance.

• **Findings to support the decision.** In order to facilitate judicial review, the BZA is required to make findings that reasonably articulate the basis for its decision. *See Packer v. Hornsby*, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980) (adding that if the BZA does not, “the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal”). There is no minimum standard to which a BZA must adhere in making findings of fact. At bottom, the BZA must ensure that it has created a record that addresses the findings so that the circuit court can properly adjudicate the issues on appeal. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) (“In fact, the verbatim transcript contains numerous findings of fact in support of the BZA’s decision”). The findings must address the elements that must be established by the applicant in order for the BZA to grant a variance.

### 13-600 Elements to establish a right to a variance

The criteria that the BZA must consider when reviewing an application for a variance are referenced in section 13-500 (under “Decision”). These criteria became effective on July 1, 2015 and are, in many respects, reformulations of *Virginia Code § 15.2-2309(2)*’s evidentiary and finding requirements for variances that existed prior to that date.

Section 13-1100 provides summaries of variance cases decided by Virginia’s courts under the prior statutory criteria. Although the new criteria are similar, not all of them are identical. Therefore, while it is anticipated that many of the cases cited in this outline provide valuable guidance as to how variance applications should be evaluated, the revised criteria nonetheless may lead to different results. Because of the change in the criteria, the denial of a variance under the prior law certainly does not preclude an applicant from seeking a variance under the current law. *See Chilton-Belloni v. Angle ex rel. City of Staunton*, 294 Va. 328, 806 S.E.2d 129 (2017).

The reader may be confident that the overwhelming majority of variance decisions will come down to the question of whether an *unreasonable restriction* or a *hardship* exists. Moreover, many years’ experience and Virginia case law confirm that very few variance applications actually pertain to circumstances involving truly unreasonable restrictions or hardship conditions.

**13-610 The strict application of the terms of the zoning ordinance would *unreasonably restrict the utilization of the property* or that granting of the variance would *alleviate a hardship* due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance**

The evidence must show “that the strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance.” *Virginia Code § 15.2-2309(2)(C)(2).*

**13-611 Unreasonable restrictions or hardships**

The key element that must be established in order for a variance to be granted is whether there is an *unreasonable restriction* or a *hardship* arising from a physical condition of the property. Of those two criteria, the *hardship* that may arise if a variance is not granted has been by far the more commonly analyzed criterion. That may change under the variance laws that became effective July 1, 2015 because of a peculiarity in the required showing for a hardship –
under either the unreasonable restriction or hardship standard, the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201 which includes the “standard” that the “strict application of the ordinance would unreasonably restrict the utilization of the property.” Thus, an applicant seeking a variance under the hardship criterion must establish both a hardship and an unreasonable restriction, whereas an applicant seeking a variance under the unreasonable restriction criterion need only establish an unreasonable restriction (which continues to be high standard to satisfy). For a discussion of the hardship arising for persons with disabilities, see section 13-820.

There are few, if any, cases where the unreasonable restriction criterion has been analyzed or formed the basis for granting a variance. The word unreasonable cannot be overlooked during the analysis. Something is reasonable when it is “[f]air, proper, or moderate under the circumstances; sensible.” BASF and James City County v. State Corporation Commission, 289 Va. 375, 770 S.E.2d 458 770 S.E.2d 458 (2015). Something is unreasonable if it, in the context here, is “absurd, inappropriate,” “exceeding the bounds of reason or moderation,” or “unconscionable.” Webster’s Third New International Dictionary (2002).

One unreasonable restriction case is Natrella v. Board of Zoning Appeals of Arlington County, 231 Va. 451, 345 S.E. 2d 295 (1986), where the Virginia Supreme Court concluded that a regulation that prohibited apartments from being converted to condominiums under the state Condominium Act with no changes in the land use constituted an unreasonable restriction. If an application for a variance is based on the criterion that a restriction is unreasonable, the locality should consider whether the restriction – the regulation – should be amended or repealed because unreasonableness raises an issue of whether the regulation is constitutional or facially valid.

The hardship criterion, has, at least on paper, experienced a profound evolution since 2009. Prior to 2009, the criterion called for an undue hardship approaching confiscation. Beginning in 2009, the applicant was required to merely show an undue hardship, though the BZA still had to find an undue hardship approaching confiscation. Beginning in 2015, Virginia Code § 15.2-2309(2) now merely asks for a hardship. Upon review of the variance case law, however hardship has been modified over the years, it is clear that those cases in which a hardship was not found one would likely be similarly decided under the current criterion, and those cases in which a hardship was found likewise would be similarly decided under the current criterion. These cases are summarized in section 13-1100.

13-612 The physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance

The attributes composing the physical condition of the property are not described in either the definition of variance in Virginia Code § 15.2-2201 or in the variance elements in Virginia Code § 15.2-2309(2). However, the reader should consider the property’s narrowness, shallowness, size, shape, exceptional topographic conditions, or any other similar physical conditions. All of these conditions were delineated in the version of Virginia Code § 15.2-2309(2) that existed prior to July 1, 2015. These conditions refer to the natural physical characteristics of the property itself, not to man-made objects placed on the property. Steele v. Fluvanna County Board of Zoning Appeals, 246 Va. 502, 436 S.E.2d 453 (1993) (rejecting argument that utility markers placed on the property were a situation or condition of the property). These conditions, in effect, define the hardship the BZA must find in order to grant a variance. Spence v. Board of Zoning Appeals for City of Virginia Beach, 255 Va. 116, 496 S.E.2d 61 (1998).

The attributes of any improvements on the property existing on the effective day of the zoning ordinance may also be considered, an element added effective July 1, 2015. This amendment would not have aided the owners in Steele, referenced above, because the improvements that created the need to vary the applicable setback standard were established after the zoning ordinance became effective. However, it appears that this new element will allow a way for a landowner seek a variance to transform a nonconforming structure into a conforming structure.

If the zoning regulation from which the variance is sought existed before the property was created (so as to be a lot of record), a variance may not be granted. Cherrystone Inlet, L.L.C v. Board of Zoning Appeals of Northampton County, 271 Va. 670, 675, 628 S.E.2d 324, 326 (2006) (“the applicant failed to show that the lots for which variances were sought were lots of record in 1988, when the Bay Act became effective. Because of the express language of the Bay Act and Code § 15.2-2309(2), that failure alone would have precluded variances based upon the shallowness of the lots”).
The property for which the variance is being requested was acquired in good faith

The evidence must show that “the property for which the variance is being requested was acquired in good faith.” Virginia Code § 15.2-2309(2)(i).

Although there is no case law identifying what a good faith acquisition of property might be in the context of a variance, it appears that good faith may be shown if the variance is not sought to correct a violation of the zoning ordinance existing on the property when it was acquired by an owner who knew of the violation. An owner’s knowledge that the previous owner of the property had been denied a variance does not affect “good faith” status. Spence v. Board of Zoning Appeals for City of Virginia Beach, 255 Va. 116, 496 S.E.2d 61 (1998).

The purchase price of the property is irrelevant to the consideration of whether an owner acted in good faith. Spence, supra.

Any hardship was not created by the applicant for the variance

The evidence must show that “any hardship was not created by the applicant for the variance.” Virginia Code § 15.2-2309(2)(i). This appears to be similar to the prior standard that prohibited self-inflicted hardships, and the cases below were evaluated under that standard. However, it is unclear whether an applicant may be disqualified from obtaining a variance solely where the owner’s contractor or a prior owner created the hardship.

The situation where a hardship has been created by the applicant would arise when an owner violates a provision of the zoning ordinance and then seeks a variance to provide relief from the unlawful act. Spence v. Board of Zoning Appeals for City of Virginia Beach, 255 Va. 116, 496 S.E.2d 61 (1998). Following are some examples where the court considered whether a hardship was self-inflicted:

- To correct zoning violation; reliance on erroneous boundary markers: Hardship was self-inflicted where the owners constructed a house in violation of side yard setback requirements, although done inadvertently in reliance upon misplaced property line markers. Steele v. Fluvanna County Board of Zoning Appeals, 246 Va. 502, 436 S.E.2d 453 (1993) (reliance on statement by homeowners’ association, which told builder it could assume the property lines were indicated by certain utility markers, that in fact were not on the property lines, resulting in house being constructed 8 inches from property line, was a self-inflicted hardship).

- To correct zoning violation: Hardship was self-inflicted where the owner continued construction of an apartment over an existing garage in violation of the zoning ordinance after knowledge and warning of the likely consequences of her unlawful conduct. Board of Zoning Appeals of Town of Abingdon v. Combs, 200 Va. 471, 106 S.E.2d 755 (1959).

- Knowing need for variance: Hardship was not self-inflicted where the owner purchased property knowing that he needed a variance to build a house, because a self-inflicted hardship must pertain to a violation of the zoning ordinance. Spence v. Board of Zoning Appeals for City of Virginia Beach, 255 Va. 116, 496 S.E.2d 61 (1998).

The standard must be satisfied regardless of whether the hardship was created intentionally or inadvertently. It is an open question as to whether the acts of a prior owner, a contractor, or some other third party will be attributed to the applicant.

Granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area

The evidence must show that “granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area.” Virginia Code § 15.2-2309(2)(ii).

The BZA must consider the effect that granting the variance may have on nearby properties. See Board of Zoning Appeals of City of Chesapeake v. Glasser Bros. Corp., 242 Va. 197, 408 S.E.2d 895 (1991). For example, in Board of
of land or the regulations which may be varied, which are limited to those pertaining to the "shape, size, or area of a lot or parcel. Variances have been prohibited in Virginia since 1988. This element is also directly related to the scope of the "change shall be accomplished by a rezoning or by a conditional zoning."

The prior version of Virginia Code § 15.2-2309(2) also required consideration of whether the "character of the district" would be changed. The elimination of that broader consideration may open the door for variances that might change the character of the district by, for example, allowing a tall building or the encroachment of a building into a front yard. Perhaps the theory of the new law is that a single variance cannot change the character of a district, and a series of variances is needed to change the character of a district. The issue of a series of variances is addressed in the criterion in section 13-650.

13-650 The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance

The "condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance." Virginia Code § 15.2-2309(2)(iii).

An owner's showing that the special condition of the property and the resulting hardship are non-recurring is of considerable importance in determining the propriety of the variance. Martin v. City of Alexandria, 286 Va. 61, 743 S.E.2d 139 (2013) (in determining that a variance from setbacks was improperly granted, the Court rejected the argument that the historic overlay district regulations were intended to apply only to old buildings and granting a setback variance for the proposed new building would render the zoning ordinance meaningless; rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of the lots in the area were even more shallow yet they complied with the zoning ordinance and the piecemeal granting of variances would nullify the zoning regulations; and, there was "no factual support" for the claim that the condition was unique since all lots in the area must comply with the base and overlay district regulations and the issue must be addressed legislatively). Why are variances for general or recurring problems prohibited? A high number of variance applications from a particular regulation may indicate that there is a problem with the zoning ordinance. If there is a problem with the zoning ordinance, that problem needs to be addressed legislatively. Martin, supra. As the Virginia Supreme Court has said, variances are an "administrative infringement upon the legislative prerogatives of the local governing body." Packer v. Hornsbly, 221 Va. 117, 123, 267 S.E.2d 140, 143 (1980). Thus, a legislative solution is always preferred over the piecemeal granting of variances. In Hendrix v. Board of Zoning Appeals of the City of Virginia Beach, 222 Va. 57, 61, 278 S.E.2d 814, 817 (1981), the Virginia Supreme Court said that "[t]he power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the local governing body." The Court added that using variances to resolve these problems when a legislative solution is reasonably practicable is prohibited "because the piecemeal granting of variances could 'ultimately nullify a zoning restriction throughout [a] zoning district' (internal citation omitted)."

13-660 Granting the variance does not result in a use that is not otherwise permitted on the property or a change in the zoning classification of the property

The granting of the variance may not "result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property." Virginia Code § 15.2-2309(2)(iv).

This element overlaps the definition of variance, which provides that a variance does "not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning." Virginia Code § 15.2-2201. Use variances have been prohibited in Virginia since 1988. This element is also directly related to the scope of the regulations which may be varied, which are limited to those pertaining to the "shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure." Virginia Code § 15.2-2201.
13-670  The relief or remedy sought by the variance application is not available through a special exception or a zoning modification at the time of the filing of the variance application

The “relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to [Virginia Code § 15.2-2309(6)] or the process for modification of a zoning ordinance pursuant to subdivision [Virginia Code § 15.2-2286(A)(4)] at the time of the filing of the variance application.” Virginia Code § 15.2-2309(2)(¶2(v)).

This provision is consistent with those cases explaining that a variance “allows a property owner to do what is otherwise not allowed under the ordinance.” Bell v. City Council of the City of Charlottesville, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982); Sinclair v. New Cingular Wireless, 283 Va. 567, 727 S.E.2d 40 (2012). If the zoning ordinance provides an alternative remedy, a variance is unnecessary. In other words, a variance should only be a remedy of last resort.

13-680  The variance is not contrary to the purpose of the ordinance

Virginia Code § 15.2-2309(2) requires that the evidence show not only the elements discussed in sections 13-610 through 13-660, but also that the variance application “meets the standard for a variance as defined” in Virginia Code § 15.2-2201. The definition of variance provides that it shall not be “contrary to the purpose of the ordinance.” Virginia Code § 15.2-2201.

For example, a variance from the setback requirements in a residential zoning district might be considered to be in harmony with the intended spirit and purpose of the zoning ordinance where: (1) the zoning regulations state that their purpose is to promote the development of existing parcels in residential zoning districts with useful housing stock; (2) a variance is sought to allow a house to be constructed on a vacant lot with a minor setback encroachment; and (3) without a variance, the house could not be constructed.

As a contrary example, a variance to allow the location of a house in a floodway is not in harmony with the intended spirit and purpose of a zoning ordinance that prohibited development in the floodway. Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals, 22 Va. Cir. 545 (1988).

13-690  The variance application must meet the standard for a variance as defined in Virginia Code § 15.2-2201

Virginia Code § 15.2-2309(2) requires that the evidence show that the variance application “meets the standard for a variance as defined” in Virginia Code § 15.2-2201.

These “standards” include the standard that the “strict application of the ordinance would unreasonably restrict the utilization of the property.” Thus, an applicant seeking a variance under the hardship criterion must establish both a hardship and an unreasonable restriction, whereas an applicant seeking a variance under the unreasonable restriction criterion need only establish an unreasonable restriction (which is a high bar in and of itself).

13-700  Consideration of a variance application; matters the BZA may and may not decide

A BZA acts in an administrative capacity in accordance with the standards prescribed by Virginia Code § 15.2-2309(2) when it considers a variance application. Coelbran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004).

Within the context of the applicant’s burden of proof to show by a preponderance of the evidence that it has satisfied the criteria for granting a variance, the BZA must exercise its discretion with regard to the particular facts of the application, including the precise extent of the relief sought. Spence v. Board of Zoning Appeals for City of Virginia Beach, 255 Va. 116, 496 S.E.2d 61 (1998). In the performance of this duty, the BZA is "clothed with discretionary power, and this power must be exercised intelligently, fairly and within the domain of reason, and not arbitrarily.” Board of Zoning Appeals v. Fowler, 201 Va. 942, 948, 114 S.E.2d 753, 758 (1960); see also Board of Zoning Appeals of Town of
**Abingdon v. Combs**, 200 Va. 471, 106 S.E.2d 755 (1959). “Any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts, is an illegal action by a board of zoning appeals.” *Martin v. City of Alexandria*, 286 Va. 61, 69, 743 S.E.2d 139, 143 (2013).

Under the prior law, the Virginia Supreme Court said repeatedly that, if the BZA fails to state its findings as required by Virginia Code § 15.2-2309 in granting or denying the variance, the parties cannot properly litigate, and the trial court cannot properly adjudicate, the issues on appeal. *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980); see also *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005). A BZA is no longer required to state findings; however, a BZA may grant a variance only if the evidence shows that all of the criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion.

Variances may not be approved for reasons other than those set forth in Virginia Code § 15.2-2309(2). *Cochran*, supra, *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (BZA does not have the authority to grant a variance from a regulation prohibiting a nonconforming sign from being repaired at a cost in excess of 50% of its original cost because the regulation does not pertain to the size, area, bulk or location of a building or structure). Thus, for example, it is inappropriate for the BZA to grant a variance because a proposed design is superior or more attractive than what would be allowed without the variance. In addition, variances may not be approved solely because similar variances were previously approved. For example, although not mentioned in the court’s opinion in *Cochran*, the Fairfax County BZA had previously granted 20 to 25 variances in the neighborhood that was the center of the controversy in that case. An attorney involved in that case has suggested that the omission of this fact from the Virginia Supreme Court’s opinion suggests the irrelevance that prior variances should have on the merits of a variance application before the BZA.

In granting a variance, a BZA may impose conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. *Virginia Code § 15.2-2309(2)*. Property upon which a variance has been granted is treated as conforming for all purposes under state law and local ordinances; however, a structure permitted by a variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the zoning ordinance. *Virginia Code § 15.2-2309(2)*. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required. *Virginia Code § 15.2-2309(2)*.

### 13-800 Special situations: condominium conversions, the Americans with Disabilities Act, and the Fair Housing Act; National Flood Insurance Program

The preceding analysis pertains to variances subject to and analyzed solely under Virginia Code § 15.2-2309(2). There are at least three special situations where rigid adherence to Virginia Code § 15.2-2309(2) is superseded.

#### 13-810 Condominium conversions

*Virginia Code § 55-79.43(E)* provides in part that localities may provide by ordinance that proposed conversion condominiums and the use thereof which are nonconforming obtain a variance (or special use permit) prior to the property becoming a conversion condominium. The variance “shall be granted if the applicant can demonstrate to the nonconformities are not likely to be adversely affected by the proposed conversion.” *Virginia Code § 55-79.43(E)*.

#### 13-820 The Americans with Disabilities Act and the Fair Housing Act

Variance applications received from disabled persons or facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act require special consideration. Under both of those Acts, the locality is required to make reasonable accommodations from its policies and rules (e.g., its zoning regulations and the criteria for granting a variance in *Virginia Code § 15.2-2309(2)*) so as not to discriminate against disabled persons.
Virginia Code § 15.2-2309(2) expressly recognizes modifying zoning regulations to accommodate persons with disabilities by allowing variances to “alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability.” Virginia Code § 15.2-2309(2) continues: “Any variance granted to provide a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability may expire when the person benefited by it is no longer in need of the modification to such property or improvements provided by the variance, subject to the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 et seq.), as applicable. If a request for a reasonable modification is made to a locality and is appropriate under the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 et seq.), as applicable, such request shall be granted by the locality unless a variance from the board of zoning appeals under this section is required in order for such request to be granted.”

13-830 National Flood Insurance Program

Localities such as Albemarle County participating in the National Flood Insurance Program are required to adopt floodplain management regulations required by federal law either as part of its zoning ordinance or otherwise. 44 CFR § 59.1 et seq.

A locality’s floodplain management regulations must include a provision that provides a procedure and standards for variances for development in the floodplain. A landowner may be eligible for a variance under the floodplain management regulations in two circumstances: (1) for new construction or substantial improvements where nearby structures were constructed below the base flood elevation, generally for parcels less than ½ acre in size; and (2) for new construction, substantial improvement, or development that is required for water-dependent facilities. 44 CFR § 60.6. Encroachment standards and construction standards specific to the floodplain are among the standards that may be varied. 44 CFR § 60.6. The findings required to be made by the BZA include a finding substantially similar to the “hardship” standard applicable to variances considered under Virginia Code § 15.2-2309(2), as well as a finding that the variance will not result in unacceptable or prohibited increases in flood heights. 44 CFR § 60.6. The BZA is also required to consider a number of factors related to the impact of the variance, if granted. 44 CFR § 60.6.

13-900 Modifications

In a 2006 bill introduced as a legislative response to Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004), the General Assembly ended up amending Virginia Code § 15.2-2286(A)(4). This enabling authority allows localities to authorize zoning administrators to review and approve modifications from zoning regulations. A modification is relief from any provision contained in the zoning ordinance with respect to the physical requirements on a lot or parcel of land, including but not limited to the size, height, location or features of or related to any building, structure, or improvements. Virginia Code § 15.2-2286(A)(4). Under the prior law, localities were enabled to authorize their zoning administrators to grant variances from any building setback requirement. Virginia Code § 15.2-2286(A)(4).

The findings required to grant a modification are similar to those for a variance. Virginia Code § 15.2-2286(A)(4). The zoning administrator’s decision on a modification may be appealed to the BZA, and the BZA’s decision may be appealed to circuit court.

The Albemarle County Zoning Ordinance does not authorize the zoning administrator to grant modifications.

13-1000 Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA’s decision to the circuit court by filing a petition for writ of certiorari. Virginia Code § 15.2-2314. Persons challenging a decision as a person aggrieved must allege that they are aggrieved within the meaning of the Virginia Supreme Court’s decision in Friends of the Rappahannock v. Caroline County, 286 Va. 38, 743 S.E.2d 142 (2013).
13-1010 Time in which to file a petition for writ of certiorari

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. Virginia Code § 15.2-2314. The date of the final decision is the date the BZA takes its vote on the matter that decides its merits. West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County, 270 Va. 259, 268, 618 S.E.2d 311, 315 (2005). Local zoning regulations or BZA by-laws establishing a different method to determine the running of the 30-day period are inconsistent with Virginia Code § 15.2-2314 and are invalid. West Lewinsville, supra (holding invalid BZA by-laws that commenced the 30-day period on the “official filing date,” which was a date specified in the BZA clerk’s letter that was eight days after the BZA voted on the appeal). The failure of a party to file a petition for writ of certiorari within the 30-day period does not divest the circuit court of its subject matter jurisdiction, so the issue of timely filing is waived if it is not raised in the circuit court. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 271 Va. 336, 347-348, 626 S.E.2d 374, 381 (2006).

13-1020 Nature of the proceeding in circuit court

A proceeding under Virginia Code § 15.2-2314 “has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance.” Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 275 Va. 452, 456-457, 657 S.E.2d 147, 149 (2008) (proceeding under Virginia Code § 15.2-2314 is not a trial proceeding for which nonsuit is available under Virginia Code § 8.01-380(B); adding that the option to take additional evidence was insufficient to change the nature of the proceeding from an appeal to a trial).

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court. Virginia Code § 15.2-2314. The necessary parties in a case challenging a BZA decision are the governing body and the landowner and the applicant/appellant before the BZA (assuming the latter is different from the landowner). Virginia Code § 15.2-2314. The governing body must be named in the petition within the 30-day appeal period. Boasso America Corporation v. Zoning Administrator of the City of Chesapeake, 293 Va. 203 (2017). In Boasso, Boasso appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, Boasso’s petition did not name the city as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city had to be named in the petition within the 30-day period, or whether Boasso could add the city as a necessary party by amending its petition after the 30-day period had run. The trial court granted the city’s motion to dismiss the petition because the city had not been named as a necessary party within the 30-day appeal period. The Virginia Supreme Court affirmed. The Court held that a locality’s governing body that “is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition.” In In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County, 88 Va. Cir. 114 (2014), the circuit court concluded that the failure to serve the governing body with the petition may implicate the provisions of Virginia Code §§ 8.01-275.1 and 8.01-277, but would not constitute grounds for dismissing the case under a motion to dismiss for failing to name a necessary party because the county was included in the style of the case). The court may also allow other aggrieved parties to intervene in the proceeding, Virginia Code § 15.2-2314.

The court’s role is to determine whether the BZA’s decision was correct.

This limited scope of review that applies in a certiorari proceeding prohibits the court from ruling on the validity or constitutionality of the ordinance or statute underlying the BZA’s decision. City of Emporia v. Mangum, 263 Va. 38, 44, 556 S.E.2d 779, 783 (2002); Board of Zoning Appeals of James City County v. University Square Associates, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); Kebabish v. Board of Zoning Appeals of Fairfax County, 2004 Va. Cir. LEXIS 37 at 17-18, 2004 WL 516224 at 6-7 (2004) (trial court would not rule on the constitutionality of the federal Religious Land Use and Institutionalized Persons Act of 2000 in a certiorari proceeding).

Because the individual members of a BZA act only as a single entity, the court does not review the individual actions of each member of the BZA, but reviews the decision of the BZA. Sundlun v. Board of Zoning Appeals of Fauquier County, 23 Va. Cir. 53 (1991). The result reached by the circuit court in Sundlun is consistent with the
broader principle that public bodies act only through the body itself, and not by the acts of its individual members. See Campbell County v. Howard, 133 Va. 19, 59, 112 S.E. 876, 888 (1922) (a board of supervisors can act only at authorized meetings as a corporate body and not by actions of its members separately and individually).

A petitioner in a certiorari proceeding to review a decision of the BZA cannot challenge the composition of the BZA or the authority of a member to sit on the BZA. Sundlun, supra.

13-1030 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions on variance applications, the decision of the BZA is presumed to be correct. Virginia Code § 15.2-2314. The petitioner 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.

The circuit court may reverse or affirm, wholly or partly, or modify the BZA’s decision. Virginia Code § 15.2-2314. If the BZA’s decision is affirmed and the circuit court finds that the appeal was frivolous, the petitioner may be ordered to pay the costs incurred in making the return of the record. Virginia Code § 15.2-2314. The petitioner may be entitled to recover its costs only if the court determines that the BZA acted in bad faith or with malice in making the decision that was appealed. Virginia Code § 15.2-2314. Any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. Virginia Code § 15.2-2314.

13-1100 Analysis of the hardship issue by Virginia courts prior to July 1, 2015

Under the law existing prior to July 1, 2015, the key element that had to be established in order for a variance to be granted was whether there was an unreasonable restriction or a hardship arising from a physical condition of the property. Of those two criteria, the hardship that may arise if a variance is not granted was by far the more commonly analyzed criterion.

<table>
<thead>
<tr>
<th>Hardship: The Critical Analysis for Almost Every Variance Application</th>
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<tbody>
<tr>
<td>• Hardship. Almost every variance application will turn on whether, when the zoning ordinance is applied to the property, the regulations will produce a hardship relating to the property.</td>
</tr>
<tr>
<td>• Consider reasonable uses of the property: To determine whether the zoning regulations interfere with a reasonable use of the property, evaluate the existing uses of the land, whether any of those uses are reasonable, what other uses are allowed under the applicable zoning regulations without the need for a variance, and whether those uses, if pursued, would be reasonable. If, despite the regulations, there are existing or other possible reasonable uses, a hardship has not been established.</td>
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<tr>
<td>• Consider whether the zoning regulations interfere with the uses on the property taken as a whole. If you find that the regulations interfere with the reasonable use of the property, you must also determine that the regulations interfere with those uses on the property taken as a whole, rather than only some portion of the property. If there are other areas of the property where a reasonable use could be located without the need for a variance, an undue hardship has not been established.</td>
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13-1110 Cochran v. Fairfax County Board of Zoning Appeals

The Virginia Supreme Court ruled on three consolidated appeals pertaining to variances in Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004). Because the nature of the variances sought, the underlying fact patterns, and the arguments raised by the applicants, are typical of those often seen by BZAs, each case is laid out in some detail below. Likewise, the Court’s informative discussion of the controlling legal principles as to whether an undue hardship exists is set out at length. The Court’s decision, of course, now must be considered in light of the July 1, 2015 amendments to Virginia Code § 15.2-2309(2) which deleted the requirement that the applicant show that a hardship is undue and that it approaches confiscation. The facts in each of the cases considered in the consolidated appeal indicate that the Court would reach the same conclusions, though its holdings and guidance would be stated differently, because there was no hardship within the meaning of Virginia Code § 15.2-2309(2) whatsoever.
The facts in *Cochran v. Fairfax County Board of Zoning Appeals*

In *Cochran*, the owner of a 20,000 (approximately) square foot parcel, improved with a house occupied by the owner for eight years, desired to demolish his existing house and construct a much larger house. The parcel rose 42 feet from the front property line to the rear property line. Along the northern property line, the proposed house would come within 13 feet of the side yard property line along the entire length of the house. The zoning district in which the parcel was located required 15-foot side yard setbacks. Thus, a 2-foot variance was sought.

A variance would not have been necessary if the proposed house had been moved two feet to the south (plus some additional accommodations for proposed chimneys on the northern side of the house). This change would have required that the house’s proposed side-load garage on the south side of the house be replaced with a front-load garage. The owner did not want a front-load garage because it would diminish the house’s “curb appeal.” The relocation of the house also would have resulted in a loss of 152 square feet of living area (the house was described as having a footprint of 71 feet by 76 feet (5,396 square feet), and being two stories in height). The 152 square feet lost by complying with the setback regulations could have been recaptured either in the front or back of the house, or by adding a third story. The owner rejected these options because he wanted to save the front area for a children’s play area, the back area for an outdoor courtyard, and he opined that a third story would be aesthetically undesirable.

The BZA granted the variance, finding among other things, that “the lot suffers from severe topographical conditions which the applicant has worked hard to accommodate” and that “the requests are modest.” Based on these findings, the BZA concluded that the physical conditions of the parcel were such that a strict interpretation of the zoning ordinance would result in an undue hardship that “would deprive the owner of all reasonable use of the land and/or the buildings involved.” The circuit court affirmed the decision of the BZA.

The facts in *MacNeal v. Town of Pulaski Board of Zoning Appeals*

In *MacNeal*, the owners of a 0.6248-acre parcel bounded on three sides by public streets desired to construct a garage in the northeast corner of the parcel. There was no existing garage on the parcel, and the owners explained that the garage’s proposed location would provide the easiest access to a street. The topography of the parcel was described as “difficult.” The owners desired to construct the garage to the property line. The applicable setback regulations required a 15-foot setback. Thus, a 15-foot variance was sought.

A variance would not have been necessary if the proposed garage was constructed closer to the existing house, though this would have required construction of a ramp that would increase the cost of the project and weaken or destroy a five-foot tall stone retaining wall behind the house.

After four meetings, the BZA granted a modified variance permitting the garage to be constructed five feet from the northern property line and 15 feet from the eastern boundary line. The variance also included a condition that the construction not “alter or destroy the aesthetic looks of existing vegetation bordering the northern projected boundary” of the parcel. The circuit court affirmed the decision of the BZA.

The facts in *Board of Zoning Appeals of the City of Virginia Beach v. Pennington*

In *Pennington*, the owners of a 1.25-acre parcel desired to construct a storage building on their parcel. The parcel was already improved by the owners’ home and a nonconforming detached garage. The proposed storage shed would have been 288 square feet in size, and the existing detached garage was 528 square feet. The zoning district regulations limited the area of accessory structures to 500 square feet. Thus, the owners sought a variance of 28 square feet to bring the garage into conformity (which was not in issue in the case), and a variance of 288 square feet for the storage shed. The zoning district in which the parcel was located would have allowed four dwellings.

A variance for the storage shed would not have been necessary if it had been attached to the existing house. The owners’ representative claimed that the shed would be nearly invisible from the street, would have no impact on neighboring properties, and that the impact of a small additional outbuilding would be minimal and in keeping with the spirit of the zoning ordinance, particularly when compared to the four dwelling units allowed by the zoning.
The BZA denied the variance that would have allowed the storage shed. At trial in the circuit court, the owners raised a new claim of hardship – that the owners’ daughter had returned to live with them to care for an ailing parent, and that the storage shed was needed as a place to store her belongings. The circuit court ruled that a hardship existed, overruled the BZA, and granted the variance.

13-1114 The Court’s discussion of the controlling legal principles and its holdings

Concluding that the facts did not support the granting of a variance in any of the cases, the Virginia Supreme Court reversed all three circuit court judgments. The court’s analysis includes a discussion of the controlling legal principles applicable to variances authorized under Virginia Code § 15.2-2309(2):

The BZA, when considering an application for a variance, acts only in an administrative capacity. Under fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals for the rule of law. The General Assembly has prescribed such standards regulating the authority of the BZA to grant variances by enacting Code § 15.2-2309(2) . . .

Cochran, 267 Va. at 765, 594 S.E.2d at 576-577.

The court concluded that under the facts of the three cases, without a variance “each of the properties retained substantial beneficial uses and substantial value.” In Cochran, the proposed house could have been reconfigured or moved two feet to the south, or the project could have been abandoned and the existing residential use continued in effect. In MacNeal, the proposed garage could have been moved to another location on the parcel or the project could have been abandoned. In Pennington, the storage shed could have been built as an addition to the existing house or the project could have been abandoned.

13-1115 The Court’s guidance on how to approach a variance application

The Virginia Supreme Court provided some useful guidance on how a BZA is to approach a variance application:

The threshold question for the BZA in considering an application for a variance . . . is whether the effect of the zoning ordinance upon the property under consideration, as it stands, interferes with “all reasonable beneficial uses of the property, taken as a whole.” If the answer is in the negative, the BZA has no authority to go further.

Cochran, 267 Va. at 767, 594 S.E.2d at 578.

The Court noted that the owners in the three cases had presented compelling reasons in favor of their applications, such as: their desires, supported by careful planning, to minimize harmful effects to neighboring properties; probable aesthetic improvements to the neighborhood as a whole, together with a probable increase in the local tax base; greatly increased expense to the owners if the plans were reconfigured to meet the requirements of the zoning ordinances; lack of opposition, or even support, of the application by neighbors; and a serious personal need for the proposed variance. The Court held that these factors were not relevant to the issue of undue hardship, and were material to a variance application only if an undue hardship was properly found to exist. In such a case, these factors could then be considered in the discretion of the BZA to tailor “a variance that will alleviate ‘hardship’ while remaining ‘in harmony with the intended spirit and purpose of the ordinance.’”

13-1120 Summaries of Virginia cases where an undue hardship was not found

Following are brief summaries of cases in which an undue hardship was not found to exist. Before any of these
cases are relied upon, they need to be considered in light of the Virginia Supreme Court’s analysis of the undue hardship standard in the Cochran/MacNeal/Pennington cases decided in 2004, as well as the July 1, 2015 amendment to Virginia Code § 15.2-2309(2) which deleted the requirement that the applicant show that a hardship is “undue” and that it “approaches confiscation.” Despite this change in the State law, it does not appear that any of the cases below turned on whether the undue hardship approached confiscation, or whether the hardship was “undue,” but, instead, turned on whether there was, in fact, a hardship at all.

- **Setback:** Owners of a 36’ by 44’ lot sought variances to reduce required side and rear yard setbacks; in prior applications, city staff described the lot as “level,” “large,” “buildable,” and “not unique,” with “characteristics . . . similar to other lots within this section of Prince Street” and that granting the variance would be “detrimental to the adjacent property”; city staff also stated that a house in compliance with setbacks could be built; in the most recent application for side (3’ variance) and rear (13’variance) yard setbacks, city staff described the application as a “good development” compatible with its historic context, unique because the historic overlay district regulations were designed to apply to old building, the lot was shallower than 2/3 of lots in area, and variances allowed for “more historically appropriate width and depth.” The Virginia Supreme Court rejected the argument that deletion of the phrase “approaching confiscation” from the applicant’s burden to show a “clearly demonstrable hardship” now authorized BZA’s to grant variances in cases previously not authorized because the change to the law did not change the findings required for the BZA to grant a variance; the Court also rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of lots in the area were even more shallow, yet they complied with the zoning ordinance; lastly, the Court rejected the argument that the lot was undevelopable without a variance on the theory that alternative designs could not comply with the base and historic overlay district regulations because the applicants admitted that they could submit a design that complied with the zoning regulations, it was “mere speculation” that the BAR would not approve an alternative design, and there was no factual support for the claim that the condition was unique because all lots in the area had to comply with the regulations. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (applying charter provisions virtually identical to Virginia Code § 15.2-2309(2)).

- **Setback:** Owner sought multiple variances from overlapping setbacks imposed by the county’s zoning ordinance (including those implementing the Chesapeake Bay Preservation Act) on 4 out of 5 lots in a 6.594 acre purported subdivision recorded soon after the owner purchased the property in 2004, and long after the setback regulations were imposed; without the variances the 4 lots were unbuildable; no undue hardship existed because the owner could have treated the property as a single 6.594 acre parcel and constructed a single residence on the property on that part which was not subject to the overlapping setbacks. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670, 628 S.E.2d 324 (2006).

- **Setback:** Owner sought variance from setback to expand the existing house closer to ocean; no hardship because expansion could be constructed on other side of house without violating the setback requirement. *Packer v. Hornsby*, 221 Va. 117, 121-122, 267 S.E.2d 140, 142 (1980) (“proximity to the ocean is doubtless a ‘privilege or convenience’ coveted by every homeowner along the beach”).

- **Setback:** Owner sought variance from setback so house could be constructed in the position desired by owner; no hardship because the house could be constructed without variance by shifting position of house. *Board of Zoning Appeals of City of Virginia Beach v. Nowak*, 227 Va. 201, 205, 315 S.E.2d 221, 223 (1984) (“to grant him a variance under these circumstances would bestow upon him a ‘special privilege or convenience’”).

- **Setback:** Owner sought variance from setbacks to allow a pier to be constructed on his property over wetlands, but the inability to build a pier did not leave the property with no reasonable beneficial use since there was already a single family residence on the property and no zoning regulation interfered with that use. *Gardner v. Board of Zoning Appeals and Kim*, 77 Va. Cir. 296 (2008) (noting that the BZA’s concerns that, without a variance, Kim “would be denied water access and that the variance requested was minimal” and that “the lot was designed to provide water access but the ordinances effectively deprived Mr. Kim of that right,” did not meet the test for an undue hardship).
• **Setback**: Owners sought variance from setback so that they could construct the house “they desired to have”; no hardship because there were other houses and configurations that would allow a reasonable use of the property. *Smith v. Spotsylvania County Board of Zoning Appeals*, 1989 WL 646478 (Va. Cir. Ct. 1989).

• **Minimum lot width**: Owner sought variance from minimum lot width requirements to allow existing lot to be subdivided into two lots, replacing existing house with new houses on each lot; lot had been illegally created in 1936. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 268 Va. 441, 453, 604 S.E.2d 7, 13 (2004) (owner did not experience undue hardship given that he had enjoyed the use of his home since 1964; his “inability to subdivide his property does not constitute a hardship under the facts of this case. The effect of the zoning ordinance does not interfere ‘with all reasonable beneficial uses of the property, taken as a whole’”).

• **Develop to highest allowed density**: Owner’s inability to develop land at its highest allowable density by requiring compliance with ordinance requirements was a limitation shared by all property owners and did not constitute an undue hardship. *Prince William County Board of Zoning Appeals v. Bond*, 225 Va. 177, 180, 300 S.E.2d 781, 783 (1983) (regulation restricting density to one dwelling unit per acre was not an undue hardship where owner desired to add second dwelling on 1.01-acre parcel; the owner’s “application for a variance was, in effect, a request for a rezoning of their property”).

• **Develop to highest allowed density**: Owner sought variance from regulation that prohibited property from being developed to maximum density; inability to achieve maximum density was not an undue hardship. *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993).

• **Financial loss**: Financial loss, standing alone, cannot establish a hardship justifying the granting of a variance. *Riles v. Board of Zoning Appeals of City of Roanoke*, 246 Va. 48, 431 S.E.2d 282 (1993); *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451, 345 S.E.2d 295 (1986). However, the value of the property is relevant to both the unreasonable restriction and the hardship approaching confiscation issues. *Natrella, supra*.

• **Financial loss**: Expenditure of more than $20,000 toward construction of a residence in the floodway was not an undue hardship, even though the owners had been erroneously informed that the site was out of the floodway and obtained zoning and building permits. *Corynthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).

• **Increased profitability**: There is no undue hardship where the evidence shows only that the property owner would make more money if the connected town houses could be sold within the building to separate owners. Increased profitability is insufficient alone to justify a variance. *Leigh v. Board of Zoning Appeals of the Town of Woodstock*, 1982 WL 215189 (Va. Cir. Ct. 1982).

• **Health and safety zoning regulations**: Owners sought variances from several health and safety regulations applicable to uses allowed by right; no hardship found because the right to use property in a particular way is not absolute, but conditional, and to hold otherwise would render the requirements null and void. *Board of Zoning Appeals, City of Falls Church v. O’Malley*, 229 Va. 605, 331 S.E.2d 481 (1985).

• **Commercial parking on residentially zoned property**: Owner sought a variance to allow commercial parking lot on residentially zoned land to serve business on another lot; no hardship justifying grant of variance because the lot was level and adequately suitable for the construction of improvements permitted under the zoning classification and the only hardship was related to the business and the property upon which the owner conducted its business, not the property for which the variance was sought. *C. & C. Inc. v. Semple*, 207 Va. 438, 150 S.E.2d 536 (1966) (Note: the owner was seeking a use variance, not allowed in Virginia since 1988).

• **Additional signage**: Owners sought a variance that would have allowed them to display two signs, rather than one; the only hardship was that two signs would better identify the property. *McCall v. Board of Zoning Appeals of the City of Richmond*, 1987 WL 488782 (Va. Cir. Ct. 1987).
• **Structural height restriction**: Owner sought a variance that would allow farm equipment dealership sign to be 20 feet in height, where zoning regulations permitted signs approximately no taller than 10 feet, and claimed that a sign 10 feet in height would be partially obscured by farm equipment from the highway in one direction, and completely obscured from the highway in the other direction; no undue hardship because the farm equipment dealership already existed on the property and other general commercial uses could also be located there. *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

• **Erroneously approved site plan and building permit**: Owner sought a variance from an 8-foot setback where the approved site plan showed a 3-foot setback in violation of the zoning ordinance; no hardship justifying the granting of a variance because the only error was made by the city in the granting of the building permit, and the permit was void. *Dixon v. Zoning Appeals Board of Virginia Beach*, 50 Va. Cir. 424 (1999).

• **Location of accessory structure**: Owner sought a variance from a regulation that required accessory structures to be located in the rear yard of a single family dwelling; location of a new single family dwelling resulted in a pre-existing barn being located in front sideyard, and the locality refused to issue certificate of occupancy for the dwelling; no undue hardship because the owner could dismantle the barn and eliminate the need for the variance. *Aesy v. Board of Zoning Appeals of City of Salem*, 66 Va. Cir. 382 (2005).

• **Preexisting variance limiting parcel’s use**: A preexisting variance on a parcel that limited the parcel’s use to the sale and repair of batteries, standing alone, does not amount to an undue hardship. *CL 11-93 & CL 11-41*, opinion letter dated November 28, 2011.

### 13-1130 Summaries of Virginia cases where an undue hardship was found

Following are brief summaries of cases in which an undue hardship was found to exist under the standards that applied prior to July 1, 2015.

• **Expansion of sludge drying beds**: Utility company site needing a variance to expand sludge drying beds was a hardship approaching confiscation because without expansion, plant would violate water quality standards. *Tidewater Utilities Corp. v. City of Norfolk*, 208 Va. 705, 160 S.E.2d 799 (1968).

• **Lot size and width**: In a district where lots were required to contain at least 75,000 square feet and have a minimum width of 200 feet to be considered a “buildable lot,” and the lot in question contained 45,733 square feet and was 199.45 feet wide, undue hardship existed because the lot was unbuildable under existing zoning regulations and the variance would alleviate a clearly demonstrable hardship approaching confiscation. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 2001 Va. Cir. LEXIS 381 (2001).

• **Setbacks**: Undue hardship existed so as to justify a variance from 30-foot setback requirement where the property was located at the corner of two residential streets and was exceptionally narrow and exceptionally shallow, and had no 90 degree corners. Other facts supporting the undue hardship included: (1) the owners sought to construct a 34-foot-wide house (a typical house being built in the immediate vicinity was 40 feet wide); (2) a house any narrower than the 34-foot-wide house proposed would have been too narrow to accommodate interior rooms; (3) a house any smaller or narrower than the proposed 34-foot-wide house would not be economically viable in the relevant real estate market; (4) the proposed house could not be shifted back on the property because it would infringe on the side yard setback of 10 feet, necessitating another variance; and (5) the house could not be rotated on the property because rotation would result in the other front corner of the house infringing on the front yard setback, which would require another variance. *Brown v. Fairfax County Board of Zoning Appeals*, 2001 Va. Cir. LEXIS 49, 2001 WL 543520 (2001).

• **Building height**: Undue hardship existed so as to justify a height variance where parcel sloped on edges, making construction that complied with city’s tree preservation and protection regulations difficult or impossible; the terrain and the potential loss of additional large trees constituted the undue hardship. *McGhee v. Board of Zoning Appeals of the City of Roanoke*, 57 Va. Cir. 47 (2001).
• *Lot width:* Undue hardship was found so as to justify the granting of a variance to reduce the lot width requirement to divide property into three lots sharing a driveway where the property was an odd shape; to develop it appropriately without a variance required that an expensive road be constructed; and the construction of the road would require removal of mature trees, damage a vineyard, and encroach upon an historical house, three features which enhanced the pastoral character of the area. *McCoy v. Fairfax County Board of Zoning Appeals,* 48 Va. Cir. 227 (1999).

The Virginia Supreme Court case that found an undue hardship – *Tidewater Utilities* – is an atypical variance case and most likely is limited to the unique situation it presented.
Chapter 14

Decisions by Zoning Officials

14-100 Introduction

This chapter examines the typical decisions referred to in various provisions of the Virginia Code as decisions, determinations, orders, and requirements, including notices of violation (collectively, decisions, and except where otherwise noted, this refers to written decisions) made by the zoning administrator and other administrative officers (collectively, the zoning administrator), and what makes a decision one that may have binding effect. See James v. City of Falls Church, 280 Va. 31, 43, 694 S.E.2d 568, 575 (2010) (a planning commission is not an administrative officer for purposes of making decisions under Virginia Code § 15.2-2311). The decisions made by a zoning administrator range from interpreting the zoning ordinance to deciding how a land use should be classified under the applicable zoning district regulations.

Chapter 15 explores the BZA’s consideration of appeals from decisions made by the zoning administrator. Chapter 16 (Interpreting a Statute or Ordinance), chapter 17 (Classifying Primary Uses Determining Whether a Use is an Accessory Use), chapter 18 (Nonconforming Uses and Structures), and chapter 19 (Vested Rights) provide guidance on a selected range of issues frequently considered by a zoning administrator and a BZA. Chapter 20, which addresses development rights in the rural areas zoning district, is unique to Albemarle County.

14-200 Decisions made by the zoning administrator

A zoning administrator is enabled with all of the necessary authority to administer and enforce the zoning ordinance. Virginia Code § 15.2-2286(A)(4). The decisions made under this authority invariably affect the interests of certain persons. This section reviews the key rights and obligations associated with these decisions.

When a request for a decision is made, the zoning administrator must respond within 90 days unless the requester has agreed to a longer period. Virginia Code § 15.2-2286(A)(4). The range of issues that the zoning administrator may be asked to resolve in a decision may include:

- The meaning of a particular regulation in the zoning ordinance.
- How a land use should be classified and whether the use is permitted within a particular zoning district.
- Whether a proposed structure complies with setback, height, bulk and other requirements.
- Whether a use or structure is nonconforming.
- Whether an owner has vested rights.
- Whether a lot meets minimum lot size requirements.
- Whether a use or structure is in compliance with the zoning ordinance.

Even though a zoning administrator must necessarily interpret the zoning ordinance to execute her responsibilities, she may not rule upon the validity of a zoning regulation, nor waive any requirement she is not expressly authorized to waive. Town of Jonesville v. Powell Valley Village, 254 Va. 70, 487 S.E.2d 207 (1997) (declaring a zoning ordinance invalid is within the sole province of the courts); Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992) (waiver).
14-210  What makes a decision by the zoning administrator one that may have binding effect

A decision, and in particular, a determination, must be based upon a set of existing facts, rather than upon a recitation of non-existent facts, hypotheticals, proposals, ideas, concepts, or “what-if” suppositions. See Lynch v. Spotsylvania County Board of Zoning Appeals, 42 Va. Cir. 164 (1997).

If a zoning violation is not the issue, there must be some application pending for specific relief that triggers the zoning administrator’s need to make a decision. Lilly v. Caroline County, 259 Va. 291, 298, 526 S.E.2d 743, 746 (2000). The application for specific relief need not pertain directly to a decision on the question answered. Lilly, supra (a determination of whether a radio tower was a use permitted by right arose within the framework and within the context of a proposed zoning amendment and an application for a special use permit).

If a zoning violation is the issue, a decision need not be triggered by an application for specific relief. The zoning administrator may decide that a zoning violation exists upon any information that comes to her attention, by any means. Gwinn v. Alward, 235 Va. 616, 622, 369 S.E.2d 410, 412 (1988). Any other approach would hamstring the zoning administrator in enforcing the zoning laws. Gwinn, supra.

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If there is no pending application or no zoning violation in issue, any decision by the zoning administrator will likely be found to be an advisory opinion that does not trigger the right to appeal under Virginia Code § 15.2-2311. Vulcan Materials Co. v. Board of Supervisors of Chesterfield County, 248 Va. 18, 445 S.E.2d 97 (1994). This rule has been highlighted in two recent decisions of the Virginia Supreme Court.

In Board of Supervisors of Stafford County v. Crucible, Inc., 278 Va. 152, 677 S.E.2d 283 (2009), Crucible operated a security training facility in Stafford County and wanted to expand its facility. It sought and obtained from the zoning administrator an “interpretation” that the proposed facility would be classified as a “school,” a by-right use in the applicable zoning district at the time. The zoning administrator’s interpretation was contained in a letter entitled “Zoning Verification,” and the interpretation was conditioned upon the then-current zoning laws, and Crucible cannot establish a right to proceed based on the zoning administrator’s “Zoning Verification.” The Virginia Supreme Court held that the “Zoning Verification” was not a determination within the meaning of Virginia Code § 15.2-2311(C) so as to allow rights to vest, stating:

The zoning verification letter merely stated that Crucible’s facility fell within the definition of “school” according to the then-current zoning laws and that those laws were subject to change. The zoning verification letter did not permit Crucible to use its property in a way that was otherwise not allowed under then-current zoning laws, and Crucible cannot establish a right to proceed based upon Code § 15.2-2311(C).

Crucible, 278 Va. at 161, 677 S.E.2d at 288.

In James v. City of Falls Church, 280 Va. 31, 694 S.E.2d 568 (2010), the city’s zoning administrator was asked to interpret the zoning ordinance to decide whether church parcels within a historic district could be consolidated, and concluded that they could. Based on the zoning administrator’s interpretation, the church filed a plat to consolidate the parcels. When the plat reached the city’s planning commission, the commission disagreed with the zoning administrator’s interpretation and denied the plat. In concluding that the zoning administrator’s interpretation did
not rise to the level of a decision to which vested rights might accrue under Virginia Code § 15.2-2311(C), the Virginia Supreme Court said:

[The zoning administrator merely provided an interpretation of City Code § 48-800(a). In its letter to the zoning administrator, Columbia Baptist requested a “zoning interpretation.” And in his reply letter, the zoning administrator made clear that he was responding to a “request for an interpretation.” He further stated: “while the actual consolidation process is a Planning Commission function [J] it is my interpretation [emphasis in original] that the ordinances permit the consolidation . . . That “interpretation” lacked the finality of an “order, requirement, decision or determination” under Code § 15.2-2311(C).

James, 280 Va. at 44, 694 S.E.2d at 575. The Court went on to hold that the planning commission had the authority to interpret the zoning ordinance in consideration of the plat, and it was not obliged to adopt the zoning administrator’s interpretation. See also Greene v. Board of Zoning Appeals of Fairfax County, 34 Va. Cir. 227 (1994) (erroneous written determination as to whether property was to be used only for open space was advisory to the county only, it was not one triggering rights and obligations under what is now Virginia Code § 15.2-2311).

A decision has legal significance because, if a person aggrieved by the decision fails to timely appeal it to the BZA, it becomes a final, binding decision – a thing decided. Note, however, that a different procedure applies when one seeks to challenge a zoning decision made in conjunction with the issuance of a building permit and received no actual notice of the issuance of the permit. Virginia Code § 15.2-2313. In such a situation, Virginia Code § 15.2-2313 allows the aggrieved party to pursue relief in court even though no appeal was taken from the decision of the administrative officer to the BZA, provided that the lawsuit is filed within 15 days after the start of construction. See section 14-230 for required notice of right to appeal written notices of violation or orders.

14-220 The thing decided rule

Important legal rights and responsibilities attach to a decision. A person aggrieved by a decision of the zoning administrator has the right to appeal it to the BZA. Virginia Code § 15.2-2311; see chapter 15. If this mandatory appeal is not timely filed, the zoning administrator’s decision becomes a thing decided and, thus, it is not subject to court challenge. Lily v. Caroline County, 259 Va. 291, 526 S.E.2d 743 (2000); Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992); Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988) (zoning administrator’s determination that a landowner operated a junkyard on his property in violation of the zoning ordinance became a thing decided and not subject to attack because the landowner did not appeal the decision); Board of Supervisors of Fairfax County v. Martin, 23 Va. Cir. 37 (1990) (landowners who failed to appeal decisions to the BZA would not later be allowed to put on evidence of their claim that their use was nonconforming).

When an application for specific relief is pending, a decision or determination that triggers the right to appeal may be made orally. Lily, supra (zoning administrator orally determined at a public hearing whether a use was by-right, the persons aggrieved were present at the hearing, and the zoning administrator advised the public that they could appeal the determination to the BZA).

14-221 The rationale for the rule

The thing decided rule is based on a fundamental principle of administrative law – when an administrative remedy is provided, that remedy must be exhausted before an administrative determination may be challenged in court. In the zoning context, “a landowner may be precluded from making a direct judicial attack on a zoning decision if the landowner has failed to exhaust ‘adequate and available administrative remedies before proceeding with a court challenge.” Vulcan Materials Co. v. Board of Supervisors of Chesterfield County, 248 Va. 18, 23, 445 S.E.2d 97, 100 (1994), quoting Rinker v. City of Fairfax, 238 Va. 24, 381 S.E.2d 215 (1989); Henrico County v. Market Inns, Inc., 228 Va. 82, 319 S.E.2d 737 (1984). Thus, a person aggrieved by a decision of the zoning administrator must exhaust the administrative remedy provided – a timely appeal to the BZA under Virginia Code § 15.2-2311 – before an issue may be raised in court.
The exhaustion doctrine serves several purposes: (1) it permits the BZA to apply its experience with the zoning ordinance and to perform functions within its area of expertise; (2) it provides an opportunity for the locality and the other parties to more fully develop the facts upon which the decision is based; (3) it avoids unnecessary judicial review by giving the BZA an opportunity to correct any mistakes of the zoning administrator; and (4) it preserves the autonomy of the administrative system established by a locality for reviewing official determinations.

Thus, the failure by an aggrieved person to timely appeal a zoning administrator’s decision to the BZA is thereafter precluded from challenging in a civil court proceeding:


- **Nonconforming status**: Whether a use has nonconforming status. Board of Supervisors of Fairfax County v. Martin, 23 Va. Cir. 37 (1990).

This short list is not exhaustive. Essentially, the determination of any issue germane to a zoning administrator’s decision may become a thing decided if it is not timely appealed.

The preclusive effect of the rule applies in civil zoning enforcement actions, thereby preventing a defendant from raising issues not appealed as defenses. Dick Kelly Enterprises, supra. The rule also may facilitate the resolution of civil zoning enforcement actions. In McLane v. Clark, 2010 Va. Cir. LEXIS 66, 2010 WL 2693526 (2010), a Fairfax County zoning inspector issued a notice of violation in 2008 to the owners of a bed and breakfast. The notice of violation was never appealed, but the county did not enforce the alleged violation at that time. Almost two years later, the zoning administrator filed a civil enforcement action in which the county sought both mandatory and prohibitory injunctive relief. The circuit court concluded that the thing decided rule entitled the county to obtain a prohibitory injunction without a trial. The court noted that one of the purposes of a prohibitory injunction was to prevent the future commission of an anticipated wrong. Citing the statutory authority for injunctive relief under Virginia Code §§ 15.2-2208 and 15.2-2286(A)(4), the court concluded:

> Given that these statutes expressly provide for injunctive relief for the violation of a zoning ordinance, all that is required by the County in this case is proof of a violation. A Notice of Violation was issued to the Clarks on March 18, 2008, and it was not appealed. Therefore, the fact that the Clarks were in violation of a zoning ordinance is a thing decided. [citation omitted]

Accordingly, the County has shown all that is required for entry of a prohibitory injunction.

McLane, 2010 Va. Cir. LEXIS at 9, 2010 WL 2693526.

As for the county’s request for a mandatory injunction, the court observed that its purpose is to “undo an existing wrongful condition” whose “use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue.” McLane, 2010 Va. Cir. LEXIS at 4, 2010 WL 2693526 (2010). Although the thing decided rule conclusively determined that the owners were in violation in 2008, the owners contended that the 2008 violation had been abated. The court concluded that the 2008 notice of violation was insufficient to establish that the violation still existed so as to justify the issuance of a mandatory injunction without a trial on the issue.

There are circumstances when the administrative remedy – appeal to the BZA – need not be exhausted. Because neither the zoning administrator nor the BZA may rule on the validity of a zoning ordinance, there is no requirement to exhaust administrative remedies before challenging the validity of an ordinance. Dail v. York County, 259 Va. 577, 582, 528 S.E.2d 447, 450 (2000) (challenge to county ordinance); Town of Jonesville v. Powell Valley Village
Limited Partnership, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997) (no requirement to appeal the county building inspector’s determination or to apply for a new zoning permit because there was no administrative remedy equal to the relief sought).

In addition, a landowner need not exhaust administrative remedies by seeking a vested rights determination from the zoning administrator before asking the court to make such a determination. Board of Supervisors of Stafford County v. Crucible, Inc., 278 Va. 152, 157-158, 677 S.E.2d 283, 286 (2009). This is so because, historically, the courts were empowered to make vested rights determinations. The 1993 amendment to Virginia Code § 15.2-2286 that authorized zoning administrators to make vested rights determinations did not divest the courts of their authority. Thus, the authority exists concurrently in the zoning administrator and the courts.

14-222 For the rule to apply, an official determination must make clear the basis of the decision

The thing decided rule will apply if the zoning administrator has made clear the basis upon which relief is sought when rendering a decision. Lilly v. Caroline County, 259 Va. 291, 526 S.E.2d 743 (2000); Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992); Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988). It does not appear that this requirement is overly demanding, or requires an unusual amount of detail.

In Lilly, the Virginia Supreme Court concluded that the oral statement by the zoning administrator at a public hearing that a “radio tower was a by-right use in the Rural Preservation zoning district” was a sufficient explanation of the basis for his determination. Lilly, 259 Va. at 297, 526 S.E.2d at 746.

In Dick Kelly Enterprises, the zoning administrator had notified the landowner of certain “zoning and building code violations at the subject property,” noted that the property was located in a “Bay Front Residential District,” and that “we have learned that for a period in excess of two years you have used it as a forty-two (42) unit apartment complex” rather than as a 42-unit motel. The zoning administrator further stated that the subject property’s use was “inconsistent with the use approved in the Certificate of Occupancy, violates Section 904 of the zoning ordinance and Sections 112 and 115 of the building code” and “violates the area, parking, and other BFR district regulations.” The Virginia Supreme Court concluded that the zoning administrator had adequately made clear the basis of the decision. Dick Kelly Enterprises, 243 Va. at 379, 416 S.E.2d at 684.

In Alward, zoning officials sent the landowner a series of letters stating that the use of his property was “considered by the Fairfax County Zoning Ordinance to be a junk yard . . . Consequently, the use of this commercial property as a repository for junk vehicles, trash service equipment, and miscellaneous junk and debris is in violation of the Ordinance.” The letter also advised the landowner that the property was located in a C-8, highway commercial, zoning district and, as such, could not be used for “trash hauling and related storage of vehicles,” and that the use of the property “as the location for a refuse collection service and the related storage of vehicles observed on September 13, 1984, is in violation of the Fairfax County Zoning Ordinance.” The Virginia Supreme Court concluded that the zoning officials had adequately made clear the basis for their determination. Alward, 235 Va. at 622, 369 S.E.2d at 413.

14-230 Required notice to the owner when a request for a decision is made by a person other than the owner

Virginia Code § 15.2-2204(H) provides that when a person other than the landowner or the landowner’s agent requests a decision, determination, order or requirement from either the zoning administrator, or another administrative officer that is subject to appeal under Virginia Code §§ 15.2-2311 and 15.2-2314, written notice of the request must be given to the landowner of the property within 10 days after receipt of the request.

The written notice to the landowner must either be given by the zoning administrator or other administrative officer or, at the direction of the zoning administrator or other officer, the requesting applicant. If the applicant is required to provide the notice to the landowner, the applicant also must provide satisfactory evidence to the zoning administrator or other administrative officer that the notice has been given. Written notice mailed to the owner at
the last known address of the owner as shown on the current real estate tax assessment books or current real estate tax assessment records satisfies the notice requirements.

14-240 Required notice to the owner of a notice of violation or order

A notice of violation or an order of the zoning administrator will be binding against a landowner only if the zoning administrator provided notice of violation or the order to the landowner. Virginia Code § 15.2-2311(A). Otherwise, any decision of the BZA on the matter is nonbinding against the landowner. Virginia Code § 15.2-2311(A). If the landowner had actual notice of the notice of violation or the order, or participated in the BZA appeal hearing, the lack of notice is waived. Virginia Code § 15.2-2311(A).

14-250 Required notice of right to appeal written notices of violation or orders

Any written notice of a zoning violation or a written order of the zoning administrator must include a statement informing the recipient that he may have a right to appeal the notice of zoning violation or written order within 30 days, and that the decision shall be final and unappealable if not appealed within 30 days. The 30-day appeal period for the recipient of the notice or order does not begin until she is advised of the right to appeal. Virginia Code § 15.2-2311(A). A written notice that is sent by registered or certified mail to, or posted at, the last known address of the landowner as shown on the current real estate tax assessment books or current real estate tax assessment records, is deemed sufficient notice to the landowner and satisfies the notice requirements. Virginia Code § 15.2-2311(A). Finally, the notice of appeal must inform the recipient of the applicable appeal fee and provide a reference to where additional information may be obtained regarding filing an appeal. Virginia Code § 15.2-2311(A).

Under Virginia Code § 15.2-2311(A), the required notice of appeal applies only to written notices of violation and written orders of the zoning administrator. It does not apply to other decisions and determinations that may be made and, thus, the 30-day appeal period may run against someone who may not have received, or may not have been entitled to receive, notice of the decision or determination. In other words, third parties do not have an unlimited period of time to appeal a decision, even if they assert that they are aggrieved. Otherwise, there would be no finality to a decision or determination. But see Ripol v. Westmoreland County Industrial Development Authority, 82 Va. Cir. 69 (2010), where third-parties were allowed to challenge a decision as to whether a proposed use was a “school” long after the 30-day appeal period had passed because the decision was not directed to them and there was no evidence that the petitioners knew about the decision when it was made.

14-300 The doctrine of estoppel and its application to erroneous determinations

A zoning official may make an incorrect decision, and that incorrect decision may place a burden on the person affected by it; other times an incorrect decision may give the landowner greater rights than he or she might otherwise be entitled to and, once discovered, the locality may seek to correct that error.

14-310 The doctrine of estoppel

In the land use context, the doctrine of estoppel is typically raised by a landowner who has been erroneously granted a permit or some other kind of approval. For example, a building official may issue a building permit for a building that will be unlawfully located within the setback area on the lot. When the mistake is discovered, but construction on the building has begun, the landowner will claim that the locality is estopped (prevented) from applying the setback regulations to the lot because she relied on the building permit issued by the locality.


An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute.
WANV, 219 Va. at 63, 244 S.E.2d at 763-764.

No subordinate municipal official can bind the municipality to an incorrect . . . interpretation of the [locality's] ordinances.


If a building permit is issued in violation of law, it confers no greater rights upon a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance, or authorize a structure at a location prohibited by the ordinance. Its issuance by such a municipal officer is unauthorized and void. [citations omitted] Administrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them.

Segaloff, 209 Va. at 382, 163 S.E.2d at 685 (building canopy constructed in setback as shown on approved building permit plans, but in violation of setback regulations).

Thus, estoppel does not apply because the laws of the state and a locality are supreme to any decision of an official in the administration of those laws. The effect is to prevent a law from being overridden or circumscribed by erroneous decisions at the administrative level. It is irrelevant whether the official is acting in good faith. Hurt, 222 Va. at 97, 279 S.E.2d at 142 (estoppel would not apply even though building official acted in good faith and under the honest belief that he had a legal right to issue the building permit, because he was without authority to issue a building permit for the construction of a multi-family apartment building unless and until the county regulation had been met).

14-320 Virginia Code § 15.2-2311(C) and statutory estoppel

Virginia Code § 15.2-2311(C) provides “for the potential vesting of a right to use property in a manner that otherwise would not have been allowed.” Goyonaga v. Board of Zoning Appeals for the City of Falls Church, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008). When a zoning administrator makes an erroneous written decision that works to the benefit of a landowner (e.g., by allowing the landowner to do something not otherwise allowed by the zoning ordinance) and that error is discovered, the zoning administrator presumably will seek to correct it. Virginia Code § 15.2-2311(C) creates a limited circumstance when estoppel principles apply to localities, and vests rights in the landowner if the zoning administrator does not correct an erroneous written determination within 60 days after the date of the decision.

Specifically, Virginia Code § 15.2-2311(C) provides:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical errors.

See section 19-400 for a discussion of the vested rights that may attach to an erroneous determination.
14-400  The doctrine of laches as applied to decisions related to zoning enforcement

In most Virginia localities, zoning enforcement is triggered by a complaint, which is usually lodged by a neighbor of the alleged violator or other concerned citizens. Few localities are engaged in proactive zoning enforcement where zoning inspectors go out seeking zoning violations on their own. Under this prevailing state of zoning enforcement, it is possible for zoning violations to go unnoticed by the locality for years, sometimes decades. The passage of time, however, in no way legitimizes the illegal use or prevents the locality from enforcing its zoning regulations.

*Laches* is an equitable defense that may be raised by a party who claims that the failure of another party to assert a known right for an unexplained length of time is prejudicial to the party raising the defense. *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 47, 353 S.E.2d 727, 735 (1987). Assuming for the sake of argument that the defense of laches applies against localities, the defense would be raised by a zoning violator facing a zoning enforcement action. However, laches does not apply to a locality in the discharge of its governmental functions, and this includes the enforcement of its zoning regulations. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 381, 416 S.E.2d 680, 685 (1992); *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 164, 349 S.E.2d 351, 354 (1986).

In *Dick Kelly Enterprises*, the landowner unsuccessfully argued that the doctrine should apply because it had been illegally operating an apartment building in a building zoned for a motel use for six years before the zoning regulations were enforced. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the circuit court rejected the landowner’s claim that laches should prevent the county from enjoining him from operating his illegal vehicle light service business because the county had not enforced against his property for over 40 years, the business was now his sole source of income, and because he was no longer able to work away from his home due to his and his wife’s medical conditions.

To put it simply, an illegal use does not become a legal use solely because it has escaped detection from zoning inspectors for a certain period of time.
Chapter 15

Appeals of Decisions by Zoning Officials to the Board of Zoning Appeals

15-100 Introduction

A BZA has the power and duty to consider a variety of matters. Some of those matters originate with the BZA, such as applications for special use permits (see chapter 12) and variances (see chapter 13). The procedures and standards applicable to those matters are covered in those respective chapters. Others matters originate with either the zoning administrator or other administrative officers (collectively, the zoning administrator), and they come to the BZA in the nature of an appeal from that zoning official’s decisions, determinations, orders, and requirements, including notices of violation (collectively, decisions). Virginia Code § 15.2-2309. This chapter focuses on appeals of those decisions to the BZA.

The range of issues that the zoning administrator may be asked to resolve in a decision, and which may be appealed to the BZA, may include:

- The meaning of a particular regulation in the zoning ordinance.
- How a land use should be classified and whether the use is permitted within a particular zoning district.
- Whether a proposed structure complies with lot size, setback, height, bulk and other requirements.
- Whether a use or structure is in compliance with the zoning ordinance or is nonconforming.
- Whether an owner has vested rights.

A decision has legal significance because, if a person aggrieved by the decision fails to timely appeal it to the BZA, it becomes a final, binding decision – a thing decided. (see chapter 14 for further discussion of decisions by zoning officials and the thing decided rule).

15-200 Standing to appeal

Any person aggrieved, and any officer, department, board, or bureau of the locality affected, by any decision of the zoning administrator or from any order, requirement, decision, or determination (collectively, a “decision”) made by any other administrative officer in the administration or enforcement of the state zoning laws, the locality’s zoning ordinance, or any modification of zoning requirements pursuant to Virginia Code § 15.2-2286, may appeal the decision to the BZA. Virginia Code § 15.2-2311(A).

In order to have a right to appeal a decision, the non-locality affiliated appellant must be a person aggrieved by the decision. Virginia Code § 15.2-2311(A). The meaning of aggrieved is settled under Virginia case law:

. . . [I]n order for a petitioner to be “aggrieved,” it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner “must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest” . . . The word “aggrieved” in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.


Mere proximity to the parcel that is the subject of the appeal alone is insufficient to establish standing; a particularized harm must exist. *Friends of the Rappahannock v. Caroline County*, 286 Va. 38, 743 S.E.2d 142 (2013) (to allege standing, proximity to the subject property, alone, is insufficient; instead, a plaintiff must allege sufficient facts showing harm to some personal right or property right different than that suffered by the public generally). This standard applies to appeals of zoning decisions to the BZA. In *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County*, 89 Va. Cir. 345 (2014). The alleged harm also cannot be speculative. In *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County*, the zoning administrator determined that a proposed warehouse was part of a “public benefit use” that could be allowed by special use permit, and not a prohibited “storage” use. The trial court concluded that the neighbor’s alleged harm that the decision changed the nature of their residential neighborhood with resulting visual impacts, increased traffic flow, and noise from truck deliveries, and the need for increased vigilance, was “speculative” and insufficient to establish standing. The court noted that the proposed warehouse still required a special use permit from the board of supervisors, and until that board approved the special use permit, it was “impossible to know what harms, if any, might result.”

**15-300 Notice of the decision and perfecting an appeal**

An appeal must be filed within 30 days after the decision is made. *Virginia Code § 15.2-2311(A)*; see *Voorhees v. County of Fairfax Board of Zoning Appeals*, 2009 Va. Cir. LEXIS 84, 2009 WL 1269384 (2009) (BZA did not err in denying appeal as untimely where zoning approval of grading plans was made on April 20, and the petitioner’s appeal was not filed until May 23; failure of petitioners to receive notice of zoning approval does not trigger any due process rights where notice of the decision was not required by state law or county ordinance).

Written notice of a zoning violation or a written order of the zoning administrator must include a statement informing the recipient that he may have a right to appeal the decision within 30 days in accordance with Virginia Code § 15.2-2311, and that the decision will be final and unappealable if it is not appealed within 30 days. *Virginia Code § 15.2-2311(A).* The notice of the zoning violation or written order must state that the applicable appeal fee and a reference to where additional information may be obtained regarding the filing of an appeal. *Virginia Code § 15.2-2311(A).* The appeal period does not begin until the statement is given and the zoning administrator’s written order is sent by registered or certified mail to, or posted at, the last known address or usual place of abode of the property owner or its registered agent, if any. *Virginia Code § 15.2-2311(A).*

A locality’s zoning ordinance may provide for an appeal period of less than 30 days, but not less than 10 days, for short-term recurring violations pertaining to temporary or seasonal commercial uses, parking commercial trucks in residential zoning districts, or maximum occupancy limitations on a residential dwelling unit. *Virginia Code § 15.2-2286(A)(4).*

The failure to file a timely appeal results in the official determination becoming final and binding – a *thing decided*, at least in a subsequent civil court proceeding.

An appeal to the BZA pursuant to Virginia Code § 15.2-2311(A) may not be circumvented by filing a court action under Virginia Code § 15.2-2313. Virginia Code § 15.2-2313 provides:

Where a building permit has been issued and the construction of the building for which the permit was issued is subsequently sought to be prevented, restrained, corrected or abated as a violation of the zoning ordinance, by suit filed within fifteen days after the start of construction by a person who had no actual notice of the issuance of the permit, the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals.

In *Campbell v. Davidson*, 96 Va. Cir. 55 (2017), the city had issued building permits for the construction of a 301-unit multifamily apartment complex on April 11, 2017. On April 25, 2017, the plaintiffs, who were landowners in
the vicinity of the apartment complex, filed a lawsuit against the city and the zoning administrator pursuant to Virginia Code § 15.2-2313. The plaintiffs alleged that the building permits had been issued in violation of the zoning ordinance. The plaintiffs never filed an appeal to the board of zoning appeals under Virginia Code § 15.2-2311.

The issue was whether Virginia Code §§ 15.2-2311 and 15.2-2313 provide optional avenues for appeal or whether they are sequential. Citing prior Virginia case law, the circuit court granted the city’s and zoning administrator’s motion to dismiss the lawsuit, holding that an appeal under Virginia Code § 15.2-2311 is a “mandatory appeal” and a person is precluded from direct judicial attack under Virginia Code § 15.2-2313 if he fails to timely exhaust his administrative remedies under Virginia Code § 15.2-2311. The trial court said that what the plaintiffs had attempted in this case “was essentially an end-run around that mandatory administrative appeal.”

In those localities that impose civil penalties for zoning violations, civil penalties may not be assessed by a court having jurisdiction during the 30-day appeal period. Virginia Code § 15.2-2311(A).

The notice of appeal must be filed with the zoning administrator and with the BZA and must specify the grounds for the appeal. Virginia Code § 15.2-2311(A). After the notice of appeal is filed, the zoning administrator must promptly transmit to the BZA all the papers constituting the record upon which the action appealed was taken. Virginia Code § 15.2-2311(A).

If an appellant fails to perfect the appeal because it was not filed within 30 days of the date of the determination or there is a question as to whether the appellant is aggrieved, the BZA should consider and act on these jurisdictional issues. It is not the locality’s staff’s role to reject or dismiss the appeal or to refuse to process it.

15-400 Effect of filing an appeal on pending proceedings

Generally, filing an appeal stays all proceedings in furtherance of the action appealed from. Virginia Code § 15.2-2311(B). Proceedings, as the term is used in Virginia Code § 15.2-2311(B), refers to not only litigation, but also “any action that proceeds from the action appealed from.” Wahrhaftig v. Artman, 73 Va. Cir. 37, 38 (2007) (because Virginia Code § 15.2-2311(B) is remedial in nature, it should be liberally construed and, therefore, construction of the structure authorized by county’s issuance of zoning permits was stayed pending BZA appeal). For example, if the zoning administrator makes an official determination that a zoning violation exists on the landowner’s property and initiates a zoning enforcement action, that action is stayed while the appeal is considered by the BZA. As another example, if a site plan is being processed and there is an appeal of the use classification related to the site plan, processing of the site plan is stayed until the appeal is resolved.

However, proceedings pertaining to parts of a project that are separate and distinct components, such as different phases of a phased site plan or subdivision plat, are not stayed. Ripol v. Westmoreland County Industrial Development Authority, 82 Va. Cir. 69 (2010) (BZA appeal pertaining to the site plan for Phase 1A did not stay proceedings pertaining to Phase 1B; therefore, the zoning administrator was not stayed from acting on the site plan for Phase 1B of the project where the two phases were separate and distinct components).

Finally, the zoning administrator may certify to the BZA that facts exist such that a stay, in her opinion, would cause imminent peril to life or property. Virginia Code § 15.2-2311(B). If the zoning administrator makes such a certification, the pending proceedings will not be stayed unless the appellant successfully applies to the BZA or the circuit court for a restraining order. Virginia Code § 15.2-2311(B).

15-500 Procedural requirements prior to and during an appeal hearing

A number of procedural rules apply to the conduct of an appeal hearing:

- **Scheduling the hearing on the appeal.** The BZA must “fix a reasonable time for the hearing” Virginia Code § 15.2-2312.

- **Notice of the hearing.** The BZA must “give public notice thereof as well as due notice to the parties in interest.” Virginia Code § 15.2-2312. Notice of the hearing must be provided as required in Virginia Code § 15.2-2204.
Virginia Code § 15.2-2309(3).

- Prior to the hearing; contact by parties with BZA members. The non-legal staff of the governing body, as well as the appellant, landowner, or its agent or attorney, may have ex parte communications with a member of the BZA prior to the hearing but may not discuss the facts or law relative to the appeal. If any ex parte discussion of facts or law in fact occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited ex parte communications do not include discussions that are part of a public meeting or discussions prior to a public meeting to which the appellant, landowner or his agent or attorney are all invited. The non-legal staff of the governing body is “any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542. Virginia Code § 15.2-2308.1(A) and (C).

- Prior to the hearing; sharing of locality-produced information. Any materials relating to an appeal, including a staff recommendation or report furnished to a BZA member must be available without cost to the appellant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the appellant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (Virginia Code § 2.2-3700, et seq.). Virginia Code § 15.2-2308.1(B).

At the hearing: the right to equal time for a party to present its side of the case. The BZA must offer an equal amount of time in a hearing on the case to the appellant or other person aggrieved and the staff of the local governing body. Virginia Code § 15.2-2308(C).

At the hearing: the zoning administrator’s required explanation. At a hearing on an appeal, the zoning administrator must explain the basis for her decision. Virginia Code § 15.2-2309(1).

At the hearing: the presumption of correctness. At the hearing, the zoning administrator’s decision is presumed to be correct. Virginia Code § 15.2-2309(1).

At the hearing: the burden of proof is on the appellant. After the zoning administrator explains the basis for her decision, the appellant has the burden of proof to rebut the presumption of correctness by a preponderance of the evidence. Virginia Code § 15.2-2309(1).

Decision. The BZA may reverse or affirm, wholly or partly, or may modify, the decision of the zoning administrator. Virginia Code § 15.2-2312. See section 15-700 for further discussion.

Time for the decision. The decision must be made within 90 days. Virginia Code § 15.2-2312. This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on an appeal after the time period has passed. See Tran v. Board of Zoning Appeals of Fairfax County, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

Required vote. The concurring vote of a majority of the BZA’s membership is necessary to reverse the determination of the zoning administrator. Virginia Code § 15.2-2312. This means that a seven-member BZA may reverse the zoning administrator’s determination only if at least four members vote for reversal, and a five-member BZA may reverse only if at least three members vote for reversal. See Hughey v. Fairfax County Zoning Appeals Board, 41 Va. Cir. 138 (1996) (3-3 vote of a seven-member BZA was a “decision” because the vote established that the BZA could not and would not reverse the zoning administrator’s decision). Thus, if only three members of a five-member BZA are present for the vote, all three must vote in favor of reversal; however, the zoning administrator’s determination may be affirmed or modified on a 2-1 vote. If the BZA’s vote on an appeal results in a tie vote, the person filing the appeal may request to have the matter carried over until the next meeting, but nothing compels the BZA to grant the request. Virginia Code § 15.2-2311(D).
• **Findings to support the decision.** To facilitate judicial review, the BZA is required to make findings that reasonably articulate the basis for its decision. See *Packer v. Hornsby*, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980) (adding that if the BZA does not, “the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal”). There is no minimum standard to which a BZA must adhere in making findings of fact. At bottom, the BZA must ensure that it has created a record that addresses the findings so that the circuit court can properly adjudicate the issues on appeal. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) (“In fact, the verbatim transcript contains numerous findings of fact in support of the BZA’s decision”).

15-600  Considering an appeal; matters the BZA may and may not decide

The BZA’s decision on appeal is limited to the issue of whether the zoning administrator’s decision was correct. *Virginia Code § 15.2-2309(1); Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 295, 435 S.E.2d 385, 388 (1993); see *In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015) (BZA correctly determined that the zoning administrator erred when he determined that he needed more information before could make a determination as to the nonconforming status of a towing and recovery lot when the zoning ordinance at the time had a by right use classification that was consistent with the actual use at the time). This does not mean that the BZA’s inquiry is limited only to the reasons and authority cited in the zoning administrator’s written decision. *Town of Madison v. Board of Zoning Appeals/Potichas*, 65 Va. Cir. 433, 434-435 (2004). Regardless of what the zoning administrator states in his determination, the BZA’s role is to determine whether the decision was correct, and must apply the terms and provisions of the zoning ordinance even if they were not cited by the zoning administrator. *Madison*, supra.

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<th>Summary of the Scope of Review on Appeal</th>
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<td>• The issue for the BZA is whether the zoning administrator’s decision was correct.</td>
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<td>• Statements by the appellant or his attorney may further limit the scope of the appeal.</td>
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<td>• In the consideration of an appeal, the BZA may not:</td>
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<td>→ Determine whether a proposed use is appropriate in the zoning district.</td>
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<td>→ Determine what is in the public interest.</td>
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<tr>
<td>→ Amend or repeal a zoning regulation.</td>
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<td>→ Determine that a zoning regulation is invalid.</td>
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The scope of the proceeding before the BZA may be limited by statements made by the appellant or his attorney. See *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). In *Adams*, the applicant’s attorney stated at the BZA hearing on his client’s application for a variance for a sign that the “only issue is whether Adams spent too much on the sign and whether, because of the misunderstanding between the City and Adams [on] what could be done and what could not be done and whether it would in fact be proper for a variance. That’s all that’s before you.” Because the scope of the BZA proceeding was limited by the attorney’s statements, the scope of judicial review was likewise limited. The Virginia Supreme Court determined that the BZA correctly denied the variance, particularly since the BZA did not have the authority to grant a variance on the grounds presented. *Adams*, 261 Va. at 414, 544 S.E.2d at 319.

A BZA may not determine what uses are appropriate in a zoning district because that is a legislative function reserved to the governing body. *Foster v. Geller*, 248 Va. 563, 568, 449 S.E.2d 802, 806 (1994) (the BZA does not have the power to rezone property); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982) (the decision of the legislative body, when framing its zoning ordinance, to place certain uses in the special exception or conditional use category, is a legislative action). The BZA’s role in is not to determine whether a proposed use is appropriate in the zoning district, but only to determine whether the use is within one of the use classifications the governing body has decided to allow in the district.

Likewise, a BZA may not determine what is in the public interest because that determination requires the balancing of private conduct and the public interest, which is a legislative decision that lies with the governing body, not the BZA. *Helmick v. Town of Warrenton*, 254 Va. 225, 229, 492 S.E.2d 113, 114 (1997) (the exercise of legislative power involves the “balancing of the consequences of private conduct against the interests of public welfare, health,
and safety”); Southland Corp., 224 Va. at 521, 297 S.E.2d at 721 (the power to regulate the use of land by zoning laws is a legislative power, residing in the state, which must be exercised in accordance with constitutional principles). Administrative zoning decisions such as those made by the BZA must be grounded within the legislative framework provided. Higgs, 258 Va. at 573, 522 S.E.2d at 864. While the BZA should consider the zoning ordinance, the ordinance should not be extended by interpretation or construction beyond its intended purpose. Higgs, supra. In addition, equitable considerations are inappropriate. Coleman v. Board of Zoning Appeals of the City of Fairfax, 2011 Va. Cir. LEXIS 66 (2011) (reversing decision of the BZA because a single BZA member relied on “equitable considerations” in voting to overturn the decision of the zoning administrator that the counseling center had engaged in an activity not allowed by the zoning ordinance; the circuit court said that the BZA member’s statements revealed that he arrived at his decision because the counseling center had engaged in that activity for years). See sections 15-720 and 29-600 for discussions of the rule that public bodies act only as a corporate body and not by the actions of its members separately and individually.

Lastly, one of the duties of the BZA on an appeal may be to determine whether the zoning administrator correctly interpreted the zoning ordinance.

The power to interpret the zoning ordinance has its limitations. Although the BZA (as well as the zoning administrator) must necessarily interpret the zoning ordinance to execute its responsibilities, that obligation does not give rise to a power to declare a regulation invalid; that is a determination within the sole province of the judiciary. Town of Jonesville v. Powell Valley Village, 254 Va. 70, 487 S.E.2d 207 (1997). In addition, the BZA does not have the power to amend or repeal portions of a zoning ordinance. Foster, supra. The principles relevant to the interpretation of the zoning ordinance by the BZA are well established. Higgs, supra. See chapter 16 for a discussion of some of these key principles.

15-700 The effect of a decision on an owner who did not receive a notice of violation or order

For a notice of violation or an order of the zoning administrator to be binding against a landowner, the landowner must have been given notice of the notice of violation or the order. Virginia Code § 15.2-2311(A). Otherwise, any decision of the BZA on the matter is nonbinding against the landowner. Virginia Code § 15.2-2311(A). If the landowner had actual notice of the notice of violation or the order, or participated in the appeal hearing, the lack of notice is waived. Virginia Code § 15.2-2311(A).

15-800 Presenting an appeal to the BZA

Appeals to the BZA can become legal free-for-alls resulting in long, drawn-out hearings where a multitude of issues, both relevant and irrelevant, are raised by the participants and the BZA, and where relevant and material issues may be lost in the confusion. This risk is especially true where the BZA’s practices and procedures do not require a level of formality that imposes structure to the proceedings and the participants and the BZA are not familiar with the relevant issues and the applicable legal standards.

15-810 Insist on a clearly stated and comprehensive statement of the basis for the appeal

The appellant’s written appeal must clearly state the basis for the appeal. When the appeal is received, the BZA or its staff must review the statement to assure that this requirement is satisfied. A statement of the basis for the appeal is critical because it should be relied on to frame and limit the issues on appeal.

If the statement is unclear or needs further information, the BZA or its staff should ask the appellant to elaborate on the basis for the appeal. Without a clearly stated basis for appeal, the parties and the BZA can only guess what the key issues will be on appeal (such as whether a use is nonconforming). In any event, the appellant much provide as much information as possible about the appeal before the appeal is scheduled for hearing.

15-820 Presenting the appeal

There are several things a locality’s staff can do to present their side of an appeal to ensure that the BZA
understands and focuses on the material issues.

- **Identify the dispositive issues**: Staff must identify the dispositive issues and keep them at the forefront for the BZA’s consideration. This will depend, in part, on the appellant providing a detailed statement of the basis for the appeal.

- **Provide a legal memorandum**: Appeals to the BZA are quasi-judicial proceedings that often raise legal issues that need to be explained to the BZA. For example, assume that the issue on appeal is whether a use is accessory to a primary use; the BZA may need to be briefed on the elements of establishing an accessory use and how those elements have been interpreted under the case law. If necessary, a legal memorandum prepared by the locality’s attorney should accompany the staff report. Staff should not be concerned that a legal memorandum will cause the appeal to become too legalistic. The BZA is always obligated to apply the correct legal principles in making a decision.

- **Use visual aids**: Presentations should include a visual component for several reasons. Maps, aerial photographs, and ground level photographs familiarize the BZA and the persons attending the public hearing with the property at issue. Applicable zoning regulations, definitions of key terms, and other information displayed throughout the hearing provide the BZA, the participants, and others in attendance points of reference that they can easily turn to when necessary.

- **Focus the oral presentation on the dispositive issues**: BZA members must read the locality’s staff report and other materials, the appellant’s written materials, and all of the other writings received pertaining to the appeal before the public hearing. Staff should assume that the BZA has read these materials and focus its oral presentation on the dispositive issues and the relevant materials and facts, rather than merely re-read the staff report at the public hearing.

- **Minimize the detours to the irrelevant and immaterial issues**: All of the parties to an appeal need to ensure that the BZA understands the relevant and material issues. Whether intentional or not, some appellants may sometimes send some BZA members on detours by raising irrelevant or immaterial issues and arguments (e.g., common topics include the claim that the owner is a longstanding resident who pays taxes; less obvious though irrelevant topics include the claim that the zoning on the property is inappropriate for the neighborhood), misstate or misrepresent the law (e.g., by stating that a regulation or a case stands for A, when it actually stands for B), or play the victim or seek sympathy (e.g., “I already built the structure”; “I didn’t know it was a violation”; “So and so said it was okay”; “So and so has been harassing me about this/has been verbally abusive”; “Doesn’t the zoning department have anything better to do with its time?”). Unfortunately, this strategy may be effective with some BZA members.

The strategies applied to properly present a particular appeal will depend on the issues and parties involved, and the public interest that may be generated by the appeal.

15-900 **Appeals of BZA decisions to the circuit court**

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA’s decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code § 15.2-2314.*

15-910 **Time in which to file a petition for writ of certiorari**

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. *Virginia Code § 15.2-2314.* The date of the final decision is the date the BZA takes its vote on the matter that decides its merits. *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 268, 618 S.E.2d 311, 315 (2005). Local zoning regulations or BZA by-laws establishing a different method to determine the running of the 30-day period are inconsistent with Virginia Code § 15.2-2314 and are invalid. *West Lewinsville, supra* (holding invalid BZA by-laws that commenced the 30-day period on the “official filing date,” which was a date
specified in the BZA clerk’s letter that was eight days after the BZA voted on the appeal). The failure of a party to file a petition for writ of certiorari within the 30-day period does not divest the circuit court of its subject matter jurisdiction, so the issue of timely filing is waived if it is not raised in the circuit court. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 271 Va. 336, 347-348, 626 S.E.2d 374, 381 (2006).

15-920 The governing body must be included in the filed petition within 30 days after the BZA decision

The third paragraph of Virginia Code § 15.2-2314 states:

Any review of a decision of the board shall not be considered an action against the board and the board shall not be a party to the proceedings; however, the board shall participate in the proceedings to the extent required by this section. The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings in the circuit court. The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals. (italics added)

In Boasso America Corporation v. Zoning Administrator of the City of Chesapeake, 293 Va. 203 (2017), Boasso appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, Boasso’s petition did not name the city as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city had to be named in the petition within the 30-day period, or whether Boasso could add the city as a necessary party by amending its petition after the 30-day period had run. The trial court granted the city’s motion to dismiss the petition because the city had not been named as a necessary party within the 30-day appeal period.

The Virginia Supreme Court affirmed. The Court held that a locality’s governing body that “is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition.”

15-930 Nature of the proceeding in circuit court

A proceeding under Virginia Code § 15.2-2314 “has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance.” Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 275 Va. 452, 456-457, 657 S.E.2d 147, 149 (2008) (proceeding under Virginia Code § 15.2-2314 is not a trial proceeding for which nonsuit is available under Virginia Code § 8.01-380(B); adding that the option to take additional evidence was insufficient to change the nature of the proceeding from an appeal to a trial).

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court. Virginia Code § 15.2-2314. The necessary parties in a case challenging a BZA decision are the governing body and the landowner and the applicant/appellant before the BZA (assuming the latter is different from the landowner). Virginia Code § 15.2-2314; see In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County, 2014 WL 1391769 (Va. Cir. Ct.) (naming the governing body in the style of the case is not required and, therefore, motion to dismiss petition on the ground that it failed to name a necessary party was denied; by statute the governing body is a necessary party and the style of the case complied with Virginia Code § 15.2-2314; however, the failure to serve the governing body with the petition may implicate the provisions of Virginia Code §§ 8.01-275.1 and 8.01-277, but would not constitute grounds for dismissing the case under the motion brought). The court may also allow other aggrieved parties to intervene in the proceeding. Virginia Code § 15.2-2314.

The court’s review of the BZA’s decision is limited to the scope of the BZA proceeding, i.e., whether the zoning administrator’s decision was correct. Foster v. Geller, 248 Va. 563, 567, 449 S.E.2d 802, 805 (1994); Board of Zoning Appeals of James City County v. University Square Associates, 246 Va. 290, 294-295, 435 S.E.2d 385, 388 (1993). Thus, the court’s role, like the BZA’s, is to determine whether the decision was correct, applying all of the applicable terms and provisions of the zoning ordinance, even if they were not cited by the zoning administrator.

Because the individual members of a BZA act only as a single entity, the court does not review the individual actions of each member of the BZA, but reviews the decision of the BZA. *Sundlun v. Board of Zoning Appeals of Fauquier County*, 23 Va. Cir. 53 (1991). The result reached by the circuit court in *Sundlun* is consistent with the broader principle that public bodies act only through the body itself, and not by the acts of its individual members. *See Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922) (a board of supervisors can act only at authorized meetings as a corporate body and not by actions of its members separately and individually).

A petitioner in a certiorari proceeding to review a decision of the BZA cannot challenge the composition of the BZA or the authority of a member to sit on the BZA. *Sundlun, supra*.

**15-940 Presumptions attached to BZA decisions and standard of review**

On appeals from BZA decisions arising from appeals from decisions by the zoning administrator, two rules apply.

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, which includes 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 and, therefore, without any presumptions. *Virginia Code § 15.2-2314*. The interpretation of statutes and ordinances are questions of law to which no presumption of correctness applies. *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 269, 673 S.E.2d 170, 179 (2009).

The party challenging the BZA’s decision has the burden of proof. *Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 380-381, 641 S.E.2d 104, 107 (2007); *Foster v. Geller*, 248 Va. 563, 566, 449 S.E.2d 802, 805 (1994). 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 the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Virginia Code § 15.2-2314*.

The circuit court may reverse or affirm, wholly or partly, or modify the BZA’s decision. *Virginia Code § 15.2-2314*. If the BZA’s decision is affirmed and the circuit court finds that the appeal was frivolous, the petitioner may be ordered to pay the costs incurred in making the return of the record. *Virginia Code § 15.2-2314*. The petitioner may be entitled to recover its costs only if the court determines that the BZA acted in bad faith or with malice in making the decision that was appealed. *Virginia Code § 15.2-2314*.
Chapter 16

Interpreting Statutes and Ordinances

16-100 Introduction

This chapter provides general guidance regarding the interpretation of statutes and ordinances, which is a common task of the zoning administrator and, on an appeal, of the BZA. It is by no means an exhaustive review of the rules of statutory interpretation. It does, however, provide a general framework for interpreting statutes and ordinances and addresses many misconceptions about this sometimes difficult task.

The rules of interpretation are the same for statutes and ordinances, and for simplicity, they are collectively referred to in this chapter as ordinances.

A legislative body (for a locality, its governing body) is “the author of public policy.” In re Woodley, 290 Va. 482, 490, 777 S.E.2d 560, 565 (2015). The best indications of public policy are to be found in the enactments of the legislative body. Woodley, supra.

16-200 Responsibility for interpreting the land use ordinances and the comprehensive plan

At the staff level, the task of interpreting the zoning ordinance is assigned to the zoning administrator. Virginia Code § 15.2-2286. A BZA is authorized to interpret the zoning ordinance. Higgs v. Kirkbride, 258 Va. 567, 522 S.E.2d 861 (1999). The task of interpreting the subdivision ordinance is assigned to the subdivision agent. Virginia Code § 15.2-2241(9).

A locality’s public bodies also have the authority to interpret an ordinance if it is necessary to do so to exercise its powers. James v. City of Falls Church, 280 Va. 31, 694 S.E.2d 568 (2010) (planning commission had the authority to interpret the zoning ordinance as part of its consideration of a subdivision plat; also holding that the planning commission was not obligated to adopt the zoning administrator’s interpretation of the zoning ordinance). In addition, a governing body is authorized to interpret the comprehensive plan. Board of Supervisors of Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980); Gasner v. Board of Supervisors of Fairfax County, 1993 WL 945908 (Va. Cir. Ct. 1993). On appeal from decisions of the zoning administrator, a governing body is authorized to interpret proffers. Virginia Code § 15.2-2299 et seq.

In the end, the courts “shoulder the duty of interpreting statutes because ‘pure statutory interpretation is the prerogative of the judiciary.’” Fitzgerald v. Loudoun County Sheriff’s Office, 289 Va. 499, 505, 771 S.E.2d 858, 860 (2015). “This axiom stems from basic principles of separation of powers,” Fitzgerald, supra, because “It is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

16-300 Two rules specifically applicable to zoning ordinances

With respect to zoning ordinances in particular, the Virginia Supreme Court has said that they “should be given a fair and reasonable construction in the light of the manifest intent of the legislative body enacting them, the object sought to be attained, the natural import of the words used in common and accepted usage, the setting in which such words are employed, and the general structure of the ordinance as a whole.” Patton v. City of Galax, 269 Va. 219, 229-230, 609 S.E.2d 41, 46 (2005), quoting Mooreland v. Young, 197 Va. 771, 91 S.E.2d 438 (1956).

However, zoning regulations also are in derogation of the common law and operate to deprive an owner of a use thereof which otherwise would be lawful; therefore, they should be strictly construed in favor of the property owner. 83 Am. Jur. 2d, Zoning and Planning, § 699; see, e.g., Schwartz v. Brownlee, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (“Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.”); Higgs v. Kirkbride, 258 Va. 567, 522 S.E.2d 861 (1999) (an ordinance should not be extended by interpretation beyond its intended purpose). A rule of strict construction only
means that the regulations are not to be enlarged in their operation beyond their express terms. As a rule of statutory construction, this rule applies only when an ordinance is ambiguous. See section 16-500 for a summary of the rules that apply to the construction of ambiguous ordinances.

16-400 Give an ordinance its plain and natural meaning

The first step in interpreting an ordinance is to employ the plain and natural meaning of the words used. West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County, 270 Va. 259, 618 S.E.2d 311 (2005); Capelle v. Orange County, 269 Va. 60, 607 S.E.2d 103 (2005); Fritts v. Carolinas Cement Company, 262 Va. 401, 551 S.E.2d 336 (2001); McLung v. County of Henrico, 200 Va. 870, 108 S.E.2d 513 (1959). This approach is possible when the language of the ordinance is unambiguous.

Often, those charged with interpreting an ordinance mistakenly jump to a perceived intent of the ordinance and construe it accordingly, and ignore the language of the ordinance itself. However, when employing the plain and natural meaning to language that is unambiguous, the key question is not what the governing body intended to enact, but the meaning of the words of the ordinance enacted. Carter v. Nelms, 204 Va. 338, 131 S.E.2d 401 (1963). When an ordinance is unambiguous, the governing body’s intent is determined only from what the ordinance says, and not from what anyone thinks it should have said. Logan v. City Council of the City of Roanoke, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) (“We determine the General Assembly’s intent from the words employed in the statutes”).

It must be assumed that the governing body chose, with deliberation and care, the words it used when it adopted the ordinance at issue. Miller v. Highland County, 274 Va. 355, 650 S.E.2d 532 (2007) (as employed in the relevant statutes, the terms “locality” and “board of supervisors” are not synonymous or interchangeable). The words used are binding when the ordinance is interpreted, Barr v. Town & Country Properties, Inc., 240 Va. 292, 396 S.E.2d 672 (1990), unless such a literal interpretation would involve a manifest absurdity. Dominion Trust Co. v. Kenbridge Construction Co., 248 Va. 393, 448 S.E.2d 659 (1994). If the rule was otherwise, the legislative power of the governing body would be usurped by those not holding that power. Barr, supra. For example, in Land & Learning Development, LLC v. Board of Supervisors of Shenandoah County, 55 Va. Cir. 226 (2001), the court agreed with the board of supervisors that cluster developments in a certain zoning district were limited to 25 acres, even though the court agreed with the developer’s argument that “limiting the maximum size of a cluster housing development undermines the stated goal of preserving open spaces.” The court recognized that there were countervailing policy goals that led the board to impose the size limitation, and it would not substitute its judgment for that of the board.

When ascertaining the plain meaning of an ordinance, each word’s meaning must be considered in the context of the entire phrase from which it is taken. Bell v. Commonwealth, 22 Va. App. 93 (1996). An undefined term must be given its ordinary meaning, given the context in which it is used. Sansom v. Board of Supervisors of Madison County, 257 Va. 589, 514 S.E.2d 345 (1999). The context may be examined by considering the other language used in the ordinance. Sansom, supra.

A word that is non-technical is presumed to have been used in its ordinary sense. Freer v. Commonwealth, 19 Va. App. 460 (1995). Dictionaries may be used as aids in obtaining the plain and natural meaning of a word. Fritts, supra; Brown-Forman Corp. v. Sims Wholesale Co., 20 Va. App. 423 (1995). Other resources also may be relied on. For example, in order to determine whether a flag qualifies as an official flag of the United States, it may be appropriate to rely on Executive Order 10834 if the term is not otherwise defined in the zoning ordinance. Hanover County v. Dunn, 82 Va. Cir. 225 (2011) (upholding determination that the defendant’s flag was not a flag of the United States allowed by the zoning ordinance because it did not comply with Executive Order 10834; therefore, the defendant’s banners were mere representations of the flag and were prohibited under the zoning ordinance).

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<th>Suggested Approach to Determine the Plain and Natural Meaning of an Ordinance</th>
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<td>• Read the entire phrase to understand its context generally, and its context with other provisions of the ordinance.</td>
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<tr>
<td>• Review the ordinance’s definitions to determine the meaning of words used in the phrase.</td>
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<tr>
<td>• Review dictionaries to determine the meaning of words not defined in the ordinance and apply a meaning that is relevant to the context in which the term is used. When it resorts to a dictionary, the Virginia Supreme Court often cites Webster’s Third New International Dictionary.</td>
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16-2
Zoning regulations, as with all other laws, must be interpreted to achieve a sensible meaning, and interpretations that produce absurd or unreasonable results must be avoided. McFadden v. McNorton, 193 Va. 455, 69 S.E.2d 445 (1952); Hoover v. Saunders, 104 Va. 783 (1906). An absurd result describes “situations in which the law would be internally inconsistent or otherwise incapable of operation.” Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006).

Curious, narrow, or strained interpretations also should be avoided. Crews v. Commonwealth, 3 Va. App. 531 (1987). Certainly, an ordinance should not be extended by interpretation beyond its intended purpose. Higgs v. Kirkbride, 258 Va. 567, 522 S.E.2d 861 (1999). It is perfectly reasonable to conclude that if the governing body had intended to include a provision in an ordinance, it could, and would, have done so. Board of Zoning Appeals ex rel. County of York v. 852 L.L.C., 257 Va. 485, 514 S.E.2d 767 (1999).

When current and prior versions of an ordinance are at issue, there is a presumption that the governing body, in amending the ordinance, intended to make a substantive change in the law. West Lewinsville Heights, supra. Further, it is assumed that the amendments to an ordinance are purposeful, rather than unnecessary. West Lewinsville Heights, supra.

Section 16-410 examines a case where the zoning administrator and the BZA correctly interpreted the zoning ordinance. The case shows that when done correctly, the exercise can be relatively simple. However, zoning administrators and BZAs can go seriously astray when they ignore the fundamental principles discussed in this chapter and instead strain to reach a particular result. The cases in sections 16-420 and 16-430 provide classic situations in the land use context where the public bodies failed to adhere to some of these fundamental principles.

16-410 Follow the basic rules to reach a sound result

In The Lamar Company, L.L.C v. Board of Zoning Appeals, City of Lynchburg, 270 Va. 540, 620 S.E.2d 753 (2005), Lamar sought approval to remove two billboards and re-erect billboards approximately 10 yards from their current location. The relevant zoning regulations prohibited a billboard from being erected in the district unless the billboard replaced a then-existing billboard in the district. Because the zoning ordinance did not define “replaces,” the zoning administrator resorted to the dictionary and applied the following definition – “to place again: restore to a former place, position, or condition.” Based on this definition, the zoning administrator determined that the new billboards would satisfy the zoning ordinance only if they were placed in the exact same location (i.e., the footprint of) as the existing billboards. Because the new billboards would not be in the exact same location as the existing billboards, the zoning administrator denied Lamar’s request to move the billboards, and the BZA affirmed that decision.

The Virginia Supreme Court found no error in the BZA’s decision. The Court’s opinion is instructive as to how ordinances should be interpreted: (1) the zoning administrator chose from among several possible definitions of “replaces,” but chose the one that he determined best reflected the meaning of the word within the context of the ordinance; (2) although the “footprint” requirement may not have been the only possible interpretation, it clearly fell within the reasonable scope of the dictionary definition; and (3) both the zoning administrator and the BZA were familiar with the use of the word “replaces” and other relevant terms used in the zoning ordinance.

In Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk, 273 Va. 375, 641 S.E.2d 104 (2007), the issue was whether two parcels separated by a public street were adjacent within the meaning of the zoning ordinance so as to allow them to be considered a single lot for zoning purposes. The zoning administrator and the BZA concluded that they were not adjacent and the Virginia Supreme Court affirmed. The Court stated that “deciding when two objects are not widely separated, but are close enough to be adjacent requires a ‘judgment call.’”

16-420 Don’t ignore the plain meaning of a law, even with the best intentions

In Board of Zoning Appeals ex rel. County of York v. 852 L.L.C., 257 Va. 485, 514 S.E.2d 767 (1999), the zoning administrator and the BZA went astray when, in an effort to reach a conclusion they believed would be equitable to
a landowner and the county, they ignored the plain meaning of a regulation and construed it in a manner they thought was fair, though contrary to the regulation.

The issue in 852 L.L.C. was the proper interpretation of a regulation in the York County zoning ordinance pertaining to computing developable land area. The regulation provided density credits for certain bodies of water that could be included in calculating net developable density. Specifically, the regulation allowed: (1) a 0% density credit for existing ponds, lakes or other impounded water bodies; (2) a 50% density credit for certain nontidal wetlands; and (3) a 100% density credit for stormwater management ponds or basins. The owner sought a determination of the density credit for an 11-acre body of water on a 30-acre parcel.

The zoning administrator initially determined that the body of water was an existing lake and entitled to no density credit. When the owner complained, the zoning administrator agreed to consider a portion of the body of water to be a stormwater management facility, but only that portion that would be required to meet the stormwater management requirements of the drainage area. The zoning administrator arrived at a density credit of 18.6%, and the BZA affirmed the decision on appeal. The trial court reversed the decision of the BZA.

On appeal to the Virginia Supreme Court, the BZA argued that the density credit regulation was ambiguous where a body of water served multiple purposes (lake, wetland, stormwater management facility), and that its decision offered “a fair interpretation of the ordinance which recognizes legitimate development expectations, while protecting the county from overdevelopment.”

The Virginia Supreme Court concluded that, however equitable the BZA’s solution might be, it “extended beyond permissible ordinance interpretation and became prohibited legislative action taken by an administrator.” First, the Court concluded that the ordinance was unambiguous because it provided that the computation of the density credit “shall” be determined by one of the three percentages set forth in the ordinance. Because it was undisputed that the body of water was used for stormwater management (though it may have had excess capacity for that purpose), the plain meaning of the regulation required that it be given a 100% density credit. The Court concluded: “Nowhere does the ordinance permit the administrator to allocate a reduced density credit based on what the administrator and his staff determine is the appropriate percentage ‘necessary for a development site such as the subject property’. . . Had the County Board of Supervisors intended the administrator to have such latitude, it would have so provided in the ordinance; such latitude may not properly be created by administrative interpretation.” 852 L.L.C., 257 Va. at 490, 514 S.E.2d at 770.

In Renkey v. County Board of Arlington County, 272 Va. 369, 375, 634 S.E.2d 352, 356 (2006), the board rezoned land from the R-5 to the C-R zoning district, even though the first paragraph of the C-R district regulations stated that in order to be eligible for the C-R classification, “a site shall be located within an area designated ‘medium density mixed use’ and zoned ‘C-3’.” The Virginia Supreme Court rejected the board’s claim that this provision was nothing more than part of the district regulation’s preamble, which began with the stated purposes of the C-R zoning district. The Court said that the language at issue set out mandatory eligibility criteria for the district.

16-430 Don’t read language into a law that isn't there

In Lilly v. Caroline County, 259 Va. 291, 526 S.E.2d 743 (2000), the plaintiffs owned land in the vicinity of a proposed radio station and tower and sought to challenge a decision by the zoning administrator that a radio tower was a use allowed by right. In fact, the Lillys had been present at all four public hearings before the board of supervisors at which the question arose. At the fourth public hearing, the zoning administrator announced his determination that the construction of a radio tower was a by-right use, and told the audience that his ruling could be appealed to the BZA. No one, including the Lillys, appealed the zoning administrator’s determination to the BZA.

The Lillys filed a declaratory relief action challenging the board of supervisors’ decisions approving a radio station and tower. The circuit court ruled that their action was barred because they failed to exhaust their administrative remedies by timely appealing the zoning administrator’s verbal determination to the BZA. On appeal, the Lillys claimed, among other things, that they had not received notice of the zoning administrator’s
determination. In its analysis of Virginia Code § 15.2-2311(A), the Virginia Supreme Court noted that nothing in section 15.2-2311(A) required that the zoning administrator’s decision be in writing. Indeed, Virginia Code § 15.2-2311(A) only requires that “any written notice of a zoning violation or a written order of the zoning administrator” must inform the aggrieved person of his or her right to appeal. The zoning administrator’s decision in Lilly was neither a notice of zoning violation nor an order. Although the practice among zoning administrators may be to put all of their determinations and decisions in writing in order to start the clock running on the time to file an appeal, there is no requirement in Virginia Code § 15.2-2311(A) that a zoning administrator’s determination or decision, or the notice of the right to appeal, be in writing.

The Virginia Supreme Court concluded that the Lillys had actual notice of the decision because they were present at the public hearing, the zoning administrator made clear the basis for his decision, and the zoning administrator intended his determination to be final – based on his statement that it could be appealed to the BZA.

The following four cases illustrate errors made by zoning administrators and BZAs who read language into zoning ordinances that did not exist.

In Donovan v. Board of Zoning Appeals of Rackingham County, 251 Va. 271, 467 S.E.2d 808 (1996), the Virginia Supreme Court held that the BZA erred when it determined that an automobile graveyard lost its nonconforming status because it was not screened within three years after the adoption of the zoning ordinance. The Court concluded that “[n]othing in the ordinance provides that the failure to screen an automobile graveyard terminates a valid nonconforming use.” Donovan, 251 Va. at 276, 467 S.E.2d at 811.

In Cook v. Board of Zoning Appeals of City of Falls Church, 244 Va. 107, 418 S.E.2d 879 (1992), the Virginia Supreme Court held that the BZA erred when it determined that all structures built before 1910 were deemed to be on the city’s official register of protected property. The Court found that the BZA’s interpretation was contrary to the regulation’s express requirement that each structure successfully complete a certification procedure before being placed on the official register.

In Shri Ganesh, LLC v. City Council for the City of Hampton, 2014 Va. LEXIS 19 (2014) (unpublished), the owner of an unimproved parcel sought to install posts to prevent trespassers from driving golf carts across the parcel to the beach. The relevant zoning regulation at the time allowed as a permitted use “an accessory building or structure, . . . provided that no accessory building shall be constructed on a lot until the construction of the main building has been actually commenced . . .”. The zoning administrator determined that the posts were not allowed because he determined that an accessory building or structure could not be constructed prior to commencement of construction of the main building. By definition at the time, the posts did not meet the definition of a “building.” The Virginia Supreme Court concluded that the zoning administrator’s determination was plainly wrong because the restriction in the ordinance that prohibited accessory building from being constructed until construction of the main building had commenced did not apply to accessory structures.

In Ramsey v. Board of Zoning Appeals of the Town of Front Royal, 68 Va. Cir. 135 (2005), a landowner appealed the BZA’s decision that a special use permit was required to construct a garage on a lot, a portion of which was in the floodplain, even though the garage would not be constructed on the portion of the lot that was in the floodplain. The relevant zoning regulation stated that a special use permit was required “for all uses, activities and development occurring within any floodplain district . . . .” The zoning administrator and the BZA erred because they misread the regulation to mean that a special use permit was required for uses, activities and development occurring anywhere on any lot, any portion of which lay within any floodplain district. The zoning regulations did not impose such a requirement.

16-440  Be mindful of the context in which a word or phrase is used

In Board of Supervisors of James City County v. Windmill Meadows, LLC, 287 Va. 170, 752 S.E.2d 837 (2014), the issue was whether Virginia Code § 15.2-2303.1:1 applied retroactively. Section 15.2-2303.1:1 was adopted in 2010, and it delays the collection of cash proffers for residential construction that are on a per dwelling unit or per home basis until completion of the final inspection and prior to the issuance of a certificate of occupancy for the subject.
property. The question was whether Virginia Code § 15.2-2303.1:1(A), and its reference to “any cash proffer,” meant that it applied to proffers accepted before July 1, 2010, when the statute became effective.

The county relied on the Virginia Supreme Court’s statement in Berner v. Mills, 265 Va. 408, 413, 579 S.E.2d 159, 161 (2003) that it is a “fundamental principle[ ] of statutory construction that retroactive laws are not favored, and that a statute is always construed to operate prospectively unless a contrary legislative intent is manifest.” The county argued that retroactive application was not manifest in Virginia Code § 15.2-2303.1:1.

The Virginia Supreme Court disagreed, first noting that it has never required that the General Assembly use any specific form of words to indicate that a new statute or amendment to an existing statute is intended to be applied retroactively. Rather, the Court said that it looks “to the context of the language used by the legislature to determine if it shows it was intended to apply retroactively and prospectively.” Windmill Meadows, 287 Va. at 180, 752 S.E.2d at 843. The Court concluded:

[I]t is clear that in the overall context of the statute the legislature intended to limit the time for payment of cash proffers to the period following a final inspection and before the issuance of a certificate of occupancy “[n]otwithstanding the provisions of any cash proffer requested, offered, or accepted.” (Emphasis added.) The plain meaning of this language clearly indicates that even if an existing cash proffer already agreed to, but not yet due on the effective date of the statute, requires a payment to a locality before the completion of a final inspection, the new statute would apply, “[n]otwithstanding” that requirement, to delay the authority of the locality to demand or accept payment until after the final inspection of a subject unit is completed.

Windmill Meadows, 287 Va. at 181, 752 S.E.2d at 843. The Court also relied on Sussex Community Services Association v. Virginia Society for Mentally Retarded Children, Inc., 251 Va. 240, 467 S.E.2d 468 (1996), in which it had held that the term “any restrictive covenant” in Virginia Code § 36-96.6, added to the statute in 1991, applied retroactively to restrictive covenants recorded before the effective date of the amendment.

16-450 The court does not defer to the locality’s or the BZA’s interpretation

In both The Lamar Company, L.L.C. v. Board of Zoning Appeals, City of Lynchburg, 270 Va. 540, 620 S.E.2d 753 (2005) and Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk, 273 Va. 375, 641 S.E.2d 104 (2007), the Virginia Supreme Court stated that it was deferring to the interpretations of the zoning ordinance by the zoning administrator and the BZA because those officials and bodies had experience and expertise with their respective zoning ordinances. The reader should note that the Virginia Supreme Court’s deference to the local interpretations of zoning ordinances in Lamar and St. Luke’s were made under a different standard of review that changed on July 1, 2006.

Whatever judicial deference to an administrative interpretation previously existed has also been clarified. In The Nielsen Company, L.L.C. v. County Board of Arlington County, 289 Va. 79, 767 S.E.2d 1 (2015), a tax case, the Virginia Supreme Court acknowledged that its prior decisions about giving “deference” or “weight” to administrative decisions “have been less than clear,” and then it explained:

“Deference” refers to a court’s acquiescence to an agency’s position without stringent, independent evaluation of the issue. [citation omitted]. “Weight” refers to the degree of consideration a court will give an agency’s position in the course of the court’s wholly independent assessment of an issue. [citation omitted]

We have consistently held that courts do not defer to an agency’s construction of a statute because the interpretation of statutory language always falls within a court’s judicial expertise. [citation omitted] Though a court never defers to an administrative interpretation, in certain situations a court may afford greater weight than normal to an agency’s position. When “the statute is obscure or its meaning doubtful, [a court] will give great weight to and sometimes follow the interpretation which those whose duty it has been to administer it have placed upon it.” Superior Steel Corp. v.
In Board of Supervisors of Culpeper County v. State Building Code Technical Review Board, 52 Va.App. 460, 663 S.E.2d 571 (2008), the issue was whether the Culpeper County board of supervisors could establish minimum qualifications for persons acting as third-party inspectors under the county’s building official. USBC § 109.3 authorizes localities to impose “any limitation” it chooses on the delegation by the building official of his duties to third-party inspectors. Acting on this authority, the board of supervisors required that third-party inspectors be either engineers or architects. A former building official who lacked those qualifications challenged the board’s authority to the State Building Code Technical Review Board, which interpreted USBC § 109.3 in a way that denied the board of supervisors the ability to impose limitations. The court of appeals reversed the decision of the circuit court, which had deferred to the interpretation of the Technical Review Board. The court of appeals held that the Technical Review Board incorrectly interpreted USBC § 109.3 in a manner that usurped a locality’s authority to establish criteria for who may act as a delegate of the building official’s authority.

Addressing the issue of deference that should be afforded an interpretation of a regulation by the body charged with its enforcement, the court said:

Even so, “deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.” EEOC v. Arabian American Oil Co., 499 U.S. 244, 260, 111 S. Ct. 1227, 1237, 113 L. Ed. 2d 274, 290 (1991) (Scalia, J., concurring). No matter how one calibrates judicial deference, the administrative power to interpret a regulation does not include the power to rewrite it. When a regulation is “not ambiguous,” judicial deference “to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.” Christensen v. Harris County, 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621, 632 (2000).

Culpeper County, 52 Va. App. at 466-467, 663 S.E.2d at 574.

For any person charged with interpreting an ordinance, one of the key lessons to be learned from Culpeper County is that the authority to interpret an ordinance does not confer the power to administratively change the meaning of an ordinance through interpretation. See section 16-520 for the rules pertaining to the weight the courts may give to a consistent administrative interpretation of an ambiguous ordinance.

16-460 Three useful rules: the “Latin Classics”

The following rules of construction should, ordinarily, be resorted to only when attempting to determine the meaning of an ambiguous ordinance (see section 16-500). However, these rules can be helpful even when an ordinance is unambiguous:

- **Ejusdem generis**: General words are to be taken as referring only to those things of the same class as the special words.
  
  *Example*: A statute that refers to “. . . animals such as cats and dogs.”
  
  *Effect of the rule*: The general word “animals” does not include wild animals.

- **Noscitur a sociis**: The meaning of a term can be understood from the words around it.
  
  *Example*: In a statute pertaining to money and interest earned, the term “interest” means “annual interest.”
  
  *Effect of the rule*: Because of the words around it, “interest” could not mean daily, weekly or monthly interest.

- **Expressio unius est exclusio alterius**: Reference to one or more things in a particular class excludes all other things in that class.
Example: The reference to “locality” excludes “homeowners’ association.”

Effect of the rule. Among the various types of entities, the fact that the statute refers to “locality” means that other entities such as “homeowners’ associations” are excluded.

16-470 The meanings given by the courts to certain commonly used words and phrases that are modifiers

Certain words and phrases that act as modifiers recur throughout the Virginia Code and local ordinances, and it is helpful to understand how the courts have interpreted these terms:

- **All**: The word *all* suggests an expansive meaning because *all* is a term of great breadth. *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012).

- **An and any**: The words *an* and *any*, are unrestricted modifiers and are generally considered to apply without limitation. *Sussex Community Services Association v. Virginia Society for Mentally Retarded Children, Inc.*, 251 Va. 240, 243, 467 S.E.2d 468, 469 (1996); *see Board of Supervisors of James City County v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014), where the Virginia Supreme Court concluded that Virginia Code § 15.2-2303.1:1(A), and its reference to *any cash proffer*, applied retroactively, as discussed in section 16-440.

- **Shall include**: The term *shall include* is not exhaustive, and merely indicates that the listed items, among others, are covered by the relevant provision. *Shall include* is not equivalent to *limited to*. *Project Vote/Voting for America, Inc.*, 682 F.3d at 337.

16-500 If an ordinance is ambiguous, apply rules of construction to give meaning

If the language of an ordinance is clear and unambiguous, there is no need to construe it. *Taylor v. Shaw and Cannon Co.*, 236 Va. 15, 372 S.E.2d 128 (1988). The plain and natural meaning is applied, as discussed in section 16-400. Resort to rules of construction, legislative history and extrinsic facts are not permitted because the words of the ordinance itself must be taken as written to determine their meaning. *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999); *Taylor, supra*.

An ambiguous ordinance is subject to rules of construction to give it meaning. Language is ambiguous if it can be understood in more than one way. *Virginia-Am. Water Co. v. Prince William Service Authority*, 246 Va. 509, 436 S.E.2d 618 (1993). An ambiguity also exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness. *Brown v. Lukhard*, 229 Va. 316, 330 S.E.2d 84 (1985). The fact that parties may disagree as to the meaning of an ordinance does not necessarily mean that an ordinance is ambiguous. *Michie’s Jurisprudence, Statutes*, p. 310.

When an ordinance is determined to be ambiguous, the language must be construed to promote the end for which it was enacted, if such an interpretation can reasonably be made from the language used. *VEPCO v. Board of County Supervisors of Prince William County*, 226 Va. 382, 309 S.E.2d 308 (1983). An ordinance should be read to give reasonable effect to the words used and to promote the ability of the enactment to remedy the mischief at which it is directed. *Jones v. Connell*, 227 Va. 176, 314 S.E.2d 61 (1984).

Surprisingly, there do not appear to be many published opinions where a court has found a law to be ambiguous. A good example of an ambiguous law applying the “consistent administrative construction” rule is found in *Anglin v. Joyner*, 181 Va. 660, 26 S.E.2d 58 (1943), where the statute at issue provided for the forfeiture of a chauffeur’s license upon “conviction or forfeiture of bail upon two charges of reckless driving all within the preceding twelve months.” A chauffeur was convicted in August 1941 and February 1942. The chauffeur contended that the statute required that he be charged two times within a 12-month period in order for the forfeiture statute to apply. The Virginia Supreme Court found the statute to be ambiguous, but found that the Department of Motor Vehicles’ longstanding consistent interpretation was to apply the 12-month period to the dates of the convictions, not the dates of the charges, and upheld the forfeiture of the chauffeur’s license. *See section 16-520 for further discussion of this rule of construction.*
The reader should be aware that the rules of statutory construction are numerous, some are contradictory to one another, and they can be selectively invoked to support a desired result. “Canons of construction need not be conclusive and are often countered, of course, by some pointing in a different direction.” Circuit City Stores, Inc v. Adams, 532 U.S. 105, 115, 121 S.Ct. 1302 (2001). Sections 16-510 through 16-540 provide brief discussions of some of the key rules.

16-510 Ascertaining the intent of the governing body

If an ordinance is ambiguous, the intent of the governing body must be ascertained. This determination involves the appraisal of the subject matter, purposes, objects and effects of the ordinance, in addition to its express terms. Volland v. Arlington Co. Electoral Board, 216 Va. 674, 222 S.E.2d 793 (1976). One source for determining the intent of the governing body is the ordinance’s preamble, which is the introductory statement explaining the document’s basis and objective. Renkey v. County Board of Arlington County, 272 Va. 369, 634 S.E.2d 352 (2006). In a typical zoning ordinance, each district’s regulations begin with a preamble stating the governing body’s purpose and intent for that district.

The views of the meaning and application of an ordinance indicated by both the legislative and administrative departments of the locality also are material in determining the purpose and intent of the ordinance. Belle-Haven Citizens Association v. Schumann, 201 Va. 36, 109 S.E.2d 139 (1959). For example, in Gasner v. Board of Supervisors of Fairfax County, 1993 WL 945908 (Va. Cir. Ct. 1993), the circuit court found that a provision of Fairfax County’s comprehensive plan calling for “environmentally responsible” development was ambiguous. As such, the court concluded that the board of supervisors could interpret the term in a manner that, in its discretion, best implemented the objectives of the plan, provided that its construction was reasonable.

16-520 Weight may be given to a consistent construction by officials charged with enforcement

When an ordinance is ambiguous, the Virginia Supreme Court has often said that the consistent construction of an ordinance by officials charged with its enforcement, such as the zoning administrator, is given great weight. Cook v. Board of Zoning Appeals of City of Falls Church, 244 Va. 107, 418 S.E.2d 879 (1992). In The Nielsen Company, LLC v. County Board of Arlington County, 289 Va. 79, 767 S.E.2d 1 (2015), a tax case, the Court said that “[w]hen ‘the statute is obscure or its meaning doubtful, [a court] will give great weight to and sometimes follow the interpretation which those whose duty it has been to administer it have placed upon it.’” “Weight,” the Nielsen Court said, “refers to the degree of consideration a court will give an agency’s position in the course of the court’s wholly independent assessment of an issue.” It should be noted that the courts have often cited this rule even in cases where the court found the ordinance to be unambiguous.

With the foregoing statements of the Virginia Supreme Court in mind, it remains vital that each interpretation must be supportable on its own merits. When viewed from that perspective, the following principles from prior case law make sense:

- **Courts will reject plainly wrong consistent administrative interpretations:** If the consistent administrative interpretation is so at odds with the plain language used in the ordinance as a whole, the interpretation is plainly wrong and will be reversed. Board of Zoning Appeals ex rel. County of York v. 852 L.L.C., 257 Va. 485, 514 S.E.2d 767 (1999).

- **Locality may change consistent administrative interpretation that is wrong:** A locality will not be estopped from changing a longstanding consistent administrative interpretation where it is wrong. In Land & Learning Development, L.L.C. v. Board of Supervisors of Shenandoah County, 55 Va. Cir. 226 (2001), the court agreed with the board of supervisors that cluster developments in a certain zoning district was limited to 25 acres, thereby disqualifying the landowner’s 29.069 acre parcel from such a development. The landowner claimed that county officials had not adhered to the 25-acre size limitation and had not interpreted the zoning district regulations as imposing such a size limitation. Citing Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968) and other cases, the court granted the board’s demurrer on this issue, stating that the board was not estopped from advancing its present (and correct) interpretation.
• **A single administrative interpretation may be “consistent”:** How many prior interpretations are required in order to establish a consistent administrative interpretation of an ordinance? The evidentiary burden to establish a consistent construction does not appear to be high. In *Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007), the BZA was able to establish a consistent construction of the regulation at issue by a letter from the assistant city attorney to the trustee’s attorney explaining that “[t]his interpretation has been applied uniformly throughout the city” and then explaining the rationale for that interpretation.

16-530 **Construe the ordinance as a whole**


Ordinance provisions that relate to the same subject are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete ordinance arrangement. *Lillard v. Fairfax County Airport Authority*, 208 Va. 81, 155 S.E.2d 338 (1962) (regulations that deal with the same or connected subjects may be considered in pari materia and should be read and construed together so as to harmonize and give effect to all the provisions of each); *Prillaman v. Commonwealth*, 199 Va. 401, 100 S.E.2d 4 (1957).

When a term is used in different sections of an ordinance, the courts will give it the same meaning in each instance unless there is a clear indication that the legislative body intended a different meaning. *REV1, LLC v. Chicago Title Insurance Co.*, 290 Va. 203, 211, 776 S.E.2d 808, 812 (2015).

16-540 **Other rules of construction**

Following are other common rules of construction applied to determine the meaning of an ambiguous ordinance:

• **The “Latin” classics:** The rules of *ejusdem generis*, *moscitur a sociis*, and *expressio unius est exclusio alterius*, as explained in section 16-460. Although they should be applied only to assist in determining the meaning of an ambiguous ordinance, are helpful when giving meaning to an unambiguous ordinance.

• **General and specific regulations:** If conflicts between regulations cannot be resolved, the more specific regulation will be deemed controlling. *Virginia Department of Health v. Kepa, Inc.*, 289 Va. 131, 142, 766 S.E.2d 884, 890 (2015) (“[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.” [citation omitted]). A specific regulation may not be nullified by one of general application unless the legislative intent is plain. *Commonwealth ex rel. Virginia Department of Corrections v. Brown*, 259 Va. 697, 529 S.E.2d 96 (2000).

• **General and specific words:** When general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words. *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996).

• **Subsequent legislation:** A presumption normally arises that a change in law is intended when new provisions are added to prior legislation by an amendment. *Boyd v. Commonwealth of Virginia*, 216 Va. 16, 215 S.E.2d 915 (1975). However, when amendments are enacted soon after controversies arise over the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act – a formal change – rebutting the presumption of substantial change. *Boyd, supra*. 

16-10
• **Meaning given to every word:** No part of a statute or ordinance may be treated as meaningless unless absolutely necessary. *Garrison v. First Federal Savings and Loan of South Carolina*, 241 Va. 335, 402 S.E.2d 25 (1991); *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation*, 277 Va. 198, 671 S.E.2d 160 (2009) (holding that the BZA correctly affirmed the determination by the zoning administrator that a site plan showing multi-family structures violated the zoning district regulations because, although “condominium-type ownership” was allowed by special use permit in the district, multi-family structures were not allowed; since “condominium-type ownership” applies to the legal form of land tenure to be adopted, not to the physical structure of the buildings to be erected and the ownership aspect of the term could not be ignored). An exception to this rule applies when a word appears to have been inserted through inadvertence or mistake and is incapable of any sensible meaning or is otherwise repugnant to the rest of the statute or ordinance. *Burnette v. Commonwealth*, 194 Va. 785, 75 S.E.2d 482 (1953).

• **Different terms:** When an ordinance uses different terms in the same section, the terms are presumed to have a different meaning from one another. *Klarfeld v. Salsbury*, 233 Va. 277, 355 S.E.2d 319 (1987).

• **Punctuation:** The punctuation used in an ordinance is said to be the most fallible of all means to interpret an ordinance, and it should not be used as an aid of interpretation except as a last resort. See, e.g., *Harris v. Commonwealth*, 142 Va. 620, 128 S.E. 578 (1925).


• **Preambles:** Preambles explain the governing body’s purpose and intent for a zoning ordinance or district regulation, but cannot enlarge or confer powers to control the words of the act unless they are doubtful or ambiguous. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006) (holding that mandatory eligibility criteria for the zoning classification at issue was not part of the preamble; see case discussion in section 16-420). In a typical zoning ordinance, each district’s regulations begin with a preamble stating the governing body’s purpose and intent for that district.
Chapter 17

Classifying Primary Uses and Determining Whether a Use is an Accessory Use

17-100 Introduction

The zoning administrator and, on appeals, the BZA often must determine whether a particular use is permitted in a zoning district, either as a primary (also referred to by some localities as a principal or main) use or as an accessory use. This chapter examines some of the key rules that apply to these determinations.

There are two types of zoning ordinances: (1) the inclusive or permissive type (hereinafter, collectively, “inclusive”), which permits only those primary uses specifically named; and (2) the exclusive type, which prohibits specified uses and permits all others. Wiley v. Hanover County, 209 Va. 153, 163 S.E.2d 160 (1968); see also Board of Supervisors of Madison County v. Gaffney, 244 Va. 545, 422 S.E.2d 760 (1992) (nudist club not allowed in conservation zoning district because not specifically permitted in district regulations). A zoning ordinance also may use both forms. Wiley, supra.

With an inclusive ordinance, the burden is on the landowner to show that a proposed primary use is permitted. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 271 Va. 336, 626 S.E.2d 374 (2006); Fairfax County v. Parker, 186 Va. 675, 44 S.E.2d 9 (1947). With an exclusive ordinance, the burden is on the locality to show that a use is not permitted, or that it falls within a classification that is excluded. Parker, supra.

The inclusive ordinance appears to be the more modern approach to zoning and is the more common type of zoning ordinance in Virginia.

17-200 Rules for classifying uses

Classifying a use means determining whether a particular use or activity fits within one of the uses specifically permitted by right or by special use permit in an inclusive zoning ordinance, or as one of those prohibited in an exclusive zoning ordinance. The classification of a use requires the exercise of discretion. Ancient Art Tattoo Studio v. City of Virginia Beach, 263 Va. 593, 561 S.E.2d 690 (2002).

<table>
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<th>Ten Rules for Classifying a Use</th>
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<tr>
<td>• When the use regulations are ambiguous, use classifications will likely be strictly construed in favor of the landowner.</td>
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<tr>
<td>• Refer to and rely on the definitions in the zoning ordinance.</td>
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<tr>
<td>• When classifying a use, all possible uses within the district should be considered.</td>
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<td>• Use classifications should not be based on the proposed use’s proximity to other uses.</td>
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<td>• The activity itself, not the activity’s accoutrements, determine the type of use.</td>
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<tr>
<td>• Whether a use is appropriate in the district may not be considered.</td>
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<td>• Use classifications must be based on legitimate land use considerations, and not on illegitimate or personal reasons.</td>
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<td>• For uses of structures, look to their function rather than their form.</td>
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<tr>
<td>• The use itself, not the owner or the nature of the owner, should determine the classification.</td>
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<td>• When the use regulations are ambiguous, the purpose and intent of the district should be considered.</td>
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To classify a use, in addition to applying the rules for interpreting statutes and ordinances (see chapter 16), the following rules should be considered as well:

• Use classifications will likely be strictly construed in favor of the landowner: The rule that prevails in most jurisdictions, at least in the absence of any statute to the contrary, is that because zoning ordinances are in derogation of the
common law and operate to deprive an owner of a use thereof which otherwise would be lawful, they should be strictly construed in favor of the property owner. 83 Am. Jur. 2d, Zoning and Planning, § 699; see, e.g., Young v. Town of Vienna, 203 Va. 265, 123 S.E.2d 388 (1962) (revenue ordinance must be strictly construed); Mitchem v. Counts, 259 Va. 179, 523 S.E.2d 246 (2000). In the context of classifying uses, this rule means that the zoning administrator and the BZA should not read an implied prohibition of a particular use into a use classification.

- **Refer to and rely on the definitions in the zoning ordinance:** Most zoning ordinances include definitions of many, if not all, use classifications. If a use is defined in the zoning ordinance, that definition must be applied. In Coston v. Norfolk Board of Zoning Appeals, 81 Va. Cir. 152 (2010), the petitioner challenged the BZA’s decision that a moped was an automobile under the definition of “automobile” in the zoning ordinance, and therefore his moped sales use was not allowed in the C-1 zoning district. The circuit court upheld the BZA’s interpretation because the definition included “any vehicle propelled by its own motor and operating on ordinary roads” and the definition included “motor scooters, motorized bicycles and the like.” The court also concluded that the zoning ordinance definition was not in conflict with any State definition of the term.

- **When classifying a use, all possible uses within the district should be considered:** Although it may seem obvious, determining that a use is not allowed in a district because it does not fit within one use classification does not mean that it may not be allowed under another classification. In Buckley v. Zoning Appeals Board, 59 Va. Cir. 150 (2002), the circuit court held that the zoning administrator and the BZA erred when it determined that the landowner’s proposed use was not allowed in the zoning district because it was a distribution facility (defined to mean “the intake of goods and merchandise, the short term storage of such goods or merchandise, and/or the breaking up into lots or parcels and the shipment off-site of such goods and merchandise”), a use that was not allowed in the A-3 zoning district. The landowner sorted and hauled unprocessed felled trees. The court concluded that even if the logs were goods as defined in the definition of distribution facility, the use also was a log yard (defined to mean “a location where unprocessed felled trees are taken, sorted by grade and species, and hauled to prospective purchasers”), which was an agricultural, forestry and silvicultural use allowed by right in the A-3 zoning district. In CL 11-93 & CL 11-41, opinion letter dated November 28, 2011, the circuit court concluded that the BZA erred when it found that the landowner’s proposed taxi detailing use was a by right use in the C-3 zoning district, thereby reversing the decision of the zoning administrator that the proposed use required a permit. The BZA had concluded that the proposed use fell within the by-right “similar to other by-right uses” catch-all classification. Instead, the court concluded that the zoning administrator had correctly determined that the use fell within the “vehicle service establishment” use classification, which required a permit.

- **When classifying a use, find the classification that best aligns with the actual use of the property:** In In re April 23, 2015 Decision of the Bd. of Zoning Appeals, 92 Va. Cir. 246 (2015), the zoning administrator determined that a conditional use permit was required to operate the towing yard at the time in question because the use was classified under “Junkyards for automobiles and scrap materials subject to all city ordinances” and the zoning ordinance further provided that a salvage yard was “[a]n area used for storage of waste paper, rags, scrap metal, or other junk, including storage of motor vehicles, and dismantling of vehicles, equipment, and machinery; junkyard.” The trial court disagreed, concluding that the following by right use classification was more appropriate: “Truck terminals, repair shops, hauling and storage yards.” The court concluded that this classification was “far more aligned with the actual use of the subject property.”

- **Use classifications should not be based on the proposed use’s proximity to other uses:** In Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. (former) 1981), plaintiff sought to establish a medical facility providing abortion services. The city determined that the proposed facility was not allowed in the zoning district and justified its decision because of the proposed use’s proximity to single family residences, churches and schools. The court found that the city’s reliance on the proposed facility’s proximity to these other uses to classify the use was impermissible.

- **The activity itself, not the activity's equipment and materials, determine the type of use:** General use classifications such as agricultural or commercial can sometimes be problematic because those terms, even if defined, are broad in scope and likely come with a number of assumptions. For example, in determining whether a landscaping business is an agricultural or a commercial use, the zoning administrator would err if he simply followed this analysis:
Landscaping business → Plant stock and small tractors → Agricultural use

The equipment and materials of the landscaping business – plant stock and small tractors – do not in and of themselves, determine whether the use is agricultural or commercial. In fact, continuing with the landscaping business example, the courts have uniformly concluded that a landscaping business is not an agricultural use where the business had a number of employees who worked off-site, the plant stock was stored on the property to be used in landscaping jobs, and equipment stored on the property was used in the landscaping jobs. See, e.g., *Town of Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95 (1953); *Petitti v. Plain Township Board of Zoning Appeals*, 2003 Ohio 8449 (2003) (unpublished); *Winnebago County v. Wilson*, 98-3114 (Wis. Ct. App. 1999) (unpublished).

- **Whether a use is appropriate in the district may not be considered:** The determination of what uses are appropriate within a particular zoning district is a legislative function reserved to the locality’s governing body. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). Thus, the role of the zoning administrator and the BZA is not to determine what types of uses they feel are appropriate in the zoning district, but only to give meaning to the use classifications the governing body has decided to allow in the district.

- **Use classifications must be based on legitimate land use considerations, and not on illegitimate or personal reasons:** A use classification should not be based or swayed by illegitimate or personal reasons. *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989). *Marks* is instructional even though it is not a use classification case. In *Marks*, a palmist sought a conditional use permit and the city initially supported granting the permit. However, after certain local citizens displayed overt religious hostility to the presence of the palmist, the city council denied the permit. The federal court of appeals concluded that the city council had improperly denied the permit. The court said that the public’s negative attitudes, or fears, unsubstantiated by factors which are properly cognizable in a zoning proceeding, were not permissible bases for a land use decision. In *P.L.S. Partners, Women’s Medical Center of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788 (D.R.I. 1988), the center obtained a building permit for a “health care facility,” a use allowed by right in the underlying zoning district. When residents complained that the center would be providing abortions, the zoning inspector changed the use classification to “hospital,” a use that required a special use permit. The center brought a civil rights action. The court held that singling out abortion services for special treatment under the zoning ordinance by classifying the use as a hospital rather than as a health care facility violated equal protection. The city had classified emergency centers, out-patient clinics, and physician’s offices that performed other minor surgical procedures as health care facilities.

- **For uses of structures, look to their function rather than their form:** Generally, the function, rather than the form, of a structure is relevant to defining the use under the zoning ordinance. *Fritts v. Carolinas Cement Company*, 262 Va. 401, 551 S.E.2d 336 (2001) (“silos” used as warehouses were properly classified as a warehouse use).

- **The use itself, not the owner or the nature of the owner, should determine the classification:** Ownership does not determine how a use is classified. *Maxey v. Board of Zoning Appeals*, 480 N.E.3d 589 (Ind. App. 1985); *Gallagher v. Zoning Board of Adjustment*, 32 Pa. D&C 669 (1963) (proposal to use single-family dwelling for religious broadcasting is not a church).

- **Consider the purpose and intent of the district:** When the use regulations are ambiguous, the purpose and intent of the zoning district and the nature of the uses allowed by-right and by special use permit should be considered to understand the zoning district.

- **Consider the legislative history.** The legislative history may provide evidence as to whether a particular use is allowed in the district or allowed by a special use permit. In *Virginia Psychiatric Co. v. Zoning Appeals Board of Fairfax County*, 47 Va. Cir. 36 (1998), the circuit court considered the record of the BZA hearing when it granted a special use permit for a nursing home in affirming a later decision by the BZA that a residential treatment facility was not within the scope of the original permit.
One Way to Reduce the Need to Classify Uses

- The traditional way in which uses have been classified in a particular zoning district has been to list in the district regulations the uses that are allowed by right and by special use permit. For example, a commercial zoning district’s regulations might list dozens of retail sales shops with great specificity – gifts shops, clothing shops, shoe shops, department stores, drug stores, stores selling musical instruments, stores selling photography equipment, and so on. If someone proposes to sell something not included in the list, the zoning administrator must determine whether it is allowed.
- Consider replacing the traditional list with broad, defined, categories such as “retail sales.”

This list of rules is not exhaustive. The first task for the zoning administrator and the BZA when classifying a use is to read the language in the zoning ordinance and apply a reasonable interpretation using the plain and natural meaning of the terms used, within the context they are used.

The classification of some uses is self-evident and simple. Other uses may not easily fit into a classification or may be difficult to classify, such as when the use is conducted indoors or in a difficult-to-observe location, the use is conducted in a manner in which its impacts are outside of the normal hours when the zoning official can observe the activities (e.g., overnight storage of equipment), or when the landowner or occupant is conducting the use in a manner that prevents it from being easily classified.

The zoning official must collect information that will allow her to make an informed decision as to how a use should be classified. In order to collect the necessary information, it is suggested that she look to the following sources:

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<tr>
<th>Collecting Information to Classify a Use</th>
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<tr>
<td>• Ask the owner to describe the nature of its activities in writing.</td>
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<td>• Ask the owner for permission to enter the property or buildings to observe the activities; if permission is denied, seek an administrative search warrant to conduct an inspection to determine whether the use is permitted in the zoning district.</td>
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<td>• Interview neighbors.</td>
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<td>• Observe the use at various times of the day and week to understand its dimensions.</td>
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<td>• For commercial and industrial uses, collect descriptions of the use from telephone book and newspaper advertisements or the business’s website.</td>
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<td>• For suspected commercial and industrial uses that you question whether they are being forthright in their descriptions of their use, conduct an internet search of the business.</td>
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<tr>
<td>• For certain uses, search State records for state-issued permits (e.g., permit issued for a trash hauler) and licenses (e.g., a Class A contractor's license).</td>
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<td>• Search court records and published court decisions involving the person or business for descriptions of the nature of the activities.</td>
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17-300 Accessory uses

Each primary use allowed is accompanied by a range of accessory uses. The issue of whether a use is an accessory use arises in various situations. For example, a landowner may claim that a use not otherwise allowed in the zoning district as a primary use is, in fact, accessory use to a permitted primary use.

Because a limited number of Virginia cases have considered the issue of accessory uses, this section relies heavily on cases from other states. A short survey of uses that have been found or not been found to be accessory follows section 17-324.

17-310 The nature of accessory uses

An accessory use is commonly defined to be a use that is subordinate and customarily incidental to the primary use. See Wiley v. County of Hanover, 209 Va. 153, 157, 163 S.E.2d 160, 163 (1968). For example, Albemarle County
defines an “accessory use, building or structure” to mean “[a] subordinate use, building or structure customarily incidental to and located upon the same lot occupied by the primary use, building, or structure, and located upon land zoned to allow the primary use, building or structure provided that a subordinate use, building or structure customarily incidental to a primary farm use, building or structure need not be located upon the same lot occupied by the primary farm use, building, or structure.” Albemarle County Code § 18-3.1. In addition, a locality may expressly delineate those uses that it deems to be accessory. See, e.g., Carter v. Bavuso, 2014 WL 3510293 (2014) (Virginia. Supreme Court, unpublished).

“The rule of accessory use is a response to the impossibility of providing expressly by zoning ordinance for every possible lawful use. Even though a given use of land is not explicitly allowed, it is nonetheless permissible if it may be said to be accessory to a use that is expressly permitted.”

Town of Salem v. Durrett, 125 N.H. 29, 32, 480 A.2d 9, 10 (1984). An accessory use “must be one ‘so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it.” Whaley v. Dorchester County Zoning Board of Appeals, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1994) (parking 18-wheel truck overnight and on weekends at owner’s home was not an accessory use on a residentially-zoned parcel). The Alaska Supreme Court has observed that the accessory use cases throughout the United States “uniformly give accessory use a fairly narrow meaning.” Dykstra v. Municipality of Anchorage, 83 P.3d 7, 10 (2004).

17-320 The key criteria for determining whether a use is accessory

The two key criteria for determining whether a use is accessory are whether the use is subordinate to a lawful primary use and whether it is customarily incidental to a primary use. These key requirements are commonly used terms to define accessory use in zoning ordinances throughout the United States, and are discussed at length in the following sections. Whether a use is accessory is a matter to be determined from the evidence. Wiley v. County of Hanover, 209 Va. 153, 163 S.E.2d 160 (1968).

17-321 The use must be subordinate to the primary use

A landowner claiming that a use is accessory must first demonstrate that the use is subordinate to an identified primary use. The term subordinate is defined by Webster’s Dictionary to mean “placed in or occupying a lower class or rank: inferior.” A subordinate use incorporates the requirement that the accessory use be minor in relation to the permitted primary use. Dykstra v. Municipality of Anchorage, 83 P.3d 7 (2004); Becker v. Town of Hampton Falls, 117 N.H. 437, 374 A.2d 653 (1977).

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<th>Common Factors to Consider in Determining Whether a Use is Subordinate</th>
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<td>• Area devoted to the use.</td>
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<td>• Frequency of the use.</td>
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<td>• Active versus passive activities.</td>
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<td>• Number of employees and work hours.</td>
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<td>• Whether the use is truly subordinate to the primary use or whether it is a different, alternative, additional use.</td>
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The relevant factors in determining whether a particular use is subordinate to a primary use will depend on the circumstances. Following are some of the factors that should be considered:

• Area devoted to the use: The area devoted to the use in relation to the primary use should be considered. However, the fact that a use occupies less area than the primary use does not necessarily make it subordinate, and the fact that a use occupies more area than the primary use does not necessarily preclude it from being subordinate. For example, on a 1-acre lot with a primary residential use, gardening would nonetheless be subordinate to the primary use even though the gardened portion of the lot may consume more than 90% of the lot’s area. In McLane v. Wiseman, 84 Va. Cir. 10 (2011), the fact that inoperable or junk vehicles occupied a large portion of the landowner’s residentially-zoned parcel was a key factor in the court concluding that the vehicles were not accessory to the primary residential use. In Gavis v. Board of Zoning Appeals of the City of Winchester, 1985 WL 306753 (1985), the circuit court found that proposed garage and storage facilities that would be 41% the floor
space of the four apartments the facilities would purportedly serve were not accessory where the average in the city for storage space was less than 10% of the floor space and, therefore, the proposed garage and storage facilities were not a customary or incidental use.

- **Frequency of the use**: The time devoted to the use in relation to the primary use may be a relevant consideration. *Orion Sporting Group, LLC v. Board of Supervisors of Nelson County*, 68 Va. Cir. 195 (2005) (sporting clays facility was a year-around activity; hunting preserve limited to eight months per year). A seasonal activity, in relation to a year-around primary use, would likely be considered to be subordinate to the primary use. Conversely, a purported year-around accessory use would not be subordinate to a seasonal primary use.

- **Active versus passive activities**: The relative intensity of the use, and the resulting impacts on the land and the neighboring properties, should be considered. For example, as between a landscaping business and a nursery, the landscaping business is often the more intense use because it may have a business office, employees and landscaping vehicles and equipment coming and going, as well as a storage yard where landscaping equipment and materials are stored and equipment is maintained. A nursery, on the other hand, may be limited to an area where plants are stored and watered until they can be used in the landscaping work.

- **Number of employees and work hours**: The number of employees assigned to a use may be a relevant consideration. Although in most cases one may expect that the accessory use will have fewer employees than the primary use, that is not always the case. For example, a primary equipment storage yard use may have a single employee assigned to work on storage-related activities. However, the maintenance of the stored equipment could be considered to be a permitted subordinate use, even though there are more employees performing equipment maintenance work.

- **Whether the use is truly subordinate to the primary use or whether it is a different, alternative, additional use**: The use must truly be subordinate to the primary use and not simply be a different, alternative or additional use. For example, in *Orion Sporting Group, LLC*, supra, the circuit court found that a proposed sporting clays facility was not subordinate to a hunting preserve because the evidence showed that the sporting clays facility was a different and alternative use for those who did not wish to participate in hunting. The court found that the sporting clays facility was a separate primary use of the property. In *McLane v. Wiseman*, 84 Va. Cir. 10 (2011), the court affirmed the decision of the BZA that the storage and maintenance of inoperable or junk vehicles on a residentially-zoned parcel was an alternative use to the residence, not a subordinate use, because of the landowner’s purpose in having the vehicles and the area occupied or extent of the vehicles.

As part of this analysis, recognize that multiple uses on a parcel may each be classified as primary uses – some of which may be permitted in the zoning district, some of which may not be.

17-322 The use must be customarily incidental to the primary use

A landowner claiming that a use is accessory must next demonstrate that the use is *customarily incidental* to the primary use. Although the Virginia courts have not examined the meaning of this commonly used term, the courts from other states have considered it on numerous occasions. In general, a use that is *customarily incidental* to a primary use implies that the use flows from, naturally derives or follows as a logical consequence of, or is a normal and expected offshoot from the primary use. *Town of Alta v. Ben Hame Corporation*, 836 P.2d 797 (Utah Ct. App. 1992) (boarding houses, lodging houses, hotels are not accessory to permitted primary use in agricultural-residential zoning district). Some courts have said that the terms *customarily* and *incidental*, though often linked in definitions of *accessory use*, impose distinct requirements that warrant separate analysis.

17-323 The meaning of the word customarily

A *customarily* incidental use is one that has “commonly, habitually, and by long practice been established as reasonably associated with the primary ... use.” *Becker v. Town of Hampton Falls*, 117 N.H. 437, 441, 374 A.2d 653, 655 (1977) (holding that a barn constructed to house heavy construction equipment on residentially zoned land was not accessory to primary residential use); *Lawrence v. Zoning Board of Appeals of the Town of North Branford*, 158 Conn.

Although a rare association of uses cannot qualify as customary, the uses need not be joined in a majority of the instances of the primary use. Town of Salem v. Durrett, 125 N.H. 29, 480 A.2d 9 (1984); Southco, Inc. v. Concord Township, 552 Pa. 66, 713 A.2d 607 (1998) (a use may be customarily incidental to a primary use even where there is no evidence that a majority, or even a substantial number, of similar properties are engaged in a similar accessory use). However, the lawful occurrence of the use must be more than unique or rare. Lawrence, supra. The use must be “common enough so that it can be said to be a known and accepted incidental use.” County of Lake v. La Salle National Bank, 76 Ill. App. 3d 179, 182, 395 N.E.2d 392, 394 (1979) (determining whether a trailer for a groundskeeper’s sleeping quarters was accessory to the operation of a golf course). In other words, a use is customarily incidental “when it is so necessary or so commonly to be expected in connection with the main use that it cannot be supposed that the ordinance was intended to prevent it.” Grandview Baptist Church v. Zoning Board of Adjustment, 301 N.W.2d 704, 708-709 (1981) (holding that 32 by 42 foot steel storage building was not accessory to a church in a residential zoning district; of 50 churches examined, it was the only one with a steel storage building).

### Common Factors to Consider in Determining Whether a Use is Customary

| • The size of the parcel. | • The size of the parcel. |
| • The nature of the primary use of the parcel. | • The nature of the primary use of the parcel. |
| • The use made of the adjacent parcels. | • The use made of the adjacent parcels. |
| • The economic structure of the area. | • The economic structure of the area. |
| • Whether the proposed use is customary within the locality and the region. | • Whether the proposed use is customary within the locality and the region. |

Some of the factors that are relevant to determining *custom* are the size of the parcel in question, the nature of the primary use of the parcel, the use made of the adjacent parcels and the economic structure of the area. Lawrence, supra. The zoning administrator and the BZA need to determine whether the proposed use is customary within the locality and the region. For example, the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with a residential use include garages, swimming pools, decks, gazebos, small sheds and small-scale gardening; the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with an agricultural use include barns, sheds, silos, the storage of farm equipment and machinery, and the raising of crops and livestock.

#### 17-324 The meaning of the word incidental

The term *incidental* incorporates “the concept of [a] reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of ‘incidental’ would be to permit any use which is not primary, no matter how unrelated it is to the primary use.” Lawrence v. Zoning Board of Appeals of the Town of North Branford, 158 Conn. 509, 512, 264 A.2d 552, 554 (1969); Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 641 N.E.2d 1334 (1994) (gravel removal for commercial purposes was not accessory to a permitted agricultural use, even though the removal of the gravel would allow creation of a Christmas tree farm).

### Survey of Uses Found to be and not to be Customarily Incidental

<table>
<thead>
<tr>
<th>Customarily Incidental</th>
<th>Not Customarily Incidental</th>
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</thead>
</table>
### Survey of Uses Found to be and not to be Customarily Incidental

<table>
<thead>
<tr>
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<th>Not Customarily Incidental</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stone crushing customarily incidental to a quarry. James H. Maloy, Inc. v. Town Board of Guilderland, 92 A.D. 2d 1056, 461 N.Y.S.2d 529 (1983).</td>
<td>Proposed garage and storage facilities that would be 41% of the floor spaces of the four apartments they would purportedly serve were not accessory where the average in the city for storage space was less than 10% of the floor space and, therefore, the proposed garage and storage facilities were not a custom or incidental use. Garvis v. Board of Zoning Appeals of the City of Winchester, 1985 WL 306753 (1985).</td>
</tr>
<tr>
<td>Day care center operated “for the instruction and education of the children who attend,” and which was “viewed by the pastor, by the employees, and presumably by those who have chosen for their children to attend, as in fact an extension of the ministry” of the church, was customarily incidental to the church use. Harvest Christian Center v. King George County Board of Zoning Appeals, 55 Va. Cir. 279 (2001).</td>
<td>32 by 42 foot steel storage building not customarily incidental to a church in a residential zoning district. Grandview Baptist Church v. Zoning Board of Adjustment, 301 N.W.2d 704 (1981).</td>
</tr>
</tbody>
</table>

### 17-330 An accessory use may not become a lawful nonconforming primary use


In Knowlton, the owners had operated a hog farm, and garbage was hauled onto the property to feed the hogs. In
1959, Fairfax County enacted a zoning ordinance that permitted hog farming, but did not permit the general trucking business, which therefore became a nonconforming use. Eventually, the hog farm use terminated, but a waste hauling operation continued and expanded over the years. One of the questions the Virginia Supreme Court considered was whether the waste hauling operation was a nonconforming primary use, since it had begun as an accessory function of the hog farm. The Court stated: “It is true that trash collection . . . was related to the hog raising operation permitted by the ordinance. But a use accessory or incidental to a permitted use ‘cannot be made the basis for a nonconforming principal use.’” Knowlton, 220 Va. at 575-576, 260 S.E.2d at 236.

In Bull Run Civic Association v. Board of Zoning Appeals of Loudoun County, 7 Va. Cir. 201 (1983), the circuit court concluded that a crusher that was accessory to a nonconforming quarry operation under a 1955 permit was limited to processing stone extracted in accordance with the 1955 permit and to extend its use beyond that which was permitted under the prior permit would elevate the crusher to a nonconforming primary use.

In Gwinn v. Lester, 1991 WL 83553 (1991), the circuit court found that the landowners could not continue to park a dump truck on their residentially-zoned parcel where a prior regulation merely required that each parcel have one vehicle space per family unit and at that time parking the dump truck on the parcel had begun, the parcel had been used for a farm and a residence. The current regulations prohibited parking dump trucks of a certain size in residential zoning districts. Assuming that the parking space requirement under the former regulations was a “use,” the court held that parking the dump truck was only accessory to the farm and residence use and when the property ceased to be used for that primary use, parking the dump truck – an accessory use – could not become a nonconforming primary use.

17-340 The character of the primary use determines the character of the accessory use, and the accessory use must be allowed in the zoning district

The very nature of an incidental use (see section 17-324) requires that the accessory use be of the same use classification (i.e., commercial, residential, agricultural or industrial) as the primary use. Capelle v. Orange County, 269 Va. 60, 607 S.E.2d 103 (2005) (because the mining operation was not allowed in the residential zoning district, the mining access road, which was accessory to the primary mining use, was likewise not allowed in the residential zoning district); Carolinas Cement Co. v. Zoning Appeals Board of Warren County, 49 Va. Cir. 463 (1999) (the character of the primary use determines the character of the accessory use: “the focus of the analysis is on the character of the activity on the property rather than the physical characteristics of the structures housing the use”).

17-350 Primary and accessory uses on a split-zoned parcel

Occasionally, a single parcel may have multiple zoning designations, such as when a single 10-acre parcel abutting a highway has 2 acres of commercially zoned land abutting the highway and the remaining 8 acres are zoned residential or agriculture. The issue that typically arises in a split-zoned parcel situation is whether the access or some other accessory use is permitted on the portion of the parcel within one zoning district to serve the primary use which is on the portion of the parcel within another zoning district. Whether an accessory use may be located on a portion of the parcel subject to different zoning regulations will depend on the applicable zoning regulations.

In Capelle v. Orange County, 269 Va. 60, 607 S.E.2d 103 (2005), the Virginia Supreme Court considered whether a mining operation allowed by special use permit on the agriculturally zoned portion of a 139-acre parcel could construct an access road across the residually zoned portion of the parcel to serve the mining operation. The residually zoned portion of the parcel was situated between the agricultural use portion and a public highway. Although the special use permit request applied only to the part of the parcel located in the agricultural zoning district, the “operation plan narrative” that the mining operator submitted with its special use permit application included a proposal to construct an access road across the portion of the parcel zoned for limited residential use to transport raw materials from the mining site to the public highway.

The Orange County zoning ordinance at issue in Capelle defined accessory use as “a secondary and subordinate use or structure customarily incidental to, and located upon the same lot occupied by, the main use or structure.” In holding that the mining road could not be used on the portion of the parcel zoned for limited residential use, the
Court relied on the regulations for the portion of the parcel zoned for limited residential use, which further limited accessory uses to those customarily incidental to the listed permitted uses in the limited residential zoning districts. The Court also relied on another provision in the zoning ordinance that provided that “any use not expressly permitted or permitted by special use permit in a specific district is prohibited.” Because the mining operation was a use neither allowed by right nor by special use permit in a limited residential zoning district, the access road to the mining operation was prohibited in the limited residential zoning district.

In Gilbert’s Corner Limited Partnership v. Loudoun County Board of Zoning Appeals, 1990 Va. Cir. LEXIS 472, 1990 WL 751280 (1990), the two tracts at issue were zoned commercial on one side and agricultural on the other. The landowners proposed to develop the commercially zoned land for retail, office and personal service uses and to use portions of the agriculturally zoned lands for drainfields for the waste generated from the commercial uses and for road access to the commercial uses. The zoning administrator and the BZA determined that the drainfields and private roads that would serve the commercial uses were not allowed in the agricultural zoning district, and the landowners appealed. The circuit court affirmed the BZA’s decision on these issues, holding:

Thus, “to the extent such uses are accessory uses, the principal use to which they are incidental or subordinate must be a permissible use.” In the instant cases, the commercial development planned for the portion of the properties zoned C-1 is not a use specifically permitted by right or by special exception in the “A-3” district.


The following cases from other jurisdictions pertain to split-zoned parcels: Dupont v. Town of Dracut, 41 Mass. App. Ct. 293, 670 N.E.2d 183 (1996) (split-zoned parcel; access and parking on commercially zoned portion of parcel, which prohibited residential uses, could not serve multi-family dwelling in residentially zoned portion of parcel); Wolf v. Zoning Board of Adjustment, 79 N.J. Super. 546, 192 A.2d 305 (1963) (split-zoned parcel; parking lot on residentially zoned portion could not serve restaurant in commercially zoned portion); Park Construction Co. v. Planning & Zoning Board of Appeals, 142 Conn. 30, 110 A.2d 614 (1954) (split-zoned parcel; residentially (R-6) zoned portion could not serve as access to multi-family residentially zoned portion).

The rule distilled from the split-zoned parcel cases is that, where a parcel is located in two different zoning districts, an accessory use may not be established in one zoning district to serve a primary use in the other zoning district if the primary use is not allowed in the zoning district in which the accessory use is located. See, e.g., Dupont, supra. Another rule obtained from these cases is that an accessory use takes on the use characteristics of the primary use it serves. For example, a parking lot on commercially zoned land serving dwellings on residentially zoned land is a residential use; a parking lot on residentially zoned land serving a restaurant on commercially zoned land is a commercial use. See section 17-340.

17-360 Accessory uses on differently zoned and separate parcels

Whether an accessory use serving a primary use may be located on a separate parcel within a separate zoning district will depend on the applicable zoning regulations.

In Carolinas Cement Co. v. Zoning Appeals Board of Warren County, 49 Va. Cir. 463 (1999), the circuit court concluded that a private road on an agriculturally zoned parcel would not be accessory to a proposed cement and fly ash distribution facility on an industrially zoned parcel.

A number of cases from other jurisdictions have concluded that an accessory use could not be located on a separate parcel that was subject to different zoning regulations: Teachers Insurance & Annuity Association v. Furlotti, 70 Cal. App. 4th 1487, 83 Cal. Rptr. 2d 455 (1999) (commercial building’s use of portion of alley in residential zone was commercial in nature and violated residential zoning district regulations); Atria, Inc. v. Board of Adjustment, 438 Pa. 317, 264 A.2d 609 (1969) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel); Williams v. Bloomington, 108 Ill. App. 2d 307, 247 N.E.2d 446 (1969) (residentially zoned parcel could not be used to provide access to serve an adjoining commercially zoned parcel); Sprague-Cotington Co. v. Zoning
Board of Review, 102 R.I. 317, 230 A.2d 419 (1967) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel); San Francisco v. Safeway Stores, Inc., 150 Cal. App. 2d 327, 310 P.2d 68 (1957) (residentially zoned easement may not be used to provide access to commercial use on adjoining parcel); Yonkers v. Rentways, Inc., 304 N.Y. 499, 109 N.E.2d 597 (1952) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel).

17-370 Specific accessory uses may be excluded from a zoning district

A locality may exclude specific accessory uses from a district by regulation. Wiley v. County of Hanover, 209 Va. 153, 157, 163 S.E.2d 160, 163 (1968) (“Had it been the purpose of the ordinance to prohibit the raising, sheltering or harboring of pigeons or other fowl in a residential district, as the county claims, this could easily have been accomplished by a simple and direct provision to that effect”).
Chapter 18

Nonconforming Uses and Structures

18-100  Introduction

A claim that a use or structure is nonconforming is often raised by a landowner as a defense when the zoning administrator has determined that a particular use is in violation of the zoning ordinance.

The principles that apply to nonconforming uses and nonconforming structures actually compose a class of vested rights (discussed in chapter 19). However, nonconformities and vested rights are treated in separate chapters in this handbook because different rules apply, even though both are intended to protect certain existing private property interests when zoning regulations are changed.

<table>
<thead>
<tr>
<th>Nonconforming Uses</th>
<th>Vested Rights</th>
</tr>
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<tbody>
<tr>
<td>Determines whether a pre-existing use may continue even though it no longer conforms to new zoning regulations.</td>
<td>Determines whether a previously approved use has ripened to the point that it should be allowed to exist, even though it would not conform to new zoning regulations.</td>
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The Virginia Supreme Court has made it clear that when one is considering nonconformities, the principle of vested rights is at hand. *Alexandria City Council v. Mirent Potomac River, LLC*, 273 Va. 448, 454, 643 S.E.2d 203, 206 (2007) (operation of a power plant before the city had adopted comprehensive zoning established “a vested right to use the property for operation of a power plant” when the 1963 and 1992 zoning ordinances were adopted); *Holland v. Board of Supervisors of Franklin County*, 247 Va. 286, 441 S.E.2d 20 (1994) (a landowner may acquire a vested right to conduct a nonconforming use on its property if that use was in existence on the effective date of the zoning ordinance; because the quarry was not operational on the effective date of the county’s zoning ordinance, a vested right under the common law of vested rights in effect at that time was not established); *Edenton v. Board of Zoning Appeals of Spotsylvania County*, 37 Va. Cir. 176 (1995) (a nonconforming use is said to be a vested right that zoning regulations generally cannot annul).

The doctrine of nonconformities is similar to, but different than, the concept of grandfathering, which is the term used when a locality expressly exempts a use or land from newly adopted regulations that would otherwise apply. *See, e.g., Bertozzi v. Hanover County*, 261 Va. 608, 544 S.E.2d 340 (2001).

The rules applicable to nonconformities are governed by Virginia Code § 15.2-2307(C) through (G). The reader is advised to refer to, be familiar with, and stay current with that statute, because it is regularly amended by the General Assembly.

18-200  The nature of a nonconforming use

When a locality adopts or amends its zoning ordinance, the land within the locality is either undeveloped or developed with uses that may not conform to the new zoning regulations. These pre-existing uses may, if allowed to continue, threaten the effectiveness of the locality’s comprehensive plan and zoning regulations. Nonetheless, it is well established in Virginia law that “as to an existing use, absent condemnation and payment of just compensation, the landowner has the right to continue that use even after a change in the applicable zoning classification causes the use to become nonconforming.” *See Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 271, 673 S.E.2d 170, 180 (2009); *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006).

A nonconforming use may not be established through a use of land which was commenced or maintained in violation of a zoning ordinance. Board of Supervisors of Washington County v. Booher, 232 Va. 478, 352 S.E.2d 319 (1987); Hardy, supra; McLane v. Wiseman, 84 Va. Cir. 10 (2011) (junk vehicles did not become a lawful nonconforming use when the county amended its zoning regulations in 1985 to, among other things, substitute “inoperative motor vehicle” for “junk vehicle” and expanded a definition so as to deem certain maintenance of inoperative motor vehicles to be a permitted accessory use). In Booher, the landowner obtained a rezoning of his land in 1975 from A-2 to B-2, and informed the board of supervisors of his intention to establish an automobile graveyard and junkyard. Neither of those uses was allowed by right or by special use permit in the B-2 zoning district. In 1981, the county amended its zoning regulations requiring a conditional use permit for those uses, but only in the M-2 zoning district. The board denied Booher’s application to rezone his property to M-2 and ordered him to discontinue the use and remove the vehicles from his property. The Virginia Supreme Court concluded that the chancellor erred when he determined that Booher’s operation was a lawful nonconforming use because, quite simply, the use was never lawful, despite the county’s implicit acceptance of the use for several years. The Court added that “[i]t may be that the Board intended . . . to grant Booher a special exception. But an automobile graveyard was not then and is not now a permitted use in the B-2 zone. Booher did not apply for a special exception in that zone [and] the Board had no power to grant an exception by implication. . .” Booher, 232 Va. at 481-482, 352 S.E.2d at 321.

As used in this chapter, the reference to nonconforming uses includes not only uses, but also structures (e.g., the structure does not comply with new setback or height regulations).

18-300 The purpose and scope of the nonconformities principle

The purpose of Virginia Code § 15.2-2307(C) through (G) and the protection it affords to nonconformities is to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy opposes the extension and favors the elimination of nonconforming uses. City of Chesapeake v. Gardner Enterprises, Inc., 253 Va. 243, 482 S.E.2d 812 (1997). Nonconforming uses are disfavored because they detract from the effectiveness of a comprehensive zoning plan. Gardner, supra. However, a locality may not terminate a nonconforming use in a manner that is not provided in Virginia Code § 15.2-2307. See Alexandria City Council v. Mirant Potomac River, LLC, 273 Va. 448, 643 S.E.2d 203 (2007). In Mirant, the Virginia Supreme Court found that the effect of the city’s zoning text amendment effectively required that Mirant’s coal-fired nonconforming power plant to cease operation within seven years and concluded that “termination of the use allowed by virtue of an established vested right impairs the vested right and therefore violates Code § 15.2-2307.”

A zoning ordinance should contain a statement of intent regarding nonconformities. For example, Albemarle County disfavors nonconforming uses, as expressed in Albemarle County Code § 18-6.1, Purpose:

The purpose of this section 6 is to regulate nonconforming uses, structures and lots in a manner consistent with sound planning and zoning principles . . . Nonconforming uses, structures and lots are declared to be incompatible with the zoning districts in which they are located and, therefore, are authorized to continue only under the circumstances provided herein until they are discontinued, removed, changed or action is taken to conform to the zoning regulations applicable to the district in which the use, structure or lot is located.

(emphasis added) A locality’s statement of intent in regulating nonconforming uses is relevant when applying that locality’s nonconformities regulations. See Patton v. City of Galax, 269 Va. 219, 609 S.E.2d 41 (2005).

18-400 A nonconforming use must have been a primary use of the property; an accessory use cannot become a nonconforming primary use

Not every pre-existing use qualifies as a sufficient use to attain nonconforming status. The courts have long recognized that, for a use to be eligible for nonconforming status, it must have been a primary use of the property; conversely, an accessory use cannot become a primary nonconforming use. Knowlton v. Browning-Ferris Industries of Virginia, Inc., 220 Va. 571, 260 S.E.2d 232 (1979) (accessory use cannot become a primary nonconforming use).
Two circuit court opinions highlight application of Knowlton. In Bull Run Civic Association v. Board of Zoning Appeals of Loudoun County, 7 Va. Cir. 201 (1983), the circuit court concluded that a crusher that was accessory to a nonconforming quarry operation under a 1955 permit was limited to processing stone extracted in accordance with the 1955 permit and a 1958 permit and to extend its use beyond that which was permitted under the prior permit would elevate the crusher to a nonconforming primary use. In Gwinn v. Lester, 1991 WL 835353 (1991), the circuit court found that the landowners could not continue to park a dump truck on their residentially-zoned parcel where a prior regulation required that each parcel have one vehicle space per family unit and at that time the parcel had been used for a farm and a residence. The current regulations prohibited parking dump trucks of a certain size in residential zoning districts. Assuming that the parking space requirement under the former regulations was a “use,” the parking of the dump truck was only accessory to the farm and residence use and when the property ceased to be used for that primary use, the previously permitted accessory use – parking the dump truck – could not become a nonconforming primary use.

There also is support for the related position that a nonconforming use must have been substantial. In Edenton v. Zoning Appeals Board, 37 Va. Cir. 176 (1995), the issue was whether the appellants had established camping as a nonconforming use on a portion of their property where the activity was irregular and infrequent. In finding that the evidence was insufficient to establish a nonconforming use, the circuit court stated:

Every pre-existing use does not qualify as a sufficient use to give rise to a vested right. The commonly applied guideline is that only a use which is substantial in the sense that its termination would involve significant financial, property, or other economic results will be protected. (emphasis added)

This rule is consistent with the prevailing rule throughout the United States – that a use must be substantial in order to attain nonconforming status. If the rule were otherwise, every trivial, incidental, or insubstantial activity, hobby, or act of personal convenience could attain constitutional protection as a nonconforming use; e.g., a meal served in a house where the invitees are asked to contribute to the cost of the food could be the basis for a claimed nonconforming restaurant use; repairing a car in a garage for a friend as part of a bartered exchange or as a hobby could be the basis for a claimed nonconforming commercial garage; a telecommuter who worked at home from time to time could be the basis for a claimed nonconforming commercial office use.

18-500 The burden of proof is on the landowner to establish a nonconforming use except in a criminal proceeding

A landowner has a vested right to continue a nonconforming use if he or she establishes the validity of the nonconforming use. Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992). In a civil proceeding in which a use is challenged as illegal, the challenging party (e.g., the locality) has the initial burden of producing evidence to show the uses permitted in the zoning district in which the land is located, and that the challenged use of the land is not a permitted use. Patton v. City of Galax, 269 Va. 219, 609 S.E.2d 41 (2005). Upon a sufficient evidentiary showing by the locality, the burden then shifts to the landowner to show that the use is a lawful nonconforming use. Patton, supra. The reason for placing the burden of proof on the landowner in a civil proceeding is because the landowner has better access to the evidence pertaining to the uses of his or her own property. Knowlton v. Browning-Ferris Industries of Virginia, Inc., 220 Va. 571, 260 S.E.2d 232 (1979).

The rule imposing the burden of proof on the landowner is not excused by a locality’s incomplete or absent records. See Town of Front Royal v. Martin Media, 261 Va. 287, 542 S.E.2d 373 (2001), cited in Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 69 Va. Cir. 129 (2005).

There is no presumption that a lawful nonconforming use exists, so the landowner must produce probative material evidence to meet the burden. In Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 271 Va. 336, 626 S.E.2d 374 (2006), the landowners failed to show that a garage apartment was a lawful nonconforming use from the unsubstantiated opinion of the original landowner’s daughter that the garage apartment was built in accordance with the 1941 zoning ordinance. In Emerson v. Zoning Appeals Board of Fairfax County, 44 Va. Cir. 436 (1998), the landowners attempted to establish that their vehicle light service business was
established before the 1941 zoning ordinance was adopted. The landowners acquired the property in 1949, and they failed to present any evidence regarding the property’s use prior to 1949. The circuit court rejected the landowners’ request that the court simply presume that the use of the property was lawful until 1949. See also Shilling v. Baker, 279 Va. 720, 728, 691 S.E.2d 806, 810 (2010) (the trial court did not err in concluding that a cemetery did not exist on the property prior to or at the time the urn containing the cremated remains of Shilling’s mother was buried and that the interment of the urn at that location violated county code requiring a special use permit to use the land as a cemetery).

Likewise, circumstantial evidence alone may be insufficient to establish a nonconforming use. In Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 69 Va. Cir. 129 (2005), the circuit court declined to infer that a second dwelling on the landowners’ property was legally nonconforming because the zoning administrator had issued a partially illegible building permit for interior alterations in 1984. The court found that the BZA’s determination that the landowner had failed to sustain her burden was not plainly wrong.

18-600 The prerequisites to preserving nonconforming status

Virginia Code § 15.2-2307(C) provides that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued provided that three prerequisites are established, as set forth below:

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<th>Elements to Establish a Nonconforming Use</th>
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<td>• The then-existing or a more restricted use continues.</td>
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<tr>
<td>• The use is not discontinued for more than two years.</td>
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<tr>
<td>• Buildings or structures are maintained in their then structural condition.</td>
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Virginia Code § 15.2-2307(C) also enables a locality to require that the uses of buildings or structures conform to the current zoning regulations whenever they are enlarged, extended, reconstructed or structurally altered. In Patton v. City of Galax, 269 Va. 219, 609 S.E.2d 41 (2005), the Virginia Supreme Court held that the right to continue a nonconforming use did not extend to other areas of a building (not used for the nonconforming use) unless, at the time the regulations were adopted, the design of the building clearly indicated that the use was intended throughout. The Court concluded that the owners failed to establish that they had the right to extend the apartment use on the second floor of their building to the first floor, where they only showed that they intended renovations to the first floor, but failed to prove that the first floor was arranged or designed for the apartment use when the regulations were adopted. The Court also confirmed that a locality may establish the manner in which the extension of a use may be permitted, or it may prohibit extension of a use altogether.

An increase in the land area of a nonconforming use is generally prohibited. City of Chesapeake v. Gardner Enterprises, Inc., 253 Va. 243, 482 S.E.2d 812 (1997); Board of Supervisors of Chesterfield County v. Trollingwood Partnership, 248 Va. 112, 445 S.E.2d 151 (1994). Also, Virginia Code § 15.2-2307(C) enables a locality to prohibit a nonconforming building or structure from being moved on the same lot or to any other lot that is not properly zoned to permit the nonconforming use.

Finally, in determining whether a nonconforming use is established, equitable concerns cannot be the basis for a decision by the zoning administrator or the BZA. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 271 Va. 336, 626 S.E.2d 374 (2006) (concern expressed by BZA about ending use of unlawful garage apartment after 54 years of use).

18-610 The first prerequisite: continuing the existing use or a more restricted use

The first prerequisite to establishing the right to continue a nonconforming use is that “the then existing or a more restricted use continues.” Virginia Code § 15.2-2307(C). This question is resolved by determining whether the character of the use has changed. Knowlton v. Browning-Ferris Industries of Virginia, Inc., 220 Va. 571, 576, 260 S.E.2d 232, 236 (1979).
A nonconforming commercial use need not remain static. Knowlton, supra. Trivial, insubstantial or reasonably customary and incidental change may be permitted by the zoning ordinance. Numerous cases from other states hold that these minor changes are allowed for commercial uses only; the principle does not apply to residential uses. Unlawful changes of use can result from increased volume or frequency of use. See 83 Am. Jur. 2d, Zoning and Planning, p. 669. The degree of relevance of any change depends in each case upon the quantum of the increase and its effect upon the purposes and policies the zoning ordinance was designed to promote. Knowlton, supra; Wheelabrator Clean Water System, Inc. v. County of King George, 43 Va. Cir. 370 (1997).

Whether a nonconforming use has been increased in size or scope is merely one circumstance relevant to the key determination of whether the character of the use has been changed. Knowlton, supra. However, a zoning ordinance may expressly restrict the manner in which a nonconforming use can be extended throughout an entire building, or expressly prohibit extension of the use. Patton v. City of Galax, 269 Va. 219, 609 S.E.2d 41 (2005). A zoning ordinance also may prohibit the enlargement of a nonconforming structure. Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach, 274 Va. 189, 645 S.E.2d 271 (2007) (zoning regulation prohibited nonconforming sign from being structurally altered, enlarged, moved or replaced unless it is brought into compliance with the zoning ordinance; billboard was enlarged because electronic message board attached to the face of a billboard increased both the weight and the mass of the billboard; the fact that the surface area of the message board did not increase the advertising surface area of the billboard was not the controlling factor).

The following cases are examples where the courts found that the changes in the uses were sufficient to change the character of the use and destroy its nonconforming status:

- **General cargo to trash hauling**: The character of the use had changed where a general trucking business engaged in hauling random cargoes using four small trucks parked on unimproved land and repaired and maintained in the shade of a tree, transformed into a specialized commercial enterprise engaged in collecting and disposing trash, using a fleet of 18 large trash compactors whose repair and maintenance required a spacious garage on the site and two gasoline tanks installed underground. Knowlton v. Browning-Ferris Industries of Virginia, Inc., 220 Va. 571, 260 S.E.2d 232 (1979).

- **Warehouse and repair to assembly and fabrication**: The character of the use had changed where the property was used as a warehouse and automobile repair shop prior to adoption of the zoning ordinance, and was thereafter used to assemble boats, trailers, and related equipment, and still later was used for a metal fabrication operation. Spotsylvania County Board of Zoning Appeals v. Mccalley, 225 Va. 196, 300 S.E.2d 790 (1983).

- **Primary structure to accessory structure**: A barn lost its nonconforming status under a regulation that required accessory structures to be located in the rear yard of a single-family dwelling. When a new single-family dwelling was established on the property, the barn’s status as a primary structure changed to that of an accessory structure, and it was now located in the front sideyard in violation of the regulation. Asey v. Board of Zoning Appeals of City of Salem, 66 Va. Cir. 382 (2005). Note that this is not a true nonconformities case because no change in the locality’s zoning regulations made a lawful structure unlawful; instead, it was the actions of the landowner to create a second primary structure that changed the status of the barn.

- **Vehicle repair to paving and sealing**: The character of the use changed where the property was used as a vehicle towing and repair business prior to the adoption of the zoning ordinance, and was thereafter used for the storage of vehicles, equipment, materials and supplies used in a paving and sealing business. Relying on Knowlton, the court rejected the landowners’ argument that the vehicle repair activities under the original use opened the door for the paving and sealing business because there were truck repair activities associated with the prior use of the property; the similar accessory repair activities could not open the door to allow a different primary use – the paving and sealing business. Seekford v. Zoning Appeals Board of the Town of New Market, 49 Va. Cir. 112 (1999).

- **Residence school and dormitory to primary residence and guest house**: Assuming a lawful nonconforming use had existed, the character of the guest house changed where the property was originally used as a “private residence primary school” with a dormitory, and the rented guest house was originally used for classrooms. Even if the rented guest house had served as the dormitory, the character changed because using the guest house for a school was

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not the same as using the guest house for apartments. *Hughey v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 138 (1996) (ultimately finding that although residence school and dormitory was originally nonconforming, original owners had obtained a special exception from the county in 1945 which converted the nonconforming use into a conforming use).

- **Auto repair; expansion in scope and intent:** Assuming that a lawful nonconforming use had originally existed, the character of a vehicle light service business had changed when the original one-car garage was replaced by a two-car garage, and the landowner turned the part-time business into a full-time business. *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1988).

- **Carnival equipment storage with occasional repair to commercial garage:** The character of the use changed where the nonconforming use had been the storage of carnival equipment when not in use, carnival equipment repair, and occasional repair and maintenance of trucks and trailers that transported carnival equipment, and the use became commercial truck and motor vehicle repair and a towing facility. *Town of Mount Jackson v. Fawley*, 53 Va. Cir. 49 (2000).

- **Infrequent to permanent:** The character of the use had changed where the portion of the property on the east side of a creek was infrequently used for camping prior to the adoption of the zoning ordinance, and was thereafter changed to a permanent commercial campground. *Edenton v. Board of Zoning Appeals of Spotsylvania County*, 37 Va. Cir. 176 (1995).

A change in the character of the use is not relevant if the nonconformity pertains to something other than the use. For example, in *Lievan v. County of Fairfax Board of Zoning Appeals*, 2000 Va. Cir. LEXIS 395, 2000 WL 33316930 (2000), the circuit court concluded that the BZA correctly determined that a dry cleaning business was not prohibited in the zoning district where the structure had been used as a shoe store when the applicable zoning regulations were adopted. The court rejected the petitioner’s (a competing dry cleaner) argument that the change in the use of the property from a shoe store to that of a high-volume cleaners was a change in the character of the use to one that was more intense. The court noted that the change in use was not relevant because the nonconformity at issue concerned the size of the building used, not the use.

The failure to comply with a particular zoning requirement other than those provided in Virginia Code § 15.2-2307 and the locality’s nonconformities regulations cannot be the basis for terminating a nonconforming use. *Donovan v. Board of Zoning Appeals of Rockingham County*, 251 Va. 271, 467 S.E.2d 808 (1996) (failure to screen nonconforming automobile graveyard as required by current zoning ordinance could not be basis for terminating nonconforming use). In *Gwinn v. Herring*, 2000 Va. Cir. LEXIS 392, 2000 WL 33316932 (2000), the circuit court held that a nonconforming junkyard did not become an illegal junkyard when it expanded in the absence of a zoning regulation specifically invalidating the use itself for failure to comply with the regulation.

**18-620 The second prerequisite: not discontinuing the use for more than two years**

The second prerequisite to establishing the right to continue a nonconforming use is that “the use is not discontinued for more than two years.” *Virginia Code § 15.2-2307(C)*.

The Virginia Code does not define what it means to discontinue a use. The Virginia Supreme Court has applied the definition in *Webster’s Third New International Dictionary* 646 (2002): “to break off, give up, terminate, end the operations or existence of, cease to use.” *Prince William Board of County Supervisors v. Archie*, 296 Va. 1, 12, 817 S.E.2d 323 (2018) (holding that nonconforming automobile graveyard use was not discontinued).

**18-621 Whether intent to abandon is required in order for the two-year period to run**

The case law nationwide is all over the board on the question of whether discontinuing a use requires an intention to abandon. Some courts have said that discontinue is synonymous with abandon and require some evidence of intent to abandon. Other courts have said that ordinances terminating a nonconforming use if the use is discontinued for a specified period (e.g., 2 years) creates a rebuttable presumption that the landowner intended to
abandon the use. Still other courts have held that these regulations require no evidence of intent to abandon the use by the landowner, but instead look to only whether the use existed during the requisite period. See Hartley v. City of Colorado Springs, 764 P.2d 1216 (1988) for an exhaustive analysis of this issue.

In Virginia, the General Assembly has not required an intention to abandon in the language it chose in Virginia Code § 15.2-2307(C), thereby allowing localities to define the parameters of what it means to discontinue a use for two years. The Virginia Supreme Court has been willing to look at and defer to a locality’s nonconformities regulations implementing the authority granted by Virginia Code § 15.2-2307. See, e.g., Patton v. City of Galax, 269 Va. 219, 609 S.E.2d 41 (2005); Masterson v. Board of Zoning Appeals of City of Virginia Beach, 233 Va. 37, 353 S.E.2d 727 (1987).

Thus, whether discontinuing a use requires an intention to abandon will depend on the language of the locality’s zoning regulations. See Prince William Board of County Supervisors v. Archie, 296 Va. 1, 12, 817 S.E.2d 323 (2018) (“There is no intent element in the relevant nonconforming use termination ordinance”). Two trial court decisions out of the City of Norfolk appear to require that there be some evidence of an intent to abandon the nonconforming use based on the language in the City’s zoning regulations. Montgomery v. Zoning Appeals Board of the City of Norfolk, 45 Va. Cir. 126 (1998); Turock Estate v. Thomas, 7 Va. Cir. 222 (1984). In Montgomery, the BZA determined that a duplex did not lose its nonconforming status even though it had been more than two years since both units had been occupied. The BZA decision was described by the court as follows:

The BZA based its decision on its reading of discontinuance as requiring a look at the totality of the circumstances of use as a duplex, including the intent of the landowner to use the property as a duplex, as well as overt acts in furtherance of that intent, not simply focused on the single fact of whether the property was occupied by one or two tenants during the time frame.

The Montgomery court agreed with the decision of the BZA and interpreted the meaning of discontinuance in the Norfolk zoning ordinance to mean that it required an intention to abandon, noting the prevailing view described above from other states, citing several decisions from other state courts, and referring to the definition of discontinuance in a law dictionary which defined the word to be “synonymous with abandonment.” One key factor in Montgomery is that Norfolk’s zoning ordinance included the following, which may or may not have been relied upon by the Norfolk BZA in reaching its decision: “The words ‘used or occupied’ include the words ‘intended, designed or arranged to be used or occupied.’”

A trial court from the City of Chesapeake in In re April 23, 2015 Decision of the Board of Zoning Appeals, 92 Va. Cir. 246, 248 (2015) has followed Montgomery, holding that a nonconforming towing and recovery lot did not lose its nonconforming status where the owner attempted to lease the property throughout the period during which the towing lot use was discontinued and obtained a tenant within the 2-year period whose actual use was prevented by the zoning dispute at issue in the case. The court said that “discontinuance or abandonment as used in zoning laws is construed to contain an element of intent, plus overt acts indicative of abandonment.”

A locality should address whether an intention to abandon is part of the determination as to whether a use has been discontinued for two or more years in its zoning regulations.

18-622 The starting and ending dates for the two-year period

The starting date for the running of the two-year period may be easy to determine in some cases, such as when a nonconforming grocery store use closes after the building is damaged by a fire. For other nonconforming commercial uses, the only evidence as to when the use discontinued may be from evidence of the date a business license expired, a business tax went unpaid, or a lease agreement expired. For residential uses, the two-year period may begin when the structure is no longer occupied. Localities may need to obtain evidence from neighbors as well as utilities who may be able to determine if and when service was terminated.

The other key issue is whether a use has restarted within the two-year period. In Board of Zoning Appeals of the City of Norfolk v. Kabbal, 255 Va. 476, 499 S.E.2d 519 (1998), the owners’ grocery store was closed after it was damaged by a fire. Within the two-year period after the store was closed, the owners secured financing to repair the property,
paid a meals tax bond, obtained business licenses, obtained building permits and associated sub-permits, and
requested and obtained other required inspections. In other words, the owners in *Kabhal* successfully completed
virtually all of the steps necessary to re-open their grocery store within the two-year period except to actually re-open its doors for business. The Virginia Supreme Court found that the nonconforming use had restarted within the two-year period. *Kabhal* was followed in *In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015), discussed in section 18-621. Merely obtaining a business license is likely insufficient to continue a nonconforming use. *Babazadeh v. Fairfax County Board of Zoning Appeals*, 1997 WL 107641 (Va. Cir. Ct. 1997).

The rule emerging from *Kabhal* and *Babazadeh* is that a landowner must obtain the requisite governmental
approvals and successfully engage in a series of activities toward restarting the use within the two-year period in
order to preserve the use’s nonconforming status. A landowner should not be able to preserve the nonconforming
status of her use or structure under *Kabhal* simply by engaging in various activities that fail to re-start the use within
the two-year period. For example, obtaining a building permit but allowing it to expire, leasing the property but
never re-starting the use, failing to pursue the full range of permits and approvals necessary to re-start the use, are all
evidence of a failure to continue the use within the two-year period. In other words, the landowner must
demonstrate that she has successfully completed all or virtually all of the steps to re-start the use, rather than merely
engage in a series of activities during the two-year period.

### 18-623 Abandoned signs

A locality may order the removal of a nonconforming sign that has been abandoned after attempting to provide
notice to the owner. A sign is considered abandoned if the business for which the sign was erected has not been in
operation for a period of at least two years. The locality may remove the sign and charge the costs to the owner if
the owner refuses to remove the sign after reasonable attempts by the locality to notify the owner. *Virginia Code §
15.2-2307(G)*.

### 18-630 The third prerequisite: maintaining structures and buildings in their then structural condition

The third prerequisite to establish the right to continue a nonconforming use is that “the buildings or structures
[be] maintained in their then structural condition.” *Virginia Code § 15.2-2307(C)*. As noted above, *Virginia Code §
15.2-2307(C)* enables a locality to require that the uses of buildings or structures conform to the current zoning
regulations whenever, with respect to the building or structure, the square footage of a building or structure is
enlarged, or the building or structure is structurally altered as provided in the Uniform Statewide Building Code
(*Virginia Code § 36-97 et seq*). In addition, a zoning ordinance may provide that “no nonconforming use may be
expanded, or that no nonconforming building or structure may be moved on the same lot or to any other lot which
is not properly zoned to permit such nonconforming use.” *Virginia Code § 15.2-2307(C)*.

The requirement that “the buildings or structures [be] maintained in their then structural condition” means that
“[w]hen a property owner wishes to make certain changes to, or to move, a building or structure which supports a
nonconforming use or is itself nonconforming, the proposed changes are subject to the regulations of the zoning
regulate or prohibit new construction related to a nonconforming use. *Gardner, supra* (holding that city could prohibit
a cemetery from constructing new buildings or structures to support a nonconforming use).

In *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 645 S.E.2d
271 (2007), the Virginia Supreme Court did not consider the circuit court’s holding that the addition of an electronic
message sign to a billboard *structurally altered* the billboard because it had already determined that the addition of the
electronic message sign had *enlarged* the billboard in violation of the zoning ordinance. See section 18-610.

Of course, a change to the structural condition of a building or structure associated with a nonconforming use
does not destroy the nonconforming status if the zoning ordinance allows the change. In *Masterson v. Board of Zoning
Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987), a nonconforming hotel was enlarged and the
Virginia Supreme Court held that the change in the hotel’s structural condition did not terminate its nonconforming
status. The change itself did not increase the nonconformity, and the city’s zoning regulations allowed “additions or

18-8
alterations that themselves conform to zoning requirements, as such changes cannot also increase the nonconformity.”

18-700 Restrictions on local zoning authority pertaining to certain nonconforming structures and uses: business licenses, building permits, property taxes, and other permits

If a use was nonconforming and a business license was issued by the locality for the nonconforming use, the holder of the business license operated continuously in the same location for at least 15 years and paid all local taxes related to the nonconforming use, the locality must allow the business license holder to apply for a rezoning or a special use permit without charge by the locality or any agency affiliated with the locality for fees associated with the filing. Virginia Code § 15.2-2307(C).

Virginia Code § 15.2-2307(D) prohibits localities from declaring that nonconforming structures are illegal and subject to removal solely because of the nonconformity if: (1) the locality “has issued a building permit, the building or structure was thereafter constructed in accordance with the building permit, and upon completion of construction, the local government issued a certificate of occupancy or a use permit therefor”; or (2) the owner of the building or structure has paid taxes to the locality for such building or structure for a period of more than the previous 15 years.” This provision is restrictive legislation, as compared to enabling legislation, and operates regardless of whether the locality has adopted an ordinance implementing the statute. Lamar Co., LLC v. City of Richmond, 287 Va. 348, 352, 756 S.E.2d 444, 446-447 (2014).

In Board of Supervisors of Fairfax County v. Cohn, 296 Va. 465, 821 S.E.2d 693 (2018), the Cohns’ parcel had three dwelling units on it (a main house, a converted garage, and a “garden house”), where the applicable R-1 zoning district allowed only a single dwelling unit. The two illegal structures were constructed before the Cohns acquired the parcel in 1998. In 2016, the zoning administrator issued a zoning violation because of the excessive number of dwelling units on the parcel. The Cohns appealed, claiming that the converted garage and the garden house had vested rights as dwelling units under Virginia Code § 15.2-2307(D)(ii) because they had been paying real estate taxes on them for at least the 15 previous years. The board of zoning appeals determined that Virginia Code § 15.2-2307(D)(ii) did not protect the unlawful use of the structures as dwelling units.

The trial court concluded that Virginia Code § 15.2-2307(D)(ii) created vested rights for both the illegal structures and their uses. The Virginia Supreme Court reversed, holding that only the structures themselves were protected by Virginia Code § 15.2-2307(D)(ii), and that Virginia Code § 15.2-2307(D)(ii) “does not provide protection for the uses of those structures.” Cohn, 296 Va. at 477 (the language of subsection (D) “does not mention the vesting of the right to use a building or structure in a particular way,” unlike the language used by the General Assembly in subsection (C), which refers not only to “buildings” and “structures,” but also “the uses thereof”).

Structures eligible for the protections of Virginia Code § 15.2-2307(D) are nonetheless nonconforming, and a locality may require in its ordinance that such a structure “be brought in compliance with the Uniform Statewide Building Code, provided that to do shall not affect the nonconforming status of such building or structure.” Virginia Code § 15.2-2307(D) also provides that if a locality “has issued a permit, other than a building permit, that authorized construction of an improvement to real property and the improvement was thereafter constructed in accordance with such permit, the ordinance may provide that the improvements are nonconforming, but not illegal.”

18-800 Reconstruction or restoration of involuntarily damaged or destroyed nonconforming building

A locality’s zoning ordinance must permit the owner of any residential or commercial building damaged or destroyed by a natural disaster or other act of God to repair, rebuild, or replace the building to eliminate or reduce the nonconforming features to the extent possible, without the need to obtain a variance. Virginia Code § 15.2-2307(E). An “act of God” includes a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, or certain fires. Virginia Code § 15.2-2307(E) also provides that a fire caused by an individual other than the owner does not adversely affect the rights vested in the affected property.
If a building is damaged greater than 50 percent (the statute does not state whether it is 50 percent of the physical structure or 50 percent of its value) and cannot be repaired, rebuilt or replaced except to restore it to its original nonconforming condition, it may be restored to that condition. *Virginia Code § 15.2-2307(E).*

If the building cannot be repaired, rebuilt or replaced except to restore it “to its original nonconforming condition,” the landowner has the right to do so. *Virginia Code § 15.2-2307(E).*
Chapter 19

Vested Rights

19-100 Introduction

Under Virginia zoning and subdivision law, there are four general statutes that protect certain vested rights:

- Virginia Code § 15.2-2307(A): This statute protects certain rights to use property arising from a proposed lawful use allowed by a prior approval by the locality when the zoning regulations change before the proposed use is established. See section 19-300, below.

- Virginia Code § 15.2-2311(C): This statute protects certain rights to use property in a manner that otherwise would not have been allowed under the applicable zoning regulations when the landowner relies on an erroneous written order, requirement, decision or determination by the zoning administrator or other administrative officer. See section 19-400, below.

- Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303: These statutes protect certain rights to use property arising from a proposed lawful use where the landowner has proffered as part of a rezoning a specific use or density, to dedicate land, or to make a substantial cash contribution when the zoning regulations change before the proposed use is established. See section 19-500, below.

- Virginia Code § 15.2-2261(C): This statute protects certain rights to develop property under previously approved subdivision plats and site plans for a specified period of time when the applicable regulations are later changed. See section 19-600, below.

Each of these statutes has prerequisites that must be satisfied in order for the vested rights to be established. This chapter focuses primarily on vested rights that apply to zoning.

As noted in chapter 18, the principles of nonconforming uses and vested rights are closely related to one another (the principle of nonconforming uses is one type of vested rights), and they are intended to protect certain existing private property interests when zoning regulations are changed.

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<tr>
<th>Vested rights</th>
<th>Nonconforming Uses</th>
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<td>Determines whether a previously approved use has ripened to the point that it should be allowed to exist, even though it would not conform to the new zoning regulations.</td>
<td>Determines whether a pre-existing use may continue even though it no longer conforms to new zoning regulations.</td>
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For vested rights determinations under a locality’s zoning regulations, Virginia Code § 15.2-2286(A)(4) specifically gives the zoning administrator the authority to make conclusions of law and findings of fact regarding vested rights with the concurrence of the attorney for the governing body under Virginia Code §§ 15.2-2307(A) and 15.2-2311(C). The zoning administrator’s authority to make vested rights determinations is not exclusive. A landowner may seek a vested rights determination in a declaratory relief action filed in circuit court without first obtaining a determination from the zoning administrator. Board of Supervisors Stafford County v. Crucible, Inc., 278 Va. 152, 677 S.E.2d 283 (2009) (holding that when what is now Virginia Code § 15.2-2286 was amended to confer authority on zoning administrators to make vested rights determinations, the pre-existing remedy available from the circuit courts was not abolished).

19-200 The nature of vested rights generally

Generally, landowners have no property right in the anticipated uses of their land since they have no vested property right in the continuation of the land’s existing zoning status. Hale v. Board of Zoning Appeals for the Town of Blacksburg, 277 Va. 250, 673 S.E.2d 170 (2009); Board of Zoning Appeals of Bland County v. Caselin Systems, Inc., 256 Va.
not merely Lamar failed to allege that the city had adopted an ordinance implementing subsection (D). The trial court had dismissed Lamar's complaint on the motion of the city because the locality had not adopted an ordinance implementing Virginia Code § 15.2-2307. Lamar sought an order requiring either the removal of the billboard or, in the alternative, an order requiring that the billboard's height be reduced. The landowner and Lamar brought a separate action against the city, alleging that the city may not require the removal of the billboard because the city has received taxes for the billboard's existence for more than 15 years. Indeed, Virginia Code § 15.2-2307 prohibits a locality from declaring that nonconforming structures are illegal and subject to removal solely because of the nonconformity if the owner of the structure has paid taxes to the locality for the structure for a period of more than the previous 15 years. The city had not adopted an ordinance having force only if a locality has adopted an implementing ordinance, but are self-executing restrictive legislation.

The doctrine of vested rights arises from the principle that certain property rights are constitutionally protected. The determination of whether one has a constitutionally protected property right is a question of state law. Stop the Beach Renourishment v. Florida Department of Environmental Protection, 560 U.S. 702, 130 S. Ct. 2592 (2010) (The Takings Clause protects property rights as they are established under state law); Garraghty v. Commonwealth of Virginia, Department of Corrections, 52 F.3d 1274 (4th Cir. 1995), citing Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074 (1976); Biser v. Town of Bel Air, 991 F.2d 100 (4th Cir. 1993). To have a property interest in a certain benefit, a person or entity must have more than an abstract need or desire for it. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972). Rather, there must be a legitimate claim of entitlement to the benefit in order for a property right to be involved. Roth, supra; Biser, supra. This legitimate claim must arise under Virginia law.

Prior to July 1, 1998, the requirements to establish vested rights in zoning were developed through Virginia case law, i.e., the common law. In 1998, the General Assembly amended Virginia Code § 15.2-2307 and codified those requirements and expanded the scope of vested rights by adding various actions that are significant governmental acts.

19-300 Vested rights under Virginia Code § 15.2-2307(A) and (B)

The intent of Virginia Code § 15.2-2307(A) is to provide a landowner with protection from a subsequent amendment to a zoning ordinance when the landowner has already received approval for and made substantial efforts to undertake a use of the property permitted under the prior version of the ordinance. Goyonaga v. Board of Zoning Appeals for the City of Falls Church, 275 Va. 232, 657 S.E.2d 153 (2008). In other words, vested rights under Virginia Code § 15.2-2307(A) only protect a landowner's right to develop a specific project under existing zoning regulations and allow the continuation of what has become, in essence, a nonconforming use when the zoning regulations are amended. Hale v. Board of Zoning Appeals for the Town of Blacksburg, 277 Va. 250, 673 S.E.2d 170 (2009); Board of Supervisors of Culpeper County v. Greengael, LLC, 271 Va. 266, 626 S.E.2d 357 (2006).

The vested rights provisions in Virginia Code § 15.2-2307 are not merely enabling legislation having force only if a locality has adopted an implementing ordinance, but are self-executing. The Lamar Company, LLC v. City of Richmond, 287 Va. 348, 756 S.E.2d 444 (2014). In Lamar, the city had brought a zoning enforcement action against a landowner and its tenant, The Lamar Company, LLC. Lamar maintained a nonconforming billboard on the property. The city sought an order requiring either the removal of the billboard or, in the alternative, an order requiring that the billboard’s height be reduced. The landowner and Lamar brought a separate action against the city, alleging that the city may not require the removal of the billboard because the city has received taxes for the billboard for more than 15 years. Indeed, Virginia Code § 15.2-2307(D) prohibits a locality from declaring that nonconforming structures are illegal and subject to removal solely because of the nonconformity if the owner of the structure has paid taxes to the locality for the structure for a period of more than the previous 15 years. The city had not adopted an ordinance implementing subsection (D). The trial court had dismissed Lamar’s complaint on the motion of the city because Lamar failed to allege that the city had adopted an ordinance implementing Virginia Code § 15.2-2307.

The Virginia Supreme Court reversed, holding that the vested rights provisions in Virginia Code § 15.2-2307 are not merely enabling legislation having force only if a locality has adopted an implementing ordinance, but are self-executing restrictive legislation.
The mere reliance on a particular zoning classification creates no vested right in the landowner. *Hale, supra.* The doctrine of vested rights does not preclude a governing body from rezoning property to a zoning designation that would otherwise prohibit the vested use. *Greengael, supra.* It merely vests a right to a permissible use of the property against any future attempt to make the use impermissible by amending the zoning ordinance. Virginia Code § 15.2-2307(A) is not intended to permit, nor does it provide for, the vesting of a right to an impermissible use. *Goyonaga, supra* (no vested right arose under Virginia Code § 15.2-2307 from the zoning administrator’s approval of building plans showing the reinforcement of existing walls, where the reconstruction of the house resulted in the complete demolition of the existing house which, in turn, caused the house to lose its nonconforming status).

A vested right may be established under Virginia Code § 15.2-2307(A) if:

- **Significant affirmative governmental act:** The locality has taken a significant affirmative governmental act that remains in effect allowing development of a specific project.

- **Good faith reliance:** The landowner relies in good faith on the significant affirmative governmental act.

- **Extensive obligations/substantial expenses and diligent pursuit:** The landowner incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

A locality is not enabled to do anything that would impair vested rights acknowledged by state law. *Virginia Code § 15.2-2307(A)* (“*[n]othing in this article shall be construed to authorize the impairment of any vested right”).

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<tr>
<th>Questions To Address When Considering a Vested Rights Claim</th>
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<tr>
<td>• Was the government approval a significant affirmative governmental act that is still valid?</td>
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<td>• Has the claimant provided documentation such as bills and contracts to show it has incurred extensive obligations or substantial expenses?</td>
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<td>• To what extent has physical construction occurred?</td>
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<td>• Do the various activities show diligent pursuit of the project?</td>
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### 19-310 Significant affirmative governmental acts

Virginia Code § 15.2-2307(B) lists seven actions by a locality that are deemed to be significant affirmative governmental acts:

- **Certain proffered rezonings which specify the use:** The governing body has accepted proffered conditions related to a rezoning which specify the use. *Virginia Code § 15.2-2307(B)(i).* In order for one to rely on Virginia Code § 15.2-2307(B)(i), the proffer must clearly, expressly and unambiguously specify the use to which the developer agrees to be bound, and the mere exclusion of uses or the imposition of design and development standards that could apply to any permissible use, does not specify use within the meaning of Virginia Code § 15.2-2307(B)(i). *Hale v. Board of Zoning Appeals for the Town of Blacksburg, 277 Va. 250, 673 S.E.2d 170 (2009)* (developers did not have vested right to construct a single 176,000 square foot retail use building in one section of a planned development and, therefore, the building was subject to town zoning regulations adopted after the parcel’s 2006 rezoning requiring a special use permit for retail sales uses located in one structure in excess of 80,000 square feet gross floor area); *Board of Supervisors of Stafford County v. Crucible, Inc., 278 Va. 152, 677 S.E.2d 283 (2009).* Prooffers that prohibit various uses and regulate building height, setbacks and the placement of various improvements do not specify use within the meaning of Virginia Code § 15.2-2307(B)(i). *Hale, supra.*

- **Rezonings to a specific use or density:** The governing body has approved an application for a rezoning to a specific use or density. *Virginia Code § 15.2-2307(B)(ii).* The only vested right that accures to the landowner is the right to use the property for the specific use and up to the density that the particular proffer specified. *Hale, supra.* In *Hale,* the developers unsuccessfully contended that a proffer limiting the maximum residential density in the project...
satisfied the type of significant governmental act described in Virginia Code § 15.2-2307(B)(ii) and, therefore, their rights vested to develop part of their project in accord with their desired commercial use of a single 176,000 square foot retail use building. Vesting need not wait until site plans have been filed for the entire property. City of Suffolk v. Board of Zoning Appeals for the City of Suffolk, 266 Va. 137, 580 S.E.2d 796 (2003). Rezonings to a planned development zoning district may likely fall into this category.

- **Special use permits:** The governing body or board of zoning appeals has granted a special use permit with conditions. Virginia Code § 15.2-2307(B)(iii).

- **Variances:** The board of zoning appeals has granted a variance. Virginia Code § 15.2-2307(B)(iv).

- **Preliminary subdivision plats and site plans:** The governing body or its designated agent has approved a preliminary subdivision plat, site plan, or plan of development for the landowner’s property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances. Virginia Code § 15.2-2307(B)(v). The question is open as to whether a court-ordered approval of a preliminary plat is a significant affirmative governmental act. Greengael, LLC, supra (declaring to decide the question since the court reversed the trial court’s approval of the plat); see Pursellville West, LLC v. Board of Supervisors of Loudoun County, 75 Va. Cir. 284 (2008) (rejecting plaintiff’s argument that there is a point in time prior to acceptance of the preliminary plat when the actions of the approving body rise to the level of a significant affirmative governmental act).

- **Final subdivision plats and site plans:** The governing body or its designated agent has approved a final subdivision plat, site plan, or plan of development for the landowner’s property. Virginia Code § 15.2-2307(B)(vi). See Commonwealth-Abingdon Partners LP v. Town of Abingdon, 79 Va. Cir. 226 (2009) (even though town ordinance provided that a final site plan was deemed approved if it was not acted on within 60 days, and the planning commission did not act on the site plan within 60 days, there was no significant governmental act because the town’s approval of the pending final subdivision plat was a necessary prerequisite to consideration of the site plan, the subdivision plat was not approved and, therefore, the site plan could not be approved or even acted upon).

- **Administrative action pertaining to the permissibility of a specific use or density:** The zoning administrator or other administrative officer has issued a written order, requirement, decision, or determination regarding the permissibility of a specific use or density of the landowner’s property that is no longer subject to appeal, and is no longer subject to change, modification or reversal under Virginia Code § 15.2-2311(C) because it contained nonclerical errors. Virginia Code § 15.2-2307(B)(vii). See section 19-400 for a discussion of vested rights that may arise from an erroneous decision.

In order to make a vested rights claim, Virginia Code § 15.2-2307(A) requires that these acts remain in effect allowing development of a specific project. This issue most often arises with preliminary and final subdivision plats and site plans, which by law have limited periods of validity unless certain rights are perfected. When making a vested rights determination pertaining to a subdivision plat or site plan, see also Virginia Code § 15.2-2261(C), discussed in section 19-600. The requirement of a significant affirmative governmental act creates a bright line test that enables landowners to know precisely when they may have acquired a vested right in a land use. See Holland v. Board of Supervisors of Franklin County, 247 Va. 86, 441 S.E.2d 20 (1994) (decided under prior common law).

The seven enumerated actions discussed above are not exhaustive because Virginia Code § 15.2-2307(B) states that the list is “without limitation” as to other actions that may be determined to be significant governmental acts. When an act does not fall within one of the seven enumerated above, the decisions of the Virginia Supreme Court determine whether a particular act constitutes a significant governmental act. Crucible, Inc., supra. The evidence to support the claim must be clear, express, and unambiguous. Crucible, Inc., supra.

Certain actions have been determined to not be significant affirmative governmental acts:
General rezonings: General rezonings, not initiated at the landowner’s request and not directed at the landowner’s project, are not significant affirmative governmental acts. Board of Supervisors of Culpeper County v. Greengail, L.L.C., 271 Va. 266, 626 S.E.2d 357 (2006).

Compliance letters: A letter from the zoning administrator that an applicant’s proposed cluster development would comply, as proposed, with the relevant cluster overlay district standards then in effect so as to entitle the applicant to proceed with a by-right development, was not a significant governmental act that might establish vested rights when the board of supervisors later repealed the cluster overlay district regulations. Board of Supervisors of Prince George County v. McQueen, 287 Va. 122, 752 S.E.2d 851 (2014). Relying on Board of Supervisors of Stafford County v. Crucible, Inc., 278 Va. 152, 677 S.E.2d 283 (2009), the Virginia Supreme Court concluded in McQueen that the zoning administrator’s compliance letter neither affirmatively approved McQueen’s proposed development nor made any commitment regarding the proposed project; instead, the compliance letter merely confirmed that McQueen’s proposed development met the general standards for a cluster subdivision. The Court agreed with the county that McQueen’s right to pursue his project by-right did not derive from the compliance letter, but from the legislative action of the board of supervisors in adopting the cluster regulations themselves.

Filing applications: The mere act by a landowner to file an application for approval, such as an application for a preliminary site plan, is not a significant affirmative governmental act. 2006 Va. Op. Atty. Gen. LEXIS 38, 2006 WL 4286462 (filing application for preliminary site plan is not a significant affirmative governmental act because Virginia Code § 15.2-2307 specifically requires the approval of the preliminary site plan; also noting that Senate Bill 570 as originally presented merely required filing a preliminary or final subdivision plat or site plan; because the version of the bill as passed required approval, the change in the bill “indicates that the General Assembly intended to exclude earlier reviews and approvals in the category of unspecified significant governmental acts that may establish a vested property right in a particular land use”).

Denied application; pending appeal: A landowner’s mere application for a permit, which is thereafter denied, cannot create a vested right because there is no significant affirmative governmental act. Moore v. Zoning Appeals Board of Spotsylvania County, 49 Va. Cir. 428 (1999). In Moore, the applicants applied for a permit to operate a tattoo parlor, which was denied because the zoning administrator determined that a tattoo parlor was not a “personal service establishment,” which would have been a by-right use in the applicable zoning district. The BZA upheld the zoning administrator, and while the applicants’ appeal was pending in circuit court, the board of supervisors amended its zoning ordinance to define “tattoo parlor” and allow tattoo parlors only by special use permit.

Statement of zoning classification: A statement of zoning classification is not a significant governmental act where the zoning administrator “verified” that a proposed use would be classified as a school under the zoning regulations then in effect, especially where the zoning administrator stated that the classification was subject to change, and did not affirmatively approve any proposed project. Crucible, Inc., 278 Va. at 160, 677 S.E.2d at 287 (“There was no commitment contained within the zoning verification. The zoning administrator simply answered the question concerning the classification of Crucible’s project according to the [regulations] in place on the date the request was made”). The General Assembly attempted to address the Virginia Supreme Court’s holding in Crucible by adding Virginia Code § 15.2-2307(B)(vii), discussed above.

Virginia Code § 15.2-2307 requires specificity in the significant governmental act for a landowner to obtain vested rights. Hale v. Board of Zoning Appeals for the Town of Blacksburg, 277 Va. 250, 673 S.E.2d 170 (2009). “[W]hen vested rights accrue to a landowner as the result of a significant affirmative governmental act, the rights that vest are only those that the government affirmatively acts upon, and the evidence to support the claim to those rights must be clear, express, and unambiguous.” Hale, 277 Va. at 274, 673 S.E.2d at 182. The governmental act must have a sense of finality as well. In Crucible, the Virginia Supreme Court held that the zoning administrator’s letter as to whether a proposed use was a by-right use under the district regulations in effect at the time (and later amended to be allowed only by special use permit) was not a significant governmental act because “the zoning administrator did not affirmatively approve the project. There was no commitment contained within the zoning verification. . . . The zoning administrator specifically stated that the verification was subject to change.” Crucible, Inc., 278 Va. at 160, 677 S.E.2d at 287.

19-5
19-320  Reliance in good faith

Having benefited from a significant affirmative governmental act, a landowner must rely in good faith on that act, i.e., the landowner must take actions designed to move the project forward after the approval of the significant governmental act. Examples of actions that may show good faith reliance include hiring consultants and engineers to develop site plans, stormwater plans, marketing plans, environmental information or other actions designed to advance the completion of the project if those actions result in the landowner incurring extensive obligation or expense. See, e.g., Board of Supervisors of Fairfax County v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972) (obtained engineering and architectural plans, made a bond deposit, and obtained site plan approval; decided under prior common law); Salem Fields, LLC v. Spotsylvania County Zoning Appeals Board, 40 Va. Cir. 289 (1996) (hired an engineering firm to develop construction plans and the final plat; hired another firm to delineate wetlands, to locate drainfields on the lots, and to coordinate review of the project by the appropriate agencies; acquired a construction bond; decided under prior common law). Whether reliance on a significant affirmative governmental act is in good faith is a factual determination that is made on a case-by-case basis.

Good faith reliance will not necessarily be found where the present actions by the landowner create a need to claim vested rights under prior zoning regulations in order to use the property. For example, in Robertson v. City of Alexandria, 46 Va. Cir. 6 (1998) (decided under prior common law), the landowners’ undeveloped lot (“Lot 7”) was created in 1946, but in 1951 the city amended its zoning regulations, and Lot 7 no longer met the minimum lot size and street frontage requirements. From 1960 until 1987, Lot 7 was owned by the same person as the owner of the adjoining developed lot (“Lot 6”) and was used as a yard for the house on Lot 6. When the current owners bought both lots, they sold developed Lot 6 and then asserted a vested right to develop Lot 7 under the zoning regulations in effect in 1946. On the issue of good faith reliance, the circuit court stated that “where, as in the case at bar, the property has been owned and used in conjunction with an adjacent house and lot for a period of twenty-seven years, the incaution of the current owners in separating title to Lot 7 from title to the adjacent Lot 6 can hardly be described as a type of good faith reliance meriting vested rights protection.” Robertson, 46 Va. Cir. at 9-10.

19-330  Extensive obligations or substantial expenses

A party claiming vested rights also must demonstrate that it incurred “extensive obligations or substantial expenses” in diligent pursuit of the project. Virginia Code § 15.2-2307(A). Virginia Code § 15.2-2307(A) does not define extensive obligations or substantial expenses, and so the meaning of those terms is defined by the limited number of cases that have considered the issue. Whether extensive obligations or substantial expenses have been incurred is a factual determination that is made on a case-by-case basis. The following cases illustrate how this has been applied.

In City of Suffolk v. Board of Zoning Appeals of the City of Suffolk, 266 Va. 137, 580 S.E.2d 796 (2003), the Virginia Supreme Court concluded that a landowner had incurred substantial expenses between 1993 and 1998 where he spent $158,000 on services to review development options, to rezone a portion of the property and have the master plan amended to reduce the density of the remainder, to prepare and submit a preliminary recreation plan and traffic impact analysis, to have a survey prepared, and to prepare and submit preliminary and final subdivision plats. The landowner also conveyed 1.1 acres to VDOT for road improvements.

In Board of Supervisors of Fairfax County v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972) (decided under prior common law), the landowner had purchased a tract of land for which a special use permit had been issued, and then spent $59,000 for engineering and architectural plans, made a bond deposit, and obtained site plan approval, before the county amended its zoning ordinance to prohibit the use contemplated by the landowner. The Virginia Supreme Court held that the landowner had acquired a vested right because, in addition to satisfying the other prerequisites, it had incurred substantial expenses.

In Salem Fields, LLC v. Spotsylvania County Zoning Appeals Board, 40 Va. Cir. 289 (1996) (decided under prior common law), the circuit court found that vested rights had been established by a landowner that hired an engineering firm to develop construction plans and a final subdivision plat at a cost of $38,080, obtained the services of another firm to delineate wetlands, to locate drainfields on the lots, and to coordinate review of the project by the appropriate agencies, at a cost of $16,800, and obtained a construction bond from a local bank for a fee of $2,190.
19-340 Diligent pursuit

Finally, the party claiming vested rights must establish that the extensive obligations or substantial expenses were incurred in diligent pursuit of the project. Virginia Code § 15.2-2307(A). Although the term is not defined in Virginia Code § 15.2-2307(A), the usual and common meaning of diligent is “steady, earnest, attentive, and energetic application and effort.” Webster’s Third New International Dictionary (1993), cited in Justice Keenan’s dissenting opinion in City of Suffolk v. Board of Zoning Appeals of the City of Suffolk, 266 Va. 137, 580 S.E.2d 796 (2003). Whether pursuit is diligent is a factual determination that is made on a case-by-case basis. The following cases illustrate how this principle has been applied.

In Suffolk, the landowner had obtained the rezoning for his property in 1988 but did not take any action in pursuit of its approval until 1993, and his actions continued until 1998 when the city amended its zoning regulations. The four-justice majority focused on the extensive obligations and substantial expenses incurred by the landowner between 1993 and 1998 (discussed in section 19-330 above), concluding that the “record shows a train of regular, although not constant, events occurring in the period of some [14] years between the purchase of the property and the adoption of the [new zoning regulations].” Suffolk, 266 Va. at 147, 580 S.E.2d at 800-801. In its majority opinion, the Court speculated that economic conditions may have been a factor in the landowner’s inaction from 1988 until 1993. The developer of an adjoining tract that was part of the 1988 rezoning dropped out because of financial difficulties. The three-justice dissent found no diligent pursuit because of the landowner’s inaction from 1988 until 1993.

A California case picks up on the relevance of economic conditions the Virginia Supreme Court considered in Suffolk, though in a different context. In Foothill Properties v. Lyon/Copely Corona Associates, L.P., 46 Cal.App.4th 1542 (1996), Lyon was obligated under an option agreement with Foothill to diligently pursue the preparation of a final subdivision plat for a portion of the property at issue. There was a dispute as to whether Lyon had diligently pursued the subdivision, and the court concluded that what is diligent must be considered in light of what is commercially reasonable, i.e., by considering what a reasonably prudent developer would do, given the economic and logistical circumstances.

In Robertson v. City of Alexandria, 46 Va. Cir. 6 (1998) (decided under prior common law; discussed in section 19-320 above), the landowners’ undeveloped lot (“Lot 7”) was created in 1946 but in 1951 the city amended its zoning regulations and the lot no longer met the minimum lot size and street frontage requirements. From 1960 until 1987, Lot 7 was owned by the same owner as the owner of the adjoining developed lot (“Lot 6”) and was used as a yard for the house on Lot 6. When the current owners bought both lots, they sold developed Lot 6 and then asserted a vested right to develop Lot 7 under the zoning regulations in effect in 1946. In rejecting the vested rights claim, the circuit court stated on the issue of diligent pursuit:

Nothing in the vested rights doctrine suggests or requires that a half-century old approval might give rise to a vested right to use and develop land contrary to the current zoning regulations. The absurdity and chaos that would result from such a rule is self-evident. . . . It is clear that the present owners and their predecessors in interest have failed to diligently pursue development of Lot 7 within a reasonable time and are now precluded from exercising that option.

Robertson, 46 Va. Cir. at 9-10.

In Salem Fields, LLC v. Spotsylvania County Zoning Appeals Board, 40 Va. Cir. 289 (1996) (decided under prior common law; discussed in section 19-330 above), the circuit court found that a vested right had been established by a landowner that incurred extensive obligations or substantial expenses within one year after obtaining preliminary subdivision plat approval.

19-400 Vested rights under Virginia Code § 15.2-2311(C) arising from an erroneous determination

Virginia Code § 15.2-2311(C) provides “for the potential vesting of a right to use property in a manner that otherwise would not have been allowed.” Goyonaga v. Board of Zoning Appeals for the City of Falls Church, 275 Va. 232,
When a zoning administrator makes an erroneous written determination that works to the benefit of a landowner (e.g., by allowing the landowner to do something not otherwise allowed by the zoning ordinance) and that error is discovered, the zoning administrator presumably will seek to correct the erroneous determination. Virginia Code § 15.2-2311(C) creates a limited exception to the general rule that estoppel does not apply to localities, and vests rights in the landowner if the zoning administrator does not correct an erroneous written determination within 60 days after the date of the decision.

Virginia Code § 15.2-2311(C) provides:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical errors.

The burden of establishing the vesting of a right to an otherwise impermissible use of the property under Virginia Code § 15.2-2311(C) is on the landowner. Norfolk 102, LLC v. City of Norfolk, 285 Va. 340, 738 S.E.2d 895 (2013); Goyonaga, supra (landowners failed to meet their burden and could not reasonably rely on the zoning administrator’s approval of the building plans as permission to completely demolish an existing nonconforming house and replace it with a new nonconforming house; the only conclusion upon review of the plans was that the front and principal portions of both side walls of the existing structure were to be retained).

The vested rights protections created by Virginia Code § 15.2-2311(C) serve a different purpose than those created by Virginia Code § 15.2-2307(A), as explained in the table below:

<table>
<thead>
<tr>
<th>Vested rights under Virginia Code § 15.2-2307(A)</th>
<th>Vested rights under Virginia Code § 15.2-2311(C)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provides for the vesting of a right to a permissible use of property against any future attempt to make the use impermissible by amendment of the zoning ordinance; it is not intended to permit, nor does it provide for, the vesting of a right to an impermissible use under the existing ordinance.</td>
<td>Provides for the vesting of a right to use property in a manner that otherwise would not have been allowed.</td>
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19-410 Factors that define the scope of the rights that may vest

Four factors define the scope of the vested rights created by Virginia Code § 15.2-2311(C).

<table>
<thead>
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<th>Four Factors</th>
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<tr>
<td>• The action to which Virginia Code § 15.2-2311(C) is being applied must have been made by the “zoning administrator or other administrative officer.”</td>
</tr>
<tr>
<td>• Vested rights may attach only to a “written order, requirement, decision or determination.”</td>
</tr>
<tr>
<td>• Virginia Code § 15.2-2311(C) only prevents the zoning administrator or other administrative officer from changing, modifying, or reversing an erroneous written order, requirement, decision or determination; it does not prohibit others from doing so.</td>
</tr>
<tr>
<td>• The party asserting vested rights must demonstrate that they relied to their detriment on the erroneous action.</td>
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</table>

First, the action to which Virginia Code § 15.2-2311(C) is being applied must have been made by “the zoning administrator or other administrative officer.”
Second, vested rights may attach only to a “written order, requirement, decision or determination.” *Virginia Code § 15.2-2311(C).* The courts will carefully consider whether the action actually falls within one of these four categories. In *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010), the city’s zoning administrator was asked to interpret the zoning ordinance to decide whether church parcels within a historic district could be consolidated, and the zoning administrator concluded that they could be consolidated. Based on the zoning administrator’s interpretation, the church filed a plat to consolidate the parcels. When the plat reached the city’s planning commission, the commission disagreed with the zoning administrator’s interpretation and disapproved the plat. In concluding that the zoning administrator’s interpretation did not rise to the level of an official determination to which vested rights might accrue under Virginia Code § 15.2-2311(C), the Virginia Supreme Court said:

> The zoning administrator merely provided an interpretation of City Code § 48-800(a). In its letter to the zoning administrator, Columbia Baptist requested a “zoning interpretation.” And in his reply letter, the zoning administrator made clear that he was responding to a “request for an interpretation.” He further stated: “while the actual consolidation process is a Planning Commission function[,] it is my interpretation” [emphasis in original] that the ordinances permit the consolidation . . . That “interpretation” lacked the finality of an “order, requirement, decision or determination under Code § 15.2-2311(C).

*James*, 280 Va. at 44, 694 S.E.2d at 575. The Court went on to hold that the planning commission had the authority to interpret the zoning ordinance when it considered the plat, and it was not obliged to adopt the zoning administrator’s interpretation. *See also Greene v. Board of Zoning Appeals of Fairfax County*, 34 Va. Cir. 227 (1994) (erroneous written determination as to whether property was to be used only for open space was advisory to county only, not one triggering rights and obligations under what is now Virginia Code § 15.2-2311).

In *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), Crucible operated a security training facility and wanted to expand its facility. It sought and obtained from the zoning administrator an “interpretation” that the proposed facility would be classified as a “school,” a by-right use in the applicable zoning district at the time. The zoning administrator’s interpretation was contained in a letter entitled “Zoning Verification,” and the interpretation was conditioned that the verification was valid as of the date of the letter and was subject to change. Relying on that letter, Crucible bought the property. When the county changed its zoning regulations to make schools a special use, Crucible sought to claim vested rights based on the zoning administrator’s “Zoning Verification” letter. The Virginia Supreme Court held that the letter was not a determination within the meaning of Virginia Code § 15.2-2311(C) so as to allow rights to vest, stating:

> The zoning verification letter merely stated that Crucible’s facility fell within the definition of “school” according to the then-current zoning laws and that those laws were subject to change. The zoning verification letter did not permit Crucible to use its property in a way that was otherwise not allowed under then-current zoning laws, and Crucible cannot establish a right to proceed based upon Code § 15.2-2311(C).

*Crucible*, 278 Va. at 161, 677 S.E.2d at 288.

In *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013), two establishments that served alcoholic beverages claimed that they had vested rights to do so under Virginia Code § 15.2-2311(C) because each received a “cash receipt” which was signed by the zoning administrator, bore the description of being a zoning clearance for a business license, and listed the license category as “eating place.” In addition, there was apparent acquiescence by city officials for those establishments to serve alcoholic beverages, even though the underlying zoning did not allow them to serve alcoholic beverages. The Virginia Supreme Court held that the cash receipts were insufficient to establish vested rights under Virginia Code § 15.2-2311(C), stating:

> The “Cash Receipt” was not a specific determination by the zoning administrator or any other City official that either of these businesses could use their respective premises in a manner not otherwise allowed under the zoning ordinances in effect at that time. . . . In other words, those documents did not reflect a determination that either Bar Norfolk or the Cafe could operate as an “Entertainment
Establishment” and provide alcoholic beverages for on-premises consumption contrary to the terms of either the 1983 or the 1997 Ordinances. Furthermore, the apparent acquiescence of the City officials in the business operations of Bar Norfolk and the Cafe does not satisfy the specific requirements of Code § 15.2-2311(C).

Norfolk 102, LLC, 285 Va. at 355, 738 S.E.2d at 903.

Third, Virginia Code § 15.2-2311(C) only prevents the zoning administrator or other administrative officer from changing, modifying or reversing an erroneous written order, requirement, decision or determination after 60 days have passed. It does not prevent, for example, a planning commission from effectively changing, modifying, or reversing the decision of the zoning administrator or other administrative officer. James, supra (holding that the planning commission was not constrained by Virginia Code § 15.2-2311(C) because it was not an “administrative officer” within the meaning of that statute and it could, therefore, interpret the zoning ordinance differently than the zoning administrator, even though more than 60 days had passed).

Fourth, the party asserting vested rights must demonstrate that they relied to their detriment on the erroneous action. In Goyonaga v. Board of Zoning Appeals for the City of Falls Church, 275 Va. 232, 657 S.E.2d 153 (2008), the landowners sought approval to do renovations to a nonconforming structure on a nonconforming lot. The landowners obtained a variance to enlarge and extend their home by adding a second story to the existing structure and an addition to the rear of the structure. No representation was made in the variance application that the renovations would require the demolition of the front and side exterior walls of the home. Construction commenced, and the work involved some demolition of the house. As work proceeded, the building inspector determined that the structural integrity of the portion of the exterior walls that was to have been retained was inadequate to support the new construction, and required additional demolition of the exterior walls. This work was done, but it resulted in the house being demolished to an extent that exceeded 75% of the assessed value of the house which, under the Falls Church Zoning Ordinance, caused the house to lose its nonconforming status. When the zoning administrator inspected the site, he determined that the “original structure has been totally demolished,” that the work was outside the scope of the building permit, and that the house now violated the zoning regulation pertaining to the replacement of nonconforming structures. The zoning administrator issued a stop work order.

With respect to Virginia Code § 15.2-2311(C), the landowners contended that the zoning administrator’s approval of the building plans ripened into a vested right after 60 days because they had materially changed their position in good faith reliance on the zoning administrator. The Virginia Supreme Court rejected that argument. The Court said that under Virginia Code § 15.2-2311(C), the issue was whether the zoning administrator’s approval of the building plans constituted a waiver, although an improper one, of the requirements of the zoning ordinance’s prohibition against removing, demolishing, or damaging a nonconforming structure to an extent equal to 75% of its assessed value. Because the building plans did not reflect even the potential that the house would have to be demolished to its foundation and a new structure erected in its place, the Court concluded that the landowners had failed to meet their burden of proof that they could have reasonably relied on the zoning administrator’s approval of the building plans as authorizing them to completely demolish the house.

19-420 The four factors come together in Board of Supervisors of Richmond County v. Rhoads

In Board of Supervisors of Richmond County v. Rhoads, 294 Va. 43 (2017), the Rhoadses had a one-story primary dwelling on their property and they wanted to add a detached garage. They and their contractor met with a county code compliance officer at their property, and the code compliance officer suggested a two-story garage, even though the county’s zoning regulations prohibited accessory structures being taller than the primary structure. The design for the two-story detached garage, along with architectural plans, were submitted with the Rhoadses’ application for a zoning certificate of compliance. The zoning administrator at the time checked the box approving the two-story detached garage. The zoning administrator later acknowledged that he neither read the application nor looked at the attached plans before approving and signing the certificate. The Rhoadses built the garage according to the approved plans at a cost of $27,000.
Approximately nine months later, the new county zoning administrator informed the Rhoadses that the garage violated the zoning ordinance because it was taller than the primary structure on their property. There was no dispute that more than 60 days elapsed between the zoning administrator’s approval of the zoning certificate of compliance and the notice of violation; or that the Rhoadses materially changed their position in good faith reliance on the zoning administrator’s approval of the zoning certificate.

The board of supervisors claimed that the zoning administrator’s approval of the zoning certificate was in “clear violation” of the zoning ordinance and that his action was therefore void ab initio (i.e., void from the beginning). The Virginia Supreme Court rejected the board’s claim, holding that Virginia Code § 15.2-2311(C) is a remedial statute whose purpose is “to provide relief and protection to property owners who detrimentally rely in good faith upon erroneous zoning determinations and who would otherwise suffer loss because of their reliance upon the zoning administrator’s error.” Rhoads, 293 Va. at 51.

The board of supervisors also claimed that even if the zoning certificate of compliance was not void ab initio, the signed certificate was not a “written order, requirement, decision or determination” by the zoning administrator. The Court rejected this claim as well, making several important related holdings:

- In approving the zoning certificate of compliance, “the zoning administrator necessarily made a determination that the building plans complied with the Zoning Ordinance in all respects.”

- “[I]t is irrelevant that the decision or determination evidenced by the [zoning certificate of compliance] makes no reference to the height of the Garage or to the zoning administrator’s intent to waive the requirements of the Zoning Ordinance. Such specificity is not required by [Virginia] Code § 15.2-2311(C).” Rhoads, 293 Va. at 52.

- In contrast to prior cases where Virginia Code § 15.2-2311(C) was found not to apply because the zoning administrator had not made any specific determination or had made an interpretation that lacked finality, the zoning certificate in this case “was a written determination by the zoning administrator that a particular building plan on a particular property complied” with the applicable zoning regulations. “It affirmatively approved the zoning for the Garage project at issue.” Rhoads, 293 Va. at 53.

- The zoning certificate “was a final determination” that “provided notice that the zoning administrator’s decision was appealable, which demonstrates that the zoning administrator’s involvement was final.” Rhoads, 293 Va. at 53.

The Court also rejected the board of supervisors’ claim that Virginia Code § 15.2-2311(C) was not binding on either the board of supervisors or the board of zoning appeals. In so doing, the Court summarized the relationship of the zoning administrator to his or her governing body:

A zoning administrator is a representative of his or her board of supervisors. Thus, when a zoning administrator has acted within the scope of his employment and made a “decision” or “determination” within the meaning of [Virginia] Code § 15.2-2311(C), he or she has also bound the board of supervisors. If [Virginia] Code § 15.2-2311(C) did not bind the board of supervisors as the zoning administrator’s principal, it would afford scant, if any, protection to the property owner, and would not serve to remedy the mischief at which [the statute] is directed. The remedial purpose of the statute requires the statute to be interpreted so as to provide relief and protection to property owners who rely in good faith upon erroneous zoning determinations.

Rhoads, 293 Va. at 53 (internal citations and quotation marks omitted). Therefore, once rights vested under Virginia Code § 15.2-2311(C), “they were not subject to alteration by the zoning administrator, the BZA or the Board.” Rhoads, 293 Va. at 55.
19-430 The 60-day rule

Virginia Code § 15.2-2311(C) provides that the zoning administrator or other administrative officer has 60 days to correct an erroneous written order, requirement, decision, or determination. The 60-day rule applies to any error other than a clerical error where there is no malfeasance or fraud. Virginia Code § 15.2-2311(C).

The circuit courts have not agreed whether Virginia Code § 15.2-2311(C) applies to determinations made before July 1, 1995 when the subsection became effective. Virginia Code § 15.2-2311(C) begins “In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator . . .” (italics added) Some circuit courts have held that the 60-day rule applies only to determinations made after July 1, 1995. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 69 Va. Cir. 129 (2005) (note that the court’s decision mistakenly states that Virginia Code § 15.2-2311(C) was enacted in 1997; subsection (C) was added to former Virginia Code § 15.1-496.1 in 1995; the mistaken reference in the court’s decision is likely because title 15.1 was recodified as title 15.2 in 1997); Hughey v. Fairfax County Zoning Appeals Board, 41 Va. Cir. 138 (1996).

Other circuit courts have held that the prospective application of Virginia Code § 15.2-2311(C) means that the protections of that section also apply to determinations made before July 1, 1995 where the locality seeks to reverse the erroneous determination after July 1, 1995. Board of Supervisors of Henrico County v. Board of Zoning Appeals of Henrico County, Case No. CL03-1024, opinion letter dated December 13, 2004. The conclusion that Virginia Code § 15.2-2311(C)’s “In no event” introductory clause extends to determinations made before July 1, 1995 may find support in the analysis of the Virginia Supreme Court in Board of Supervisors of James City County v. Windmill Meadows, LLC, 287 Va. 170, 752 S.E.2d 837 (2014), where the Court held that Virginia Code § 15.2-2303.1:1’s reference to “any cash proffer” applied to proffers accepted before July 10, 2010 when that statute became effective.

19-440 Clerical errors

In considering whether an erroneous tax assessment more than one year old was a clerical error, the court in Commonwealth v. Richmond-Petersburg Bus Lines, Inc., 204 Va. 606, 611, 132 S.E.2d 728, 732 (1963) (upholding tax commission’s refund to carrier where the erroneous assessment and overpayment by carrier was the result of an error by a subordinate who provided the carrier with the wrong tax form) explained as follows:

It is true, as the Attorney General argues, that a “clerical error” often denotes “an error made in copying or writing.” But the term frequently has a broader meaning according to the context in which it is used and the purpose for which it is employed. Construing the words literally, a “clerical error” means an error committed by a clerk or some subordinate agent in the performance of clerical work. [citations omitted] It usually denotes negligence or carelessness which is not attributable to the exercise of judicial consideration or discretion. [citations omitted]

A clerical error is different from a nondiscretionary error. The latter class of errors was removed from Virginia Code § 15.2-2311(C) effective July 1, 2012 as one that could be corrected by the zoning administrator after 60 days had passed since the erroneous determination.

19-500 Vested rights under Virginia Code §§ 15.2-2297, 15.2-2298, and 15.2-2303 (proffered rezonings)

For proffered rezonings, the enabling authority for conditional zoning found in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 establishes alternative standards for vested rights. Under these sections, a locality may neither rezone the property, amend the proffers, nor amend the applicable zoning district regulations, in a manner that eliminates, or materially restricts, reduces or modifies the uses, floor area ratio, or the density applicable to the property. The scope of rights vested under Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 is narrower than the rights that may vest under Virginia Code § 15.2-2307(A).
19-510 Elements to establish vested rights under Virginia Code §§ 15.2-2297, 15.2-2298, and 15.2-2303

Vested rights arise in a proffered rezoning if a proffer requires:

- The dedication of real property of substantial value; substantial cash payments for the construction of substantial public improvements; or construction of the substantial public improvements themselves.

and

- The need for the dedication or the substantial public improvements is not generated solely by the rezoning; and there has been no mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

19-520 Dedication of real property must have substantial value, cash payments must be substantial, or the developer must construct substantial public improvements

*Substantial* is not defined in the applicable statutes. Of the several definitions available, the one that appears to most appropriate in this context is “adequately or generously nourishing: ABUNDANT, PLENTIFUL.” *Webster’s Third New International Dictionary* (2002) (definition of *substantial*). Whether a dedication of real property, cash payment, or the construction of public improvements is substantial is a factual determination that is made on a case-by-case basis.

In *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009), the developers contended that their proffer to create a multi-use path through their project, which would be owned, controlled and maintained by the developers, was a “requirement for the dedication of land having substantial value” within the meaning of Virginia Code § 15.2-2298(B). With little discussion, the Virginia Supreme Court rejected the developers’ argument because, however the developers chose to characterize the path, the proffers did not require any land to be dedicated as required by Virginia Code § 15.2-2298(B).

19-530 The need for the dedication, cash payment, or public improvements must not be generated solely by the rezoning

A proffered rezoning may vest only if the need for the dedication, cash payment, or the substantial public improvements is *not* generated solely by the rezoning. This means that the landowner must proffer land, cash, or public improvements above and beyond those that are merely addressing the impacts substantially created by the proposed development itself.

The *substantially generated* standard has its origins in the holdings of the Virginia Supreme Court in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) and *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). In *Rowe*, the Court held that a county may not require a landowner to dedicate land and make off-site road improvements through the zoning regulations applicable to the zoning district where the need for the improvements was not substantially generated by the development itself. *Cupp* extended the holding of *Rowe* to special use permit conditions.

In *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009), the developers contended that a proffer requiring that they contribute $25,000 to the cost of off-site street intersection improvements was a *substantial cash payment* within the meaning of Virginia Code § 15.2-2298(B). The Virginia Supreme Court did not directly address the question of whether a $25,000 cash payment in the context of a $45,000,000 project was *substantial*. Instead, the Court rejected the developers’ argument because the need for the transportation improvements to which the cash payment would be applied was generated solely by the rezoning itself. Virginia Code § 15.2-2298(B) requires that for vested rights to arise, the need for the land dedication or the cash payment must not be “generated solely by the rezoning itself.”
19-540  There must have been no mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare

There is no case law addressing the mistake, fraud or change in circumstances standards under Virginia Code §§ 15.2-2297, 15.2-2298 or 15.2-2303. The discussion in the following three paragraphs is borrowed from the similar analysis that occurs when determining the validity of a piecemeal downzoning.

A mistake is demonstrated when there is probative evidence to show that material facts or assumptions relied upon by the governing body at the time of the prior rezoning were erroneous. Board of Supervisors of Henrico County v. Fralin and Waldron, Inc., 222 Va. 218, 278 S.E.2d 859 (1981) (no evidence of mistake or changed circumstances). A mistake does not include judgmental errors. Fralin and Waldron, supra. Moreover, a difference of opinion or a change of heart is not a mistake. Conner v. Board of Supervisors of Prince William County, 7 Va. Cir. 62 (1981).


Changed circumstances mean a changed condition since the prior ordinance, as shown by objectively verifiable evidence that substantially affects the character of the neighborhood insofar as the public health, safety or welfare is concerned. Turner v. Board of County Supervisors of Prince William County, 263 Va. 283, 559 S.E.2d 683 (2002) (holding that the “prior ordinance” is the last ordinance adopted by the locality before it enacted the ordinance that downzoned the land); Fralin and Waldron, supra. In Seabrook Partners v. City of Chesapeake, 240 Va. 102, 393 S.E.2d 191 (1990), the Virginia Supreme Court held that the city’s downzoning of 9.88 acres of a neighborhood from multi-family to single family housing was valid where the city presented sufficient evidence of changed circumstances. The Court found that the neighborhood defined by the city had changed since 1969 when the multi-family zoning was established because the surrounding area had developed, or was planned to be developed, as single-family housing. If developed as multi-family housing as desired by the plaintiffs, the Court concluded that it was fairly debatable that the island of multi-family housing would substantially affect the public health, safety, or welfare.

19-600  Vested rights under Virginia Code § 15.2-2261(C)

Virginia Code § 15.2-2261(C) establishes certain rights in approved subdivision final plats and site plans. Approved and recorded final subdivision plats and approved final site plans are valid for 5 years from the date of approval or for a longer period as the planning commission or the agent may determine to be reasonable. Virginia Code § 15.2-2261(A). However, Virginia Code § 15.2-2209.1 extends to July 1, 2017 the expiration date for any subdivision plat, recorded plat, or final site plan that was valid and outstanding as of January 1, 2011. All of these extensions require that any performance bonds or other financial guarantees of completion of public improvements be continued for the time of the extension.

For five years after a subdivision plat is approved, or as extended under Virginia Code § 15.2-2209.1, and during the period that an approved final site plan remains valid, “no change or amendment to any local ordinance, map, resolution, rule, regulation, policy or plan adopted subsequent to the date of approval of the recorded plat or final site plan shall adversely affect the right of the subdivider or developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the recorded plat or site plan unless the change or amendment is required to comply with state law or there has been a mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare.” Virginia Code § 15.2-2261(C).

Note that although Virginia Code § 15.2-2261(A) provides that an approved and recorded subdivision plat and approved site plans may be valid for 5 years from the date of approval or for a longer period as the planning commission or the agent may determine to be reasonable, Virginia Code § 15.2-2261(C) vests rights “[f]or so long as the final site plan remains valid in accordance with the provisions of [section 15.2-2261], or in the case of a recorded plat for five years after approval.”
While an approved and recorded subdivision plat and an approved final site plan remains valid, Virginia Code § 15.2-2261(C) provides much broader protections to the landowner beyond amendments to the zoning ordinance (which is the scope of Virginia Code § 15.2-2307(A)), and extends those protections from amendments to any local ordinance and other policies and rules. This broader protection makes sense because a subdivision plat or site plan requires the landowner to develop the property in the very specific manner shown on the plat or site plan.
Chapter 20

Development Rights in the Rural Areas Zoning District in Albemarle County

20-100 Introduction

This chapter reviews the regulations and many of the key issues pertaining to development rights in the rural areas zoning district in Albemarle County and, in particular, how they may be used and how their use may be limited.

20-200 What is a development right?

Up to 5 development rights were allocated to each parcel of record in the rural areas zoning district existing at 5:15 p.m. on December 10, 1980, when the current zoning ordinance was adopted by the Albemarle County board of supervisors. Albemarle County Code § 18-10.3. A parcel of record is synonymous with lot of record, which is defined to be a "lot shown on a subdivision plat or other lawful plat or legal description which is lawfully recorded in the Clerk’s Office of the Circuit Court of Albemarle County, Virginia.” Notwithstanding that definition, those lots approved by the County before December 10, 1980, including those approved on a preliminary subdivision plat, but not put to record until after December 10, 1980, are deemed to be parcels of record for the purpose of determining development rights. Albemarle County Code § 18-6.5.3 (former). As will be examined more closely in the following sections, development rights permit the creation of lots less than 21 acres in size in the rural areas zoning district.

In a series of official determinations, the zoning administrator has determined that a parcel of record must be one that was originally established as a lot that could be developed for, most typically, residential purposes. Special lots, such as well lots, cemeteries, and narrow strips of land created for the purpose of providing access, are not parcels of record with development rights.

The board of supervisors may grant a special use permit to allot additional development rights to parcels of record outside of the reservoir watersheds, provided that the additional development rights are compatible with the neighborhood and specified goals and objectives are satisfied. Albemarle County Code § 18-10.5.2.1. Special use permits to attain additional development rights are rarely sought.

In this chapter, the term parcel of record refers to the original lot that was allocated development rights; the term lot refers to each lot created from a parcel of record.

20-300 What a development right allows

Development rights have a dual nature – they identify not only the number of lots that may be theoretically created by the subdivision of a parcel of record, but also the number of single family dwellings that may be established. A parcel of record may be divided into up to 5 lots that are at least 2 acres in size, but less than 21 acres, in addition to as many 21-plus acre lots that can be created. Albemarle County Code §§ 18-10.3.1 and 18-10.3.2. The table below explains how development rights would be allocated:

<table>
<thead>
<tr>
<th>Parcel Size</th>
<th>Number of Theoretical Development Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>≥ 10 acres</td>
<td>5</td>
</tr>
<tr>
<td>≥ 8 acres, but &lt; 10 acres</td>
<td>4</td>
</tr>
<tr>
<td>≥ 6 acres, but &lt; 8 acres</td>
<td>3</td>
</tr>
<tr>
<td>≥ 4 acres, but &lt; 6 acres</td>
<td>2</td>
</tr>
<tr>
<td>&lt; 4 acres</td>
<td>1</td>
</tr>
</tbody>
</table>

1 Six development rights were conferred by the ordinance adopted December 10, 1980. The number of development rights was reduced from 6 to 5 by a zoning text amendment adopted March 18, 1981.
The following illustration shows how a 96-acre parcel of record could be subdivided using its 5 allocated development rights:

![Diagram of parcel subdivisions]

The 80-acre residue in this illustration could then be subdivided into a total of 3 lots, because that is the maximum number of 21-acre lots that could be created from it. If the development right lots were reduced in size so that the residue was 84 acres or more, then the residue could be divided into 4 lots.

Development rights also identify the number of single family dwellings that may be established on a single lot less than 21 acres in size in the rural areas. Up to 5 single family dwellings may be established on a single lot. Albemarle County Code § 18-10.5.1. Multiple dwellings on a single lot must be located so that if the lot was subdivided, each dwelling could be located on a separate lot that satisfied all of the requirements of the zoning and subdivision ordinances. The location of 3 or more dwellings on a single lot is permitted only with an approved site plan. Albemarle County Code § 18-32.2(a).

20-400 Theoretical and usable development rights

The development rights allocated by Albemarle County Code § 18-10.3 are theoretical. They may be usable only if the lot being created contains a building site meeting the requirements of the zoning ordinance. The requirements for a building site are in Albemarle County Code § 18-4.2.1.

The use of development rights also may be limited by other zoning and subdivision regulations, conditions of approval, private covenants, or easements. See sections 20-700 through 20-1000 for more discussion of the limitations on the use of development rights.

20-500 How the number of development rights is determined

The number of theoretical development rights is determined in a variety of ways. Typically, the number of development rights is determined by staff in the department of community development in the course of their review of subdivision plats, and is based on the information supplied by the landowners, surveyors or engineers. The landowner, or more often, his or her engineer or surveyor, shows the usable development rights on the subdivision plat.
On occasion, the number of theoretical development rights is determined by the zoning administrator in an official determination. Official determinations issued by the zoning administrator are made with the assistance of the county attorney. These determinations require research through the land records to identify the parcel of record existing immediately prior to December 10, 1980, and then analyzing the history of the lot since December 10, 1980 to determine whether any development rights have been off-conveyed from the original parcel of record. Official determinations are often requested by landowners who believe that their land may be comprised of multiple parcels of record, or by prospective buyers, appraisers or auditors seeking to fully understand the value of the land. It is fairly common for a single tax parcel identified on the county’s tax maps to consist of multiple parcels of record under Albemarle County Code § 18-10.3. The administrative practice of the county’s assessor’s office through the 1970’s was to consolidate adjoining parcels under the same ownership into a single tax parcel so that the county could mail fewer tax bills and track fewer tax parcels. The determination of the number of parcels of record requires a thorough examination of the deeds and plats in the chain of title, sometimes back to the late 1800’s.

Official determinations also are made by the zoning administrator for applications under the ACE program. The number of theoretical and usable development rights is used to rank the property under the criteria in the ACE ordinance and for appraising the value of the open-space easement (for those development rights that will be extinguished by the easement).

Official determinations of development rights become binding on the land if they are not timely appealed to and reversed or modified by the BZA.

20-510 Parcels separated by roads: 1980 to 1990

From the adoption of the current Zoning Ordinance in 1980 until the Albemarle County Circuit Court’s 1990 decision in Sanford v. Board of Zoning Appeals of Albemarle County, Virginia, the zoning administrator and the BZA consistently determined that a public road did not divide a parcel into multiple parcels of record.

20-520 Parcels separated by roads; physical separation sufficient: 1990 to 2002

In Sanford, the circuit court overturned the BZA’s decision that the Inglecress property was a single parcel. The court held that a 10-acre piece of the property (identified as “Parcel X”) was not only physically separated from its parent parcel when Garth Road was realigned in 1958, but it also was legally separated prior to December 10, 1980 and, hence, a parcel of record, by a probated will. With respect to the physical separation resulting from the realignment of Garth Road, the Sanford court cited City of Winston-Salem v. Tickle, 53 N.C.App. 516 (1981), a North Carolina eminent domain case, for the rule (the “Tickle rule”): “It is generally held that parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law.” Tickle, supra.

After Sanford, the practice of the zoning administrator was to determine that parcels physically separated by a public road were separate parcels of record under Albemarle County Code § 18-10.3.

20-530 Parcels separated by roads; legal separation required: 2002 to present

In late 2001, the Virginia Supreme Court decided County of Chesterfield v. Stigall, 262 Va. 697, 554 S.E.2d 49 (2001), in which the Court considered whether a taking by eminent domain triggered the property tax roll-back provisions under Virginia Code § 58.1-3241, applicable to separated or split-off parcels under land use valuation. The Court concluded that the roll-back provisions were not triggered by the mere physical separation of the taxpayer’s land caused by the taking of right-of-way for construction of the Powhite Parkway. Rather, the Court concluded that the statutory language required that the roll-back provisions be triggered by a legal separation initiated by the owner – and this required, at a minimum, “a change in the legal description of the property, either by metes and bounds or by plat, which is duly recorded in the appropriate land records.” Stigall, 262 Va. at 705, 554 S.E.2d at 54.

Stigall instructs that there is a significant distinction between parcels that are physically separated and those that are legally separated, and that the applicable law determines the applicable standard in a particular situation. As a result, county staff re-examined its application of Sanford and the Tickle rule.
In light of Stigall, and in the context of a parcel physically separated by a public road, the County concluded that Albemarle County Code § 18-10.3’s requirement that a parcel be a “parcel of record” required legal separation of the land, established by a recorded plat or other legal description delineating, describing and establishing each piece separated by the road as a separate parcel. Thus, a proper parcel determination in such a case had to be based on whether the parcel was legally separated based upon plats or other legal descriptions of record, rather than merely be physically separated by a public road, at 5:15 p.m. on December 10, 1980.

This new interpretation was upheld by the Albemarle County Circuit Court in 2004 in Scruby v. Board of Zoning Appeals of Albemarle County, 65 Va. Cir. 89 (2004). The Virginia Supreme Court’s decision in W & W Partnership v. Prince William County Board of Zoning Appeals, 279 Va. 483, 689 S.E.2d 739 (2010) re-affirms the application of the principles considered in Stigall to zoning matters.

20-600 Development rights and 21-acre lots

As noted in section 20-300, development rights identify the number of lots less than 21 acres in size that may be theoretically created by the subdivision of a parcel of record. The rural areas zoning district regulations also allow as many 21-acre or greater sized lots to be created as possible. Albemarle County Code § 18-10.3.2. The table below shows the number of lots that could be created from parcels of various sizes:

<table>
<thead>
<tr>
<th>Size of the Parcel of Record</th>
<th>Theoretical Development Right Lots</th>
<th>21-Acre Lots</th>
<th>Total Number of Lots That May Be Created</th>
</tr>
</thead>
<tbody>
<tr>
<td>38 acres</td>
<td>5</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>84 acres</td>
<td>5</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>167 acres</td>
<td>5</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td>220 acres</td>
<td>5</td>
<td>10</td>
<td>15</td>
</tr>
</tbody>
</table>

As noted in section 20-400, the actual number of lots may be less if building sites and other zoning and subdivision requirements cannot be satisfied.

20-700 The 31-acre rule

Subdivisions occurring after November 8, 1989 are subject to what is commonly known as the 31-acre rule. The rule provides that the “aggregate acreage devoted to such lots or development shall not exceed thirty-one (31) acres, except in such case where this aggregate acreage limitation is precluded by other provisions of this ordinance.” Albemarle County Code § 18-10.3.1. In other words, the rule limits the aggregate acreage consumed by development right lots to 31-acres.

Although development right lots may be as small as 2 acres, the regulations allow a development right lot to be as large as just less than 21 acres. The 31-acre rule minimizes the acreage consumed by development right lots and requires the balance of the property to be lots of at least 21 acres in order to better preserve Albemarle County’s rural character. The illustrations below show how the 31-acre rule would apply in two situations:
This subdivision complies with the 31-acre rule because the aggregate acreage of the 5 development rights lots does not exceed 31 acres.

The following illustration shows how development rights can be encumbered by the operation of the 31-acre rule on an 80-acre parcel.

In this illustration, two lots, containing 20 acres and 10 acres respectively, are divided from the original parcel. The off-conveyances are assigned a total of 4 development rights and contain a total of 30 acres. The 50-acre residue retains 1 development right. However, the development right cannot be used because a 2-acre lot, divided from the residue, would result in an aggregate of 32 acres being devoted to development lots.

The 31-acre rule comes with a number of quirks that arise in its application, depending on the site of the parcel of record. Following are some of those quirks:

- **31-acre parcel**: The area available for DR lots is the entire 31-acre parcel; the average lot size for the 5 DR lots is 6.2 acres.
- **31.01-acre parcel**: The area available for DR lots is 10.01 acres, because a residue of at least 21 acres must be maintained; the average lot size for the 5 DR lots is 2.002 acres.
- **41-acre parcel**: The area available for DR lots is 20 acres, because a residue of at least 21 acres must be maintained; the average lot size for the 5 DR lots is 4 acres.
- **52-acre parcel**: The area available for DR lots is 31 acres and a residue of at least 21 acres must be maintained; the average lot size for the 5 DR lots is 6.2 acres.

20-800 Development rights must be used within the boundaries of the parcel of record; the “kernel rule”

The general rule is quite simple – development rights must be used within the boundaries of the parcel of record. Albemarle County Code § 18-10.3.1.
Over time, lots may be created from a parcel of record or their boundary lines may be adjusted. The requirement that development rights be used within the boundaries of the parcel of record—sometimes referred as the kernel rule—requires that each development right lot created contain a kernel from the original parcel of record. The rule prevents the transfer of development rights from one parcel of record to another. By doing so, the rule prevents landowners from assembling development rights from other parcels of record, a practice that could result in large suburban-scale subdivisions and development at a much greater density than otherwise allowed in the rural areas.

A kernel must consist of: (1) a minimum 2-acre piece of land; (2) a building site; and (3) a development right. Although a kernel must have a building site and a development right, a dwelling itself need not be established within the kernel. A 3 ½ acre lot could not add ½ acre and divide because the ½ acre added could not be a kernel meeting all three of these requirements.

The illustrations below show how the kernel rule would be applied in two situations:

**Parcels and Development Rights**

<table>
<thead>
<tr>
<th>Parcel A</th>
<th>Parcel B</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 acres</td>
<td>15 acres</td>
</tr>
<tr>
<td>5 DRs</td>
<td>5 DRs</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Parcel A</th>
<th>Parcel B</th>
<th>Parcel C</th>
<th>Parcel B</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 Acres</td>
<td>10 Acres</td>
<td>3 DRs</td>
<td>10 Acres</td>
</tr>
<tr>
<td>4 DRs</td>
<td>3 DRs</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Parcel A</th>
<th>Parcel B</th>
<th>Parcel C</th>
<th>Parcel B</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 acres</td>
<td>15 acres</td>
<td>3 DRs</td>
<td>10 Acres</td>
</tr>
<tr>
<td>5 DRs</td>
<td>5 DRs</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Parcel C contains 1 DR acquired from Parcel A, which contains 2+ acres within the portion that came from Parcel A, including a >30,000 square foot building site and contains 2 DRs acquired from Parcel B, each with at least 2 acres and a >30,000 square foot building site within the portion that came from Parcel B. Note that a dwelling using the 1 DR from Parcel A need not necessarily be established within the portion of Parcel C that came from Parcel A.

The kernel rule does not prevent development rights from being transferred among lots created from a single parcel of record. The kernel rule also does not apply to the creation of 21-acre lots. Finally, the kernel rule does not apply to rural preservation developments established under Albemarle County Code § 18-10.3.3.
20-900 Allotment of development rights upon subdivision

Both the zoning ordinance and the subdivision ordinance require that development rights be allocated to the several lots created (including the residue) when a parcel of record or a lot is subdivided. *Albemarle County Code § 18-10.3.2; Albemarle County Code § 14-302(A)(10).* The subdivision ordinance also requires that the subdivision plat identify the number of acres consumed by development right lots in order to allow the county and the public to monitor compliance with the 31-acre rule. *Albemarle County Code § 14-302(A)(10).*

Occasionally, a subdivision plat, particularly those approved in the early 1980’s when the concept of development rights was still new, fails to allot all of the development rights. This omission does not extinguish the development rights. Within the past ten years, there have been several occasions where the landowners of lots created from a parcel of record sought to “claim” a development right that had not been allocated.

In one case, the landowners of all of the lots created from the original parcel of record who might otherwise have been eligible to use the additional development right (e.g., their lots had been allocated only one development right though the lots were larger than 4 acres) agreed to allow one of the eligible landowners to have it.

In another case, the landowner of one of the eligible lots asked the county about available development rights, was informed that there was an unallocated available development right, and used it before the landowner of the other eligible lot was aware of the situation. In the end, the landowner who missed out on the unallocated development right did not appeal the decision that allowed the other landowner to claim the development right. A development rights determination of his property revealed that he had more development rights than he thought.

The department of community development now has procedures in place to assure that unallocated development rights are not used without the knowledge of the landowners of the other eligible lots.

20-1000 Other limitations on the use of development rights

Development rights are part of the zoning of a rural areas lot and, because those rights were created by a legislative action, they may be extinguished only by a legislative action, i.e., a rezoning to another zoning district or a comprehensive downzoning of the rural areas by, for example, reducing the number of development rights. Thus, the failure of a landowner to allot all development rights as discussed in section 20-900, or to use all development rights in a project, does not extinguish those development rights that are not allotted or used. For example, a landowner who subdivides a 63-acre parcel into a 21-acre lot and a 42-acre lot does not extinguish the right to further subdivide the 42-acre lot into two 21-acre lots, or to use the 5 development rights allocated to the original parcel of record. As another example from a different zoning district, there is no doubt that a landowner who subdivides a 1-acre lot zoned R-4 (4 dwellings per acre) into 3 lots does not waive the right to further create the fourth lot and dwelling to achieve the zoning density allowed under the R-4 zoning district regulations, assuming that all applicable zoning and subdivision regulations can be satisfied.

 Nonetheless, there are ways by which the use of development rights may be limited:

- **Subdivision – lot acreage precludes full use of development rights**: In this situation, the development right lots are sized in a way that prevents all of the development rights from being used. For example, a 6-acre lot has 3 development rights and it is divided into two 3-acre lots. Because each 3-acre lot may use only one development right, the third development right is unusable while the lots are in this configuration.
- **Subdivision – acreage consumes 31-acres before all development rights used:** In this case, the area consumed by the development right lots reaches the 31-acre limit before all of the development rights are used. For example, a 70-acre parcel of record has 5 development rights and, in the first subdivision, a 20-acre lot and a 10-acre lot are created. Because the aggregate area of these 2 lots is 30 acres, and the minimum size of a development right lot is 2 acres, no further development right lots may be created from the parcel of record. However, the lots could be resubdivided and resized and, of course, the 20-acre lot and the 10-acre lot could be further subdivided if they were allocated additional development rights.

- **Condition of approval restricts further subdivision or additional dwellings without a new permit:** The most likely scenario in this situation is a private street approval that is conditioned on the lots not being further subdivided without further approval. The justification for the condition is to assure that the private street approved is adequate for a particular number of dwellings, and that additional dwellings would require further review to assure that the private street is adequate for the additional traffic. This kind of condition does not extinguish the development rights. The condition would apply only so long as the lots are served by a private street (i.e., the condition could be avoided by constructing a public street). The condition also could be amended or eliminated by a future county action. Even assuming that there was authority and justification to impose a condition that prohibited a private street from being converted to a public street, the development rights would not be extinguished because, as noted before, the condition could be amended or eliminated.

- **Proffers:** In one of the less likely scenarios, proffers could encumber the use of development rights. For example, their use could be encumbered in an owner-initiated rezoning from rural areas to rural areas with a proffer prohibiting subdivision or more dwellings.

- **Restrictive covenants:** Restrictive covenants – privately imposed and privately enforced restrictions on land use – may limit the full use of development rights. For example, a subdivision consisting of two 4-acre lots and one 2-acre lot, with a recorded restrictive covenant expressly prohibiting further subdivision of any of the lots, would prevent the additional development rights allocated to the two 4-acre lots from being used. The county does not enforce restrictive covenants.

The following illustration shows how development rights can be encumbered by private covenant.

<table>
<thead>
<tr>
<th>21 acre residue</th>
<th>4 acres 2 DRs</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 acres 1 DR</td>
<td>4 acres 2 DRs</td>
</tr>
</tbody>
</table>

In this illustration, the original parcel contained 31 acres. Three lots containing 2 acres, 4 acres and 4 acres respectively have been divided from the original parcel. These lots were assigned the 5 development rights associated with the original parcel. The zoning ordinance would permit the use of the 2 development right assigned to the 4-acre lots resulting in their further division. However, the subdivider may restrict the further
division of these lots by the recordation of a restrictive covenant. This covenant would be enforced as a private civil matter.

- **Open-space and similar easements:** Open-space easements that restrict the number of lots that may be created or the number of dwellings that may be established limit the use of development rights. In essence, the landowner has either sold the development rights (such as under the ACE program as part of the county’s purchase of the easement) or has agreed to not use them. In either case, the easement holder, such as the county, the Virginia Outdoors Foundation, and the county’s public recreational facilities authority, may enforce the terms of the easement to assure that the development rights surrendered are not used.

- **Development rights allocated to a lot with a limited number of building sites:** In this situation, development rights are allocated to a lot where the conditions of the lot will prevent the full number of development rights from actually being used. For example, by allotting 4 development rights to an 8-acre lot, all but 1 acre of which lies in the flood plain, 3 of the 4 development rights may not be used because no more than one 30,000 square foot building site will exist on the lot.

None of the examples above extinguish development rights. Development rights for lots under open-space easements exist, but they cannot be used either because the landowner no longer owns them or has agreed not to use them; conditions of approval can be amended or eliminated; lots can be resubdivided, restrictive covenants can expire, and standards of development can be changed.
Chapter 21

Design Review: Selected Issues for an Architectural Review Board

21-100  Introduction

This chapter analyzes selected issues considered by architectural review boards (“ARB”) established under Virginia Code § 15.2-2306. The issues addressed in this chapter include design guidelines and their proper application, the authority to regulate aesthetics, dealing with trademarks and service marks, and the proper application of design guidelines to religious structures.

21-200  Design guidelines and their proper application

Virginia Code § 15.2-2306 enables localities to determine whether a proposed structure is architecturally compatible with the historic landmarks, buildings or structures within a historic district. See Worley v. Town of Washington, 65 Va. Cir. 14 (2004) (designation of town as historic district by the Virginia Historic Landmarks Commission is not the equivalent of designating the town as an historic landmark under Virginia Code § 15.2-2306).

These determinations are usually made by an ARB by applying appropriate design guidelines adopted by the governing body. For a discussion of the legal status of guidelines, see Appendix E.

21-210  Reasonable specificity and objectivity required in design guidelines

There is little Virginia case law considering Virginia Code § 15.2-2306, and it appears that, to date, only one court has been asked to decide whether a locality’s design regulations (not guidelines) were void for vagueness. In Covel v. Town of Vienna, 78 Va. Cir. 190 (2009), affirmed at 280 Va. 151, 694 S.E.2d 609 (2010), the circuit court considered whether the following aspects of a building, accessory building, structure, fence, or sign, contained in the town’s historic district regulations, were unconstitutionally vague:

1. Exterior architectural features, including all signs, which are subject to public view at any time of the year from a public street, way or place.

2. General design and arrangement.

3. Texture and material.

4. The relation to similar features of buildings, accessory buildings, structures, fences or signs in the immediate surroundings.

5. Harmony or incongruity with the old and historic aspect of the surroundings.

6. The extent to which historic places and areas of historic interest in the District will be preserved or protected.

7. Special public value because of architectural and other features which relate to the cultural and artistic heritage of the Town of Vienna.

The circuit court held that the town’s criteria were not unconstitutionally vague. Because the appellants failed to preserve their facial challenge to the town’s regulations, the issue was not before the Virginia Supreme Court when it affirmed the trial court’s decision.
In a limited sampling of cases from other jurisdictions, the courts have taken various perspectives as to the specificity required for a design guideline to be valid. For example, in Diller & Fisher Co. v. Architectural Review Board, 246 N.J. Super. 362, 587 A.2d 674 (1990), the court found the following guideline language to be too vague:

Signs that demand public attention rather than invite attention should be discouraged. Color should be selected to harmonize with the overall building color scheme to create a mood and reinforce symbolically the sign’s primary communication message. . . . Care must be taken not to introduce too many colors into a sign. A restricted use of color will maintain a communication function of the sign and create a visually pleasing element as an integral part of the texture of the street. [Emphasis supplied]

Likewise, in City of Mobile v. Weinacker, 720 So. 2d 953 (1998), the court rejected design guidelines that used undefined terminology such as modern materials and modern architectural design and statements such as:

[T]he use of neon will be considered in cases where the architecture of the building is compatible with neon.

. . .

[T]he use of plastic, vinyl or similar materials is discouraged and will be approved only under the circumstances where the architecture of the building where the sign is to be located or if surrounding buildings are of a modern architectural design and the building incorporates modern materials.

The court held that these guidelines failed to provide “ascertainable criteria, requirements, or guidelines for approval, [and therefore subjects] applicants to the unbridled discretion of the Review Board.” Weinacker, 720 So.2d at 955.

On the other hand, the Alabama Supreme Court in Ex parte City of Orange Beach Board of Adjustment, 833 So. 2d 51, 55 (2001) distinguished Weinacker and held that the phrase “structurally unsound,” although it allowed for some judgment, was not ambiguous in the manner and to the degree that the terms “modern materials” and “modern architectural design” in Weinacker were.

In A-S-P Associates v. Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979), the court held that the ordinance’s standard of incongruity was a permissible general, yet meaningful, contextual standard that limited the discretion of the city’s historic district commission. The court said that a contextual standard was one that derived its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. In the city’s case, the standard of incongruity had to derive its meaning, if any, from the total physical environment of the historic district, i.e., the conditions and characteristics of the historic district’s physical environment had to be sufficiently distinctive and identifiable to provide reasonable guidance to the historic district commission in applying the standard. The court added that in order to “achieve the ultimate purposes of historic district preservation, it is a practical necessity that a substantial degree of discretionary authority guided by policies and goals set by the legislature, be delegated to such an administrative body possessing the expertise to adapt the legislative policies and goals to varying, particular circumstances.” A-S-P Associates, 298 N.C. at 223, 258 S.E.2d at 454; see also, Nadelson v. Township of Millburn, 297 N.J. Super. 549, 560, 688 A.2d 672, 677 (1996) (“the heterogeneity of architectural style for non-designated properties in the Short Hills Park Historic District is not such as to render the standard of `incongruity’ meaningless. The predominant architectural style for non-designated properties in the district is ‘Colonial’ or ‘Colonial Revival,’ the characteristics of which are readily identifiable”).

In Conner v. City of Seattle, 153 Wn. App. 673, 687-688, 223 P.3d 1201, 1208-1209 (2009), the court found the city’s regulations to be constitutionally sound. The regulations required the decision-makers to consider “[t]he extent to which the proposed alteration or significant change would adversely affect the specific features or characteristics specified in the . . . designating ordinance,” that “[n]ew additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property,” and that “new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property
and its environment.” The court said that these were general standards, which gained specificity from application to a particular landmark and a particular proposal, adding that the fact that an ordinance must be applied in context to a given proposal did not render it unconstitutionally vague.

In U–Haul v. City of St. Louis, 855 S.W.2d 424, 427 (Mo. App. 1993), the court held that an ordinance entrusting the city’s heritage commission to enforce exterior appearance standards on a case-by-case basis was not unconstitutionally vague where it focused on specific areas, including “architectural development of the community, unattractiveness, compatibility with the neighborhood, and absence of detriment to the neighborhood” because “[i]t would be practically impossible and socially undesirable for the city to list all minimum exterior standards.”

21-220 The proper application of design guidelines

There is limited Virginia case law examining whether an ARB has properly applied its guidelines and the cases discussed below only indirectly considered whether the guidelines were properly applied.

In Norton v. City of Danville, 268 Va. 402, 602 S.E.2d 126 (2004), Norton, a landowner in a historic district, was cited for replacing the all-wood front door on his house, constructed in 1884, with a door containing glass panes without a certificate of appropriateness. Both the city’s commission of architectural review and the city council denied Norton’s application for a certificate of appropriateness for the glass-paned door. The commission instructed Norton to restore the front door to its “original condition.” In affirming the commission, the city council noted that the commission “feels the door was wooden when it was built,” but stated no factual basis for determining the appearance or composition of the original door or whether it was a solid wooden door when the house was built. At trial, there was no evidence that the front door was a wooden door prior to 1992 and there was no evidence to verify how the city determined the original nature of the door. In fact, the city admitted that it did not know what type of door was on the house when it was constructed, and it could not explain why it instructed Norton to replace the front door, particularly since there were other glass-paned doors visible to the public not only on Norton’s house, but on other houses in the neighborhood as well. Despite the absence of evidence, the trial court affirmed the decision of the city council, concluding that the issue was fairly debatable. The Virginia Supreme Court reversed, finding that Norton met his burden to show probative evidence of unreasonableness in the city council’s action, and that the city failed to meet its burden to show that its decision was reasonable.

In Rogers v. Loudoun County Board of Supervisors, 38 Va. Cir. 235 (1995), the neighbors of landowners who obtained a certificate of appropriateness for a house and barn challenged the board’s approval of the certificate, claiming that the house and barn were not appropriately concealed from their manor house under the design guidelines. The court upheld the board’s decision, noting that the landowners had moved their proposed house 200 yards from its originally proposed location and that the plaintiff’s attorney had conceded that the house was “real close” to being properly located but not yet there.” The court concluded that if the location of the house and barn was real close to being properly located as the plaintiffs conceded, the board’s decision could not be arbitrary or capricious.

21-300 An ARB’s authority to make decisions based solely on aesthetics under Virginia Code § 15.2-2306

A locality has a substantial governmental interest in preserving its aesthetic character. American Legion Post 7 v. City of Durham, 239 F.3d 601 (4th Cir. 2001); Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993). Nevertheless, under Virginia law, absent express enabling authority such as that found in Virginia Code § 15.2-2306, a locality cannot limit or restrict the use a person makes of his property under the guise of its police power where the exercise of the power is justified solely on aesthetic considerations. Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975).

One circuit court has described Virginia Code § 15.2-2306 as “a broad grant of legislative authority for localities to enact zoning provisions tailored to preserving the unique character of their historic areas.” Owens v. City Council of the City of Norfolk, 78 Va. Cir. 436, 445 (2009) (upholding validity of district regulation allowing buildings taller than 35 feet with “authorized variations” determined to be architecturally compatible with the building’s surroundings).
The general rule is that a locality may not base a zoning decision solely on aesthetics

The ordinance considered by the Virginia Supreme Court in Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975) required that preliminary site plans within a particular zoning district be subjected to an architectural design review of the elevations of each façade, materials, colors, texture, light reflecting characteristics and other special features intended for each building. Each building was reviewed to determine whether it furthered the stated purposes for the review: to protect property values, to promote the general welfare by insuring buildings in good taste, proper proportion, and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture which was distinct from the Colonial Williamsburg architecture. The landowners challenging the ordinance asserted that the enabling legislation did not delegate authority to localities to impose restrictions on architectural design. Rowe is still the controlling law in Virginia on the question of whether a locality may consider solely aesthetic factors in rezoning matters or zoning restrictions. However, since Rowe the General Assembly has enabled localities to regulate aesthetics within historic districts established under Virginia Code § 15.2-2306.

In finding the ordinance to be invalid, the Rowe court relied on its earlier decision in Kenyon Peck v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969). In Kenyon Peck, the challenged portion of the County of Arlington’s zoning ordinance prohibited advertising by means of outdoor moving signs or devices. The plaintiff claimed that the basis for the prohibition was purely aesthetic; the county contended that the prohibition was based on, among other things, traffic safety. The Court stated:

There is a generally accepted rule that a State, municipality or county cannot limit or restrict the use which a person may make of his property under the guise of its police power where the exercise of such power would be justified solely on aesthetic considerations. However, aesthetic considerations are not wholly without weight and need not be disregarded in adopting legislation to promote the general welfare. [citations omitted]

Although aesthetic considerations alone may not justify police regulations, the fact that they enter into the reasons for the passage of an act or ordinance will not invalidate it if other elements within the scope of police power are present.

Kenyon Peck, 210 Va. at 64, 168 S.E.2d at 120.

A locality’s authority to regulate aesthetics in a historic district under Virginia Code § 15.2-2306

After Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), the General Assembly authorized localities to establish architectural review boards. Virginia Code § 15.2-2306 provides that a locality’s historic district ordinance:

. . . may include a provision that no building or structure, including signs, shall be erected, reconstructed, altered or restored within any such district unless approved by the review board or, on appeal, by the governing body of the locality as being architecturally compatible with the historic landmarks, buildings or structures therein.

The scope of the authority of an ARB to consider architectural compatibility must be delineated in the locality’s zoning regulations and guidelines.

The distinction between aesthetics and visibility: considered in the context of wireless facilities

In the past, the providers of wireless services in Virginia sometimes argued that evidence pertaining to the visibility of a proposed facility may not be considered because visibility is an aesthetic consideration not allowed by Virginia law. This assertion is based on a misunderstanding of Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), discussed in section 21-310. As noted above, the Virginia Supreme Court held in Rowe that Virginia localities were not enabled to impose aesthetic requirements related to the elevations of façades,
materials, colors, texture, light reflecting characteristics and other special features intended for buildings within a particular zoning district.

The visibility of a wireless facility is primarily based on its size, height, location or bulk, rather than the range of aesthetic considerations such as color and other features considered in Rowe. Virginia law expressly enables a locality to regulate the size, height, location and bulk of structures. Virginia Code § 15.2-2280(2). Moreover, when a locality is considering the visibility of a proposed facility, it is considering whether the facility, as proposed, will adversely affect the neighboring properties, the character of the district, and the public in general. This determination is quite different than the regulations that were considered in Rowe.

**21-400 The applicability of design guidelines to trademarks and service marks**

Trademarks and service marks are two types of registered marks that may obtain protection under federal trademark laws. A trademark includes any word, name, symbol, or device, or any combination thereof used, or intended to be used, to identify and distinguish goods, including a unique product, from those manufactured or sold by others. 15 U.S.C. § 1127. A service mark is similarly defined, except that service marks identify and distinguish services, rather than goods.

**21-410 In the implementation of local zoning regulations and guidelines, an ARB may require that a registered logo or symbol not be displayed on a sign or that it be changed as a condition of granting a certificate of appropriateness**

Federal law does not prohibit an ARB from applying its design guidelines to an exterior sign, even if that sign uses a registered mark.

15 U.S.C. § 1121(b), which is part of the Lanham Act, prohibits a locality from requiring the alteration of a registered mark. However, this prohibition applies only to regulations that require alteration of the registered mark itself, not the use of the mark in exterior features. Lisa’s Party City Inc. v. Town of Henrietta, 185 F.3d 12 (2d Cir. 1999); see also, Gold Coast Publications Inc. v. Corrigan, 42 F.3d 1336 (11th Cir. 1994) (ordinance regulating placement and color of newsracks did not violate 15 U.S.C. § 1121(b)); Payless Shoesource Inc. v. Town of Penfield, 934 F. Supp. 540 (W.D.N.Y. 1996) (sign ordinance requiring exterior sign to be a uniform color did not violate 15 U.S.C. § 1121(b)).

In other words, 15 U.S.C. § 1121(b) only prohibits a locality from requiring that a business alter its registered mark in every display of that mark within the locality, such as on letterhead, leaflets, magazines, newspapers, television and Internet advertising, and point-of-sale displays inside the business. Lisa’s Party City, supra. The Lanham Act does not prohibit the application of local zoning regulations and guidelines that control the design elements of an exterior sign.

In Lisa’s Party City, the town’s sign regulations required that the design and style of signs for individual stores within a shopping plaza be “coordinated so as to create an aesthetic uniformity within the plaza.” The owner of the plaza at issue in Lisa’s Party City had selected the color red for all signs within the plaza. Lisa’s Party City sought a variance so that it could erect a multi-colored sign that was consistent with its trademark. When the variance was denied, Lisa’s Party City sued,contending that the town’s requirement for uniformity in sign color compelled the alteration of its trademark in violation of 15 U.S.C. § 1121(b). The court of appeals rejected this claim, holding that:

> [L]ocal uniform aesthetic and historic regulations simply limit color typefaces and decorative elements to certain prescribed styles. These regulations have no effect on the businesses’ trademark. They limit only the choice of exterior sign at a particular location. As such, though entirely disallowing the use of a registered trademark in carefully delimited instances, these regulations do not require “alteration” at all.

Lisa’s Party City, 185 F.3d at 15.

The legislative history of 15 U.S.C. § 1121(b) supports this conclusion. The House Report for H.R. 5154, the bill that became 15 U.S.C. § 1121(b), states:
During the course of Committee debate Mr. Frank raised the issue of whether the bill would in any way restrict the zoning or historic site protection laws or regulations of states. On the advice of counsel, the Committee concludes that the bill in no way affects the powers of state and local governments in areas of concern raised by the gentleman from Massachusetts.


In summary, zoning regulations and guidelines merely control certain design elements to assure that a sign or structure is appropriate for the district.

21-420 Colors may be registered marks or trade dress, and they may be subject to local regulations and guidelines

If a color meets the ordinary trademark requirements, there is no special rule preventing it from serving as a trademark. Qualitex Company v. Jacobson Products Company Inc., 514 U.S. 159, 115 S. Ct. 1300 (1995). Therefore, if a color, or combination of colors, used in a particular manner is non-functional, inherently distinctive, and the imitation of that color or combination of colors would cause confusion as to the source of the goods, it may qualify as a trademark (or trade dress). Two Pesos Inc. v. Taco Cabana Inc., 505 U.S. 763, 112 S. Ct. 2753 (1992).

Nevertheless, an ARB may require that proposed colors be changed if it determines the change to be necessary to issue a certificate of appropriateness.

21-500 Considering the architectural design of religious buildings and properties


One commentator has stated that “[m]ajor religious traditions have been keenly aware of the symbiotic interaction between architecture and theology, of architecture’s connection with doctrinal and liturgical reform, and of the role architecture plays in sustaining and revitalizing faith.” Angela C. Carmella, Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, 36 Villanova Law Review 401 (1991). The relationship between architecture and religion was further explained by the commentator as follows:

[E]clesiastical architecture is religious expression, its semiotic properties reflecting and influencing choices made by religious communities regarding theological principles, liturgical practices, faith renewal, doctrinal developments, missional goals and ecclesial identity. . . . Houses of worship . . . express, among other things, the religious community’s purpose, theology, identity, hope, unity and reverence for the divine and its identification with or separation from certain aspects of culture.

Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, supra. The commentator then provides the following caution to localities:

By determining which religious beliefs are worthy of architectural expression, the state compels affirmation of particular religious beliefs and ecclesial self-understanding and denies affirmation to others. . . . The state becomes the reviewer and arbiter of internal design decisions, arrogates to
itself the role of religious community, and places itself in a position to direct the long term development of ecclesiastical architecture.


Of course, First Amendment jurisprudence does not require that localities completely close their eyes to matters of architectural design where religious structures are involved – it is permissible to distinguish the secular from the religious. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305, 105 S. Ct. 1953, 1963-1964 (1985) (“The Establishment Clause does not exempt religious organizations from such secular government activity as fire inspections and building and zoning regulations . . .”). The Free Exercise Clause asks that the individual demonstrate that beliefs professed are “sincerely held” and in the individual’s “own scheme of things, religious.” *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003). Thus, on matters of architectural design, it is reasonable for the locality to ask whether a particular feature is related to a religious belief. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 833, 109 S. Ct. 1514, 1517 (1989) (“States are clearly entitled to assure themselves that there is ample predicate for invoking the free exercise clause”).

As explained in more detail in chapter 34, the neutral application of generally applicable and legitimate land use regulations will usually not be found to impose a substantial burden on religious exercise. In the architectural review context, therefore, the removal of religious artifacts such as crosses and stained glass windows depicting scenes in the life of Jesus Christ, a process known as deconsecration, is religious exercise. *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172 (D. Mass. 2011). However, requiring a church to file an application for a certificate of appropriateness before demolishing the church did not impose a substantial burden on religious exercise, despite allegations of delay, uncertainty and expense. *Roman Catholic Bishop, supra.* In *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009), the court concluded that a city’s historic preservation ordinance did not impose a substantial burden on religious exercise where the city’s landmark designation on an apartment house owned by a “substantial religious organization” prevented it from demolishing the building, which was located where the organization wanted to establish a family life center. *World Outreach Conference Center, supra.* The court said that the building remained habitable, could be sold to finance the construction of its family-life center elsewhere, and there were alternative sites on the organization’s property to locate the family life center. *World Outreach Conference Center, supra.*

21-510 Determining whether a feature is religious exercise

Determining whether the exterior features of a religious property are the result of sincerely held religious beliefs can be “a difficult and delicate task.” *Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430 (1981). An ARB must decide whether the beliefs held by the applicant are sincere and whether they are, in the scheme of things, religious in character. *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003). To that end, the ARB may ask for an explanation of the religious basis of the design features if their significance is not readily apparent. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 109 S. Ct. 1514 (1989).

If the religious institution states that a feature is religious in character, the statement must be given great weight. *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850 (1965). An ARB cannot inquire into the truth or falsity of the belief on which the statement is based. *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882 (1944). Also, the ARB may not determine, or base a decision upon, whether including a particular feature is necessary for a particular religion. *Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 150, 747 N.E.2d 131, 138 (2001) (trial court impermissibly concluded that a steeple was not a necessary element of the Mormon religion; “[a] rose window at Notre Dame Cathedral, a balcony at St. Peter’s Basilica, are judges to decide whether these architectural elements are ‘necessary’ to the faith served by those buildings?”).

In conducting its review, an ARB is advised to heed the following passage from *First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board*, 129 Wash.2d 238, 250, 916 P.2d 374, 380 fn. 6 (1996): “While preserving aesthetic and historic structures may be of value to the [locality], the possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.”
If the feature is not tied to a sincerely held belief that is religious in character, then the religious institution must comply with all requirements of the applicable land use regulations, and there are no further First Amendment or RLUIPA considerations. If the feature is tied to a sincerely held belief that is religious in character, then the ARB must determine whether compliance with the applicable regulations imposes a substantial burden on free exercise. Generally, the outright disapproval of a religiously-connected feature would impose a substantial burden on religious exercise. See Goldman v. Weinberger, 475 U.S. 503, 106 S. Ct. 1310 (1986) (implicitly recognizing burden caused by prohibition on the wearing of a yarmulke by Jewish military officer).

Imposing a substantial burden on religious exercise is permitted only if there is a compelling governmental interest to do so. See chapter 34 for a discussion of the meaning of substantially burdening religious exercise. However, neither aesthetic concerns nor historic preservation under local regulatory schemes have been found to be a compelling governmental interest. See Whiten v. City of Gladstone, 54 F.3d 1400, 1408 (8th Cir. 1995) (“a municipality’s asserted interests in . . . aesthetics, while significant, have never been held to be compelling”); American Legion Post 7 v. City of Durham, 239 F.3d 601 (4th Cir. 2001) (flag case; city has substantial governmental interest in preserving its aesthetic character). As some courts have said, a locality’s “interest in preservation of aesthetic and historic structures is not compelling and it does not justify the infringement of [the church’s] right to freely exercise religion.” First Covenant Church of Seattle v. City of Seattle, 120 Wash.2d 203, 223, 840 P.2d 174, 185 (1992); Munns v. Martin, 131 Wash.2d 192, 209, 930 P.2d 318, 326 (1997) (quoting First Covenant; Keeler v. Mayor and City Council of Cumberland, 940 F. Supp. 879 (D.Md. 1996) (historic preservation is not a compelling governmental interest).

21-520 If a feature is related to a religious exercise, it should be exempt from ARB review because its change, modification or disapproval likely would be found to impose a substantial burden on a religious exercise

To understand the principle of substantial burden as it pertains to architectural review, bear in mind that substantiality must be measured by the impact of the land use regulation on religious exercise, not by the impact of the regulation on the particular feature in its relation to the development as a whole. This distinction is critical. For example, the denial of a certificate of appropriateness because of the existence of a small window in a front door – a window that is significant to the religion – may be a substantial burden on religious exercise, even though, from a purely architectural standpoint, the window is a minor feature when compared to the structure as a whole.

The religious importance of some features on a religious structure is self-evident, such as stained glass, crosses and steeples on churches, and minarets on mosques. Some features likely have no relation to a religious belief, such as the type of rain gutters, the materials used for a structure’s exterior, or landscaping. Other features or elements issues may or may not be related to a religious belief, such as the color of the structure or its doors, the shape or orientation of a building, or the desire to construct an addition to an existing structure. The shape of a building (square, round, rectangular, a basilica, a cross) may be inextricably connected to liturgical experience and ecclesial identity. A building addition may be compelled as the result of a sincerely held religious belief because religious doctrine requires accommodating all people who wish to worship in a single structure.

Cases pertaining to the architectural design of proposed religious structures are limited. Most of the case law in this area pertains to historic preservation regulations that either prohibit the demolition of religious structures or require review and approval by the locality before exterior features of a designated religious structure are altered or demolished. Some of these cases have upheld the locality’s denial of the demolition permit, even though the religious institution had outgrown its existing facilities and would face financial hardship by being required to find another site to accommodate its activities. Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp.2d 691 (E.D.Mich. 2004) (under RLUIPA); Rector, Wardens and Members of Vestry of St. Batholomew’s Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (pre-RLUIPA; pertaining to accessory building, not place of worship).

Other courts have found that these types of regulations impose a substantial burden on religious exercise. First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board, 129 Wash.2d 238, 916 P.2d 374 (1996) (holding that an ordinance prohibiting any alterations or significant changes to a church without city approval burdened the free exercise of religion because it prevented the church from selling its property and using the proceeds to advance its religious mission); First Covenant Church of Seattle v. City of Seattle, 120 Wash.2d 203, 840 P.2d

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174 (1992) (holding that an ordinance requiring a church to get a certificate of approval before making certain alterations to the church’s exterior violated the Free Exercise Clause because it required the church to seek approval from secular authorities before altering the exterior of the building and by cutting in half the value of the church’s property); Keeler v. Mayor and City Council of Cumberland, 940 F. Supp. 879 (D.Md. 1996) (city’s denial of certificate of appropriateness to allow demolition of old monastery violated the Free Exercise Clause because the church had a sincere religious belief that the monastery had to be demolished and replaced as part of the church’s mission to its members).

Controlling themes are hard to identify in these cases. The two Washington cases, First United Methodist and First Covenant, might be distinguishable from St. Bartholomew’s because the Washington Supreme Court relied not only on the United States Constitution, but also the Washington Constitution, which admittedly granted more expansive religious protections than those under the United States Constitution. The buildings at issue in First United Methodist and First Covenant were the churches themselves, whereas the building at issue in St. Bartholomew’s was an accessory structure. However, Episcopal Student Foundation involved a worship facility and the court found no substantial burden. Keeler has been criticized by one commentator as a misapplication of controlling Supreme Court precedent. Carol M. Kaplan, Note, The Devil is in the Details: Neutral, Generally Applicable Laws and the Exceptions from Smith, 75 N.Y.U. L. Rev. 1045 (2000). The facts in each case are critical.

21-530 If the size of a building is related to religious exercise, it may be exempt from ARB review because its change, modification or disapproval would be found to impose a substantial burden on a religious exercise

In Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp.2d 1203 (C.D.Cal. 2002) (denying redevelopment agency’s motion to dismiss; granting church’s request for preliminary injunction), the church sought to relocate to the city because its existing facility seated only 700 members, forcing it to hold multiple services for its congregation. Its senior pastor stated that the church’s beliefs required that its congregation make a lasting impact in the communities served by the church by “ministering to the spiritual and physical needs of the members of these communities.” The pastor concluded that its members were “compelled to continually seek growth in the size of [their] congregation and [their] ministries.”

The city denied the church’s application for a permit that would allow it to establish a 4,700 seat worship facility and accessory buildings. The court determined that the church was “unable to practice its religious beliefs in its current location. Simply put, its Los Alamitos facility cannot handle the congregation’s large and growing membership, and its small quarters prevent Cottonwood from meeting as a single body, as its beliefs counsel.” Cottonwood Christian Center, 218 F. Supp.2d at 1226. The court then found that the denial of the permit substantially burdened religious exercise, stating that the church had “demonstrated that meeting in one location at one time, as well as providing numerous ministries, [were] central to its faith. Thus, beyond the fundamental need to have a church, Cottonwood has shown a religious need to have a large and multi-faceted church.” Cottonwood Christian Center, 218 F. Supp.2d at 1227.

Cottonwood may be unique to its facts since the church wanted to construct a new church facility on property the city wanted to condemn in favor of building a retail shopping center, and the church was able to establish that the size of the church was related to religious exercise.
Chapter 22

Subdivisions

22-100 Introduction

A subdivision, unless otherwise defined by local ordinance, means the division of a parcel of land into three or more lots of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in the division, any division of a parcel of land. Virginia Code § 15.2-2201. In Albemarle County, a subdivision means “any division of land, and includes resubdivisions, rural subdivisions, family subdivisions, and the establishment of a condominium regime.” Albemarle County Code § 14-106. The agent designated in the locality’s subdivision ordinance for its administration may be authorized to determine whether a proposed division is a subdivision within the meaning of the subdivision ordinance. See 1987-88 Va. Op. Atty. Gen. 208.

<table>
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<th>Purposes of Subdivision Regulations</th>
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<td>• Establish the procedures for dividing land.</td>
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<td>• Establish the requirements for the subdivider to provide public infrastructure and other improvements when the land is developed, rather than placing the burden on the public at large.</td>
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<td>• Do not regulate land uses and are not a substitute for zoning regulations.</td>
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While zoning regulations delineate the uses and the permissible ways in which land may be developed, subdivision regulations identify the procedures for dividing land and impose requirements for providing public infrastructure and other improvements when the land is developed. Thus, subdivision regulations are different from zoning regulations, and are not substitutes for zoning regulations. 1985-86 Va. Op. Atty. Gen. 90.

Subdivision regulations exist to assure the orderly subdivision and development of land and to promote the public health, safety, convenience and welfare of the locality’s citizens. Virginia Code §§ 15.2-2200, 15.2-2240; 1989 Va. Op. Atty. Gen. 100. Among the key concerns addressed by subdivision ordinances are the coordination of existing and planned streets, the provision of adequate water, sewerage and drainage systems, the extent and manner in which streets are to be improved, the dedication of rights-of-way for public use of rights-of-way, and the dedication of other site-related improvements. 1989 Va. Op. Atty. Gen. 100. One of the main purposes of the subdivision enabling legislation is to require a subdivider to lay out and construct streets and other improvements in accordance with state and local standards before the maintenance is taken over by VDOT or the city and to relieve the public to this extent of the burden that would otherwise exist. Board of Supervisors of Fairfax County v Ecology One, Inc., 219 Va. 29, 245 S.E.2d 425 (1978).

22-200 A summary of the evolution of subdivision regulation

In Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 66-67 (4th Cir. 1992), the court summarized the evolution of subdivision regulations as follows:

“Land use controls over subdivisions . . . date from the late nineteenth century. The original statutes took the form of land platting legislation and were intended to provide a more efficient method of conveying property. See D. Hagman & J. Juergensmeyer, Urban Planning and Land Development Control Law § 7.2, at 191 (2d ed. 1986). Before subdivision control, land was sold by reference to metes and bounds, an unreliable system that often resulted in confusion and overlapping titles. See id. Subdivision regulations avoided these problems by requiring land developers to record in the local records office a ‘plat,’ or map, of the property. The plat, which contained precise dimensions, subdivided the land into blocks and lots and indicated the location of roads and parks. Once the plat was recorded, individual lots could then be conveyed by reference to the lot, block, and plat name, thereby avoiding the confusion inherent in the metes and bounds system. See id.

Beginning in the 1920s, subdivision control became not only a mechanism to simplify the conveyance of individual lots, but also a means through which localities could regulate urban and suburban development through
comprehensive planning. See id. at 191-92. Localities began to use subdivision regulations to prevent the construction of new streets that were not well aligned with existing roads. See D. Mandelker, Land Use Law, § 9.02, at 362 (2d ed. 1988). Subdivision control also functioned to ensure that development did not result in platted lots of unusable sizes that remained vacant, see D. Hagman & J. Juergensmeyer, supra, § 7.2, at 192, or in the splitting of large holdings suited for industrial or agricultural uses into numerous parcels that a private person could not reassemble, see Note, Land Subdivision Control, 65 Harv.L.Rev. 1226 (1952).

Following [World War II], localities used subdivision control to implement more extensive substantive regulation. With the expansion of suburban areas, subdivision regulation turned to ensuring the provision of adequate local governmental facilities and services. Thus, such regulation mandated the construction of parks and other recreational facilities as well as schools for area residents. See D. Hagman & J. Juergensmeyer, supra, § 7.2, at 193. Comprehensive planning also became concerned with structuring development to avoid serious off-site drainage problems and to avert the negative impact of development on the local environment. See id. Subdivision regulation also became a mechanism to ensure that streets were properly constructed and were sufficiently wide for anticipated traffic. See R. Platt, Land Use Control: Geography, Law, and Public Policy 222 (1991). Finally, localities required each lot to have adequate access to public services and utilities, such as water, sewage, gas, electricity, telephone, and cable television. See id. at 223.”

22-300 The scope of the authority to regulate the division of land


The scope of a locality’s subdivision regulations is delineated in Virginia Code § 15.2-2241, which prescribes the mandatory provisions that must be included in a subdivision ordinance, and Virginia Code §§ 15.2-2242 through 15.2-2244.1, which prescribe the optional provisions that may be included in a subdivision ordinance.

A locality does not have the power to enact a subdivision ordinance that is more expansive than the enumerated requisites contained in Virginia Code §§ 15.2-2241 through 15.2-2244.1. See Board of Supervisors of Augusta County v. Countryside Investment Co., 258 Va. 497, 522 S.E.2d 610 (1999). Finally, a locality is entitled to exercise discretion only to the extent permitted by Virginia Code §§ 15.2-2241 through 15.2-2244.1. See Countryside Investment, supra; Helmick v. Town of Warrenton, 254 Va. 225, 492 S.E.2d 113 (1997). See section 22-330 for an analysis of attempts by localities to exercise implied powers.

22-310 Mandatory provisions

Virginia Code § 15.2-2241 sets forth several provisions that must be included in a subdivision ordinance:

- **Plat details:** Plat details which meet the standard for plats as adopted under Virginia Code § 42.1-82, which is part of the Virginia Public Records Act. Virginia Code § 15.2-2241(1). See also Virginia Code § 15.2-2258, which requires, among other things, that if any portion of the land lies in a drainage district or a mapped dam break inundation zone, those facts must be set forth on the plat. In addition, if any grave, object, or structure marking a place of burial exists on the lands, they must be identified on the plat.

- **Coordination of streets:** The coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades, and drainage, including, for ordinances and amendments thereto adopted on or after January 1, 1990, for the coordination of those streets with existing or planned streets in existing or future adjacent or contiguous to adjacent subdivisions. Virginia Code § 15.2-2241(2).
• **Drainage, flood control and other public purposes:** Adequate provisions for drainage and flood control, for adequate provisions related to the failure of impounding structures and impacts within dam break inundation zones, and other public purposes, for light and air, and for identifying soil characteristics. *Virginia Code § 15.2-2241(3).* Note that Virginia Code § 15.2-2243.1 requires a subdivider to pay 50% of the contract ready costs for necessary upgrades to an impounding structure attributable to the project.

• **Design for streets, public utilities and community facilities:** The extent and manner in which streets will be graded, graveled or otherwise improved, and water and storm and sanitary sewer and other public utilities or other community facilities will be installed. *Virginia Code § 15.2-2241(4).* In contrast to Virginia Code § 15.2-2241(2) pertaining to the coordination of streets, the language in subsection (4) does not require that existing or planned streets be present in existing or future subdivisions on adjacent properties in order for a locality to implement regulations providing for the extent to which subdivision streets will be improved. The plain and ordinary meaning of the term *extent* means the “amount of space which [the street] occupies or the distance over which it extends” and the term includes the length and width of the street. *Webster’s Third New International Dictionary* (1993). The term *extend* means “to cause to stretch out or reach” or to “push to a farther point.” *Webster’s Third New International Dictionary* (1993).

• **Dedication of right-of-way and certain public improvements for public use:** Accepting the dedication for public use of any right-of-way located within a subdivision where a street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system, or other improvement dedicated for public use has been constructed or will be constructed and be publicly maintained. *Virginia Code § 15.2-2241(5).* Recordation of the plat operates to transfer to the locality, in fee simple, the portion of the subdivision set apart for streets, alleys or other public use. *Virginia Code § 15.2-2265.* Recordation of the plat also operates to transfer to the locality any easement on the plat to create a public right of passage and such easements shown on the plat for the conveyance of stormwater, domestic water and sewage, including the installation and maintenance of any facilities used for such purposes as the locality may require. *Virginia Code § 15.2-2265.*

• **Vehicular ingress and egress:** Site-related improvements required by the locality’s ordinance for vehicular ingress and egress, including traffic signalization and control, for public access streets. *Virginia Code § 15.2-2241(5).*

• **Critical slope stabilization:** Site-related improvements required by the locality’s ordinance for structures necessary to ensure the stability of critical slopes. *Virginia Code § 15.2-2241(5).*

• **Stormwater management facilities:** Site-related improvements required by the locality’s ordinance for stormwater management facilities. *Virginia Code § 15.2-2241(5).*

• **Phased subdivisions:** The phasing of sections of a subdivision, with certain rights protected, provided the requirements of Virginia Code § 15.2-2241(5) are satisfied. *Virginia Code § 15.2-2241(5).*

• **Security to guarantee construction of required improvements:** In lieu of constructing the required improvements prior to final subdivision plat approval, the developer may provide security to guarantee their construction or installation. *Virginia Code § 15.2-2241(5).* A locality may not require a security to guarantee the construction of a facility or improvement if it is not shown or described on the approved subdivision plat or site plan. *Virginia Code § 15.2-2241(8).* The primary purpose of a performance security requirement is to guarantee the completion of the improvements covered by the security. See *Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985). The security primarily protects the locality from assuming undesired financial burdens, but also indirectly protects residents of a new subdivision by ensuring that there will be adequate access and that public facilities will be constructed. *1987-88 Va. Op. Atty. Gen. 204.* A locality may require an acceptable form of surety for the completion of public improvements, such as a bond, letter of credit, escrow or another performance guarantee as provided in the statute.

• **Security to provide for maintenance of a dedicated street until acceptance into state-maintained system:** If the locality accepts the dedication of a road for public use and the street, due to factors other than its quality of construction, is not acceptable into the secondary system of state highways, then the locality may require the developer to provide...
security to pay for the maintenance of the street until it is accepted into the state system. Virginia Code § 15.2-2241(5).

- **Conveyance of easements for cable television and certain utilities**: The required conveyance, in appropriate cases, of common or shared easements to franchised cable television operators furnishing cable television, and public service corporations furnishing cable television, gas, telephone and electric service to the proposed subdivision. Virginia Code § 15.2-2241(6).

- **Monuments**: Monuments of specific types to be installed establishing street and property lines. Virginia Code § 15.2-2241(7).

- **Period of validity of approved final plat**: Unless a plat is filed for recordation within six months after final approval thereof or a longer period provided by the locality, the approval must be withdrawn and the plat marked void and returned to the agent. If the facilities to be dedicated to public use are under construction or the developer has furnished security to the locality, the time for recording the final plat is one year or the period provided in the security agreement, whichever period is longer. Virginia Code § 15.2-2241(8).

- **Administration and enforcement**: The administration and enforcement of the subdivision ordinance, including the imposition of reasonable fees and charges for the review of subdivision plats and site plans, and for the inspection of facilities required to be installed. Virginia Code § 15.2-2241(9).

- **Family divisions**: Reasonable provisions permitting a single division of a parcel for the purpose of sale or gift to a member of the immediate family of the property owner in accordance with the provisions of Virginia Code § 15.2-2244. Virginia Code § 15.2-2241(10).

- **Release of security**: The periodic partial and final complete release of any bond, escrow, letter of credit, or other performance guarantee required by the County for required improvements, in accordance with the provisions of Virginia Code § 15.2-2245. Virginia Code § 15.2-2241(11).

### 22-320 Optional provisions

Virginia Code §§ 15.2-2242, 15.2-2243 and 15.2-2244.1 set forth several provisions that may be included in a subdivision ordinance. This list does not include specific enabling authority in Virginia Code § 15.2-2242 granted to one or a very limited number of localities. Some of these optional provisions have been adopted by Albemarle County, as noted below.

- **Variations or exceptions**: Variations in or exceptions to the general regulations of a subdivision ordinance may be allowed in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship. Virginia Code § 15.2-2242(1); Logan v. City Council of the City of Roanoke, 275 Va. 483, 659 S.E.2d 296 (2008) (upholding subdivision regulations authorizing the subdivision agent to make exceptions to otherwise applicable subdivision regulations if the size or shape of the land, topography, proposed land use or other special conditions made compliance with the subdivision regulations impractical, and to make exceptions to the minimum paved width of streets if the cross slope would not permit a greater width); GIBC Golf, L.L.C. v. Loudoun County, Board of Supervisors, 77 Va. Cir. 287 (2008) (variation or exception considered by governing body is a legislative act). See Albemarle County Code §§ 14-224.1 and 14-225.1.

- **Health official opinion on subsurface sewage disposal**: The furnishing of a preliminary opinion from the applicable health official regarding the suitability of a subdivision for installation of subsurface sewage disposal systems where that method of sewage disposal will be used in the subdivision. Virginia Code § 15.2-2242(2)(i); Albemarle County Code §§ 14-309 and 14-310. Virginia Code § 15.2-2157 provides that when sewers or sewerage disposal facilities are not available, “a locality shall not prohibit the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.” An “alternative onsite sewage system” is defined in Virginia Code
§ 32.1-163 to be a “treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.”

- **Requirement that buildings will connect to public water or sewer system:** All buildings constructed on lots resulting from the subdivision of a larger tract that abuts or adjoins a public water or sewer system or main shall be connected to that public water or sewer system or main, subject to the provisions of Virginia Code § 15.2-2121. *Virginia Code § 15.2-2242(2)(ii).*

- **Statement that private streets do not meet state standards and will not be publicly maintained:** If the streets in a subdivision will not be constructed to meet state standards, the subdivision plat and all approved deeds of subdivision, or similar instruments, must contain a statement advising that the streets in the subdivision do not meet state standards and will not be maintained by VDOT or the locality. Grantors of any subdivision lots to which such statement applies must include the statement on each deed of conveyance thereof. *Virginia Code § 15.2-2242(3).*

- **Private street standards:** Minimum standards for the construction of streets that will not be built to state standards. *Virginia Code § 15.2-2242(3).*

- **Security to guarantee construction of private streets:** In lieu of constructing required private streets prior to plat approval, the developer may provide security to guarantee their construction or installation. *Virginia Code § 15.2-2242(3).*

- **Voluntary funding of off-site street improvements:** The voluntary funding of off-site street improvements and reimbursement of advances by the governing body. *Virginia Code § 15.2-2242(4).* There is no express authority in the subdivision enabling authority for a locality to require a subdivider to construct off-site improvements or to make improvements to existing public roads. *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County,* 220 Va. 435, 258 S.E.2d 577 (1979); see *Potomac Greens v. City Council,* 761 F. Supp. 416 (E.D.Va. 1991), rev’d on other grounds and vacated, 6 F.3d 173 (4th Cir. 1993) (localities have no authority to exact off-site improvements to public highways, but city could require elimination of part of parking facility under its general police powers). However, a subdivider may voluntarily agree to make improvements to existing access roads. *Board of Supervisors of Prince William County v. Sie-Gray Developers, Inc.,* 230 Va. 24, 334 S.E.2d 542 (1985). See section 25-320 et seq. for a discussion of the authority to require off-site road improvements as a condition of subdivision plat approval.

- **Reimbursement for off-site street improvements, the need for which is substantially generated by the subdivision:** If a developer makes an advance of payments for construction of reasonable and necessary street improvements located off-site, and the need for those improvements is substantially generated and reasonably required by the construction or improvement of the subdivision, the locality may agree to reimburse the subdivider under statutorily prescribed conditions. *Virginia Code § 15.2-2242(4).*

- **Provisions pertaining to solar energy:** Provisions for establishing and maintaining access to solar energy to encourage the use of solar heating and cooling devices in new subdivisions. The provisions apply to a new subdivision only when so requested by the subdivider. *Virginia Code § 15.2-2242(6).*

- **Provisions for clustering single-family dwellings:** Provisions for clustering single-family dwellings and preservation of open space developments that comply with the requirements of Virginia Code § 15.2-2286.1. *Virginia Code § 15.2-2242(8).*

- **Dedication of land and construction of sidewalk on subdivision lot on pre-existing street:** Provisions requiring that where a lot being subdivided or developed fronts on an existing street, and adjacent property on either side has an existing sidewalk or when the provision of a sidewalk, the need for which is substantially generated and reasonably required by the proposed development, is in accordance with the locality’s adopted comprehensive plan, a locality may require the dedication of land for, and construction of, a sidewalk on the property being subdivided or developed. *Virginia Code § 15.2-2242(9).* This provision does not usurp the authority of localities (*Virginia Code § 15.2-2241(5)) or VDOT to require sidewalks on a new street or highway. *Virginia Code § 15.2-2242(9).*
• **Phase I environmental site assessments:** Provisions requiring and considering Phase I environmental site assessments based on the anticipated use of the property that meet generally accepted national standards. *Virginia Code § 15.2-2242(10).*

• **Disclosure and remediation of contamination:** Provisions requiring disclosure and remediation of contamination and other adverse environmental conditions of the property prior to approval of the subdivision plat. *Virginia Code § 15.2-2242(11).*

• **Payment by subdivider of pro rata share of certain facilities:** Payment by a subdivider or developer of land of the pro rata share of the cost of providing reasonable and necessary sewerage, water, and drainage facilities, located outside the property limits of the land owned or controlled by the subdivider or developer but necessitated or required, at least in part, by the construction or improvement of the subdivision or development. *Virginia Code § 15.2-2243.*

• **Durational restrictions on a family subdivision; limitation on parcel size:** Provisions allowing a family subdivision only if (1) the property has been owned for at least 15 consecutive years by the current owner or a member of the immediate family; and (2) the landowner agrees to place a restrictive covenant on the property that prohibits the transfer of the subdivided lot to a nonmember of the immediate family for a period of 15 years, subject to any reduction or exceptions to the 15-year period provided in the covenant when changed circumstances so require. *Virginia Code § 15.2-2244.1.* The restrictive covenant may be modified by such a reduction or exception, and the locality must execute a recordable instrument reflecting the modification. *Virginia Code § 15.2-2244.1.* A locality also may require that the subdivided lot be no more than one acre and otherwise meet the requirements of state and local law. *Virginia Code § 15.2-2244.1*

### 22-330 The extent of any implied authority, or the lack thereof

The exercise of powers under a subdivision ordinance must be authorized by the subdivision-enabling statutes in *Virginia Code § 15.2-2240 et seq.* See *National Realty Corp. v. Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968) (locality lacked the implied authority to impose fees under its subdivision ordinance because the State Subdivision Law, though it enabled localities to administer their subdivision regulations, did not expressly enable localities to impose fees). As noted in section 22-300, a locality does not have the power to enact a subdivision ordinance that is more expansive than the enumerated requisites contained in *Virginia Code §§ 15.2-2241 through 15.2-2244.1.* See *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999).

A subdivision ordinance may not include provisions that effectively allow a locality to make a land use policy decision when considering a subdivision plat. In *Countryside Investment*, 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.” In finding that the challenged provisions of the subdivision ordinance went beyond that enabled by *Virginia Code §§ 15.2-2241 and 15.2-2242*, the Virginia Supreme Court said that a locality may not “under the guise of a subdivision ordinance, enact standards which would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property’s zoning classification.” *Countryside Investment*, 258 Va. at 505, 522 S.E.2d at 613-614.

A subdivision ordinance also may not prohibit what is permitted by the zoning ordinance. In *County of Chesterfield v. Tetra Associates, LLC*, 279 Va. 500, 506, 689 S.E.2d 647, 649 (2010), the county’s zoning ordinance allowed one acre minimum lot size within the agricultural zoning district. However, the subdivision ordinance allowed the subdivision of lots in that district only to a five acre minimum lot size. The Virginia Supreme Court affirmed the circuit court’s grant of summary judgment in favor of Tetra, stating:

> [T]he County infringes upon the right to subordinate to a minimum one acre parcel of land in the Agricultural District even though a residence on a one acre lot is a permitted use in Tetra’s property’s current Agricultural zoning classification. *County Code § 17-36(a)*, by prohibiting a lot subdivision in the Agricultural District and requiring a residential parcel subdivision with a requisite...
five acre minimum lot size, effectively rezones Tetra’s property in a manner inconsistent with the uses permitted by Tetra’s Agricultural zoning classification. The County is not permitted to use a subdivision ordinance to prohibit a use of Tetra’s property that is permitted by the property’s zoning classification.

_Tetra Associates_, 279 Va. at 506-597, 689 S.E.2d at 650.

Also, a subdivision ordinance may not consider the anticipated improvements on a subdivider’s proposed lots when considering an application. _Seymour v. City of Alexandria_, 273 Va. 661, 643 S.E.2d 198 (2007) (regulations for resubdivison improperly provided that lots could not be resubdivided “in such a manner as to detract from the value of adjacent property”).

A subdivision ordinance also may not limit the timing for subdividing lots. In _Strong v. Orange County Board of Supervisors_, 85 Va. Cir. 396 (2012), the owners were interested in developing 175 acres, proposing to create 65 lots at the 2 acre minimum allowed under the applicable zoning district regulations. Under the county’s subdivision ordinance, the owners would be allowed to create 4 lots every 4 years, meaning that it would take over 32 years to complete the subdivision of the parcel into 65 lots. The owners challenged the subdivision regulations that required this “time delay.” The circuit court held that there is no authority in Virginia Code §§ 15.2-2241 or 15.2-2242 to include “time delay” provisions in a subdivision ordinance. Therefore, the sections of the Orange County subdivision ordinance that required time delay violated the Dillon Rule.

Over the years, the Attorney General has opined that localities have, or lack, the implied authority to impose additional subdivision regulations, including:

- **No authority to impose requirement not enabled by State law and not set forth in local regulations**: A locality may not impose conditions that require the fulfillment of any requirement unless the requirement is set forth in the zoning or subdivision ordinance. _1990 Va. Op. Atty. Gen. 94_ (locality lacked authority to require avigation easements).

- **Requiring assurance of adequate water quantity**: Virginia Code §§ 15.2-2121 and 15.2-2241 through 15.2-2246, as well as the legislative intent expressed in Virginia Code § 15.2-2200, may enable a locality to require assurance of an adequate quantity of water for each lot in a subdivision when water is to be provided by individual wells. _1997 Va. Op. Atty. Gen. 70_. This opinion may be suspect in light of the decision in _Countryside Investment_, discussed above, where the Virginia Supreme Court held that Virginia Code § 15.2-2200 is not a source of power, and a locality does not have the power to enact a subdivision regulation that is more expansive than the enumerated regulations enabled in Virginia Code §§ 15.2-2241 and 15.2-2242.

- **Creation of homeowner’s association; ownership and maintenance of private streets**: The express grant of authority to localities to allow privately owned roads implies the power to require a subdivider to create a homeowner’s association under the Virginia Property Owners’ Association Act and to own and maintain private streets in a subdivision. _1992 Va. Op. Atty. Gen 53_.

- **No authority to regulate lot sizes under subdivision regulations**: The inclusion of provisions allowing the regulation of lot sizes in the zoning enabling legislation, and the lack of similar provisions in the subdivision enabling legislation, compel the conclusion that a locality may not impose a minimum lot size requirement for mobile homes, mobile home parks or campgrounds under its subdivision regulations. _1983-86 Va. Op. Atty. Gen. 90_. This opinion is consistent with the Virginia Supreme Court’s decision in _Tetra Associates_, discussed above.

- **No authority to prohibit buildings on certain lots**: A locality is not authorized to prohibit buildings on subdivision lots abutting private “paper streets” in a subdivision antedating its subdivision ordinance. _1979-80 Va. Op. Atty. Gen. 328_.

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Kampfner/July 2019
22-340 The obligation to comply with the subdivision ordinance in order to subdivide land

Virginia Code § 15.2-2254(A) provides that a developer cannot subdivide land “without fully complying with the provisions of the subdivision ordinance.” Board of Supervisors of Culpeper County v. Greengael, L.L.C., 271 Va. 266, 281, 626 S.E.2d 357, 365 (2006) (an independent investigation regarding the provision of water and sewer service undertaken by the county, regardless of the information acquired, could not substitute for the written assurance that water and sewer would be provided, as required by the subdivision ordinance). Thus, unless land is divided by order of the court in a partition proceeding, it may be divided only by a plat of subdivision. Virginia Code § 15.2-2254(1).

A plat of subdivision (hereinafter, “plat”) is a schematic representation of land divided or to be divided and information required by law. Virginia Code § 15.2-2201. A plat may not be recorded unless and until it has been submitted to and approved by the locality. Virginia Code § 15.2-2254(2). A person may not sell or transfer any land of a subdivision before a plat has been duly approved and recorded, unless the subdivision was lawfully created prior to the adoption of the subdivision ordinance. Virginia Code § 15.2-2254(3) (but also providing that this prohibition does not prevent the recordation of the instrument by which the land is transferred or the passage of title as between the parties to the instrument); see 2009 Va. Op. Atty. Gen. LEXIS 16, 2009 WL 57059 (localities are not authorized to require the review and approval of boundary survey plats and physical survey plats as a prerequisite for recordation).

Although recording an approved plat with the clerk of the circuit court is required to lawfully transfer a lot from a subdivision, any alleged failure to comply with the recording requirements does not inhibit the passage of title between the parties. Virginia Code § 15.2-2254(B).

22-350 The conveyance of title, even if the plat does not comply with the subdivision ordinance

One of the quirks of the state subdivision laws is that even though a subdivider fails to comply with a locality’s subdivision regulations, land within the purported subdivision may be lawfully conveyed to third parties. Of course, that comes with certain risks. Virginia Code § 15.2-2254(3) provides:

No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein, unless the subdivision was lawfully created prior to the adoption of a subdivision ordinance applicable thereto. However, nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument. (emphasis added)

See, Matney v. Cedar Land Farms, Inc., 216 Va. 932, 224 S.E.2d 162 (1976); Justus v. Lowell, 28 Va. Cir. 505, 510 (1992) (“compliance with the terms of the ordinance is not a prerequisite to the rights of the parties to convey, as between themselves, or to make use of the recording statutes”; however, the right to convey title “does not insure that such title is marketable”); Leighton v. Virginia Department of Health, 2001 Va. Cir. LEXIS 1, 4, 2001 WL 34118060 (2001) (“a failure to properly subdivide the parcel may impede future plat approval and places significant limitations on the use of the property by the owner”).

In Nejati v. Stageberg, 286 Va. 197, 747 S.E.2d 795 (2013), Angstadt purchased a parcel in the City of Fredericksburg and the city’s tax maps showed the parcel as a single lot, but the tax commissioner’s records indicated that in 1942 the parcel had been listed as two separate “tax parcels.” In 2008, Angstadt had the parcel surveyed and the survey depicted boundary lines corresponding to the boundaries of the two old tax parcels. The survey was recorded without the city approving the survey as a subdivision. Both parcels were separately sold to two buyers. Nejati purchased the lot with an apartment building on it. Stageberg purchased the undeveloped lot. When Stageberg sought to build a house on his lot, the zoning administrator concluded that the house could not be built because the lot did not exist as a separate lot. Stageberg sued the buyer of the other lot, Nejati, along with Angstadt and others. As against Nejati, Stageberg contended that they owned the whole undivided parcel as tenants in common and the trial court so held.

The Virginia Supreme Court held that Stageberg and Nejati held the parcel as tenants in severalty because the deeds by which each acquired their land relied on the survey and the survey was determined to be an accurate
description of each of the lots conveyed. The court rejected Stageberg’s argument that the description of each lot was rendered indefinite (and therefore a tenancy in common should be found) because of the seller’s failure to comply with Virginia Code § 15.2-2254. The court said that failure to comply with Virginia Code § 15.2-2254 resulted only in significant limitations on the use of the lots and that future development of the divided property might be restricted, but it did not prevent conveyance of the property and did not affect the property interests transferred by the deed.

22-400 The procedures to review and act on a subdivision plat

Localities variously assign subdivision plat review and approval to the locality’s designated subdivision agent, to the planning commission or to the governing body itself. 1991 Va. Op. Atty. Gen. 68. If a subdivider has complied with all applicable laws, the approval of a subdivision plat is a ministerial function. See Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc., 216 Va. 582, 221 S.E.2d 534 (1976).

22-410 The preliminary plat

Localities may require that a subdivider submit a preliminary plat for approval if the plat involves more than 50 lots, and may provide for submittal of a preliminary plat at the option of the landowner for plats involving 50 or fewer lots. Virginia Code § 15.2-2260(A). A preliminary plat is a schematic representation of the land proposed to be divided, but is not in a final form for recording. Among other things, a preliminary plat allows the locality to review the proposed subdivision for compliance with the applicable regulations before the subdivider has all of the necessary engineering work performed, which is included in the final plat.

Following is a table summarizing the key steps and events in having a preliminary subdivision plat (hereinafter, preliminary plat) approved by Albemarle County. Simpler procedures and different improvement requirements apply to plats for rural subdivisions, family subdivisions and other delineated subdivisions.

<table>
<thead>
<tr>
<th>Albemarle County: Nine Key Steps to Action on a Preliminary Subdivision Plat</th>
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<tbody>
<tr>
<td>1. Preliminary application conference.</td>
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<tr>
<td>2. Submittal of preliminary plat and determination of completeness.</td>
</tr>
<tr>
<td>3. Notice by the agent to abutting landowners and members of the board of supervisors and the planning commission.</td>
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<tr>
<td>4. Review of preliminary plat by site review committee.</td>
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<tr>
<td>5. Site review committee forwards requirements and recommendations to the agent.</td>
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<tr>
<td>6. Subdivider makes revisions to the preliminary plat plan, if necessary.</td>
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<tr>
<td>7. Consideration of preliminary plat by the agent.</td>
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<tr>
<td>8. Action on the preliminary plat by the agent.</td>
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<tr>
<td>9. If the preliminary plat disapproved, subdivider may appeal decision to the circuit court or the planning commission.</td>
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</tbody>
</table>

Five key steps in the process, and the requirements to assure compliance with State law, are discussed below.

- **Determining completeness:** When the preliminary plat is submitted, the clock begins to run to assure a timely action. The locality is best served by requiring that the plat submittal is complete before it is deemed to be submitted. The determination as to whether a plat submittal is complete may require the exercise of discretion and not be purely ministerial. Umstattd v. Centex Homes, 274 Va. 541, 650 S.E.2d 527 (2007) (mandamus is not a proper remedy to compel a locality to accept a preliminary plat as complete because the determination as to whether the submittal was complete required the official to investigate the submitted plat, the conditions existing on the subject 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 (such as whether any variations or exceptions would be required)).

- **Time for action:** A preliminary plat must be acted on by the agent within 60 days after it was submitted, provided that if state agency approval is required of a feature (such as the street design), the plat must be acted upon within not more 35 days after receipt of all state-agency approvals (who must act within 45 days after receiving the preliminary plat) and within 90 days after the plat was officially submitted. Virginia Code § 15.2-2260(C). If the agent fails to timely act on the plat, the subdivider may, after giving ten days’ notice to the locality, petition
the circuit court “to enter an order with respect thereto as it deems proper, which may include directing approval of the plat.” Virginia Code § 15.2-2260(D). Localities with a population greater than 90,000 based on the 2000 United States Census must act on a preliminary plat for the development of commercial or industrial uses according to an alternative timeline (not applicable to Albemarle County, whose 2000 population was about 84,000). Virginia Code § 15.2-2260(C).

- **Requirements if the preliminary plat is disapproved:** If the agent does not approve the preliminary plat, he must state in writing the reasons for the disapproval and state what corrections or modifications to the plat will permit its approval. Virginia Code § 15.2-2260(C). The agent should ensure that this writing is prepared with care and that it only identifies the express requirements of the applicable regulations as grounds for disapproval. The failure of a preliminary plat to incorporate mere recommendations, whether stated in the regulations or suggested by the agent, staff or anyone else, may never be the basis for disapproving a preliminary plat. In lieu of disapproving the preliminary plat, the agent should always consider approving it with conditions requiring that the required corrections be addressed with the final plat. Whether this alternative can be used in a particular situation will depend on the type and extent of the corrections required. For additional discussion regarding the disapproval of a plat, see section 22-500.

- **Options available to the subdivider if the preliminary plat is disapproved:** If the agent disapproves a preliminary plat and the subdivider contends that the disapproval was not properly based on the applicable regulations, or was arbitrary or capricious, it may appeal the disapproval to the circuit court. Virginia Code § 15.2-2260(E). The appeal must be filed within 60 days after the written disapproval by the agent. Virginia Code § 15.2-2260(E). Albemarle County provides the subdivider the option to first appeal the disapproval to the planning commission and, thereafter, the board of supervisors. Albemarle County Code § 14-223. For additional discussion regarding judicial challenges to a decision pertaining to a plat, see section 22-600.

An approved preliminary plat is valid for a period of five years, provided the subdivider: (1) submits a final plat for all or a portion of the property within one year after the approval (or a longer period provided in the subdivision ordinance); and (2) thereafter diligently pursues approval of the final plat. Virginia Code § 15.2-2260(F). After three years have passed since the preliminary plat was approved, and upon 90 days’ written notice to the subdivider, the agent may revoke the approval of the preliminary plat upon a finding that the subdivider has not diligently pursued approval of the final plat. Virginia Code § 15.2-2260(F). Once an approved final plat for all or a portion of the property is recorded, the underlying preliminary plat remains valid for a period of five years from the date of the last recorded plat. Virginia Code § 15.2-2260(G).

As a result of the economic downturn that began in 2008, the General Assembly has extended the validity of qualifying preliminary plats by statute. Virginia Code § 15.2-2209.1(A) provides that any valid preliminary plat that was outstanding as of January 1, 2017 shall remain valid under July 1, 2020, or a later date approved or agreed to by the locality. This extension also applies to any other plan or permit associated with the preliminary plat for the same time period.

Vested rights may arise from an approved preliminary plat. See chapter 19.

**22-420 The final plat**

A final plat is a schematic representation of the land proposed to be divided that is in a final form that is suitable for recording. Following is a table summarizing the key steps and events in having a final plat approved by Albemarle County.

<table>
<thead>
<tr>
<th>Albemarle County: Six Key Steps to Action on a Final Subdivision Plat</th>
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</thead>
<tbody>
<tr>
<td>1. Final plat submitted within one year after approval of the preliminary plat.</td>
</tr>
<tr>
<td>2. Review of final plat by the site review committee.</td>
</tr>
<tr>
<td>3. Site review committee recommends action on the final plat.</td>
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<tr>
<td>4. Consideration of final plat by the agent.</td>
</tr>
<tr>
<td>6. Action on final plat by the agent.</td>
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</tbody>
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The key steps in the process, and the requirements to ensure compliance with State law, are discussed below. The reader will note that although these key steps are similar to those pertaining to preliminary plats, Virginia Code § 15.2-2259 (applicable to final plats) and Virginia Code § 15.2-2260 (applicable to preliminary plats) do not use identical language.

- Determining completeness: As with preliminary plats, when a final plat is submitted, the clock begins to run to ensure a timely action. The locality is best served by requiring that the plat submittal is complete before it is deemed to be submitted. One difference between preliminary and final plats is that Virginia Code § 15.2-2259(A)(1) expressly refers to a final subdivision plat being officially submitted. A plat is officially submitted within the meaning of Virginia Code § 15.2-2259 when the subdivider files an application in the appropriate form in the proper office, accompanied by the fee, and submits a plat for the purpose of review which contains all of the data reasonably required by the subdivision regulations and by Virginia Code § 15.2-2262 (requisites of plat). Fairview Co. v. Board of Supervisors of Spotsylvania County, 21 Va. Cir. 193 (1990) (once the basic requirements are met, the agent must review the plat and approve or disapprove it; the agent may not refuse to act on a plat, otherwise properly submitted, on the ground that the proposed plat violates certain applicable regulations). A locality may not delay official submission of any proposed plat by requiring presubmission conferences, meetings, or reviews. Virginia Code § 15.2-2259(A)(3).

- Time for action: A final plat must be acted on by the agent within 60 days after it was officially submitted, provided that if state agency approval is required of a feature (such as the street design), the plat must be acted upon within not more than 35 days after receipt of all state-agency approvals (who must act within 45 days after receiving the final plat). Virginia Code § 15.2-2259(A)(1). The agent is required to “thoroughly review the plat and [] make a good faith effort to identify all deficiencies, if any, with the initial submission.” Virginia Code § 15.2-2259(A)(1). If the final plat was previously disapproved, the agent must act on the modified, corrected and resubmitted plat within 45 days. Virginia Code § 15.2-2259(A)(1). If the agent fails to timely act on the plat, the subdivider may, after giving ten days’ notice to the locality, petition the circuit court “to decide whether the plat should or should not be approved.” Virginia Code § 15.2-2259(C). Localities must act on a final plat for the development of commercial or industrial uses according to an alternative timeline. Virginia Code § 15.2-2259(A)(2) and (3). The period within which an action must be taken does not begin with filing a plat that is in an inappropriate form. Fairview Co., supra.

- Requirements if the final plat is disapproved: If the agent does not approve the final plat, “specific reasons for disapproval shall be contained either in a separate document or on the plat itself. The reasons for disapproval shall identify deficiencies in the plat that cause the disapproval by reference to specific duly adopted ordinances, regulations or policies and [] identify modifications or corrections as will permit approval of the plat.” Virginia Code § 15.2-2259(A)(1). The failure of a final plat to satisfy the lawful conditions of the preliminary plat approval is, of course, a legitimate basis to disapprove a final plat. See Roberts v. Board of Zoning Appeals of Madison County, 64 Va. Cir. 397 (2004) (county properly disapproved subdivision plat because subdivider failed to comply with condition of plat approval that a pre-existing entrance be abandoned as required under the subdivision ordinance because it was less than 600 feet from the proposed subdivision entrance). For additional discussion regarding the disapproval of a plat, see section 22-500.

- Options available to the subdivider if the final plat is disapproved: If the agent disapproves a final plat and the subdivider “contends that the disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious,” it may appeal the disapproval to the circuit court. Virginia Code § 15.2-2259(D). The appeal must be filed within 60 days after the written disapproval by the agent or the planning commission. Virginia Code § 15.2-2259(D). Albemarle County provides the subdivider the option to first appeal the disapproval to the planning commission and, thereafter, the board of supervisors. Albemarle County Code § 14-231. For additional discussion regarding judicial challenges to a decision pertaining to a plat, see section 22-600.

An approved final plat that has been recorded is valid for a period of not less than five years from the date of approval or for a longer period as the agent or the planning commission may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development. Virginia Code § 15.2-2261(A). However, an approved final plat that has been recorded, from which any part of the property subdivided...
An approved final plat that has been recorded that may be a section of a subdivision as shown on the approved preliminary plat (i.e., a phased subdivision) entitles the subdivider to record the remaining sections shown on the preliminary plat for a period of five years after the recordation of any section or for a longer period as the agent or the planning commission may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development. *Virginia Code § 15.2-2241(5).* This rule applies only if the subdivider furnishes to the governing body a certified check, cash escrow, bond, or letter of credit in the amount of the estimated cost of construction of the facilities to be dedicated within the section for public use and maintained by the locality, the Commonwealth, or other public agency. A subdivider proceeding under this rule is also subject to all of the requirements of Virginia Code § 15.2-2241(5) and the engineering and constructions standards and zoning requirements in effect at the time the plat for each remaining section is recorded. *Virginia Code § 15.2-2241(5).*

An approved final plat that has not been recorded is valid for a period of six months or a longer period as may be approved by the governing body from the date the agent affixes his signature to the plat, or for any other period specified in a surety agreement entered into by and between the subdivider and the locality, whichever is later if: (1) the subdivider has begun construction of facilities to be dedicated to public use pursuant to an approved plan or permit with approved surety; or (2) the subdivider has furnished surety in a form authorized by the subdivision ordinance in the amount of the estimated cost of construction of the facilities. *Virginia Code § 15.2-2241(8).*

Finally, as with preliminary plats, the General Assembly has extended the validity of qualifying final plats by statute. Virginia Code § 15.2-2209.1(A) provides that any recorded final plat that was outstanding as of January 1, 2017 shall remain valid under July 1, 2020, or a later date approved or agreed to by the locality. This extension also applies to any other plan or permit associated with the final plat for the same time period.

Vested rights may arise from an approved final plat. *See chapter 19.*

### 22-500 Disapproval of a subdivision plat

If a preliminary or final plat is disapproved, the specific reasons for disapproval must be provided to the subdivider, either in a separate document or on the plat itself. *Virginia Code §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary).*

The decision-maker must identify the deficiencies in the plat that caused the disapproval by reference to specific ordinances, regulations or policies, and also must generally identify modifications or corrections that will permit approval of the plat. *Virginia Code §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary).* The decision-maker is required to make a good faith effort to identify all deficiencies, if any, in a final plat. *Virginia Code § 15.2-2259(A).*

One trial court has said that, in order for the requirement that the reasons for disapproval be stated in writing to have any legitimate meaning and effect, the reasons must: (1) be the reasons expressed by the agent or the collective action of the members of the planning commission; (2) be clearly communicated to the applicant so that he knows exactly why the plat was not approved; and (3) be in writing. *Mountain Venture Partnership Lovettsville II v. Planning Commission of Lovettsville, 26 Va. Cir. 50 (1991).* Neither approval by default nor or a declaration that the disapproval is null and void is the judicial remedy if the locality fails to provide the required explanation. *Mountain Venture, supra.*

With respect to preliminary plats, the Virginia Supreme Court has said that when a local governing body’s disapproval of a preliminary plat is appealed, the “trial court must sustain the decision unless the local governing body failed to comply with the applicable subdivision ordinances or acted arbitrarily and capriciously in denying the application.” *Board of Supervisors of Culpeper County v. Greengael, I.L.C., 271 Va. 266, 277, 626 S.E.2d 357, 363 (2006).*

Because Virginia Code §§ 15.2-2259 and 15.2-2260 apply to both subdivision plats and site plans, cases pertaining to site plans are included below.
22-510 Disapproval because the plat fails to comply with an ordinance requirement

The disapproval of a plat because the subdivider failed to show compliance with the law outside of the state and local planning, subdivision and zoning laws (Virginia Code § 15.2-2200 et seq.) is not arbitrary and capricious. Dorn v. Board of Supervisors of Fairfax County, 28 Va. Cir. 133 (1992) (but also holding that a decision based on the determination that the applicant failed to properly withdraw the subject property from a condominium regime – a decision of law rather than a decision of fact – was arbitrary and capricious).

Failure to comply with an ordinance requirement will support the disapproval of a plat. In VACOM, Inc. v. Fairfax County Board of Supervisors, 33 Va. Cir. 39 (1993), one of the issues before the court was whether the county’s disapproval of VACOM’s sixth revision of a site plan for a proposed development near the Route 28/Route 29 intersection in Fairfax County was improperly based on minor deficiencies that served as a mere pretext for the county’s real concern – the redesign of the intersection. The court identified a number of minor deficiencies in the site plan related to frontage, drainage, berms, and correct acreage totals. Although noting that these deficiencies were minor and could be corrected in seven to ten days, the court found that these were legitimate grounds to disapprove the site plan. The court rejected VACOM’s argument that the disapproval of the site plan based on the above deficiencies served as a mere pretext, finding that “any proper basis for rejecting the sixth site plan is sufficient. The failure of the sixth site plan to meet the frontage requirements was clearly a proper basis for objection. Whether the county had ulterior motives for rejecting the sixth site plan is inconsequential if one of the bases of its rejection was proper.” VACOM, 33 Va. Cir. at 48.

22-520 Neither the comprehensive plan nor other policy considerations may be a basis for disapproval

A plat may be approved only on the basis of whether it complies with all applicable regulations. The comprehensive plan may not be the basis for denying a plat that is otherwise in conformity with duly adopted standards, ordinances and statutes. Rackham v. Vanguard Limited Partnership, 34 Va. Cir. 478, 479 (1994).

A subdivision ordinance may not include provisions that effectively allow a locality to make a land use policy decision when considering a subdivision plat. In Board of Supervisors of Augusta County v. Countryside Investment Co., 258 Va. 497, 522 S.E.2d 610 (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.” In finding that the challenged provisions of the subdivision ordinance went beyond that enabled by Virginia Code §§ 15.2-2241 and 15.2-2242, the Virginia Supreme Court said that a locality may not “under the guise of a subdivision ordinance, enact standards which would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property’s zoning classification.” Countryside Investment, 258 Va. at 504-505, 522 S.E.2d at 613-614.

22-600 Judicial challenges to the approval or disapproval of a preliminary or final plat

There are at least four possible scenarios when a decision to approve or disapprove a preliminary or final plat may be challenged in court. Because Virginia Code §§ 15.2-2259 and 15.2-2260 apply to both subdivision plats and site plans, cases pertaining to site plans are included below.

22-610 Challenge by the subdivider to the disapproval of a plat

A subdivider may appeal the locality’s disapproval of a plat to the circuit court within 60 days after the decision. Virginia Code §§ 15.2-2259(C) (final), 15.2-2260(E) (preliminary). The circuit court’s review is limited to a determination of whether the locality’s disapproval was “not properly based on the ordinance applicable thereto, or was arbitrary or capricious.” Virginia Code §§ 15.2-2259(C) (final), 15.2-2260(E) (preliminary); Sansom v. Board of Supervisors of Madison County, 257 Va. 589, 514 S.E.2d 345 (1999); Ifest v. Mills, 238 Va. 162, 380 S.E.2d 917 (1989). Likewise, the court must sustain the locality’s decision unless the locality failed to comply with the applicable ordinances or acted arbitrarily or capriciously. Board of Supervisors of Culpeper County v. Greengael, LLC, 271 Va. 266, 626 S.E.2d 357 (2006) (applied to final plat).
The courts have said that their authority under Virginia Code §§ 15.2-2259(C) and 15.2-2260(E) is sufficiently broad to permit a trial court to approve a plat if the evidence supports the subdivider’s allegations. Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, 220 Va. 435, 258 S.E.2d 577 (1979) (under state enabling authority, the trial court had the authority to approve a plat that met all applicable requirements; limiting the court’s role to determining whether the county’s disapproval was not properly based upon the applicable ordinance, or was arbitrary or capricious, would be an overly restrictive interpretation of the statute); Sterling Land Corp. v. Planning Commission of Town of Hamilton, 51 Va. Cir. 307 (2000).

If an appeal is filed regarding the disapproval of a plat, the locality is not required to consider an alternative plat pending the appeal. West, supra.

22-620 Third party challenge against the locality under Virginia Code §§ 15.2-2259 or 15.2-2260

A third party may not judicially challenge the approval of a plat in an action against the locality under Virginia Code §§ 15.2-2259 or 15.2-2260. See Barton v. Town of Middleburg, 27 Va. Cir. 20 (1991). Virginia Code § 15.2-2259 confers the right to appeal only upon the applicant. There is no language giving such a right of appeal to a third party or even an aggrieved party as provided in Virginia Code § 15.2-2314 (certiorari to review a decision of a board of zoning appeals) or Virginia Code § 15.2-2311 (appeal to board of zoning appeals of a decision by a zoning administrator or other officer). Barton, 27 Va. Cir. at 21-22.

22-630 Third party challenge against the locality in a declaratory judgment action

A third party may not judicially challenge the approval of a plat in a declaratory judgment action brought under Virginia Code § 8.01-184. Logan v. City Council of the City of Roanoke, 275 Va. 483, 499, 659 S.E.2d 296, 304-305 (2008). In Logan, neighboring landowners brought a declaratory relief action under Virginia Code § 8.01-184, challenging the city’s approval of a subdivision, including the approval of various exceptions authorized under the subdivision ordinance. In dismissing the neighboring landowners’ right to declaratory judgment, the Virginia Supreme Court said:

... Logan has attempted to use the declaratory judgment statutes to create a right of appeal to the circuit courts that does not otherwise exist. Because the declaratory judgment statutes do not create such rights, and in the absence of statutory authority granting her a right of appeal to actions taken under the Subdivision Ordinance, Logan remained a stranger to the subdivision approval process and was not authorized to challenge [the director of planning’s] actions under that Ordinance.

See also Miller v. Highland County, 274 Va. 355, 369, 650 S.E.2d 532, 538 (2007), in which the Virginia Supreme Court rejected a third party challenge under Virginia Code § 8.01-184 to the board of supervisors’ finding of substantial accord under Virginia Code § 15.2-2232. The court said that “the declaratory judgment statutes may not be used to attempt a third-party challenge to a governmental action when such challenge is not otherwise authorized by statute.”

22-640 Third party challenge against the subdivider

A third party may not judicially challenge the approval of a plat in an action against the subdivider. See, Shilling v. Jimenez, 268 Va. 202, 597 S.E.2d 206 (2004) (third parties have no right to challenge the approval of a subdivision plat in an action against the developer). The landowners in Shilling claimed that Loudoun County’s subdivision ordinance had extended to them the right to enforce the requirements of the subdivision ordinance. The Virginia Supreme Court disagreed, noting that the enabling acts reaffirmed the authority of localities to regulate the subdivision and development of land, and that there was a clear legislative intent to vest in the governing body and its agents the sole power to enforce its subdivision ordinances. After noting the applicable 5-year statute of limitations under Virginia Code § 8.01-243(B), the Court said that “[t]hird-party suits challenging subdivisions long after their approval and recordation could have a profound effect on the vested property rights of innocent purchasers and lenders. We will not impute to the General Assembly an intent to create such an effect in the absence of express statutory language.” Shilling, 268 Va. at 208, 597 S.E.2d at 210.
**22-700  Family subdivisions**

A family subdivision is a division of land under family division regulations resulting in a transfer of land from the property owner to a member of his or her immediate family. Compared to a regular subdivision, the procedure for a family division is greatly simplified, and the required improvements and design requirements are minimal. The principal focus of the family division is to promote the values society places upon the disposition of family estates during the lifetime of the owner with a minimum of government regulation and to promote the cohesiveness of the family. 1989 Va. Op. Atty. Gen. 100. On the other hand, the family division procedure was not intended to authorize the subdivision of property for short-term investment purposes without complying with otherwise applicable requirements of the subdivision ordinance. 1989 Va. Op. Atty. Gen. 100.

Although exempt from most of a locality’s subdivision regulations, the lots created by family division are nevertheless subject to the locality’s zoning regulations. Crestar Bank v. Martin, 238 Va. 232, 383 S.E.2d 714 (1989) (subdivision lots created by family division subject to a zoning regulation limiting the placement of mobile homes); 1989 Va. Op. Atty. Gen. 100.

There are three types of family divisions, two of which are discussed below. Virginia Code § 15.2-2244. The third type, which may be established in counties having the urban county executive form of government (the County of Fairfax), is governed by Virginia Code § 15.2-2244(B).

**22-710  Standard family divisions**

Counties that are not experiencing 10% population growth from the next to latest to the latest decennial census (“high growth localities”) are required to adopt reasonable provisions permitting the single division of a parcel for the purpose of sale or gift to a member of the immediate family. Virginia Code §§ 15.2-2241(10) and 15.2-2244(A). The reference to a single division may include a single lot for each member of the property owner’s immediate family. 1989 Va. Op. Atty. Gen. 100.

Family divisions under Virginia Code § 15.2-2244(A) are subject only to the following requirements:

- Any express requirement contained in the Virginia Code.
- Any requirement imposed by the locality that all lots of less than five acres have reasonable right-of-way of not less than ten feet or more than twenty feet providing ingress and egress to a dedicated recorded public street or thoroughfare.

Under this type of family subdivision, a member of the immediate family is defined as any person who is a natural or legally defined offspring, stepchild, spouse, sibling, grandchild, grandparent, or parent of the owner. Virginia Code § 15.2-2244(A). In addition, a locality may include aunts, uncles, nieces and nephews in its definition of immediate family. Virginia Code § 15.2-2244(A). Transfers may be made to beneficiaries of land held in trust, provided that the beneficiaries are members of the immediate family. Virginia Code § 15.2-2244.2. The transfer of lots may go in any direction (e.g., not only from parent to offspring, but from offspring to parent). Also, the family division regulations do not concern themselves with how the property was originally acquired. Thus, offsprings can convey their joint interests in a lot to a parent, who may then effect a family division among the offspring. 1989 Va. Op. Atty. Gen. 100.

**22-720  Family subdivisions in high-growth localities such as Albemarle County**

Counties that are experiencing 10% population growth from the next to latest to the latest decennial census such as Albemarle County are not required to allow division by family subdivision. Virginia Code § 15.2-2244(C).
A family subdivision in Albemarle County is subject to all requirements of the Virginia Code and county regulations. The county’s subdivision ordinance defines member of the immediate family more narrowly than state law under Virginia Code § 15.2-2244(A). The term means the “natural or legally defined off-spring, grandchild, grandparent, or parent of the owner of property.” Albemarle County Code § 14-106. Business entities and trusts are not generally considered members of the immediate family under this definition and may neither create, convey nor receive a lot created by family subdivision. However, Albemarle County has created two exceptions: (1) land owned as part of a trust for estate planning purposes may be considered to be owned by the current owner or a member of his or her immediate family if certain factors are satisfied; and (2) a lot created by family subdivision may be conveyed to the custodian of a qualifying member of the immediate family under the Virginia Uniform Transfers to Minors Act (Virginia Code § 64.2-1900 et seq.). Albemarle County Code § 14-212(A). In a trust where the trustee or trustees is a natural person, the factors that will be considered include:

- Title to the real property is in the name of one of the trustees.
- The intended grantee is a qualifying member of the trustee’s immediate family and, if there is more than one trustee, the intended grantee is a qualifying member of each trustee’s immediate family.
- The trust agreement allows the trustee to convey real property and, if there is more than one trustee, all of the trustees agree in writing to the family subdivision.
- Under the trust agreement, the trustees retain complete control over the trust assets.

Following is another special circumstance where the county attorney concluded that a proposed subdivision could qualify as a family subdivision:

A widow owned a ½ interest in a parcel; the other ½ interest was owned by a trust established by her now-deceased husband, and the widow was the sole beneficiary. The widow wanted to convey a 2-acre parcel to her grandson. The widow would get the ½ interest out of the trust before the 2-acre parcel was conveyed, and was willing to have a condition on the family division plat, stating that the ½ interest in the trust would be transferred to the widow before the parcel could be conveyed to a member of the immediate family. For tax reasons, the widow’s attorney claimed that the plat needed to be approved by the county before the ½ trust interest was transferred to the widow. The plat and the deed(s) would be recorded simultaneously. The conclusion of the county attorney was that the conveyance would be between members of the immediate family.

The county’s subdivision regulations require minimal improvements and only minimal design requirements for private streets and utilities. Albemarle County Code § 14-208(D). Under Albemarle County Code § 14-211, a family subdivision will be approved only if, in addition to satisfying all other applicable requirements of the subdivision ordinance, the agent is satisfied that:

- Only one lot is created for transfer by sale or gift to the same family member.
- The subdivider has not previously divided any other land within the county by family subdivision for transfer by sale or gift to the same family member.
- Each lot proposed to be created complies with the all applicable requirements of the zoning ordinance.
- If the lot proposed to be created will be transferred to a member of the immediate family owning an abutting lot, the family subdivision lot shall be combined with the abutting lot and shall be so noted on the plat.

Under Albemarle County Code § 14-212, an approved family subdivision will be subject to four conditions of approval: (1) the lot must have been owned by the owner or a member of the owner’s immediate family for at least four consecutive years immediately preceding the date the family subdivision plat is submitted; (2) the lot must be
held by the grantee for a minimum period of four years, except for the purposes of securing any purchase money and/or construction loan, including bona fide refinancing, or if the lending institution requires in writing that the grantee’s spouse be a co-grantee or co-owner of the lot; a restrictive covenant must also be recorded restricting transfer of the lot to a third person during the four-year period; (3) the entrance of the principal means of access for each lot onto any public street must comply with VDOT standards and be approved by VDOT; and (4) a restrictive covenant must be recorded which prohibits the sale or conveyance of any lot created to anyone other than a member of the immediate family during the four-year period.

22-730 One concern about family subdivisions: circumvention of the standard subdivision procedures and requirements

One of the concerns localities and members of the general public have about family subdivisions is that they may be used as a means to circumvent the procedures and improvement requirements of a conventional subdivision.

Circumvention can result in long-term problems for the locality because family subdivision regulations require only minimal improvements. Thus, purchasers of family subdivision lots may be faced with roads leading to their lots may meet a lower standard than what is otherwise required. To counter potential abuse, a locality is enabled to enact reasonable provisions to protect against the abuse of the family subdivision scheme. 1986-87 Va. Op. Atty. Gen. 121; Virginia Code § 15.2-2244.1. This authority is greatest for high growth localities operating under Virginia Code § 15.2-2244(C), which allows the locality to define member of the immediate family as it chooses and to impose any other requirements it deems to be appropriate. In fact, high growth localities are not required to allow for family subdivisions. Virginia Code § 15.2-2244(C) (“a subdivision ordinance may include reasonable provisions”).

The locality may require that the proposed family subdivision be submitted to the locality’s subdivision agent for review and approval. 1989 Va. Op. Atty. Gen. 100. If the underlying circumstances indicate that the proposed family subdivision is for the purpose of circumventing the subdivision ordinance, the agent may deny the family subdivision. 1989 Va. Op. Atty. Gen. 100; Virginia Code § 15.2-2244(A). It is reasonable for a locality to require the landowner and the members of the immediate family to execute an affidavit to the effect that the proposed family subdivision is not for the purpose of circumventing the requirements of the subdivision ordinance. 1989 Va. Op. Atty. Gen. 100.

If implemented by a locality, Virginia Code § 15.2-2244.1 allows a locality to address most of the concerns about circumvention of the subdivision ordinance. Section 15.2-2244.1 allows a locality to require that before land may be divided by family subdivision: (1) the property must have been owned for up to 15 consecutive years by the current landowner or a member of the immediate family; and (2) the landowner must agree to place a restrictive covenant on the subdivided property that would prohibit the transfer of the property to a nonmember of the immediate family for a period of 15 years or a lesser period allowed by the locality under prescribed circumstances. Virginia Code § 15.2-2244.1. Finally, a locality may require that the subdivided lot be no more than one acre and otherwise meet any other express requirement imposed by the locality. Virginia Code § 15.2-2244.1.

Albemarle County requires that the land that is the subject of a family division be owned by the current owner or a member of his or her immediate family for at least four consecutive years immediately preceding the date the family subdivision plat is submitted for review. Albemarle County Code § 14-212(A). The county also prohibits any lot created by the family subdivision, including the residue, from being transferred to a person other than an eligible member of the immediate family for a period of four years after the date of recordation of the plat, with limited exceptions. Albemarle County Code § 14-212(B).

22-800 Vacation of a subdivision plat

All or part of a subdivision plat may be vacated according to the procedures provided by law. See Virginia Code § 15.2-2271 et seq. The term vacation implies an abandonment, extinguishment, or a permanent ending of the recorded plat, rather than a modification or alteration of it. 1980-81 Va. Op. Atty. Gen. 335. Not every change to a subdivision plat requires that the plat be vacated to effect the change. 1979-80 Va. Op. Atty. Gen. 330. For example, if the
subdivider makes changes affecting lot sizes, or desires to remove a lot from a plat, vacation is necessary. 1979-80 Va. Op. Atty. Gen. 330. However, the division of one lot of a subdivision into two or more lots constitutes a resubdivision, which is treated and processed as a subdivision. 1979-80 Va. Op. Atty. Gen. 330; Virginia Code § 15.2-2201. See Albemarle County Code § 14-106 (definition of subdivision).

A plat may be vacated either before or after a lot created by the plat is sold. Virginia Code §§ 15.2-2271 (before), 15.2-2272 (after). The statutory procedures for vacating all or part of a plat are mandatory in order for the vacation to be effective. 1986-87 Va. Op. Atty. Gen. 128. The manifest purpose of the statutory procedures is to prevent diminution of public uses and conveniences guaranteed in the original plan of subdivision. 1986-87 Va. Op. Atty. Gen. 128.

An 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, 492 S.E.2d 113 (1997) (affirming circuit court’s grant of town’s demurrer in action by landowners challenging the town council’s refusal to consent to the landowners’ request to vacate subdivision plat; action also held not to be unreasonable).

22-810 Vacation of a plat before a lot is sold

Before a lot is sold, a recorded subdivision plat or part thereof may be vacated either by written instrument or by ordinance, as follows:

• **Written instrument:** A plat may be vacated by a written instrument declaring the plat to be vacated. Virginia Code § 15.2-2271(1). The instrument must be signed by the owners, proprietors and trustees who signed the plat, and must be consented to by the locality. Virginia Code § 15.2-2271(1). Once duly executed and approved by the locality, the instrument is recorded. Virginia Code § 15.2-2271(1).

• **Ordinance:** A plat may be vacated by ordinance, provided that no facilities for which bonding is required by the locality have been constructed on the property and no facilities have been constructed on any related section of the property located in the subdivision within five years of the date on which the plat was first recorded. Virginia Code § 15.2-2271(2). In determining whether to adopt the ordinance, the locality’s governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation. See Virginia Code § 15.2-2271(2). A noticed public hearing must be held and any person aggrieved by file an action in circuit court challenging the adoption of the ordinance. Virginia Code § 15.2-2271(2). A certified copy of the ordinance of vacation may be recorded with the clerk of the circuit court. Virginia Code § 15.2-2271(2).

The recording of the written instrument or ordinance operates to destroy the force and effect of the recording of the vacated plat and divests all public rights in, and reinvests the owners, proprietors and trustees, if any, with the title to the streets, alleys, easements for public passage and other public areas laid out or described in the plat. Virginia Code § 15.2-2271(1) and (2).

22-820 Vacation of a plat after a lot is sold

If any lot has been sold, a recorded subdivision plat or part thereof may be vacated either by written instrument or ordinance, as provided below. Obviously, vacation of all or part of a plat after a lot has sold becomes more complicated because more parties (lot owners and the subdivider), sometimes having competing interests.

• **Written instrument:** A plat may be vacated by written instrument stating agreement to the vacation. Virginia Code § 15.2-2272(1). The instrument must be signed by all of the owners (including creditors whose debts are secured by a recorded deed of trust or mortgage) of lots shown on the plat and by a representative of the locality. Virginia Code § 15.2-2272(1). If the instrument has the effect of extinguishing utility easements, the owners of those easements must sign the instrument as well. 1986-87 Va. Op. Atty. Gen. 128; see Virginia Code § 15.2-2275. If only areas involving drainage easements or street rights-of-way will be vacated, and the vacation does not impede or alter drainage or access for any lot owners other than those lot owners immediately adjoining or contiguous to the vacated area, then only the owners immediately adjoining or contiguous to the vacated area
must sign the instrument. Virginia Code § 15.2-2272(1). Conversely, if the vacation would impede or alter the drainage or access for all the owners of lots contained on the plat, then the signatures of all those owners are required. 1996 Va. Op. Atty. Gen. 61. Once duly executed, the instrument is recorded with the clerk of the circuit court. Virginia Code § 15.2-2272(1).

- **Ordinance.** A plat may be vacated by ordinance, initiated on the motion of one of the members of the governing body or on the application of any interested person. Virginia Code § 15.2-2272(2). In determining whether to adopt the ordinance, the governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation. See Virginia Code § 15.2-2272(2). In addition, the governing body should observe constitutional principles such as due process and understand that, as always, the legislative power must be exercised in good faith. 1984-85 Va. Op. Atty. Gen. 297. A noticed public hearing must be held and any person aggrieved by filing an action in circuit court challenging the adoption of the ordinance. Virginia Code § 15.2-2272(2).

In Booher v. Board of Supervisors of Botetourt County, 65 Va. Cir. 53 (2004), the owner of a parcel (the “church parcel”) abutting a subdivision vacated by ordinance under Virginia Code § 15.2-2272 alleged that it was irreparably harmed by the plat’s vacation. The vacation of the plat also vacated a public right of way that would provide the only possible access to the church parcel once it was developed. In overruling the board’s demurrer, the circuit court concluded that the complaint did not need to allege “unreasonableness” in the ordinance under Virginia Code § 15.2-2272(2), but only “irreparable damage.” The circuit court also overruled the demurrer and special plea of another defendant that was made on the ground that the owner of the church parcel had failed to allege a cause of action and lacked standing. That defendant’s theory was that the owner of the church parcel had no remedy under Virginia Code § 15.2-2272(2) because the church parcel was not within the subdivision. The court rejected this theory because Virginia Code § 15.2-2272(2) conferred standing on “the owner of any lot shown on the plat” who showed that he will be irreparably damaged. Booher, 65 Va. Cir. at 57-58. In this case, the church parcel was shown on the subdivision plat that was vacated. The court concluded that if the General Assembly had intended to confer standing only on the owner of a lot within the subdivision, it “could easily have used more restrictive language.” Booher, 65 Va. Cir. at 59.

The recording of the written instrument or ordinance operates to destroy the force and effect of the original recording of the vacated plat and vests fee simple title to the centerline of any streets, alleys or easements for public passage so vacated in the abutting lot owners free and clear of any rights of the public or other owners of lots shown on the plat. Virginia Code § 15.2-2274. This vesting of fee simple title is also subject to the rights of the owners of any public utility installations which have been previously erected in the streets, alleys or easements. Virginia Code § 15.2-2274. If a street, alley or easement for public passage is located on the periphery of the plat, the title for its entire width vests in the abutting lot owners. Virginia Code § 15.2-2274. The fee simple title to any portion of the plat vacated that was set apart for any other public use is revested in the owners, proprietors and trustees, if any, who signed the plat, free and clear of any rights of public use in the same. Virginia Code § 15.2-2274. The vesting of title is automatic; a separate deed is not required. 1980-81 Va. Op. Atty. Gen. 332.

22-830 Relocating or vacating boundary lines by plat

A locality may authorize the boundary lines of any lot to be vacated, relocated or otherwise altered as part of an otherwise valid and properly recorded plat of subdivision or resubdivision. Virginia Code § 15.2-2275. No easements or utility rights-of-way may be relocated or altered without the express consent of all persons holding any interest therein. Virginia Code § 15.2-2275. This procedure may be used only if it does not involve relocating or altering streets, alleys, easements for public passage, or other public areas. Virginia Code § 15.2-2275.

Alternatively, a locality may allow lot lines to be vacated by deed provided that no easements or utility rights-of-way located along any of the lot lines may be extinguished or altered without the express consent of the easement holders. Virginia Code § 15.2-2275. The deed must be approved in writing on its face by the locality and must reference the recorded plat by which the lot line was originally created. Virginia Code § 15.2-2275. Once approved by the locality, the deed must be recorded. Virginia Code § 15.2-2275.
Lot owners do not necessarily have a vested right to maintain lots in subdivision at a certain size

One purpose for vacating a plat or resubdividing is to change the sizes of some of the lots. In the absence of a general plan for development restricting lots to a certain size, a conveyance of lots by reference to a recorded map or plat does not in itself raise any implied covenant that the lots will remain as shown on the plat or that they may not be later changed in size or further subdivided. 1979-80 Va. Op. Atty. Gen. 327.

However, when the necessary covenants or other terms and conditions restricting lot sizes are in the deed of conveyance itself, or otherwise in the chain of title, the resubdivision of originally platted lots is prohibited. Friedberg v. Riverpoint Building Committee, 218 Va. 659, 239 S.E.2d 106 (1977). The subdivision enabling legislation (Virginia Code § 15.2-2240 et seq.) does not require that a subdivider set forth restrictions on lot sizes in deeds or on plats. Thus, the recording of deeds and plats under those provisions does not in itself give rise to any implied covenant as to lot sizes. 1979-80 Va. Op. Atty. Gen. 327. As a result, unless there is a general plan for the development restricting lot sizes in a subdivision, there is no covenant between subdivider and purchasers, or among purchasers, as to the lot sizes, and the purchasers have no vested right in retaining the status quo. 1979-80 Va. Op. Atty. Gen. 327. Note that today subdividers often record restrictive covenants that prohibit the further subdivision of the lots within the development.

A note about notes on plats: sometimes they may be binding on the subdivider or its successors

In City of Chesapeake v. Dominion Security Plus Self Storage, LLC, 291 Va. 327, 785 S.E.2d 403 (2016), the owners of land being subdivided agreed to a note on a subdivision plat under review by the City of Chesapeake. The note addressed the owners’ reservation for future purchase by the city a portion (4,943 square feet) of a 4.5 acre parcel being subdivided, and that the purchase value of the portion would be based on the fair market value as of the date the city decided to exercise its right to purchase the land. The note concluded: “The owners agree that it shall not make or have any claims for damage to the said improvements or damages to the residue [of] the owners’ property by reason of the said purchase.” The subdivision plat was approved by the City and recorded. The owners sold the parcel to Dominion.

After the city filed its petition for condemnation, Dominion answered that it was not bound by the reservation because it was an unlawful exaction without due process, the reservation was beyond the city’s authority, and that the condemnation resulted in a reduction in market value to the remaining property because of loss of reasonable access, visibility, and other causes. The city responded that the note on the subdivision plat was a valid and enforceable contract. The trial court agreed, but allowed Dominion to present evidence of damages to the residue because, when the plat was recorded, the damages were not foreseeable. The trial court awarded Dominion $2,156,789.18 for the damages to the residue.

The city appealed, and the Virginia Supreme Court held that the note on the plat was a contract that was enforceable by the city, and foreseeability of damages to the residue was not a term of the contract. The award of $2,156,789.18 for damages to the residue was reversed, leaving $44,141.00 for the value of the property that was acquired.
Chapter 23

Site Plans

23-100 Introduction

A site plan is a proposal for a development, including all covenants, grants or easements and other conditions relating to use, location and the bulk of buildings, density of development, common open space, public facilities and other information as required by the locality’s ordinance. Virginia Code § 15.2-2201. In plain language, a site plan is a schematic drawing showing how one or more parcels will be developed, i.e., where the buildings, parking lots, roads and other improvements will be located.

Although site plans typically are required to be submitted and approved in accordance with a locality’s zoning regulations, site plan regulations are a hybrid of both zoning and subdivision regulations. For example, a locality’s site plan regulations must include the mandatory provisions of a subdivision ordinance found in Virginia Code § 15.2-2241 and may include the optional provisions in Virginia Code §§ 15.2-2242 through 15.2-2245. Virginia Code § 15.2-2246 (note that these sections include Virginia Code §§ 15.2-2244 and 15.2-2244.1, pertaining to family subdivisions, which do not translate to being applied to site plans). Likewise, site plans are subject to the submittal and approval requirements applicable to subdivision plats found in Virginia Code §§ 15.2-2258 through 15.2-2261. Virginia Code § 15.2-2258.

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This chapter reviews the general substantive and procedural requirements for submitting, reviewing, acting on site plans, as well as other general issues pertaining to site plans.

23-200 The scope of the authority to regulate the development of land under a site plan

The substantive requirements of a locality’s site plan regulations are based on the enabling authority found in Virginia Code §§ 15.2-2241 through 15.2-2245, applicable to subdivisions, but which also are made applicable to site plans by Virginia Code § 15.2-2246. These requirements are set out in sections 22-310, 22-320 and 22-330.

The reader should note that because much of the state law applicable to subdivision plats also applies to site plans, the following sections are similar to sections 22-400 through 22-640, with adjustments made to include site plan-specific regulations and requirements.

23-300 The procedures to review and act on a site plan

Localities variously assign site plan review and approval to a locality’s designated agent or other officer, to the planning commission or to the governing body itself. See 1991 Va. Op. Atty. Gen. 68. In Albemarle County, this function is primarily delegated to the site plan agent within the department of community development.

Once a developer has complied with all existing ordinances, the function of approving a site plan becomes ministerial, and the plan must be approved. Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc., 216 Va. 582, 221 S.E.2d 534 (1976) (pertaining to a subdivision plat); Planning Commission of City of Falls Church v. Berman, 211 Va. 774, 180 S.E.2d 670 (1971); see section 8-300 for a discussion of the ministerial nature of site plans.
One circuit court has said that, although the state enabling legislation provides some criteria which must be satisfied before a site plan can be approved, it does not provide an exhaustive list of what is to be considered before approval or disapproval. See Dorn v. Fairfax County Board of Supervisors, 28 Va. Cir. 133 (1992). Another circuit court has said that a zoning ordinance may give the agent or the commission the authority to make its approval of a final site plan subject to reasonable conditions. Schalk v. Planning Commission of City of Winchester, 1987 Va. Cir. LEXIS 319, 1987 WL 488696 (1987) (holding that a condition was not arbitrary and capricious even though the applicant opposed the condition and the public works director was of the opinion that it was not necessary; the members of the commission could properly consider their own personal knowledge they may have gained concerning a particular site and its environs and could give consideration to matters within the personal knowledge of its members in arriving at a decision). However, given the ministerial nature of site plans, Schalk is likely an anomaly because those conditions cannot extend beyond requiring the developer to comply with some applicable requirement in the site plan regulations.

23-310 The preliminary site plan

Localities may require that a developer submit a preliminary site plan for approval. Virginia Code § 15.2-2260(A). A preliminary site plan is a schematic representation of the land proposed to be developed. A preliminary site plan allows the locality to review the proposed development for compliance with the applicable regulations before the developer has all of the necessary engineering work performed.

Following is a table summarizing the key steps and events in having a preliminary site plan approved by Albemarle County (Albemarle County refers to preliminary site plans as “initial site plans”; they are referred to as preliminary site plans in this chapter).

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<td>2. Submittal of preliminary site plan and determination of completeness.</td>
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<td>3. Notice by the agent to abutting landowners and members of the board of supervisors and the planning commission.</td>
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<td>8. Action on the preliminary site plan by the agent.</td>
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The key steps in the preliminary site plan review process, and the requirements to assure compliance with state law, are discussed below.

- **Determination of completeness**: When the preliminary site plan is submitted, the clock begins to run to ensure a timely action. The locality is best served by requiring that the plat submittal is complete before it is deemed to be submitted. The determination as to whether a site plan submittal is complete may require the exercise of discretion and not be purely ministerial. Umstattd v. Centex Homes, 274 Va. 541, 650 S.E.2d 527 (2007) (mandamus is not a proper remedy to compel a locality to accept a preliminary plat as complete because the determination as to whether the submittal was complete required the official to investigate the submitted plat, the conditions existing on the subject 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 (such as whether any variations or exceptions would be required)).

- **Time for action**: A preliminary site plan must be acted on by the agent within 60 days after it was submitted, provided that if state agency approval is required of a feature (such as the street design), the site plan must be acted upon within not more than 35 days after receipt of all state-agency approvals (who must act within 45 days after receiving the preliminary site plan) and within 90 days after the site plan was officially submitted. Virginia Code § 15.2-2260(C). If the agent fails to timely act on the site plan, the developer may, after giving ten days’ notice to the locality, petition the circuit court “to enter an order with respect thereto as it deems proper, which

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may include directing approval of the [site plan].” *Virginia Code § 15.2-2260(D).* Localities with a population greater than 90,000 based on the 2000 United States Census must act on a preliminary site plan for the development of commercial or industrial uses according to an alternative timeline (not applicable to Albemarle County, whose 2000 population was about 84,000). *Virginia Code § 15.2-2260(C).*

- **Requirements if the preliminary site plan is disapproved:** If the agent does not approve the preliminary site plan, he must state in writing the reasons for the disapproval and state what corrections or modifications to the site plan will permit its approval. *Virginia Code § 15.2-2260(C).* The agent should ensure that this writing is prepared with care, and that it only identifies the express requirements of the applicable regulations as grounds for disapproval. The failure of a preliminary site plan to incorporate mere recommendations, whether stated in the regulations or suggested by the agent, staff or anyone else, may never be the basis for disapproving a preliminary site plan. In lieu of disapproving the preliminary site plan, the agent should always consider approving it with conditions requiring that the required corrections be addressed with the final site plan. Whether this alternative can be used in a particular situation will depend on the type and extent of the corrections required. For additional discussion regarding the disapproval of a site plan, see section 23-400.

- **Options available to the developer if the preliminary site plan is disapproved:** If the agent disapproves a preliminary site plan and the developer contends that the disapproval was not properly based on the applicable regulations, or was arbitrary or capricious, it may appeal the disapproval to the circuit court. *Virginia Code § 15.2-2260(E).* The appeal must be filed within 60 days after the written disapproval by the agent. *Virginia Code § 15.2-2260(E).* Albemarle County provides the developer the option to first appeal the disapproval to the planning commission and, thereafter, the board of supervisors. *Albemarle County Code § 18-32.4.2.6.* For additional discussion regarding judicial challenges to a decision pertaining to a site plan, see section 23-500.

An approved preliminary site plan is valid for a period of five years, provided the developer: (1) submits a final site plan for all or a portion of the property within one year after the approval (or a longer period provided in the site plan regulations); and (2) thereafter diligently pursues approval of the final site plan. *Virginia Code § 15.2-2260(F).* After three years have passed since the preliminary site plan was approved, and upon 90 days’ written notice to the developer, the agent or the commission may revoke the approval of the preliminary site plan upon a finding that the developer has not diligently pursued approval of the final site plan. *Virginia Code § 15.2-2260(F).*

As a result of the economic downturn that began in 2008, the General Assembly has extended the validity of qualifying preliminary site plans by statute. *Virginia Code § 15.2-2209.1(A)* provides that any valid preliminary site plan that was outstanding as of January 1, 2017 shall remain valid under July 1, 2020, or a later date approved or agreed to by the locality. This extension also applies to any other plan or permit associated with the preliminary site plan for the same period.

Vested rights may arise from an approved preliminary site plan. See chapter 19.

### 23-320 The final site plan

A final site plan is a schematic representation of the land proposed to be developed that is in a final form. Following is a table summarizing the key steps and events in having a final site plan approved by Albemarle County.

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The key steps in the process, and the requirements to assure compliance with state law, are discussed below. The reader will note that although these five key steps are similar to those pertaining to preliminary site plans,
Virginia Code § 15.2-2259 (applicable to final subdivision plats and site plans) and Virginia Code § 15.2-2260 (applicable to preliminary subdivision plats and site plans) do not use identical language.

- **Determination of completeness**: As with preliminary site plans, when a final site plan is submitted, the clock begins to run to ensure a timely action. The locality is best served by requiring that the site plan submittal is complete before it is deemed to be submitted. One difference between preliminary and final site plans is that Virginia Code § 15.2-2259(A)(1) expressly refers to a final site plan being officially submitted. A site plan is officially submitted within the meaning of Virginia Code § 15.2-2259 when the developer files an application in the appropriate form in the proper office, accompanied by the fee, and submits a site plan for the purpose of review which contains all of the data reasonably required by the site plan regulations. *Fairview Co. v. Board of Supervisors of Spotsylvania County*, 21 Va. Cir. 193 (1990) (subdivision plat; once the basic requirements are met, the agent must review the plat and approve or disapprove it; the agent may not refuse to act on a plat, otherwise properly submitted, on the ground that the proposed plat violates certain applicable regulations). A locality may not delay official submission or any proposed site plan by requiring presubmission conferences, meetings, or reviews. *Virginia Code § 15.2-2259(A)(3).*

- **Time for action**: A final site plan must be acted on by the agent within 60 days after it was officially submitted, provided that if state agency approval is required of a feature (such as the street design), the site plan must be acted upon within not more than 35 days after receipt of all state-agency approvals (who must act within 45 days after receiving the final site plan). *Virginia Code § 15.2-2259(A)(1).* The agent is required to “thoroughly review the [site plan] and [ ] make a good faith effort to identify all deficiencies, if any, with the initial submission.” *Virginia Code § 15.2-2259(A)(1).* If the final site plan was previously disapproved, the agent must act on the modified, corrected and resubmitted site plan within 45 days. *Virginia Code § 15.2-2259(A)(1).* If the agent fails to timely act on the site plan, the developer may, after giving ten days' notice to the locality, petition the circuit court “to decide whether the [site plan] should or should not be approved.” *Virginia Code § 15.2-2259(C).* Localities with a population greater than 90,000, based on the 2000 United States Census must act on a final site plan for the development of commercial or industrial uses according to an alternative timeline (not applicable to Albemarle County, whose 2000 population was about 84,000). *Virginia Code § 15.2-2259(A)(2) and (3).* The period within which an action must be taken does not begin with filing a site plan that is in an inappropriate form. *Fairview Co., supra.*

- **Requirements if the final site plan is disapproved**: If the agent does not approve the final site plan, “specific reasons for disapproval shall be contained either in a separate document or on the [site plan]. The reasons for disapproval shall identify deficiencies in the [site plan] that cause the disapproval by reference to specific duly adopted ordinances, regulations or policies and [ ] identify modifications or corrections as will permit approval of the [site plan].” *Virginia Code § 15.2-2259(A)(1).* The failure of a final site plan to satisfy the lawful conditions of the preliminary site plan approval is, of course, a legitimate basis to disapprove a final site plan. *See Roberts v. Board of Zoning Appeals of Madison County*, 64 Va. Cir. 397 (2004) (county properly disapproved subdivision plat because subdivider failed to comply with condition of plat approval that a pre-existing entrance be abandoned as required under the subdivision ordinance because it was less than 600 feet from the proposed subdivision entrance). *For additional discussion regarding the disapproval of a plat, see section 23-400.*

- **Options available to the developer if the final site plan is disapproved**: If the agent disapproves a final site plan and the developer “contends that the disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious,” it may appeal the disapproval to the circuit court. *Virginia Code § 15.2-2259(D).* The appeal must be filed within 60 days after the written disapproval by the agent. *Virginia Code § 15.2-2259(D).* Albemarle County provides the developer the option to first appeal the disapproval to the planning commission and, thereafter, to the board of supervisors. *Albemarle County Code § 18-32.4.3.7.* *For additional discussion regarding judicial challenges to a decision pertaining to a site plan, see section 23-500.*

An approved final site plan is valid for a period of not less than five years from the date of approval or for a longer period as the agent or the planning commission may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development. *Virginia Code § 15.2-2261(A).*
An approved final site plan that may be a section of a development on the approved preliminary site plan entitles the developer to seek approval of the remaining sections shown on the preliminary site plan for a period of five years after the approval of any section or for a longer period as the agent may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development. Virginia Code §§ 15.2-2241(5). This rule applies only if the developer furnishes to the governing body a certified check, cash escrow, bond, or letter of credit in the amount of the estimated cost of construction of the facilities to be dedicated within the section for public use and maintained by the locality, the Commonwealth, or other public agency. A developer proceeding under this rule is also subject to all of the requirements of Virginia Code § 15.2-2241(5) and the engineering and constructions standards and zoning requirements in effect at the time the site plan for each remaining section is approved. Virginia Code § 15.2-2241(5).

As with preliminary site plans, the General Assembly has extended the validity of qualifying final site plans by statute. Virginia Code § 15.2-2209.1(A) provides that any approved final site plan that was outstanding as of January 1, 2017 shall remain valid under July 1, 2020, or a later date approved or agreed to by the locality. This extension also applies to any other plan or permit associated with the final site plan for the same time period.

Vested rights may arise from an approved final site plan. See chapter 19.

23-400 Disapproval of a site plan

If a preliminary or final site plan is disapproved, the specific reasons for disapproval must be provided to the developer, either in a separate document or on the site plan itself. Virginia Code §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary).

The decision-maker must identify the deficiencies in the site plan that caused the disapproval by reference to specific ordinances, regulations or policies, and also must generally identify modifications or corrections that will permit approval of the site plan. Virginia Code §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary). The decision-maker is required to make a good faith effort to identify all deficiencies, if any, in a final site plan. Virginia Code § 15.2-2259(A).

One trial court has said that, in order for the requirement that the reasons for disapproval be stated in writing to have any legitimate meaning and effect, the reasons must: (1) be the reasons expressed by the agent or the collective action of the members of the planning commission; (2) be clearly communicated to the applicant so that he knows exactly why the plat was not approved; and (3) be in writing. Mountain Venture Partnership Lovettsville II v. Planning Commission of Lovettsville, 26 Va. Cir. 50 (1991). Neither approval by default nor a declaration that the disapproval is null and void is the judicial remedy if the locality fails to provide the required explanation. Mountain Venture, supra.

With respect to preliminary site plans, the Virginia Supreme Court has said that when a local governing body’s disapproval of a preliminary site plan is appealed, the “trial court must sustain the decision unless the local governing body failed to comply with the applicable regulations or acted arbitrarily and capriciously in denying the application. Board of Supervisors of Culpeper County v. Greengael, L.L.C., 271 Va. 266, 277, 626 S.E.2d 357, 363 (2006) (subdivision plat).

Because Virginia Code §§ 15.2-2259 and 15.2-2260 apply to both subdivision plats and site plans, cases pertaining to site plans are included below.

23-410 Disapproval because the site plan fails to comply with an ordinance requirement

The disapproval of a site plan because the developer failed to show compliance with the law outside of the state and local planning, subdivision and zoning laws (Virginia Code § 15.2-2200 et seq.) is not arbitrary and capricious. Dorn v. Board of Supervisors of Fairfax County, 28 Va. Cir. 133 (1992) (but also holding that a decision based on the determination that the applicant failed to properly withdraw the subject property from a condominium regime – a decision of law rather than a decision of fact – was arbitrary and capricious).
Failure to comply with an ordinance requirement will support the disapproval of a site plan. In VACOM, Inc. v. Fairfax County Board of Supervisors, 33 Va. Cir. 39 (1993), one of the issues before the court was whether the county’s disapproval of VACOM’s sixth revision of a site plan for a proposed development near the Route 28/Route 29 intersection in Fairfax County was improperly based on minor deficiencies that served as a mere pretext for the county’s real concern – the redesign of the intersection. The court identified a number of minor deficiencies in the site plan related to frontage, drainage, berms, and correct acreage totals. Although noting that these deficiencies were minor and could be corrected in seven to ten days, the court found that these were legitimate grounds to disapprove the site plan. The court rejected VACOM’s argument that the disapproval of the site plan based on the above deficiencies served as a mere pretext, finding that “any proper basis for rejecting the sixth site plan is sufficient. The failure of the sixth site plan to meet the frontage requirements was clearly a proper basis for objection. Whether the county had ulterior motives for rejecting the sixth site plan is inconsequential if one of the bases of its rejection was proper.” VACOM, 33 Va. Cir. at 48.

23-420 Neither the comprehensive plan nor other policy considerations may be a basis for disapproval

A site plan may be approved only on the basis of whether it complies with all applicable regulations. The comprehensive plan may not be the basis for denying a site plan that is otherwise in conformity with duly adopted standards, ordinances and statutes. Rackham v. Vanguard Limited Partnership, 34 Va. Cir. 478, 479 (1994).

A locality’s site plan regulations may not include provisions that effectively allow a locality to make a land use policy decision when considering a site plan. In Board of Supervisors of Augusta County v. Countryside Investment Co., 258 Va. 497, 522 S.E.2d 610 (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.” In finding that the challenged provisions of the subdivision ordinance went beyond that enabled by Virginia Code §§ 15.2-2241 and 15.2-2242, the Virginia Supreme Court said that a locality may not “under the guise of a subdivision ordinance, enact standards which would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property’s zoning classification.” Countryside Investment, 258 Va. at 504-505, 522 S.E.2d at 613-614.

23-500 Judicial challenges to the approval or disapproval of a preliminary or final site plan

There are at least four possible scenarios when a decision to approve or disapprove a preliminary or final site plan may be challenged in court. Because Virginia Code §§ 15.2-2259 and 15.2-2260 apply to both subdivision plats and site plans, cases pertaining to subdivision plats are included below.

23-510 Challenge by the developer to the disapproval of a site plan

A developer may appeal the locality’s disapproval of a site plan to the circuit court within 60 days after the decision. Virginia Code §§ 15.2-2259(C) (final), 15.2-2260(E) (preliminary). The circuit court’s review is limited to a determination of whether the locality’s disapproval was “not properly based on the ordinance applicable thereto, or was arbitrary or capricious.” Virginia Code §§ 15.2-2259(C) (final), 15.2-2260(E) (preliminary); Sansom v. Board of Supervisors of Madison County, 257 Va. 589, 514 S.E.2d 345 (1999); West v. Mills, 238 Va. 162, 380 S.E.2d 917 (1989). Likewise, the court must sustain the locality’s decision unless the locality failed to comply with the applicable ordinances or acted arbitrarily or capriciously. Board of Supervisors of Culpeper County v. Greengael, L.L.C., 271 Va. 266, 626 S.E.2d 357 (2006) (applied to final plat).

The courts have said that their authority under Virginia Code §§ 15.2-2259(C) and 15.2-2260(E) is sufficiently broad to permit a trial court to approve a plat, if the evidence supports the subdivider’s allegations. Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, 220 Va. 435, 258 S.E.2d 577 (1979) (under state enabling authority, the trial court had the authority to approve a plat that met all applicable requirements; limiting the court’s role to determining whether the county’s disapproval was not properly based upon the applicable ordinance, or was arbitrary or capricious, would be an overly restrictive interpretation of the statute); Sterling Land Corp. v. Planning
23-520  Third party challenge against the locality under Virginia Code §§ 15.2-2259 or 15.2-2260

A third party may not judicially challenge the approval of a site plan in an action against the locality under Virginia Code §§ 15.2-2259 or 15.2-2260. See Barton v. Town of Middleburg, 27 Va. Cir. 20 (1991). Virginia Code § 15.2-2259 confers the right to appeal only upon the applicant. There is no language giving such a right of appeal to a third party or even an aggrieved party as provided in Virginia Code § 15.2-2314 (certiorari to review a decision of a board of zoning appeals) or Virginia Code § 15.2-2311 (appeal to board of zoning appeals of a decision by a zoning administrator or other officer). Barton, 27 Va. Cir. at 21-22.

23-530  Third party challenge against the locality in a declaratory judgment action

A third party may not judicially challenge the approval of a site plan in a declaratory judgment action brought under Virginia Code § 8.01-184. Logan v. City Council of the City of Roanoke, 275 Va. 483, 499, 659 S.E.2d 296, 304-305 (2008). In Logan, neighboring landowners brought a declaratory relief action under Virginia Code § 8.01-184, challenging the city’s approval of a subdivision plat, including the approval of various exceptions authorized under the subdivision ordinance. In dismissing the neighboring landowners’ right to declaratory judgment, the Virginia Supreme Court said:

... Logan has attempted to use the declaratory judgment statutes to create a right of appeal to the circuit courts that does not otherwise exist. Because the declaratory judgment statutes do not create such rights, and in the absence of statutory authority granting her a right of appeal to actions taken under the Subdivision Ordinance, Logan remained a stranger to the subdivision approval process and was not authorized to challenge [the director of planning’s] actions under that Ordinance.

See also Miller v. Highland County, 274 Va. 355, 369, 650 S.E.2d 532, 538 (2007), in which the Virginia Supreme Court rejected a third party challenge under Virginia Code § 8.01-184 to the board of supervisors’ finding of substantial accord under Virginia Code § 15.2-2232. The court said that “the declaratory judgment statutes may not be used to attempt a third-party challenge to a governmental action when such challenge is not otherwise authorized by statute.”

23-540  Third party challenge against the developer

A third party may not judicially challenge the approval of a site plan in an action against the developer. See Shilling v. Jimenez, 268 Va. 202, 597 S.E.2d 206 (2004) (third parties have no right to challenge the approval of a subdivision plat in an action against the developer). The landowners in Shilling claimed that Loudoun County’s subdivision ordinance had extended to them the right to enforce the requirements of the subdivision ordinance. The Virginia Supreme Court disagreed, noting that the enabling acts reaffirmed the authority of localities to regulate the subdivision and development of land, and that there was a clear legislative intent to vest in the governing body and its agents the sole power to enforce its subdivision ordinances. After noting the applicable 5-year statute of limitations under Virginia Code § 8.01-243(B), the court said that “[t]hird-party suits challenging subdivisions long after their approval and recordation could have a profound effect on the vested property rights of innocent purchasers and lenders. We will not impute to the General Assembly an intent to create such an effect in the absence of express statutory language.” Shilling, 268 Va. at 208, 597 S.E.2d at 210.
Chapter 24

Roads

24-100 Introduction

This chapter considers a range of topics pertaining to roads which, as that term is used here, generally refers to publicly maintained roads in counties that are in the secondary system of state highways.¹ The chapter begins with a history of the responsibility for building and maintaining roads in counties, and concludes with private road-related issues in Albemarle County. In between, the chapter examines the dedication of rights-of-way, various issues pertaining to private property rights in relation to roads, a general discussion of the law pertaining to abandoning public rights-of-way and discontinuing state maintenance of roads, and transportation planning. For a discussion of the authority of counties to require road improvements as a condition of development, see chapter 25.

24-200 The Commonwealth is responsible for building and maintaining public roads in Virginia’s secondary highway system

The laws pertaining to the Commonwealth’s public highways are found in Title 33.2 of the Virginia Code. Virginia Code § 33.2-326 places the control, supervision and management of secondary highways on the Virginia Department of Transportation (“VDOT”) and the Commissioner of Highways. Virginia Code § 33.2-326 also expressly withholds from counties the powers conferred to VDOT. For a further discussion of Virginia Code § 33.2-326, see section 24-230.

The secondary highway system consists of all of the public roads, causeways, bridges, landings and wharves in the counties of the Commonwealth that are not included in the state system of primary highways. Virginia Code § 33.2-324. The counties of Arlington and Henrico are exceptions – their roads are not in the secondary system of state highways and they maintain them.

The Commonwealth also has control over the construction and maintenance of roads in the primary highway system, including arterial highways. Virginia Code § 33.2-310 (state highway system).

In order to fully understand a county’s authority to require the installation of, or improvements to, secondary roads as a condition of approval of a development, it is necessary to be familiar with the history of the secondary road system, and VDOT’s responsibility toward those roads.

24-210 The local public road systems prior to 1932

Prior to 1932, local public roads were built and maintained by counties. This system was described as wasteful and unsuited to modern conditions. Godwin v. Board of Supervisors of Nansemond County, 161 Va. 494, 171 S.E. 521 (1933). In 1906, an act of the General Assembly resulted in the appointment of a State Highway Commissioner who was given general supervision over the construction and maintenance of roads. Acts 1906, ch. 73. In 1918, the General Assembly made a provision for a State highway system, which included most of the main traveled roads. Acts 1918, ch. 10. Secondary roads were not taken in, and remained under local authority. Godwin, supra.


¹ As used in this chapter, the terms roads, streets, and highways are interchangeable unless otherwise noted. As part of the 2014 recodification of Title 33.1 of the Virginia Code, many prior references to roads in Title 33.1 have been changed to highways in Title 33.2.
The state system of secondary highways was established in 1932

In 1932, the General Assembly enacted the Byrd Road Act and abolished the local road systems and established a secondary system of state highways under the direction of the predecessor to VDOT. Acts 1932, ch. 415, cited in Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, 220 Va. 435, 258 S.E.2d 577 (1979). The Department’s Commissioner was responsible for maintaining and improving, including constructing and reconstructing, the secondary roads. The manifest purpose of the Act was to relieve the county taxpayers of the cost of constructing and maintaining roads. County of Henrico v. City of Richmond, 177 Va. 754, 15 S.E. 309 (1941). Thus, since 1932, financing the construction, repair, and maintenance of the State primary and secondary highway systems has constituted a major function of the State government.

The Virginia Supreme Court in Hylton summarized the centralized control of the secondary road system as follows:

The theory of centralized control in and allocation of funds by an objective arbiter presupposes that priorities for highway improvements will be established on a statewide basis in accordance with traffic demands scientifically ascertained, and will not comprise a disconnected assortment of decisions made under the influence of local pressures. Determination of the appropriate method or methods of funding highway projects is a policy decision affecting all areas of the State, a decision that is peculiarly within the exclusive province of the General Assembly.

Hylton, 220 Va. at 441, 258 S.E.2d at 581.

The Byrd Road Act does not expressly preclude a county from requiring a developer to construct needed secondary road improvements. However, this omission does not by implication confer such a power on a county.

The Byrd Road Act in its present form grants authority over secondary roads to VDOT and the Commissioner of Highways, and withholds that authority from counties

Section 2 of the Byrd Road Act is now codified in Virginia Code § 33.2-326. That section places the control, supervision and management of secondary roads on VDOT and the Commissioner of Highways, and provides in part:

The control, supervision, management and jurisdiction over the secondary state highway system shall be vested in the Department [of Transportation] and the maintenance and improvement, including construction and reconstruction, of such secondary state highway system shall be by the Commonwealth under the supervision of the Commissioner of Highways.

One effect of this provision is that a county’s interests in the rights-of-way were transferred to the Commonwealth by operation of law in 1932. Another section of the Act directed the Highway Commission to make and file maps of all public roads in the respective counties. See section 24-240, recognizing that not all roads were taken into the state-maintained system.

Virginia Code § 33.2-326 also expressly withholds from counties the powers conferred to VDOT, as follows:

The boards of supervisors . . . shall have no control, supervision, management, or jurisdiction over such public highways, causeways, bridges, landings, and wharves, constituting the secondary state highway system.

Counties do, however, retain the power to establish new roads which, upon their establishment, become part of the secondary road system, and the power to alter or change the location of any road now in the secondary system. Virginia Code § 33.2-705 et seq. In addition, although a county may not levy taxes or contract any further indebtedness for the construction of, maintenance, or improvement of roads (Virginia Code § 33.2-705), there are several exceptions, including the following:
• A county may accept gifts of money, property, or services to be used on secondary roads. Virginia Code § 33.2-702.

• A county may contribute from its revenue or the special assessment of the landowners on the road in question one-half of the cost to bring certain roads up to the necessary minimum standards for acceptance by VDOT into the secondary system. Virginia Code § 33.2-335.

These exceptions merely authorize a county to expend funds on secondary roads in limited circumstances. They do not confer on the county the authority to require developers to expend funds on established roads.

24-240 The status of public roads not accepted by the Commonwealth for maintenance in 1932; establishing that a road is a public road

The Commonwealth did not accept all of the former county roads into the state secondary highway system. Depending on the evidence, these roads may maintain their status as public roads. The question will turn on whether the road was offered for dedication and accepted as a public road under the common law, as discussed in section 24-320.

24-250 Current requirements for the acceptance of secondary roads

Until recently, many developments were built with limited ingress and egress, with interconnectivity to adjoining lands often completely missing. In 2007, Virginia Code § 33.2-334 was adopted and it directed the Commonwealth Transportation Board to promulgate secondary street acceptance requirements (“SSAR”) the board deemed necessary or appropriate to achieve the safe and efficient operation of the Commonwealth’s transportation network. Virginia Code § 33.2-334(A). The state law, as well as the regulations, have evolved over the past several years. The regulations are codified at 24 VAC 30-92-10 et seq. VDOT’s guidance document, “Secondary Street Acceptance Requirements” (2011) is here: http://www.virginiadot.org/info/secondary_street_acceptance_requirements.asp.

24-300 The dedication of right-of-way

There appear to be three recognized methods by which the public may acquire the right to use land for a public road: “(1) by condemnation, (2) by continuous and adverse use by the public accompanied by some official recognition thereof, and (3) by dedication of the land by the owner to public use coupled with acceptance of the dedication by proper authorities. [citation omitted]” Jones v. King, 37 Va. Cir. 404, 406 (1995). This section analyzes only the second and third methods, and considers both the common law and the statutory authority pertaining to the dedicating land for public roads.

Because a definite and certain grantee was required in order to take land by conveyance or grant at common law, a landowner could not effectively convey or grant an interest in land to the general public as grantee. The Barter Foundation, Inc. v. Widener, 267 Va. 80, 592 S.E.2d 56 (2004). In order to facilitate the creation of public roads and other public areas for the benefit of the general public, the doctrine of dedication evolved and recognized the rights acquired by the public by estopping the dedicator from disputing those rights. Widener, supra.

Dedication “is an appropriation of land by its owner for the public use.” Greenco Corp. v. City of Virginia Beach, 214 Va. 201, 203, 198 S.E.3d 496, 498 (1973), quoted in Mulford v. Walnut Hill Farm Group, LLC, 282 Va. 98, 106, 712 S.E.2d 468, 12 (2011); City of Norfolk v. Meredith, 204 Va. 485, 489, 32 S.E.2d 431, 434 (1963) (“[a] dedication is the setting aside of land, or of an interest therein, to public use”). A right-of-way is a right belonging to a party to pass over land of another. Ryder v. Petra, 243 Va. 421, 416 S.E.2d 686 (1992). Thus, a public right-of-way is the right of the public to pass over land of another.

The burden of proof is on the person seeking to establish a road as a public road “to establish the existence and location of this public road with reasonable certainty.” White v. Reed, 146 Va. 246, 251, 135 S.E. 809, 810 (1926) (holding that the plaintiffs failed to satisfy their burden of proof where, though there was a court order pertaining to the road, there was no report of the road commissioner, no plat showing the location or width of the road, the right
of way claimed did not follow the course indicated in the petition, the evidence was otherwise confusing and there was "no evidence from which it can be confidently inferred that the location of the public road referred to was identical with the ancient right of way").

24-310  A history of the law of dedication

Knowledge of the history of the law of dedication over the years is essential in order to determine whether a purported public right-of-way was properly dedicated because the law in effect at the time of the dedication governs the dedication's validity. For example, if faced with a document from 1937 with the notation: "Offered for dedication for public use," one must know the law of dedication in 1937 to determine whether the dedication was valid. The following history is excerpted, with minor editorial changes, from the Virginia Supreme Court's opinion in Brown v. Tazewell County Water and Sewerage Authority, 226 Va. 125, 306 S.E.2d 889 (1983):

Dedication, at common law, was a grant to the public, by a landowner, of a limited right of use in his land. For a road, the offer is merely that of a public right of passage. No writing or other special form of conveyance was required; unequivocal evidence of an intention to dedicate was sufficient. Until the dedication was accepted by the public, it was a mere offer to dedicate, no matter how finally expressed. Prior to acceptance, the offer to dedicate imposed no responsibilities upon the public and was subject to unilateral withdrawal at any time by the landowner. 2 Minor on Real Property, pps. 1696-1702 (F. Ribble 2d ed. 1928); see also Bradford v. Nature Conservancy, 224 Va. 181, 294 S.E.2d 866 (1982). Acceptance could be formal and express, as by the enactment of a resolution by the appropriate governing body, or by implication arising from an exercise of dominion by the governing authority or from long continued public use of requisite character. Ocean Island Inn v. City of Virginia Beach, 216 Va. 474, 220 S.E.2d 247 (1975). If the land was dedicated to a particular public use and accepted, the public authorities were confined to that use and those necessarily attendant upon it or incidental thereto. 2 Minor on Real Property, supra, p. 1701; see Anderson v. Water Company, 197 Va. 36, 87 S.E.2d 756 (1955).

Beginning in 1887, the General Assembly enacted a series of laws relating to dedications of roads and other public areas within platted, recorded subdivisions. Acts 1889-90 ch. 45, p. 35, Virginia Code 1919 § 5219, provided that the acknowledgement and recording of such a plat would operate to create a public easement or right of passage over roads shown on the plat. Nevertheless, the Virginia Supreme Court consistently held that although such "dedication by map" was irrevocable by the dedicator, the rights of the public were merely inchoate, and that the dedication was not complete until accepted by competent public authority. See Payne v. Godwin, 147 Va. 1019, 133 S.E. 481 (1926).

That statute was replaced in 1946 by the Virginia Land Subdivision Law (Acts 1946, ch. 369), which required that a subdivision plat be prepared by a licensed surveyor or civil engineer, that it be acknowledged by the owners, and that it be approved by the local governing body before recordation. It then provided that the recordation of the plat would operate to transfer the roads shown thereon to the county or city in fee simple. That statute was replaced in 1962 by what became Virginia Code § 15.1-478 and, with further revisions, what is now Virginia Code § 15.2-2265.

24-320  Common law dedication, accomplished by an offer and an acceptance

A common law dedication is a dedication that is accomplished by a procedure other than the statutory procedure established under Virginia Code § 15.2-2265, which is discussed in section 24-340. At common law, dedication is a grant to the public, by a landowner, of a limited right of use in his land. Brown v. Moore, 255 Va. 523, 500 S.E.2d 797 (1998). A common law dedication requires both an offer of dedication and its acceptance by the locality, either formally or by implication. Brown v. Tazewell County Water and Sewerage Authority, 226 Va. 125, 306 S.E.2d 889 (1983).

No writing or other special form of conveyance is required; unequivocal evidence of an intention to dedicate is sufficient. Moore, supra. Until the public accepts the dedication, it is a mere offer to dedicate. Moore, supra.
There is a significant difference between accepting a common law offer to dedicate an urban road as compared to a rural road. The two terms do not appear to be defined in the case law. Most of the published opinions appear to pertain to rural roads.

24-321 Accepting an offer to dedicate an urban road

Accepting an offer of dedication of an urban road by the locality may be formal and express, such as by the adoption of a resolution by the governing body, by implication arising from an exercise of dominion by the governing authority, or from long continued public use of the requisite character. \textit{Brown v. Moore}, 255 Va. 523, 530, 500 S.E.2d 797, 801 (1998).

The doctrine of implied acceptance applies when the public has made such long use of property offered for dedication as to render its reclamation unjust and improper. \textit{Moore}, supra. The doctrine only applies to urban roads. \textit{McNew v. McCoy}, 251 Va. 297, 467 S.E.2d 477 (1996).

Acceptance by implication may be shown by governmental actions demonstrating the exercise of dominion over the property, such as by installing public utility lines in or across a road, opening and paving the road, and performing maintenance on the road. \textit{Moore}, 255 Va. at 530, 500 S.E.2d at 801; \textit{see Ocean Island Inn v. City of Virginia Beach}, 216 Va. 474, 477, 220 S.E.2d 247, 250-251 (1975). In \textit{Moore}, the Virginia Supreme Court found that evidence that the disputed property was passable by means of a four-wheel-drive vehicle and that some people crossed over the disputed property when traveling between two public roads, was insufficient to demonstrate long continued public use of the requisite character, particularly because it failed to show the duration of the usage or its frequency over any period of time.

In 3232 Page Avenue Condominium Unit Owners Association v. City of Virginia Beach, 284 Va. 639, 735 S.E.2d 672 (2012) (not a road case), the issue was whether the evidence was sufficient to establish an implied dedication of a public easement over Cape Henry Beach. The owners association asserted that, in order to establish an implied dedication, the city had to prove that the use by the public was adverse to and exclusive of the use and enjoyment of the property by the association, citing \textit{City of Staunton v. Augusta Corporation}, 169 Va. 424, 193 S.E. 695 (1937) for that proposition. The Virginia Supreme Court affirmed the circuit court’s finding that a public easement had been dedicated. The Court distinguished \textit{City of Staunton} because public use was the only evidence of either dedication or acceptance in that case. In the instant case, the Court concluded that there was ample evidence that the public had used the beach since 1926, the city had patrolled and maintained the beach for over 30 years, and the association had never objected to the city’s exercise of dominion and control over the beach.

The common law dedication of a public right of way in an urban street does not necessarily extinguish any preexisting private easements. \textit{Old Dominion Boat Club v. Alexandria City Council}, 286 Va. 273, 749 S.E.2d 321 (2013). In \textit{Old Dominion}, the boat club was the successor in interest to a 1789 deed that granted an easement over what became Wales Alley to provide “for the more easy communication with the public main Streets and the river . . .” In a separate case, the circuit court had found in 2010 that Wales Alley had been dedicated to the public through over one hundred years of public use and the exercise of dominion and control over it by the city. The circuit court in \textit{Old Dominion} ruled that the boat club’s easement in Wales Alley had been dedicated, along with the fee simple interest, to the city. On appeal, the Virginia Supreme Court held that there was insufficient evidence to establish that the boat club’s preexisting private easement had been expressly or implied dedicated to public use and that changing Wales Alley to a public street did not result in a cessation of the purpose of the boat club’s private easement but, instead, merely facilitated the easement in continuing to fulfill its ongoing purpose. \textit{Old Dominion Boat Club}, 286 Va. at 284-285, 749 S.E.2d at 328.

24-322 Accepting an offer to dedicate a rural road

The general rule is that accepting an offer of dedication of a rural road must appear as a matter of record. In White v. Reed, 146 Va. 246, 252, 135 S.E. 809, 810 (1926), the Virginia Supreme Court stated the settled rule that:

Public highways should be matters of public record, and identified with such reasonable certainty as to apprise the public of their location, and supply them with the means of knowing to what extent they may travel along without becoming trespassers; and also to make known to individuals how much and what portions of their land have been appropriated to public use.

Thus, the search is for some record evidence of not only the location, but also the public nature, of the road. Where record evidence is inconclusive, other evidence will be required.

1. A public rural road may be established by public use combined with official recognition thereof; public use alone is insufficient

The Virginia Supreme Court in Stanley v. Mullins, 187 Va. 193, 200-201, 45 S.E.2d 881, 885 (1948) summarized the longstanding law in Virginia as to whether use of a road by the public establishes it as a public road:

In Gaines v. Merryman, 95 Va. 660, 663-4, 29 S.E. 738, it is said:

“The law with respect to public highways is well settled. In the case of Commonwealth v. Kelly, 8 Gratt. (49 Va.) 632, it was held that ‘the mere user of a road by the public for however long a time will not constitute it a public road; that a mere permission to the public, by the owner of the land, to pass over a road upon it, is, without more, to be regarded as a license, and revocable at the pleasure of the owner; that a road dedicated to the public must be accepted by the county court upon its records, before it can be a public road; and that if a county court lays off a road, before used, into precincts, or appoints an overseer or surveyor for it, thereby claiming the road as a public road, and if, after notice of such claim, the owner of the soil permits the road to be passed over for any long time the road may be well inferred to be a public road.’” [citations omitted]

In Bradford v. The Nature Conservancy, 224 Va. 181, 198-199, 294 S.E.2d 866, 875 (1982), the Virginia Supreme Court explained the requirements for a road to be dedicated to the public and why mere use by the public is insufficient evidence of acceptance to establish a rural road as a public road:

In order for a road to be dedicated to the public, there must be an offer made by the landowner and an acceptance by the public. Harris v. The Commonwealth, 61 Va. 648 (20 Gratt.) 833 (1871). While a dedication may be implied from the acts of the owner, these acts must be unmistakable to show the intention of the landowner to permanently give up his property. West Point v. Bland, 106 Va. 792, 794, 56 S.E. 802, 804 (1907).

This Court has long recognized that what may amount to a dedication in an urban area will not serve the same purpose in a rural one. Commonwealth v. Kelly, 49 Va. 700 (8 Gratt.) 632 (1851). This is because landowners in rural areas frequently allowed roads to be opened through their property without intending a dedication to the public. Id. at 635. Just as important, the government might not have any intention to accept the road and be responsible for its maintenance. Thus, before a rural road can be dedicated, there must be a formal acceptance by the public. Lynchburg Traction Co. v. Guill, 107 Va. 86, 57 S.E. 644 (1907).

Therefore, in order for a common law dedication of a rural road to be complete, there must be: (1) either a written or express offer to dedicate or unequivocal evidence of an intention to dedicate; and (2) a formal acceptance or express assertion of dominion over the road by a public authority. E.S. Chappell & Son, Inc., v. Brooks, 248 Va. 571, 574, 450 S.E.2d 156, 158 (1994) (a “formal acceptance or express assertion of dominion over the road by public authority is required before dedication of a rural road is complete”); Burks Brothers of Virginia v. Jones, 232 Va. 238, 248, 349 S.E.3d 134, 140 (1986); see Dykes v. Friends of the C.C.C. Road, 283 Va. 306, 720 S.E.2d 537 (2012) (circuit court erred in finding that the road in issue was a public road solely by virtue of its long and continuous use by the
general public and recognition of that use by the county). Rural roads cannot be accepted by implication. *McNew v. McCoy*, 251 Va. 297, 300, 467 S.E.2d 477, 479 (1996) (“the doctrine of implied acceptance only applies in urban areas”). Express acceptance would be in the form, for example, of a resolution by the appropriate governing body. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125, 129-130, 306 S.E.3d 889, 891 (1983); see *Dykes*, supra (the board of supervisors’ acknowledgement in 1941 by a then owner of the property to maintain a gate and cattle guard where the road in issue intersected with a state road was “clearly not a formal acceptance” of the road in issue as a public road). The express exercise of dominion over the road can be in the form of paving and maintaining the road or installing and maintaining public utilities. See, e.g., *The Barter Foundation, Inc. v. Widener*, 267 Va. 80, 90, 592 S.E.2d 56, 61 (2004) (pertaining to a street in a town). In *Kertulla v. Candea*, 68 Va. Cir. 414 (2005), the road at issue had been identified for more than 150 years as a public road, deed descriptions of adjacent properties were identified with reference to the road, the county had acted upon and denied requests to adjust the alignment of the road, and the road had never been abandoned. The circuit court found that “[f]requent, long, and continuous use of the road by the public, coupled with recognition by the county government,” supported the conclusion that the road was a public road. *Id.* at 415.

In *Bradford*, the Court held that although the plaintiffs presented evidence that the roads in question were used by the public, there was no evidence the county ever accepted the roads, either by making an entry on the public records or by assuming the duty to maintain them.

2. **Virginia Code § 33.2-105 establishes the standards for prima facie evidence that a road is a public road**

Virginia Code § 33.2-105 provides how a person may establish that a road is a public road by recognition of the public use:

When a way has been worked by highway officials as a public highway and is used by the public as such, proof of these facts shall be prima facie evidence that the same is a public highway. And when a way has been regularly or periodically worked by highway officials as a public highway and used by the public as such continuously for a period of 20 years, proof of these facts shall be conclusive evidence that the same is a public highway. In all such cases, the center of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way and in the absence of proof to the contrary, the width shall be presumed to be 30 feet.

Nothing contained in this section shall be construed to convert into a public highway a way of which the use by the public has been or is permissive and the work thereon by the highway officials has been or is done under permission of the owner of the servient tenement.

In summary, Virginia Code § 33.2-105 requires evidence that the road was worked by highway officials as a public road and that it has been used by the public for a period of 20 years or more as such.

In *Mulford v. Walnut Hill Farm Group, L.L.C.*, 282 Va. 98, 712 S.E.2d 468 (2011), the Virginia Supreme Court held that the owner of a landlocked parcel failed to establish that an ancient roadway was a public road. Although there was evidence that the roadway was in use before the American Revolution and that it had been constructed at some point as a plank road, there was no evidence that it was a public road. One expert speculated that the road was probably planked by private landowners who wanted to make the roadway accessible to their properties, and that it may have been re-planked by Civil War troops. However, there was no evidence that the roadway had been worked by road officials or that it had been used continuously by the public for at least 20 years. There also was no evidence from the county court records or board of supervisors’ minutes recognizing the road as a public road prior to the Byrd Road Act.

In *Barks Bros. of Virginia v. Jones*, 232 Va. 238, 349 S.E.2d 134 (1986), the Virginia Supreme Court held that a trail was not a public road in the absence of evidence that the requirements for a common law dedication were satisfied, even though the trails were used by the public. The Court noted that although the trail had been improved and
maintained by the Civilian Conservation Corps and the Virginia Forest Service in the past, these public agencies were not “road officials” (now, “highway officials”) within the meaning of Virginia Code § 33.2-105.

In *Kihlgren v. Sleeter*, 202 Va. 507, 118 S.E.2d 514 (1961), the Virginia Supreme Court concluded that the evidence supported the chancellor’s finding that a road was a public road where there was evidence that the road had been worked under the supervision of one of the overseers of roads in the Mt. Gilead District of Loudoun County. The overseer was the father of one of the witnesses who testified that he worked the road under his father’s supervision and that he and his team were paid for their work by public authority.

### 3. How the courts have considered deeds, maps, and court orders as evidence

As time passes, and we move farther away from the adoption of the Byrd Road Act and the establishment of statutory dedication under modern subdivision laws, it becomes more difficult to establish a rural road as a public road under the common law. Where eyewitnesses are no longer alive and records that the roadway was worked by road officials have been lost or destroyed, deeds, maps and court orders are the types of evidence that may be presented though none of them, standing alone, may satisfy the burden of proof.

The courts will not presume a dedication or acceptance by the proper authority because records have been lost or destroyed. *White v. Reed*, 146 Va. 246, 251, 135 S.E. 809, 810 (1926), quoting *Gaines v. Merryman*, 95 Va. 660, 665, 29 S.E. 738, 740 (1898). If public records are lost or destroyed, then deeds may provide some relevant evidence. As summarized in *Kinton v. Jolly*, 21 Va. Cir. 132, 137-138 (1990):

> Should public records, which are required with rural roads, be destroyed or lost, then the effect of such loss is to change the mode of proof as to their contents and to dictate admission of secondary evidence in the place of an exemplification of the record. *White v. Reed*, 146 Va. 246, 135 S.E. 809 (1926). Such secondary evidence includes “ancient” deeds and maps, deeds between third parties, and declarations in deeds to parties in the action. *Keppler v. City of Richmond*, 124 Va. 592, 98 S.E. 747 (1919).

A deed between third parties to a road has been “held competent upon the question of the location and existence of the way as a matter of public and general interest upon which reputation is admissible.” *Keppler v. City of Richmond*, 124 Va. 592, 98 S.E. 747 (1919), citing 1 Elliott on Roads and Streets, Section 198. Such evidence is not entitled to much weight and may be “rebutted by very slight evidence of a more definite character.” *Keppler*, 124 Va. 607 (1919), citing Greenleaf on Evidence, Section 139. Recitals of fact in a deed or deed of trust are prima facie evidence of those facts. Va. Code Ann. Section 8.01-389 (1984).

Thus, at most, deeds provide rebuttable evidence about the location and existence of a road, but are not evidence that the road was a public road. *See Jones v. King*, 37 Va. Cir. 404, 408 (1995). In *Kinton*, the circuit court held that, even assuming that the public records had been lost, the plaintiffs failed to establish a public road through the deeds of some of the defendants where the deeds referenced “Old Richmond or Mill Road.” *Kinton*, 21 Va. Cir. at 138. The court said that the plaintiffs had “merely established that a road existed” but that they had failed to prove “use by the public with acquiescence of the owner.” *Id*.

Maps may or may not provide evidence of the express exercise of dominion over a road by a public authority. A road’s absence from a VDOT map of public roads does not appear to be determinative as to whether it is a public road. *See Bond v. Green*, 189 Va. 23, 34, 52 S.E.2d 169, 174 (1949) (the fact that VDOT maps “do not include a county road does not alone establish a discontinuance or abandonment of such road as a public highway”); *Kertulla v. Candea*, 68 Va. Cir. 414, 415 (2005) (the “failure of the Commonwealth to accept the road for maintenance in 1932 does not defeat” the conclusion that the roadway at issue in that case was a public road). A locality’s maps may provide some evidence as to whether a road is a public road. In *Mulford v. Walnut Hill Farm Group, LLC*, 282 Va. 98, 712 S.E.2d 468 (2011), the Virginia Supreme Court held that the owner of a landlocked parcel failed to establish that an ancient roadway was a public road. In so holding, the Court noted that in 1921, in conjunction with road funding from the Commonwealth, the county created a map of its roads and the roadway in issue did not appear on that
map. In *Kinton*, the plaintiffs offered county maps in support of showing the existence of a county road. The circuit court said that “such maps although probative, are not sufficient to establish either governmental dominion or public use under § 33.1-184 [now, § 33.2-105].” *Kinton*, 21 Va. Cir. at 135.

The creation of a road by court order does not, in and of itself, establish the road as a public road. See *White v. Reed*, 146 Va. 246, 249-251, 135 S.E. 809, 809-810 (1926). “A court order establishing a public road, without more, does not create a public road in perpetuity.” *Kiefer v. Mikovch*, 68 Va. Cir. 505, 508 (2004). In *Kiefer*, landowners sought to establish that a “gravel lane” was a public road, relying on an 1890 court order creating a public road as shown on a survey plat. The circuit court concluded that the landowners failed to establish that the gravel lane existed as a public road, concluding that there was no evidence that a road was ever established over the designated lines shown on the plat, the location of the gravel lane did not coincide with the alignment shown on the plat, there was no evidence that the county or the state ever maintained the gravel lane or made those travelways part of the secondary system of state highways, and there was no evidence to show where the purported public road existed in relation to present property lines.

**24-330 Statutory dedication accomplished by recording a map (1887-1945)**

The law in Virginia from 1887 through 1945 allowed what was known as “dedication by map.” As noted in section 24-310, the Virginia Supreme Court has consistently held that dedication by map was irrevocable by the dedicatory, the rights of the public were merely inchoate (i.e., not fully completed or developed), and that the dedication was not complete until accepted by a competent public authority. *The Barter Foundation, Inc. v. Widener*, 267 Va. 80, 592 S.E.2d 56 (2004); *Payne v. Godwin*, 147 Va. 1019, 133 S.E. 481 (1926).

In *Widener*, the parties were landowners on both sides of a street that had been dedicated by map in 1944 along with two other streets. The street had never been improved, existed in a generally natural condition with trees and grass, and had been used minimally by the public over the years. Widener desired to use the street as an additional means of ingress and egress to its property; Barter claimed that the town had abrogated the dedication of the street through lack of use, and that it was the owner of the street free and clear of the dedication. The Virginia Supreme Court found that town had not manifested an intent to accept the dedication because, of the three streets dedicated by map to public use in 1944, only one had been opened to public use and the town maintained only a portion of it; and another street had been accepted by the town, though it had never been paved or opened to public use, and it remained in a more or less natural state. By contrast, there was express testimony that the town had not accepted the street at issue.

The effect of the town’s failure to accept the dedication in *Widener* was that it never assumed the duty to maintain the street. However, the Court went on to state: “[T]he public had the right to use the property for passage in accord with the expressed intent of [the original subdivider’s] certificate and plat.” *Widener*, 267 Va. at 92, 592 S.E.2d at 62. The Court concluded by holding that the occasional use of the street by the public and the town’s requirement that Widener obtain permission before clearing some of the vegetation was evidence of a requisite degree of dominion and control so as to find that the town had not abandoned the street.

**24-340 Statutory dedication accomplished by recording a subdivision plat (1946-present)**


24-341 The rights and responsibilities transferred by a statutory dedication

Because mere recordation of a properly approved subdivision plat vests fee simple title in the governing body as to all roads shown thereon, the requirement of prior approval by a competent public authority is indispensable. Brown v. Tazewell County Water and Sewerage Authority, 226 Va. 125, 306 S.E.2d 889 (1983). The recorded subdivision plat subsumes and replaces the common-law requirement of acceptance after dedication. Brown, supra. It is the only protection the public has against liability thrust upon it, without its knowledge or consent, by a developer. Brown, supra.

Once the subdivision plat is recorded, title to the portion of the premises dedicated for roads and other public use is transferred to the locality. Virginia Code § 15.2-2265; 1978-79 Va. Op. Atty. Gen. 253. Approval of the subdivision plat does not, however, imply acceptance of the obligation to maintain the roads. 1978-79 Va. Op. Atty. Gen. 253. Nor does mere recordation create that obligation. Virginia Code § 15.2-2268. Even though a road may be dedicated to public use, it does not become a road in the secondary state highway system until it is accepted by VDOT.

24-342 The doctrine of partial assumption in a statutory dedication

If a governing body has accepted part of the roads appearing on a recorded plat and no intention to limit the acceptance is shown, the partial acceptance constitutes acceptance of all of the roads, provided the part accepted is sufficiently substantial to evince an intent to accept the comprehensive scheme of public user reflected in the plat. Ocean Island Inn v. City of Virginia Beach, 216 Va. 474, 220 S.E.2d 247 (1975).

The doctrine of partial assumption assumes a situation where a subdivision plat contains several roads. Hurd v. Watkins, 238 Va. 643, 385 S.E.2d 878 (1989). In that situation, if the locality accepts enough of the platted roads without saying that its acceptance is limited, then it will be deemed to have accepted all of them. Hurd, supra.

24-343 Reservations of rights by developers in a statutory dedication

Land that is identified on a plat as reserved is not offered for dedication; the concepts of reservation and dedication are inconsistent with one another. Hurd v. Watkins, 238 Va. 643, 385 S.E.2d 878 (1989).

Virginia Code § 15.2-2265 provides “but nothing contained in this article shall affect any right of a subdivider of land heretofore validly reserved.” This language means that reservations of property made prior to submitting the plat and invoking the statutory dedication are not prohibited. Hurd, supra. Thus, a subdivider may record restrictive covenants, or reserve such a right, that apply to a publicly dedicated road only if the covenants were “heretofore validly reserved” as provided in Virginia Code § 15.2-2265. Cavalcade Homeowners Association v. Beacon, 47 Va. Cir. 449 (1998). The language of Virginia Code § 15.2-2265 quoted above does not contemplate reserving the right to restrict at a later date property which is publicly dedicated. Beacon, supra, citing Hurd, supra.

24-400 Abandoning and vacating roads

The ancient maxim of the common law, “Once a highway, always a highway,” controls in Virginia unless and until the publicly maintained road is abandoned or vacated in the manner prescribed by statute or by nonuser. Bond v. Green, 189 Va. 23, 52 S.E.2d 169 (1949). Public roads may be abandoned by either the state highway procedures under Virginia Code § 33.2-909 et seq. or, if the roads were created by a subdivision plat, by vacating the subdivision plat or a portion thereof (and the public roads shown thereon), pursuant to Virginia Code § 15.2-2270 et seq.

Citizens have no vested rights in a public road and once a road has been abandoned, the interest of the Commonwealth in the road as a way for public travel, and the interests of the persons who use them, are extinguished. Board of Supervisors of Louisa County v. Virginia Electric & Power Co., 213 Va. 407, 192 S.E.2d 768 (1972). In other words, the section of a road that is abandoned is no longer a public road. 1987-88 Va. Op. Atty. Gen. 393.
When a road over an easement is abandoned, “the land used for that purpose immediately becomes discharged of the servitude and the absolute title and right of exclusive possession thereto reverts to the owner of the fee, without further action by the public or highway authorities.” Bond v. Green, 189 Va. 23, 32, 52 S.E.2d 169, 173 (1949), cited in Virginia Electric Power, supra. In the absence of evidence to the contrary, the fee is presumed to be in the abutting landowners; if the road is the boundary line between different tracts, the presumption is that the reversion to each owner is to the center of the road. Virginia Electric Power, supra. If the Commonwealth or the county owns the underlying fee, each has the power to sell and convey the land that was once part of the abandoned road, pursuant to the procedures in Virginia Code §§ 33.2-909 (abandonment of roads in secondary system) and 33.2-924 (abandonment of roads not in secondary system). See 1984-85 Va. Op. Atty. Gen. 145.

State law cautions against abandoning a public road if its effect is to deprive any party of access to a public road. See Ord v. Fugate, State Highway Commissioner, 207 Va. 752, 152 S.E.2d 54 (1967), referring to what is now Virginia Code § 33.2-924 (applicable to abandonment of roads not in the secondary system).

<table>
<thead>
<tr>
<th>Virginia Code Section</th>
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<tr>
<td>33.2-909</td>
<td>Road is in the secondary system of state highways</td>
<td>Road is “to be no longer necessary for the uses of the secondary state highway system”</td>
<td>Public disuse is the key consideration as to necessity</td>
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<td>33.2-912</td>
<td>Road is in secondary system that has been altered or a new road serves same citizens</td>
<td>There is a new road which serves the same citizens as the old road</td>
<td>Scope of abandonment is limited to the extent of the alteration</td>
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<tr>
<td>33.2-915</td>
<td>Public road that is not in the secondary system</td>
<td>Road is “to be no longer necessary for public use”</td>
<td>Due consideration is to be given to the historic value, if any, of the road</td>
</tr>
<tr>
<td>33.2-923</td>
<td>Public road that is not in the secondary system that has been altered or new road serves same citizens</td>
<td>There is a new road which serves the same citizens as the old road</td>
<td>Scope of abandonment is limited to the extent of the alteration</td>
</tr>
<tr>
<td>15.2-2271</td>
<td>Road established by subdivision plat; no lots within subdivision have been sold</td>
<td>Plat or portion thereof may be vacated by written instrument signed by all owners or by ordinance adopted by governing body</td>
<td>In determining whether to adopt ordinance, governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation</td>
</tr>
<tr>
<td>15.2-2272</td>
<td>Road established by subdivision plat; lots within subdivision have been sold</td>
<td>Plat or portion thereof may be vacated by written instrument signed by all owners immediately adjoining or contiguous to vacated road, and all others whose access would be affected, or by ordinance adopted by governing body</td>
<td>In determining whether to adopt ordinance, governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation</td>
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Public roads in the secondary system will be deemed to be abandoned if vacated under this procedure, provided the plat or portion thereof has been the subject of a rezoning or special use permit, the Commissioner of Highways is notified of such in writing prior to the public hearing, and the vacation is necessary to implement a proffer or a special use permit condition.
The abandonment procedures may have a number of requirements, including: (1) a petition for abandonment; (2) posted and published notice, and notice to the Commonwealth; (3) a public hearing when required; (4) adoption of a resolution by the board of supervisors, making the requisite findings; (5) communication of the resolution to the Commonwealth; and (6) sale or conveyance of the publicly owned former right-of-way. Care must be taken to comply with all of the statutory requirements because failure to substantially comply with those requirements will invalidate the abandonment action. 1987-88 Va. Op. Atty. Gen.391 (failure of county to comply with all notice requirements invalidated abandonment action where county failed to post notice at the front door of the county courthouse or to post notice on and along the road, where landowners in adjoining county used road as their only means of access).

24-410 Abandonment where road in secondary system deemed to be no longer necessary

Virginia Code § 33.2-909 authorizes the board of supervisors, on its own motion or upon petition of any interested landowner, to cause any section of the secondary system to be abandoned altogether as a public road. In order to abandon a road under this section, the road must be deemed by the board “to be no longer necessary for the uses of the secondary state highway system.” Virginia Code § 33.2-909.

If the board is satisfied that no public necessity exists for the continuance of the section of the secondary road as a public road, or that the safety and welfare of the public would be served best by abandoning the section of road as a public road, it then enters an order in its minutes abandoning the section of the road as a public road.

In determining whether a public necessity exists, the board is guided by the rule that the term is not used in the “sense of being absolutely indispensable to communications between two points, but with relation to the purposes for which public highways are established, namely, the reasonable accommodation of the traveling public.” Kirby v. Town of Claremont, 243 Va. 484, 489, 416 S.E.2d 695, 699 (1992). The exercise of the power of abandonment is predicated upon public disuse. Board of Supervisors of Fairfax County v. Horne, 215 Va. 238, 208 S.E.2d 56 (1974). Scenic value alone can be sufficient to support a finding of public necessity. Kirby, supra. Excessive public use is an improper reason to support such a finding. Horne, supra.

See Virginia Code § 33.2-909 for specific notice, petition, hearing and other requirements.

24-420 Abandonment where road in secondary system has been altered or new road serves same citizens

Virginia Code § 33.2-912 authorizes a board of supervisors to adopt a resolution declaring an old road in the secondary system abandoned when it has been or is altered and a new road which serves the same citizens as the old road is constructed in lieu thereof and approved by the Commissioner of Highways. The scope of the abandonment is limited to the extent of the alteration, but no further. Virginia Code § 33.2-912.

The board’s authority under Virginia Code § 33.2-912 is broader than its authority under Virginia Code § 33.2-909. In considering this broader authority, the Virginia Supreme Court has stated that “the General Assembly obviously recognized that, when a new road is constructed to replace an old road, there is only a minimal possibility that public use will be diminished and a strong probability that public use will be facilitated and the capacity for public use increased.” Board of Supervisors of Fairfax County v. Horne, 215 Va. 238, 241, 208 S.E.2d 56, 59 (1974).

The phrase, “a new road which serves the same citizens as the old road” is to be liberally construed and the board has wide discretion in its determination to abandon a road. American Oil Co. v. Leaman, 199 Va. 637, 101 S.E.2d 540 (1958). The exercise of the board’s power is subject to challenge only upon a showing of fraud or flagrant hardship evidencing abuse of discretion by the board. American Oil, supra, cited in Horne, supra.

See Virginia Code § 33.2-912 for specific notice, petition, hearing and other requirements.
24-430 Abandonment where state-owned road not in secondary system deemed to be no longer necessary

Virginia Code § 33.2-915 authorizes a board of supervisors to cause any state-owned road not in the secondary system of highways to be abandoned as a public road. In order to abandon a road under this section, the road must be deemed by the board “to be no longer necessary for public use.” Virginia Code § 33.2-915. Abandonment under this procedure may be initiated either by the board (Virginia Code § 33.2-915) or upon the petition of any person desiring to have the road abandoned. Virginia Code § 33.2-917. In considering the abandonment of any section of road under this section, due consideration must be given to the historic value, if any, of the road. Virginia Code § 33.2-915.

See Virginia Code §§ 33.2-915 through 33.2-922 for specific notice, petition, hearing, and other requirements.

24-440 Abandonment where state-owned road not in secondary system has been altered or new road serves same citizens

Virginia Code § 33.2-923 authorizes a board of supervisors to adopt a resolution declaring an old state-owned road not in the secondary system abandoned when it has been or is altered and a new road which serves the same citizens as the old road is constructed in lieu thereof and approved by the board. The scope of the abandonment is limited to the extent of the alteration, but no further. Virginia Code § 33.2-923.

See Virginia Code § 33.2-923 for specific notice, petition, hearing, and other requirements.

24-450 Vacating road by vacating all or part of subdivision plat

A road created by a subdivision plat may be vacated under the subdivision laws, rather than under the abandonment procedures in Title 33.2 of the Virginia Code (discussed in sections 24-410 through 24-440). If no lot has been sold in a subdivision, the plat or a portion thereof may be vacated either by obtaining approval of, and recording, an instrument that vacates the plat or a portion thereof, or by an ordinance adopted by the governing body. Virginia Code § 15.2-2271. If the plat or a portion thereof is vacated, all public rights in any road shown on the plat are extinguished, and title to the streets, alleys, and easements for public passage and other public areas laid out or described in the plat are reinvested in the owners, proprietors and trustees, if any.

If any lot has been sold in a subdivision, the plat or a portion thereof may be vacated by an instrument or by an ordinance as explained above. Virginia Code § 15.2-2272. If the plat or a portion thereof is vacated, roads within the secondary system are abandoned, provided: (1) the land shown on the plat or portion thereof to be vacated was the subject of a rezoning or special use permit application approved following public hearings; (2) the Commissioner of Highways or his agent is notified in writing prior to the public hearing; and (3) the vacation is necessary in order to implement a proffered condition accepted by the governing body to implement a special use permit condition.

Upon vacation under Virginia Code § 15.2-2272, fee simple title to the centerline of any streets, alleys or easements for public passage so vacated is vested in the owners of abutting lots free and clear of any rights of the public or other owners of lots shown on the plat. Virginia Code § 15.2-2274. The title is subject to the rights of the owners of any public utility installations which have been previously erected therein. Virginia Code § 15.2-2274. If any street, alley or easement for public passage is located on the periphery of the plat, the title for the entire width thereof shall vest in the abutting lot owners. Virginia Code § 15.2-2274.

The vacation of a subdivision plat also is discussed in section 22-800.

24-500 Discontinuance of public maintenance of a road

Discontinuance of a road is a determination only that it no longer serves the public convenience warranting its maintenance at public expense. Ord v. Fugate, State Highway Commissioner, 207 Va. 752, 152 S.E.2d 54 (1967). Thus, the
determination divests VDOT of control of the road. 2000 Va. AG LEXIS 6 (concluding also that persons who voluntarily maintained a discontinued road were not entitled to reimbursement).

Virginia Code § 33.2-908 provides that only the Commonwealth Transportation Board may discontinue the maintenance of a road in the secondary state highway system, either on its own motion or on a petition of the board of supervisors.

Discontinuance does not eliminate the road as a public road or render it unavailable for public use. Ord, supra. Once discontinued, the road remains a public road over which the county has exclusive jurisdiction. Board of Supervisors of Albemarle County v. Ripper, 790 F. Supp. 632 (W.D.Va. 1992) (applying former law, road that was “eliminated” from the secondary system was not abandoned but its state-maintenance was discontinued, and such a road became a “county road”; court granted injunction to county ordering landowners to remove gate from road); 1978-79 Va. Op. Atty. Gen. 131 (road remains a public roadway until it is abandoned). Until a discontinued road is abandoned, the public is entitled to the full and free use of all the territory embraced within the road in its full length and breadth. Wray v. Norfolk & Western Railway Co., 191 Va. 212, 61 S.E.2d 65 (1950).

Notwithstanding Wray, the Attorney General has opined that a county could temporarily barricade a discontinued road as an exercise of its police powers and, conversely, could remove such a barricade. 1978-79 Va. Op. Atty. Gen. 131 (installation); 1986-87 Va. Op. Atty. Gen. 215 (removal). The Attorney General also has concluded that a county could barricade (presumably permanently) a public road to traffic where the road abutted a county landfill and the only other abutting landowner agreed to the closure, the road remained open from 8:00 a.m. to 4:30 p.m. weekdays and until noon on Saturdays, and the landfill caretaker was available on weekends and holidays to admit people wanting to visit cemeteries served by the road. 1974-75 Va. Op. Atty. Gen. 205. This opinion is likely limited in application to the peculiar facts presented, and the Attorney General declined to find it to be controlling where a county proposed a complete bar to public access. 1978-79 Va. Op. Atty. Gen. 131.

When a road in the secondary system is discontinued under Virginia Code § 33.2-908, the board of supervisors may by ordinance provide for use of the property for any of the following purposes: (1) hiking or bicycle trails and paths or other nonvehicular transportation and recreation purposes; (2) greenway corridors for resource protection and biodiversity enhancement, with or without public ingress and egress; and (3) access to historic, cultural, and educational sites. Virginia Code § 33.2-911.

24-600 The rights of the public generally and abutting landowners to use public roads


Landowners generally have a private right to use a road that abuts their property when the use of the abutting road is necessary to the enjoyment and value of the property. City of Staunton v. Cash, 220 Va. 742, 263 S.E.2d 45 (1980), cited in 1985-86 Va. Op. Atty. Gen. 81. In other words, abutting landowners have an easement of access to a public street. State Highway and Transportation Commissioner v. Linsly, 225 Va. 437, 290 S.E.2d 834 (1982). The exercise of that right, however, is subject to the right of the locality to control the streets to promote the public safety and welfare. Linsly, supra; State Highway and Transportation Commissioner v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974); Wood v. Richmond, 148 Va. 400, 138 S.E. 560 (1927) (pre-Byrd Road Act, holding that the city could require the removal of one of two driveways). A restraint upon the use of private property to promote the public welfare is a proper exercise of the police power and is not a taking requiring just compensation. Linsly, supra. For example, entrances and curb cuts may be reasonably regulated in the exercise of the police power. Board of Supervisors of Fairfax County v. Southland Corp., 224 Va. 514, 297 S.E.2d 718 (1982). However, access may not be entirely denied, absent a taking for public use and the resulting constitutional necessity for the payment of just compensation. Southland Corp. supra; see Virginia Code § 25.1-230.1(B), providing that in a condemnation proceeding, the body determining just compensation shall include in its determination of damage to the residue any loss in market value of the remaining property from lost access caused by the taking or damaging of the property.
This common law right can be restricted only pursuant to specific statutory authority or by the exercise of the locality’s police power. See Azalea Corp. v. City of Richmond, 201 Va. 636, 112 S.E.2d 862 (1960), cited in 1985-86 Va. Op. Atty. Gen. 81. Virginia Code § 15.2-2267 is such statutory authority, enabling a board of supervisors to restrict ingress and egress on publicly used roads not in the secondary system that are used primarily for the inhabitants of a subdivision. The statutory prerequisites must be strictly complied with. 1985-86 Va. Op. Atty. Gen. 81.

A long line of cases has considered the damage to private property caused by a change in access to private property resulting from public road improvements. Three general rules emerge:

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These rules are discussed in sections 24-610, 24-620 and 24-630. See also Virginia Code § 25.1-230.1 for discussion of compensation for loss of access and lost profits in calculating compensation in a condemnation proceeding.

24-610 Direct access extinguished

The complete extinguishment of direct access to an abutting public road is compensable where there is no other direct access. State Highway and Transportation Commissioner v. Dennison, 231 Va. 239, 343 S.E.2d 324 (1986) (installation of unbroken curbing extinguished direct access to residue and was compensable); State Highway and Transportation Commissioner v. Linsly, 223 Va. 437, 290 S.E.2d 834 (1982) (extinguishment of direct access and provision of indirect access via a service road was compensable); Commonwealth Transportation Commissioner of Virginia v. Miners Exchange Bank, 33 Va. Cir. 261 (1994) (elimination of two direct access points and replacing them with a dead-end service road providing indirect access was compensable); Smith v. State Highway and Transportation Commissioner, 4 Va. Cir. 223 (1984) (25-foot wide entrance located directly beside restaurant, too close to the highway right-of-way to allow traffic to reasonably enter or exit, was not reasonable; direct access was therefore extinguished and was compensable).

24-620 Direct access obstructed because of change of grade

The extinguishment of direct access that results from a change of grade and damage may be compensable. City of Richmond v. Kingsland Land Corporation, 157 Va. 619, 162 S.E. 194 (1932) (direct access to Lombardy Street extinguished when road lowered 18 feet); Nelson County v. Loving, 126 Va. 283, 101 S.E. 406 (1919) (abutting private property was damaged when road lowered several feet, requiring landowner to construct retaining walls and stairs).

A mere change of grade, without more, does not entitle the landowner to damages. In Town of Galax v. Waugh, 143 Va. 213, 129 S.E. 504 (1925), the elevation of the abutting street was raised several feet when it was improved, and the new elevation obstructed direct access to parts of the landowner’s building. The Virginia Supreme Court ruled that the landowner was not entitled to damages because the value of his property increased after the street was improved.

24-630 Direct access reduced or limited

The reduction or limitation of direct access to an abutting property generally is not compensable. State Highway and Transportation Commissioner v. Lanier Farm, Inc., 233 Va. 506, 357 S.E.2d 531 (1987) (claim that a proposed entrance would have to be relocated to a less advantageous location was not compensable where direct access would be provided); State Highway and Transportation Commissioner v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974) (curbing installed with two openings to allow direct access to the property was not compensable because there was no evidence that
the openings in the curbing would not provide the abutting owner with reasonable access); State Highway and Transportation Commissioner v. Howard, 213 Va. 731, 195 S.E.2d 880 (1973) (median strip installed with no opening at the property’s entrance resulted in an incidental non-compensable inconvenience); Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560 (1927) (reduction of direct access points from two to one for purposes of traffic control and public safety was not compensable); Close v. City of Norfolk, 2013 WL 5305309 (Va. Cir. Ct. 2013) (city’s restricted access to the plaintiff’s business while city upgraded sewer system in city street was not compensable because barriers erected to protect public safety were reasonable, did not prohibit access but were merely an inconvenience, and the evidence showed that any times when access was blocked, the blockage was caused by contractors or other third parties, not the city); State Highway Commissioner v. 1619 Associates, 6 Va. Cir. 108 (1984) (in ruling on a motion in limine, the court said that closing a crossover opposite the driveway of the property was not compensable).

The guiding rule in this line of cases reinforces the right of the locality and the state to control access to public streets and, where appropriate, to reduce or limit direct access. The Virginia Supreme Court has said that the frustration of a landowner’s plans for development or future use is not in itself compensable. Lanier Farm, Inc., supra. In addition, discontinuing maintenance of a public road does not deprive an owner of access to his or her land. See Ord v. Fugate, State Highway Commissioner, 207 Va. 752, 152 S.E.2d 54 (1967).

24-700 Private roads in Albemarle County and the further subdivision of parcels on those roads

Private roads have four key features that distinguish them from public roads: (1) the land on which the roads are built is privately owned; typically the owners of the lots abutting the private road own the underlying fee interest to its centerline or it is owned by a homeowner’s association (one exception for public roads: the State holds only a prescriptive easement of some public roads brought into the state-maintained system when the Byrd Road Act became effective in 1932); (2) the lots served by the private road have an easement allowing the owners of the lots to use the road; (3) private roads are maintained by the landowners under a maintenance agreement or by a homeowners’ association under restrictive covenants; and (4) private roads are not necessarily designed or constructed to VDOT standards.

Although the Albemarle County Subdivision Ordinance authorizes private roads to be approved in the development areas, this section focuses on private roads in the rural areas.

24-710 Albemarle County’s regulation of private roads

The county’s subdivision regulations allow subdivisions to be created with private roads under certain circumstances, and it regulates their approval, design and maintenance.

The planning commission may approve a private road in the rural areas if: (1) the private road would alleviate significant degradation to the environment, as compared to a public road in the same alignment; (2) the lots would be used for non-residential or non-agricultural purposes; or (3) the general welfare, as compared to the proprietary interests of the subdivider, would be better served by the private road. The subdivision agent may approve a private road in the rural areas if the subdivision is a family subdivision or a two-lot subdivision and the private road will serve only those lots and will be the sole and direct means of access to a public road. Albemarle County Code § 14-232(B).

In considering a private road, the planning commission and the subdivision agent must not only find that the criteria in Albemarle County Code § 14-232 are satisfied, but also that the findings required by Albemarle County Code § 14-234(C) can be made. In addition, Albemarle County Code § 14-234(B) provides in part that, in considering a request for approval of one or more private roads, the planning commission and the subdivision agent are to consider that private roads are intended to be the exception to public roads.

24-720 The rights of owners of lots served by a private road

This section examines whether planning commission approval of a private road in the rural areas is required when a lot served by the private road is proposed to be subdivided, and the private road was previously approved under the subdivision ordinance.
There are three key rules that help identify the rights of owners of lots served by a private road. However, there is nothing inherent in the private status of a road serving a subdivision lot that prohibits further division of such a lot.

24-721 The subdivision ordinance does not prohibit further division of a lot without county approval of the private road; exception

One issue that has arisen in the past is whether the further division of a lot served by a private road requires re-approval of the private road. To answer this question, the history of the county’s private road regulations must be considered. Until 1998, the private road regulations in the subdivision ordinance included the following sentence:

Any further subdivision of land involving additional use of such street shall be deemed a subdivision subject to the provisions of this chapter.

 Former Subdivision Ordinance § 18-36(a).

This provision was particularly important to the county’s regulation of subdivisions through the early 1980’s. Before then, many divisions of land in the county’s rural areas were exempt from the county’s subdivision regulations, so it was important for the county to at least review a subdivision plat if the lots being created were going to be served by a private road. In addition, the early private road regulations in the subdivision ordinance had numerous private road design classifications based on the number of lots served (as compared to the three classifications (1-2 lots, 3-5 lots, and 6 or more lots) in the current subdivision ordinance). The cited language from former Subdivision Ordinance § 18-36(a) only stated that a further subdivision of land served by a private road was “deemed a subdivision.” However, this section never required re-approval of the private road. In addition, assuming for the sake of argument that former Subdivision Ordinance § 18-36(a) was the basis for requiring re-approval of a private road when a lot was further subdivided, this provision was eliminated when the subdivision ordinance was comprehensively amended in 1998. Therefore, there is no express language in the current or former versions of the subdivision ordinance that required re-approval of a private road when a subdivision lot served by the private road was further subdivided. There are two exceptions discussed in section 24-724 below.

24-722 Generally, land that has been subdivided may be further subdivided

When a lot within a subdivision is proposed to be further subdivided, the typical complaint from other landowners in the subdivision is that they purchased their lots with the expectation that the lots would be configured as they were when they were originally purchased. However, absent an express restriction on further subdivision and assuming that the county’s zoning regulations can be satisfied, any lot may be further subdivided.

In the absence of a general plan for development restricting lots to a certain size, a conveyance of lots by reference to a recorded map or plat does not in itself raise any implied covenant that the lots will remain as shown on the plat, or that they may not be later changed in size or further subdivided. 1979-80 Va. Op. Atty. Gen. 327. However, when the necessary covenants or other terms and conditions restricting lot sizes are in the deed of conveyance itself, or otherwise in the chain of title, the resubdivision of originally platted lots is prohibited. Friedberg v. Riverpoint Building Committee, 218 Va. 659, 239 S.E.2d 106 (1977).

The subdivision enabling legislation (Virginia Code § 15.2-2240 et seq.) does not require that a subdivider set forth restrictions on lot sizes in deeds or on plats. Thus, the recording of deeds and plats under those provisions does not in itself give rise to any implied covenant as to lot sizes. 1979-80 Va. Op. Atty. Gen. 327. As a result, unless there is a general plan for the development restricting lot sizes in a subdivision, there is no covenant between subdivider and purchasers, or among purchasers, as to the lot sizes and the purchasers have no vested right in retaining the status quo. 1979-80 Va. Op. Atty. Gen. 327.

Today, subdividers often record restrictive covenants that prohibit the further subdivision of the lots within the development.
An increase in the use of a private road resulting from further subdivision of one of the lots served by the private road probably does not burden the underlying easement held by the lot owners.

With certain exceptions discussed in section 24-724 below, planning commission re-approval of a private road is not required.

When a lot within a subdivision is proposed to be further subdivided, existing landowners in the subdivision may complain that the further subdivision of a lot served by the private road would overburden the easement that grants a right of passage over the road. Generally, the further subdivision of land served by a private road will not overburden an easement. In *Shooting Point LLC v. Wescoat*, 265 Va. 256, 576 S.E.2d 497 (2003), a 176-acre lot was served by a 15 foot wide easement that was 0.3 miles long. The deed of easement did not impose any limitations on the use of the easement. At the time the easement was granted, both the 176-acre lot (the dominant estate) and the servient estate were in agricultural use. When the owner of the 176-acre lot proposed to create an 18-lot subdivision, the owner of the servient estate claimed, among other things, that the use resulting from the 18-lot subdivision would overburden the easement. The Virginia Supreme Court rejected this argument:

> Generally, when an easement is created by grant or reservation and the instrument creating the easement does not limit its use, the easement may be used for “any purpose to which the dominant estate may then, or in the future, reasonably be devoted.” [citations omitted]. However, this general rule is subject to the qualification that no use may be made of the easement, different from that established when the easement was created, which imposes an additional burden on the servient estate. [citations omitted]

*Shooting Point LLC*, 265 Va. at 266, 576 S.E.2d at 502-503.

The Court went on to hold that the subdivision of the 176-acre Shooting Point lot into 18 residential lots was a purpose to which the dominant estate could be reasonably devoted, and that the proposed use of the easement would not impose an unreasonable burden on the servient estate. The Court explained that, although the number of vehicles using the easement would increase substantially as a result of the proposed use, this fact demonstrated only an increase in the degree of burden, not an imposition of an additional burden, on the servient estate. Thus, in the absence of an express limitation (such as the prohibition of further subdivision contained in a recorded covenant), the further subdivision of a lot served by a private road will not be found to overburden the easement.

See, also, section 25-320 for a discussion of the authority to require a developer to make or contribute to improvements to off-site public roads as a condition of subdivision plat approval.

Two situations in which the county can require re-approval of a private road

There are two situations in which the county can require re-approval of a private road. First, the county can require re-approval of a private road if the road was designed to one applicable standard, and the subdivision will place the private road in a different design standard, e.g., the private road was approved to serve three to five lots, and a re-subdivision of one of the lots will increase the number of lots served by the private road to six or more lots. Second, the county can require re-approval of the private road if the original private road approval was conditioned so as to expressly require re-approval if any lot served by the private road is further subdivided.

In the absence of an express subdivision regulation, a condition imposed when the private road was approved, or where the resubdivision of a lot served by the private road would require a private road having a different design standard, there is no basis to require a person proposing to resubdivide a lot served by a private road obtain re-approval of the private road.
Chapter 25

Road Improvements in Conjunction with Land Development

25-100 Introduction

This chapter examines the authority of localities to require road improvements in conjunction with land development. The history of the responsibility for building and maintaining roads in counties, the dedication of rights-of-way, rights of access to public roads, and the law pertaining to abandoning and discontinuing the maintenance of roads, are discussed in chapter 24. Transportation planning in the comprehensive plan and rezoning processes are discussed in chapters 9 and 10, respectively.

25-200 The authority to seek road improvements as a condition of a zoning approval

Virginia’s zoning enabling statutes reflect the legislative balancing of the frequently competing interests of individual property rights and the police power interests of the public as promoted by reasonable restrictions on individual property rights. Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975). The exercise of the zoning power in a particular manner must be duly authorized by appropriate enabling legislation. Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975); Board of Supervisors of Fairfax County v. Snell Construction Corp., 214 Va. 655, 202 S.E.2d 889 (1974).

In Virginia Code § 15.2-2283, the General Assembly has identified several purposes of zoning which are related to roads and transportation:

- To provide for convenience of access.
- To reduce or prevent congestion in the public streets.
- To facilitate creating a convenient, attractive and harmonious community.
- To facilitate providing adequate transportation and other public requirements.
- To protect against danger and congestion in travel and transportation.

Despite these several purposes related to roads and transportation, the courts have been unwilling to find that a locality is enabled to require off-site improvements as a condition of approval of a land use matter.

25-210 The authority to require a landowner to make or contribute to off-site road improvements through zoning regulations

A locality is enabled to impose reasonable regulations that apply to each zoning district. The Virginia Supreme Court in Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), held that a county may not require a landowner to dedicate land and make off-site road improvements through the zoning regulations applicable to the zoning district.

In Rowe, 28 landowners challenged the rezoning of their property to a particular commercial district whose regulations required that the landowners, upon development of their property, dedicate the outer 55 feet of their land contiguous to a state highway for a service road, including curbs, sidewalks and a landscaped median strip. The district regulations also required the landowners to construct the service road in accordance with applicable VDOT standards and to maintain the median. The need for the service road was substantially generated by public traffic demands rather than by any proposed development of the landowners. With respect to the requirement that landowners dedicate a portion of their land, the Court said:
Our enabling statutes delegate no such power. Moreover, Article I, § 11, of the Constitution of Virginia expressly and unequivocally provides 'that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation.' The dedication requirement . . . offends that constitutional guarantee, and we hold that it is invalid.

Rowe, 216 Va. at 138-139, 216 S.E.2d at 208-209.

With respect to the requirement that landowners construct the service road and maintain the median, the Court said:

The Board cites nothing in the constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, when the need for such facilities is not substantially generated by the proposed development. The private money necessary to fund the performance of such requirements is 'property,' and we hold that such requirements violate the constitutional guarantee that 'no person shall be deprived of his life, liberty, or property without due process of law . . .' [citation omitted] (italics added)

Rowe, 216 Va. at 139-140, 216 S.E.2d at 209.

Rowe remains the controlling law in Virginia on this issue. However, other authority exists beyond a locality's zoning ordinance. A locality may provide in its subdivision ordinance for the voluntary funding of off-site road improvements. Virginia Code § 15.2-2242(4). Localities with a population of 20,000 or more and a growth rate of 5% or more (between the next to last and last decennial census) or in localities with a growth rate of 15% or more must designate at least one impact fee service area in its comprehensive plan. Virginia Code § 15.2-2317. These localities may establish road impact fees under Virginia Code § 15.2-2317 et seq.

25-220 The authority to require a landowner to make or contribute to off-site road improvements as a condition of approval of a rezoning

The conditional zoning statutes (Virginia Code §§ 15.2-2296 through 15.2-2303.3) empower localities to enact zoning ordinances that may include and provide for the voluntary proffering of reasonable conditions. Proffers are discussed at length in chapter 11. Accepting proffers for off-site road improvements are permitted in those localities operating under the enabling authority in Virginia Code §§ 15.2-2298 or 15.2-2303 (such as Albemarle County). See section 11-310 for a discussion of the voluntariness of proffers. See sections 10-361 and 10-362 for a discussion as to whether a rezoning request may be denied because of inadequate public facilities.

Absent express enabling authority to require certain improvements as a condition to a rezoning, a locality is not authorized to require a landowner to make or contribute to off-site road improvements. See Rinker v. City of Fairfax, 238 Va. 24, 381 S.E.2d 215 (1989). However, it may accept proffers that would require the landowner to make or contribute to off-site road improvements to address the impacts from a rezoning. In that situation, the need for those improvements is substantially generated by the proposed development.

25-230 The authority to require an applicant for a special use permit to make or contribute to off-site improvements as a condition of approval

When approving a special use permit, the governing body (or the BZA, when enabled) is authorized to impose reasonable conditions to address impacts caused by the proposed use. Virginia Code § 15.2-2286(A)(3). However, a locality does not have the authority to require the construction of off-site road improvements unless the need for those improvements is substantially generated by the proposed development.

In Capp v. Board of Supervisors of Fairfax County, 227 Va. 580, 318 S.E.2d 407 (1984), the board sought to impose a special use permit condition that required the applicant to build a right-turn lane and a service road and dedicate the
land to the county. The evidence established that the use, an expanded nursery, would draw approximately 25 customers a day; the daily traffic on the existing road in front of the nursery was 35,000 vehicles.

In holding that the county did not have the authority to require the improvements it sought as a condition of approval of the special use permit, the Virginia Supreme Court stated that it found nothing in the enabling legislation for special use permits “which empowers the Board to impose the road dedication and construction requirements which it claimed it was empowered to impose.” The Court added:

Even if we assume that the Board had the authority, in a proper case, to impose such a condition, it could not do so in this case because the dedication and construction requirements were unrelated to any problem generated by the use of the subject property.

*Capp*, 227 Va. at 594, 318 S.E.2d at 414.

Because special use permits, like rezonings, are legislative actions, the *Capp* court relied heavily on its earlier decision in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). Under *Capp*, a condition requiring an off-site improvement would have been permissible only if the need for the improvement was substantially generated by the project. Compare with *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979) (no authority to require off-site improvements as a condition of site plan or subdivision plat approval, even if the need for the improvements is substantially generated by the project).

### 25-300 The authority to require road improvements as a condition of subdivision plat or site plan approval

There is no express or implied authority in the enabling legislation authorizing a locality to require off-site road improvements as a condition of subdivision plat or site plan approval. See *Virginia Code §§ 15.2-2241, 15.2-2242, and 15.2-2243*.

The case law below reflects a consistent theme that zoning decisions, not the subdivision or site plan process, are the place and time at which density and traffic considerations are to be addressed. By the time a project reaches the subdivision plat or site plan stage, it is too late.

### 25-310 A locality may require on-site road-related improvements as a condition of subdivision plat and site plan approval

Before examining the scope of a locality’s authority to require off-site improvements to public roads, it is useful to understand the locality’s authority to require on-site road improvements. *Virginia Code § 15.2-2241* identifies the on-site road improvements that a locality may require as a condition of approval of a subdivision plat or a site plan:

- **Coordination of streets:** The coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area, including within existing or future adjacent subdivisions, or contiguous to adjacent subdivisions, as to location, widths, grades and drainage. *Virginia Code § 15.2-2241(2).* This authority “does not imply authority to charge a private landowner for the expense of reconstructing public highways.” *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 441, 258 S.E.2d 577, 581 (1979).

- **Installation of new streets:** The extent to which and the manner in which on-site streets will be graded, graveled or otherwise improved. *Virginia Code § 15.2-2241(4).*

- **Dedication of rights-of-way:** The dedication for public use of any right-of-way located within the subdivision or section thereof, including any street, curb and gutter as part of a public system. *Virginia Code § 15.2-2241(5).*

- **Vehicular ingress and egress:** Site-related improvements for vehicular ingress and egress, including traffic signalization and control. *Virginia Code § 15.2-2241(5).*

- **Public access streets:** Site-related improvements for public access streets. *Virginia Code § 15.2-2241(5).*
These provisions, as a whole, place the responsibility for establishing a new on-site road system on the developer. They are consistent with the powers retained by counties under the Byrd Road Act in its present form discussed in chapter 24, which allows counties to retain the power to establish new roads which, upon their establishment, become part of the secondary road system. *Virginia Code § 33.2-703 et seq.*

The requirement of on-site improvements needs to be guided by clear and objective standards. In *Mountain Venture Partnership v. Town of Lovettsville Planning Commission*, 26 Va. Cir. 50 (1991), the planning commission denied a preliminary subdivision plat for a 194-unit townhouse development on three grounds, one of which was because the subdivision’s two access points did not provide safe and convenient access onto the adjoining public road. Absent objective regulatory standards to determine what is required for an access to be safe, and absent any concerns by VDOT, the court found that the planning commission’s denial of the plat on this ground was arbitrary and capricious, stating:

The Virginia Department of Transportation (VDOT), one of the referring agencies, raised no concern about the safety of the street arrangement for the townhouse section of Avonlea. There is no Town ordinance concerning the number of vehicular trips which a subdivision may be allowed to generate. There is no ordinance regulating the number of townhouse units per entrance to a public street. There is no ordinance relating design criteria for streets to the number of vehicles passing over a street. VDOT raised no objection to the entrances from the townhouse area of Avonlea onto the public street . . .

*Mountain Venture*, 26 Va. Cir. at 62.

The court then elaborated on its concerns about the absence of objective standards to control the decision as to whether the access points were safe:

With no ordinance to guide the Planning Commission, if this reason were valid, then an applicant with a subdivision such as Avonlea would be at the mercy of the Planning Commission. Its whim could determine whether a preliminary plat is approved or denied. While one of the purposes of a subdivision ordinance is to promote the safety of the public. . ., such purpose does not give a planning commission the authority to deny a preliminary plat which conforms to the requirements of the applicable ordinance for the sole reason that in its opinion alone, the subdivision would create a public safety problem.

*Mountain Venture*, 26 Va. Cir. at 62.

As noted above, neither VDOT nor any other reviewing agency had raised safety concerns about the access points.

Under the reasoning of *Mountain Venture*, concerns about safe and convenient access need to be established by the application of objective standards pertaining to traffic volume and design or be supported in writing from VDOT expressing concerns about traffic volume, design, or both. In holding that the commission’s disapproval of the subdivision plat was improper, the *Mountain Venture* court noted that when the land at issue was rezoned to its current density, the rezoning “clearly put the Town and all its officials on notice that Mountain Venture could seek approval for as many as 194 townhouse units.”

**25-320 The authority to require a developer to make or contribute to off-site road improvements as a condition of subdivision plat approval**

Virginia Code § 15.2-2243 authorizes localities to require a developer to pay the *pro rata* share of the cost of providing reasonable and necessary off-site sewerage, water and drainage facilities if the need for such facilities are required, at least in part, by the development. There is no similar provision for off-site road improvements. Virginia Code § 15.2-2242(4) is the only enabling authority that speaks to off-site road improvements. It authorizes the locality to provide “for the *voluntary* funding of off-site road improvements and reimbursements of advances by the
governing body.” The courts have consistently rejected any attempts by localities to expand the authority of localities to require off-site road improvements beyond what the General Assembly has expressly enabled.

In Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, 220 Va. 435, 258 S.E.2d 577 (1979), the Virginia Supreme Court considered whether the county could require a subdivider, as a condition of approval of a subdivision plat, to pay the cost of making certain improvements to widen two secondary roads abutting the property. With respect to one of the roads, the evidence showed that at the time of trial the traffic on the road was only 400-900 vehicles per day; that by 1982 the subdivision would account for 45% to 47% of the more than 7,000 vehicles estimated to then be using the road. It was noted that “the need was established for the road improvements.” Hylton, 220 Va. at 439, 258 S.E.2d at 580. The parties stipulated that the plat complied with all applicable statutes and ordinances, except for its failure to show that Hylton would pay the cost of improving the two roads that abutted the property.

The Virginia Supreme Court held that there was no authority in the predecessors to Virginia Code §§ 15.2-2241 and 15.2-2242, either express or necessarily implied, that enabled the county to require a subdivider to construct improvements to existing roads, or to pay a pro rata share of the cost of those improvements. The Court further stated:

Neither the enabling statutes nor local ordinances provided the County with express authority to exact of Hylton construction costs for portions of Routes 640 and 643. Nor do we find any necessarily implied authority for that purpose. Authorization under the enabling zoning statute to assure adequate access to a residential planned community does not imply authorization to exact payment for improvement of existing public highways. Similarly, the authority granted by the statute to localities to coordinate streets within and contiguous to a subdivision with other existing or planned streets does not imply authority to charge a private landowner for the expense of reconstructing public highways.

Although nothing in the [Byrd Road Act] expressly precludes a county from requiring a developer to construct needed secondary road improvements, this omission does not itself suffice to authorize such power. Ever since 1932, financing the construction, repair and maintenance of the State primary and secondary highway systems has constituted a major function of our State government.

Hylton, 220 Va. at 440-441, 258 S.E.2d at 580-581.

Hylton remains the controlling law in Virginia on this issue. A locality has no authority to require off-site improvements as a condition of site plan or subdivision plat approval, even if the need for the improvements is substantially generated by the project. Compare with Capp v. Board of Supervisors of Fairfax County, 227 Va. 580, 318 S.E.2d 407 (1984) (authority to require off-site improvements as a condition of special use permit approval only if the need for the improvements is substantially generated by the project). A developer may always agree with a locality to construct off-site road improvements and, unless the written agreement was entered into under duress, the developer will be bound by that agreement. Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc., 230 Va. 24, 334 S.E.2d 542 (1985).

In Smith v. Board of Supervisors of Culpeper County, 22 Va. Cir. 82 (1990), the subdividers sought to create a 28-lot subdivision on a 58.6 acre tract of land. Although the subdivision plat complied with the requirements of the county’s subdivision ordinance, the board of supervisors denied the plat because of a staff assessment that traffic on the main road of access to the subdivision “would be increased beyond its safe carrying capacity if 28 lots were approved and developed.” Smith, 22 Va. Cir. at 83. The assessment was generated to address a requirement of the subdivision ordinance that the “safe carrying capacity” of off-site secondary roads impacted by a proposed subdivision be evaluated. A related section of the subdivision ordinance provided that when the forecast traffic on the road exceeded its safe carrying capacity (determined from a formula based on road conditions, traffic counts,
and projected traffic from the subdivision), the subdivision plat was to be disapproved. The subdividers were told that the plat would be approved if they made off-site improvements to the road. In the alternative, the subdividers were told that a 15-lot subdivision would be approved without improvements to the road since fewer lots would not overburden the road. In holding that the county had no authority to require the subdividers to improve a public road without their agreement, the Culpeper County circuit court stated:

The County seeks to control the volume of traffic on a public road until improved by withholding or conditioning subdivision approval. Control of the volume of traffic to the extent development of subdivisions increases the volume of traffic is properly achieved under Virginia law by the zoning ordinances which may limit the density to which land may be developed. The subdivision law of Virginia does not address this end.

Smith, 22 Va. Cir. at 85.

As noted in section 25-310, in Mountain Venture Partnership v. Town of Lovettsville Planning Commission, 26 Va. Cir. 50 (1991), the planning commission denied a preliminary subdivision plat for a 194-unit townhouse development on three grounds. One of those grounds was that the subdivider would not pay a lump sum fee to make off-site road improvements. VDOT had not requested any improvements to the road at issue. Relying on Hylton, the circuit court found that this reason for disapproval was not properly based on any lawful requirement of the town’s subdivision or zoning ordinances.

In Rackham v. Vanguard Limited Partnership, 34 Va. Cir 478 (1994), the abutting owners of a 55-lot subdivision challenged the county’s approval of a subdivision plat, claiming that it was approved contrary to law. The subdivision would be accessed via a secondary road, described as “a narrow, unimproved prescriptive easement approximately ten feet in width” that bisected the abutting owners’ lands. As part of its application, the subdivider filed a proposal as to how future improvements to the road might be completed if and when the decision was made to make the improvements. The county accepted the commitment of the subdivider to voluntarily contribute towards the improvements to the off-site road. The planning commission reviewed the proposed improvements to the road under what is now Virginia Code § 15.2-2232, and denied the plat on the finding that the proposed improvements were inconsistent with the features shown on the existing comprehensive plan. The commission also disapproved the plat on the ground that the off-site road was inadequate to handle the increase in traffic generated by the subdivision. As authorized by the county’s subdivision ordinance, the county’s director of planning, zoning and community development thereafter approved the plat, and on appeal by the neighbors, the board of supervisors affirmed the approval by the director. The abutting owners sought to establish that the planning commission’s decision was correct.

In considering the applicability of the comprehensive plan to the planning commission’s review of the subdivision plat, the circuit court first identified the false premise upon which the planning commission’s decision had been based – that the comprehensive plan could serve as the basis for the disapproval of a subdivision plat – holding that the “comprehensive plan may not [serve] as a basis for denial of a subdivision which is otherwise in conformity with duly adopted standards, ordinances, and statutes.” Rackham, 34 Va. Cir. at 479. The court then discussed the other basis upon which the commission had disapproved the subdivision plat – the inadequacy of the off-site road to handle the increase in traffic generated by the subdivision. The court quickly dispensed with this issue, stating that the need for future off-site road improvements was not a relevant consideration to preliminary subdivision plat approval. The court also rejected the abutting owners’ claim that the subdividers’ voluntary contribution towards the road improvements was invalid as an improper exercise of the board of supervisors’ powers and constituted a public taking for a private purpose.

25-330 The authority to require a developer to make or contribute to off-site road improvements as a condition of site plan approval

Although the subdivision cases discussed in section 25-320 apply to site plans as well, at least one case has considered the authority of a locality to require a developer to make or contribute to off-site road improvements as a condition of site plan approval.
In *Potomac Green Associates Partnership v. City Council of City of Alexandria*, 761 F. Supp. 416 (E.D. Va. 1991), reversed on other grounds, 6 F.3d 173 (4th Cir. 1993), the city required, as a condition of site plan approval, that the applicant construct two additional lanes on the George Washington Memorial Parkway which was adjacent to the applicant’s property. The district court first reviewed the enabling authority for off-site improvements, which is now found in Virginia Code § 15.2-2243 and which is limited to sewerage, water and drainage facilities, and concluded that there “is no express authorization for a developer of land to make off-site improvements at his expense to the surrounding highways.” *Potomac Green*, 761 F. Supp. at 421 (italics added). Then, citing *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984), and *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979), the court concluded that there was no implied authority to require private landowners to build additional lanes on public roads as a condition of site plan approval.

**25-340 The authority to require a developer to dedicate lands for a road shown on a locality’s plan as a condition of subdivision plat or site plan approval**

As part of the transportation planning process, future road alignments will inevitably be shown on a locality’s plans. This section briefly examines whether the locality may require the dedication of lands for the road as a condition of subdivision plat or site plan approval. The issue is closely related to the issues considered by the Virginia Supreme Court in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979), and *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984).

In *Butler v. City Planning Commission of the City of Winchester and the City of Winchester*, 2 Va. Cir. 450 (1977), the landowner’s subdivision plat was denied by the city because it failed to recognize the 25-foot setback lines that applied to a proposed “southern loop” planned to be constructed across the landowner’s property, “the obvious result of which would require the subdivider to dedicate that portion of the ‘Loop’ to public use.” The court noted that, nationally, the general rule seemed to be that the subdivider may be required to donate “only that portion of the land to be divided as may be needed for the public uses that will result from the activities specifically and uniquely attributable to the proposed development.” *Butler*, 2 Va. Cir. at 451-452, quoting *McQuillin, The Law of Municipal Corporations*, § 25.146a, p. 433 (3d Ed. Revd. 1976). In other words, the requirement for the dedication of streets “must substantially relate to the projected needs of the proposed development.” *Butler*, 2 Va. Cir. at 452. With respect to the plat under consideration, the court held that the city’s denial of the subdivision plat was improper because it “could scarcely be said that the primary purpose of the ‘Loop’ would be to the benefit of the residents of the subdivision . . . Although it will no doubt provide some access to the subdivision, the main purpose is to carry through traffic from other portions of the city across the petitioner’s land.” *Butler*, 2 Va. Cir. at 453.
Chapter 26

Open-Space and Conservation Easements, Land Use Valuation, and Other Laws Related to the Use of Land

26-100 Introduction

A locality’s comprehensive plan, zoning ordinance, and subdivision ordinance work with other state statutes and ordinances related to how land may be used. These other laws are typically very narrow in scope, established to address specific goals and objectives such as the protection of agricultural activities or the preservation of undeveloped land. This chapter briefly examines several of those laws.

26-200 The Open-Space Land Act

The Open-Space Land Act authorizes public bodies to protect open space by acquiring easements in gross to preserve open-space land. Virginia Code § 10.1-1703; 2009 Va. AG LEXIS 29, 2009 WL 1567667. Albemarle County’s Acquisition of Conservation Easements (ACE) program, summarized in section 26-400, is established under the Open-Space Land Act.

26-210 The features of an open-space easement

An open-space easement has several features:

- **“Open-space land” defined**: Open-space land includes any land which is provided or preserved for: (1) park or recreational purposes; (2) conservation of land or other natural resources; (3) historic or scenic purposes; (4) assisting in the shaping of the character, direction, and timing of community development; (5) wetlands as defined in Virginia Code § 28.2-1300; or (6) agricultural and forestal production. Virginia Code § 10.1-1700.

- **The interest acquired**: A locality may acquire unrestricted fee simple title to tracts, fee simple title to tracts subject to the reservation of rights to use such lands for farming or to the reservation of timber rights thereon, or easements or other interests in land of not less than five years’ duration. Virginia Code § 10.1-1703.

- **Who holds the interest**: Any public body as defined under the Act may be an easement holder, including the Virginia Outdoors Foundation and any locality, park authority, public recreational facilities authority, any soil and water conservation district, and any community development authority. Virginia Code §§ 10.1-1700 (definition of public body) and 10.1-1703 (authority of any public body to be an easement holder). In Albemarle County, the Virginia Outdoors Foundation and the Albemarle County Public Recreational Facilities Authority (PRFA) are typical holders of donated open-space easements. Under the county’s ACE program, the county co-holds the easement with either the Virginia Outdoors Foundation or the PRFA. A historic preservation easement may also be held by the Virginia Board of Historic Resources. Virginia Code § 10.1-2202.2.

- **Duration of the interest**: The interest must be for at least five years’ duration. Virginia Code § 10.1-1701.

26-220 Tax consequences

An open-space easement has beneficial tax consequences to the owner of the underlying interest that are too numerous and complex to discuss in any detail in this handbook. These include:
• **Taxation of the interest:** The easement holder’s interest is not taxed because the public body is exempt from the real property tax.

• **Taxation of the land:** If the land is subject to a perpetual open space interest or is otherwise devoted to an open space use, the land is assessed and taxed at the use value for open space if the locality has a use valuation program; if it does not, the land is taxed at the fair market value less the easement value.

*Virginia Code §§ 10.1-1011, 10.1-1700 et seq., and 58.1-3230 et seq.*

In addition, donated open-space easements may qualify for the charitable donation deduction under federal tax laws and a Virginia tax credit.

### 26-300 The Virginia Conservation Easement Act

The Virginia Conservation Easement Act authorizes the creation of conservation easements which are held by qualifying charitable organizations. A locality does not typically have direct involvement in establishing these easements.

#### 26-310 The features of a conservation easement

A conservation easement has several features:

• **“Conservation easement” defined:** A conservation easement is “a nonpossessory interest of a holder in real property, whether easement appurtenant or in gross, acquired through gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property.” *Virginia Code § 10.1-1009.*

• **How the easement is acquired:** The easement may be acquired by gift, purchase, devise or bequest. *Virginia Code § 10.1-1010.*

• **Who holds the easement:** The easement is held by a tax exempt charitable corporation, association or trust, whose primary purpose or powers include preserving the historic, architectural or archaeological aspects of real property. *Virginia Code §10.1-1009.* The Nature Conservancy is an example of an eligible holder of conservation easements in Albemarle County.

• **Duration of the easement:** The easement is perpetual, unless the instrument creating the easement provides a specific duration. *Virginia Code § 10.1-1010(C).*


#### 26-320 Tax consequences

A conservation easement has beneficial tax consequences to the easement holder and the owner of the underlying interest:

• **Taxation of the interest in the easement:** If a conservation easement is perpetual, the interests of the easement holder and the owner of the underlying fee are exempt from taxation for the interest in the easement.
• **Taxation of the land:** If the land is subject to a perpetual conservation easement and is devoted to an open-space use, the land is assessed and taxed at the use value for open space if the locality has a use valuation program; if it does not, the land is taxed at the fair market value less the easement value.

*Virginia Code §§ 10.1-1009, 10.1-1011, and 58.1-3230 et seq.*

Like open-space easements, donated conservation easements may qualify for the charitable donation deduction under federal tax laws and a Virginia tax credit.

### 26-400 Albemarle County’s Acquisition of Conservation Easements (ACE) program

In 2000, the Acquisition of Conservation Easements (ACE) program in Albemarle County was established under the Open-Space Land Act, and is codified in Albemarle County Code, Appendix A.1 (hereinafter, “Appendix A.1”). Although “conservation easements” are part of the name of the program, the easements acquired under the program are open-space easements.

#### 26-410 Reason for the program

The goals of the Albemarle County comprehensive plan include protecting the county’s natural, scenic and historic resources, promoting the continuation of a viable agricultural and forestal industry and resource base, and protecting the county’s surface and ground water supplies. The county’s open space and critical resources plan, adopted in 1992 as part of the comprehensive plan, identified the purchase of development rights as a potential technique to preserve the county’s resources and recommended further study.

A citizen committee was established in 1997 to study the purchase of development rights as a tool to preserve the county’s resources. The committee’s research revealed that between 1959 and 1992, 37% of Virginia’s farmland was lost. In Albemarle County alone, 25,000 acres of farmland were lost from 1974 to 1992 and, in 2000, almost one-third of the county’s forest land was too densely populated for long-term timber production. The committee concluded that regulatory land use planning tools alone were insufficient to stem the tide of land development:

> It was a governing assumption that an Acquisition of Conservation Easement Program will always be one arrow in the quiver of arrows available to protect the rural areas of Albemarle County. It is intended to supplement rather than replace protective planning efforts of the Comprehensive Plan and Zoning Ordinance, Agricultural and Forestal Districts, donation of conservation easement, and acquisition of park land and natural areas. Acquisition of conservation easements can never do the job alone.

The committee also recognized that farm and forest land, clean water and airsheds, scenic vistas and rural character have public as well as private value.

#### 26-420 The effect of the program

The ACE program is a voluntary program by which qualifying landowners offer to have open-space easements placed on their property for a determined sum paid by the county and/or another easement holder. The program was established under the Open-Space Land Act (*Virginia Code § 10.1-1700 et seq.*). It attempts to strike a balance between landowners’ rights and responsibilities, and between the private and public values of rural land.

The county does not directly purchase development rights under the program; instead, the use of those rights is restricted under the terms of the open-space easement. A model deed of easement establishes the minimum terms and conditions of the open-space easement:

- **Division:** Restrict further division so that that a parcel 200 acres or larger may be divided into as many lots so as to maintain an average lot size of at least 100 acres, plus one additional lot for any acres remaining above the required minimum average lot size.
• **Maintain mountain resource and other resources**: If the parcel is eligible for points because it has mountain resources, adjoins a scenic highway or byway, is within a qualifying watershed or adjoins a qualifying stream, adjoins a scenic river, or has sites of archaeological or architectural significance, additional restrictions to protect those resources apply.

• **No buy-back option**: Prohibit the owner from reacquiring the easement.

• **Other restrictions**: Impose other standard easement restrictions regarding uses and activities allowed on the parcel, improvements that can be made, management of forest resources, and the right of the easement holder to enter and inspect the parcel to determine compliance with the terms and conditions of the easement.

Appendix A.1-109.

A landowner may add additional restrictions to the easement (including the direct sale of development rights), but these need to be determined before the parcel is appraised so that the appraisal reflects the value of the easement with the additional restrictions. Because county funds will be used to purchase most easements, the county and another qualified entity, such as the Virginia Outdoors Foundation or the PRFA, will be the holders of each easement. Appendix A.1-109.

### 26-430 Administration of the ACE program

The ACE program is administered by the director of planning, who is designated as the program administrator. Appendix A.1-104. The key functions of the program administrator include establishing reasonable and standard procedures and forms for properly administering and implementing the program, promoting the program, pursuing additional public and private funding for the program, evaluating applications for easements, providing staff support to the program’s committees and the board of supervisors, and assuring that the terms and conditions of each easement are monitored and complied with.

A 10-member ACE committee is appointed by the board. Its primary purposes are to evaluate and rank applications and make recommendations to the board, and to annually review the program’s eligibility and ranking criteria and recommend changes to the board. Appendix A.1-105. An appraisal review committee was also appointed by the board in order to review appraisals and make recommendations on those appraisals to the board. Appendix A.1-106. The board will decide which open-space easements will be purchased. Appendix A.1-107 and A.1-108.

### 26-440 Eligibility of parcels

The ACE program is available for all privately owned and controlled lands in Albemarle County. In order for a parcel to be eligible: (1) the use of the parcel subject to each easement must be consistent with the comprehensive plan; (2) the proposed terms of the easement must satisfy the minimum easement terms and conditions set forth in the ordinance; and (3) the parcel must obtain at least 15 points under the program’s ranking criteria. Appendix A.1-107.

The ranking criteria assign various points based on the parcel's open space resources, threat of conversion to developed use, natural, cultural and scenic resources, and the availability of other public or private funding to be applied to leverage the purchase of the open-space easement. Appendix A.1-108.

### 26-450 Procedure to establish open-space easements

By an annual October 31 deadline, interested landowners submit applications on a standard application form to the program administrator, who evaluates each application and submits a list of ranked parcels to the ACE committee. Appendix A.1-110. The county does not charge an application fee.

The ACE committee evaluates and ranks the applications in the order of priority that it recommends easements should be purchased, and forwards its recommendation to the board of supervisors. The board then reviews the
ACE committee’s recommendation, and decides which easements it desires to purchase. The board then ranks those parcels. Each parcel identified by the board will be appraised by either the county assessor or an independent qualified appraiser. The appraiser review committee reviews each appraisal and submits its recommendation to the Board. Appendix A.1-110.

The board then identifies the initial pool of eligible parcels on which easements are proposed to be purchased. The size of the pool is based on the funds available to purchase easements in the current fiscal year. The purchase price is determined by multiplying the appraised value by a factor based on the average annual adjusted gross income of the owner and his or her immediate family. This factor decreases as the adjusted gross income increases (e.g., if the adjusted gross income is $55,000 or less, the purchase price will be 100% of the appraised value; if the adjusted gross income is between $105,001 and $115,000, the purchase price will be 64% of the appraised value; if the adjusted gross income is $205,001 or more, the purchase price will be 4% of the appraised value). How annual adjusted income is determined varies depending on whether the land is owned by a single individual (Appendix A.1-111(B)(f)), by multiple individuals, C-corporations having 10 or fewer shareholders, S-corporations, partnerships, limited liability companies, trusts or estates (Appendix A.1-111(B)(2)), or C-corporations having more than 10 shareholders and other entities not otherwise addressed (Appendix A.1-111(B)(3)). The county took this approach to encourage landowners with higher income to donate open-space and conservation easements in order to receive tax benefits, rather than use the ACE program with its limited funding.

The board’s next step is to invite the owners of the parcels in the pool to submit offers to sell open-space easements to the board. If an offer to sell is submitted by an owner and accepted by the board, the parties will proceed to establish the easement. If an offer to sell is not submitted, or the board elects not to acquire an easement, an invitation may be sent to the next remaining parcel on the list of eligible parcels not included in the initial pool. The purchase price and the terms and conditions of the easement are not subject to negotiation. Appendix A.1-111.

The procedure requires all applications to be ranked and the purchases occur at the same time each year. However, the board may waive any requirement or target date if it is shown that exigent circumstances exist or that the requirements of the ordinance unreasonably restrict the purchase of an easement. Appendix A.1-110.

26-500 Land use valuation

This section provides a summary of the law pertaining to land use valuation under Virginia tax law.

26-510 The constitutional and statutory framework

Article X, § 1 of the Virginia Constitution provides that “all property, except as hereinafter provided, shall be taxed.” Thus, taxation is the rule, and exemption from taxation is the exception. Virginia Baptist Homes, Inc. v. Botetourt County, 276 Va. 656, 668, 668 S.E.2d 119, 125 (2008). Section 1 also provides that “all taxes . . . shall be uniform upon the same class of subjects.” Article X, § 2 provides that “all assessments of real estate . . . shall be at their fair market value, to be ascertained as prescribed by law.” The Virginia Supreme Court has construed “fair market value” generally as “the price [a property] will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.” Tuckahoe Woman’s Club v. City of Richmond, 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958). In determining fair market value, “all the capabilities of the property and all the uses to which it may be applied or for which it is adapted, are to be considered,” Tuckahoe Woman’s Club, 199 Va. at 738, 101 S.E.2d at 574, with the assessment based on the highest and best use of the property. See County Board of Arlington v. Commonwealth, 240 Va. 108, 393 S.E.2d 194 (1990).

Article X, § 2 also authorizes the General Assembly to define and classify real estate devoted to agricultural, horticultural, forest and open space uses, and to allow localities to defer or relieve portions of taxes that would otherwise be payable if the real estate was not so classified. The General Assembly has granted localities this authority in Virginia Code §§ 58.1-3229 (not set out) through 58.1-3244, which provide for the special assessment of real property for land preservation.
The land use valuation program

Real estate devoted to agricultural, horticultural, forest, or open space use may qualify to be assessed on the basis of its use value, as distinguished from its fair market value, if the local governing body has adopted an appropriate ordinance under Virginia Code § 58.1-3231. A locality may elect to include any or all of the qualifying use classifications. As of 2010, 96 Virginia localities had adopted land use ordinances granting use value for at least one qualifying use. Albemarle County’s use valuation ordinance recognizes all four qualifying use classifications. Albemarle County Code § 15-800 et seq.


In general, to qualify for land use valuation, assessment and taxation, the real estate must meet the following use requirements:

- **Agricultural use**: Real estate devoted to agricultural use is either land devoted to the *bona fide* production for sale of plants and animals useful to man, or land that meets the requirements for payments or other compensation pursuant to a soil conservation program.

- **Horticultural use**: Real estate devoted to horticultural use is either land devoted to the *bona fide* production for sale of fruits, vegetables, and nursery and floral products, or land that meets the requirements for payments or other compensation pursuant to a soil conservation program.

- **Forest use**: Real estate devoted to forest use is land devoted to tree growth in such a quantity and so spaced as to constitute forest area.

- **Open space use**: Real estate devoted to open space use is real property used to preserve park and recreational areas, conserve land or other natural resources, floodways, or lands of historic or scenic value, or assist in the shaping of the character, direction and timing of community development, or for the public interest and consistent with the local land use plan.

Virginia Code § 58.1-3230; Albemarle County Code § 15-800.

Real estate that has been designated as devoted to one of these four uses does not lose its designation solely because a portion of the property is being used for a different purpose as allowed by the locality’s zoning regulations, including pursuant to a special use permit, if the property, excluding the portion used for a different purpose, meets all the requirements for the applicable designation. Virginia Code § 58.1-3230. The portion of the property being used for a different purpose is deemed to be a separate piece of property from the remaining property for purposes of assessment. Virginia Code § 58.1-3230. Neither the property’s zoning designation nor any special use permits is to be the sole consideration in determining whether real property is devoted to one of the four qualifying uses. Virginia Code § 58.1-3230.

In addition to the foregoing use requirements, the real estate must meet the following minimum size requirements: (1) agricultural or horticultural property must consist of a minimum of five acres; (2) forest property must consist of a minimum of 20 acres; and (3) open-space property must consist “of a minimum of five acres or such greater minimum acreage as may be prescribed” by the locality. Virginia Code § 58.1-3233(2). The minimum acreage for open-space lands in Albemarle County is 20 acres. Albemarle County Code § 15-804(2). The purpose for the minimum acreage requirements in Virginia Code § 58.1-3233(2) is to allow land use assessment and taxation on only those parcels large enough to further the goals of preserving agricultural, forest, and open-space lands. 2004 Va. Op.
The minimum acreage requirements for the qualifying use classifications is determined by adding together the total area of contiguous real estate, excluding subdivision lots recorded after July 1, 1983 that are titled in the same ownership. *Virginia Code § 58.1-3233(2).* Parcels created after July 1, 1983, by a recorded plat subject to a locality’s subdivision ordinance, but not falling within the ordinance’s definition of “subdivision,” may be aggregated for purposes of meeting the minimum acreage requirements. 2004 Va. Op. Atty. Gen. LEXIS 71, 2004 WL 3089838.

In determining the area devoted to a qualifying use, the area of all barns, sheds, silos, cribs, greenhouses, public recreation facilities and like structures, lakes, dams, ponds, streams, irrigation ditches and like facilities are included. *Virginia Code § 58.1-3236; Albemarle County Code § 15-805(B).* Farm houses and other structures not used for the qualifying use are valued, assessed and taxed at fair market value. *Virginia Code § 58.1-3236; Albemarle County Code § 15-805(B) and (C).*

Finally, real estate devoted to open space use also must be: (1) within an agricultural, a forestal, or an agricultural and forestal district entered into under *Virginia Code § 15.2-4300 et seq. (2) subject to a recorded perpetual easement that is held by a public body promoting the open space use classification; or (3) subject to a recorded commitment entered into by the landowners with the board of supervisors or its designee not to change the use to a nonqualifying use for a period of not less than four nor more than ten years. *Virginia Code § 58.1-3233(3); Albemarle County Code § 15-804(3).*

### 26-530 Determining land use value

Land participating in the land use valuation program is entitled to a tax preference in the form of a reduction in the assessed value of the qualifying land. Determining the fair market value is a factual question for the county assessor. *Virginia Code § 58.1-3236.*

In assessing land qualifying for land use valuation, the assessor must determine the value in accordance with *Virginia Code § 58.1-3236,* which provides that he must “consider only those indicia of value which such real estate has for agricultural, horticultural, forest or open space use, and real estate taxes for such jurisdiction shall be extended upon the value so determined.” *Virginia Code § 58.1-3236(A); Albemarle County Code § 15-805(A).* These factors include the real estate’s location, appearance, availability for use and the economic situation in the area. See *Smith v. City of Covington,* 205 Va. 104, 135 S.E.2d 220 (1964); 1997 Va. Op. Atty. Gen. 196. The ultimate issue is the effect these factors have on the price the land will bring when offered for sale “by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.” *Tickaboo Woman’s Club v. City of Richmond,* 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958).

In determining the *indicium* that are relevant to the fair market value of land devoted to a qualifying use, the focus of the inquiry is the effect that the factor (i.e., its use for agricultural, horticultural, forest or open space) would have on the value of the property. See 1997 Va. Op. Atty. Gen. 196. The assessor may consider the economic conditions existing in the locality as a factor that affects the value of the property. 1997 Va. Op. Atty. Gen. 196. However, the assessor has no authority to: (1) adjust the fair market value of the property on the basis of the financial effect the ultimate determination will have on the taxpayer; or (2) consider whether a landowner will receive government services equivalent to the amount of the tax imposed. 1997 Va. Op. Atty. Gen. 196.

In addition to applying his personal knowledge, judgment and experience as to the value of land in agricultural, horticultural, forest or open space use, the assessor must, in arriving at the value of the land, *consider* available evidence of agricultural, horticultural, forest or open space capability, and the recommendations of value provided by the State Land Evaluation Advisory Council (“SLEAC”). *Virginia Code § 58.1-3236(A); Albemarle County Code § 15-805(A).* SLEAC’s recommendations provide a range of suggested values for each classification of land, based on the productive earning power of that particular type of land. If, in exercising this judgment and considering other evidence, the assessor determines that the recommendations made by SLEAC are not indicative of the fair market value of property devoted to a qualifying use within the county, the assessor may disregard SLEAC’s recommendations. 1997 Va. Op. Atty. Gen. 196.
Land in the land use valuation program also must be evaluated on the basis of its fair market value as applied to other land in the county and the land book records must be maintained to show both its use value and the fair market value. *Virginia Code § 58.1-3236(D); Albemarle County Code § 15-805(D).* For example, the county’s real estate records would reflect the following value information on an unimproved piece of land:

<table>
<thead>
<tr>
<th>Land Market</th>
<th>$287,800</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land Use</td>
<td>$9,300</td>
</tr>
<tr>
<td>Improvement</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>$9,300</td>
</tr>
</tbody>
</table>

Under the county’s land use valuation program, the real property taxes for this parcel are based on a use valuation of $9,300, rather than its fair market value of $287,800.

**26-540 Sliding scale tax rate permitted**

A locality may provide a sliding scale tax rate for real estate under its land use valuation program based on the length of time the real estate is used for the activity by which it qualifies for use valuation. *Virginia Code § 58.1-3231.* The sliding scale establishes a lower assessment for property held for longer periods of time within the four qualifying use classifications. *Virginia Code § 58.1-3231.* If a sliding scale is used, a written agreement is required between the locality and the landowner for a term not to exceed twenty years. *Virginia Code § 58.1-3234.* A change in use prior to the end of the agreed-upon term will result in roll-back taxes from the date of the agreement. *Virginia Code § 58.1-3237(C).*

For example, a locality’s land use assessment program could allow taxpayers currently enrolled in its “Land Use Assessment Program” to defer additional real estate taxes by entering into a recorded commitment to keep the property in a qualifying use for a term of up to twenty years under the following scale:

- **10 to 20 year commitment:** For a commitment to hold the land in its qualifying use for more than ten years, but not exceeding twenty years, ninety-nine percent (99%) of the use value taxes otherwise assessed may be deferred for the term of the commitment.

- **5 to 10 year commitment:** For a commitment to hold the land in its qualifying use for more than five years, but not exceeding ten years, fifty percent (50%) of the use value taxes otherwise assessed.

Like use valuation generally, the additional deferral applies to qualifying land only and does not include ineligible land or buildings assessed at fair market value.

The program could provide that if roll-back taxes were triggered, the roll-back would include the current tax year plus the greater of: (1) the previous five tax years; or (2) each year from the date the sliding scale agreement was signed. For example, if real estate enrolled in the sliding scale option effective beginning tax year 2004 was rezoned in 2006, the roll-back period would include the year 2006 plus the previous five tax years, 2001 through 2005. If real estate enrolled in the sliding scale option effective beginning tax year 2004 was rezoned in 2011, the roll-back period would include the year 2011 plus each year from 2004 through 2010, a total of 8 years.

**26-550 Roll-back taxes**

When the use by which real estate qualified for land use valuation changes to a nonqualifying use, or the zoning of the real estate is changed to a more intensive use at the request of the owner or his agent, it is subject to roll-back taxes. *Virginia Code § 58.1-3237(A); Albemarle County Code § 15-806(A) and (D).* However, a locality may adopt an ordinance that does not trigger roll-back taxes because the owner or its agent requested and obtained a rezoning of the land to a more intensive use, provided that the land remains eligible for use value assessment and taxation for as long as the use by which it qualified does not change to a nonqualifying use. *Virginia Code § 58.1-3237(G)* (further providing that the roll-back tax becomes due when the use changes to a nonqualifying use).

The roll-back tax is equal to the sum of the deferred tax for each of the five most recent complete tax years, including simple interest on the roll-back taxes at a rate no greater than the rate applicable to delinquent taxes. Virginia Code § 58.1-3237(B); Albemarle County Code § 15-806(B). The deferred tax for each year is equal to the difference between the tax levied and the tax that would have been levied based on the fair market value assessment of the real estate for that year. Virginia Code § 58.1-3237(B). Therefore, roll-back taxes are equal to the difference between the tax levied under the land use valuation laws and the tax that would have been levied pursuant to the assessed fair market value of the real estate had it not been subject to the special assessment. 1999 Va. Op. Atty. Gen. 202.

Roll-back taxes are imposed when the actual use of land changes to a non-qualifying use; land remaining idle does not trigger roll-back. Virginia Code § 58.1-3237; 1997 Va. Op. Atty. Gen. 195. When land subject to use valuation is purchased by eminent domain, the residual parcel, although it no longer meets the minimum acreage requirements, is not subject to roll-back taxes. 1997 Va. Op. Atty. Gen. 193. There also is no liability for roll-back taxes when a change in ownership of the title takes place if the new owner does not rezone the real estate to a more intensive use and continues the land in the use for which it is classified. Virginia Code § 58.1-3237(D); Albemarle County Code § 15-806C).

The separation or split-off of parcels by conveyance or other action by the owner subjects the separated parcels to roll-back taxation, but it does not impair the eligibility of the separated real estate for future use valuation or affect the remaining real estate’s right to continuance of land use valuation if it still meets the requirement. Virginia Code § 58.1-3241(A). The subdivision of land into parcels that meet the applicable use valuation requirements does not subject the real estate to roll-back taxation if the owner attests that subdivision is for one or more of the qualifying use classifications. Virginia Code § 58.1-3241(A).

26-600 The Right-to-Farm Act

The Right-to-Farm Act limits the circumstances under which agricultural operations may be deemed to be a nuisance, especially when nonagricultural land uses are initiated near existing agricultural operations. Virginia Code §§ 3.2-301 and 15.2-2288. The Act places limits on a locality’s exercise of its zoning power:

- **Prohibits regulation of certain structures and practices:** The Act prohibits a locality from enacting a zoning regulation that unreasonably restricts or regulates farm structures or farming and forestry practices in an agricultural district or classification, unless the restriction is related to the health, safety and general welfare.

- **Prohibits requiring a special use permit in certain circumstances:** The Act prohibits a locality from requiring a special use permit for any production agriculture or silviculture activity in an agricultural zoning district.

Virginia Code §§ 3.2-301 and 15.2-2288.

26-700 The Agricultural and Forestal Districts Act

Localities may establish agricultural and forestal districts under the Agricultural and Forestal Districts Act, which serve two primary purposes:

- **Conserve and protect agricultural and forestal lands:** Conserve and protect agricultural and forestal lands for the production of food and other agricultural and forestal products; conserve and protect agricultural and forestal lands as valued natural and ecological resources which provide essential open spaces for clear air sheds, watershed protection, wildlife habitat, as well as for aesthetic purposes.
• Develop and improve agricultural and forestal lands: Encourage the development and improvement of agricultural and forestal lands for the production of food and other agricultural and forestal products.

Virginia Code § 15.2-4300; Albemarle County Code § 3-100 et seq.

Localities may establish districts of statewide significance (Virginia Code § 15.2-4300 et seq.) and districts of local significance (Virginia Code § 15.2-4400). This section focuses on districts of statewide significance, the much more common class of district.

26-710 Establishment and effect

Agricultural and forestal districts are established by the governing body on the petition of participating landowners. A new district must have a minimum core of 200 acres in a single or in contiguous parcels. Virginia Code § 15.2-4305. A parcel not part of the core may be included in a district: (1) if the nearest boundary of the parcel is within one mile of the boundary of the core; (2) if it is contiguous to a parcel in the district the nearest boundary of which is within one mile of the boundary of the core; or (3) if the local governing body finds, in consultation with the advisory committee or planning commission, that the parcel not part of the core or within one mile of the boundary of the core contains agriculturally and forestally significant land. Virginia Code § 15.2-4305.

A landowner may petition to add her land to the district at any time. Virginia Code § 15.2-4310. Districts are periodically reviewed by the locality (each 4 to 10 years, depending on the applicable district ordinance) and during the review period, any landowner may request to withdraw her lands from a district. Virginia Code § 15.2-4311. At other times, land may be withdrawn from a district only for good and reasonable cause. Virginia Code § 15.2-4314.

The Agricultural and Forestal Districts Act has a number of effects on development:

• Prohibits development to a more intensive use: The Act prohibits any parcel in a district from being developed to a more intensive use, other than a use resulting in more intensive agricultural or forestal production, without prior approval of the governing body.

• Prohibits regulation of certain dwelling construction and placement: The Act bars the locality from prohibiting the construction and placement of dwellings for persons who earn a substantial part of their livelihood from a farm or forestry operation on the same property, or for members of the immediate family of the owner, unless the locality finds that the use in the particular case would be incompatible with farming or forestry in the district.

• Prohibits regulation of certain structures and practices: The Act bars a locality from exercising its zoning power in a district in a manner which would unreasonably restrict or regulate farm structures or farming and forestry practices in contravention of the Act unless the restrictions or regulations bear a direct relationship to public health and safety.

Virginia Code § 15.2-4312.

26-720 Tax consequences

Land lying within a district and used in agricultural or forestal production automatically qualifies for use-value assessment authorized under Virginia Code § 58.1-3229 et seq. if the requirements for that assessment are satisfied. Land lying within a district that is devoted to open-space is eligible for use-value assessment authorized under Virginia Code §§ 58.1-3230 and 58.1-3231 if the requirements for that assessment are satisfied.
Chapter 27

Enforcing the Zoning Ordinance

27-100 Introduction

This chapter provides guidance to zoning officials for determining whether a zoning violation exists, conducting inspections and collecting evidence, and preparing for court. In enforcing its zoning ordinance, a locality may seek criminal fines (Virginia Code § 15.2-2286(A)(5)), a court order requiring the violator to abate the violation through an injunction (Virginia Code § 15.2-2208), or civil penalties (Virginia Code § 15.2-2209). In conjunction with an enforcement action, the locality may also record a lis pendens meeting the requirements of Virginia Code § 8.01-268 in the clerk’s office of the circuit court. See Virginia Code § 15.2-2208(B).

27-200 Rules of evidence for the zoning official

This section provides a brief overview of the law pertaining to the admissibility of evidence in a civil zoning enforcement action. Because this scope is so limited, it is a very brief summary of the rules of evidence in Virginia and the reader is advised to consult with the Part 2 of the Rules of the Supreme Court of Virginia, which may be found online at http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf, case law, and Virginia treatises on the subject.

In considering these rules, the readers should understand that many zoning violations are enforced in general district court, where the defendant landowner and/or occupant may not be represented by an attorney, and where evidentiary objections by the defendant are unlikely. Nonetheless, knowledge of these rules of evidence allows the zoning official to better prepare her case for court, to be confident that the evidence that will be presented will be admissible if an objection is raised, and to assure that the evidence presented will be relevant and material.

27-210 The rules of evidence and why they exist

The term evidence generally refers to the testimony, documents, and other information presented to the court at a trial to persuade the court that a proposition should be taken as established or proven. The rules of evidence are a system of rules that governs the presentation and admissibility of evidence.

The rules of evidence have evolved over the centuries, and the rules that have developed are designed to keep out any matters that: (1) are likely to be untrue; (2) are likely to mislead the trier of fact; (3) would unduly arouse the emotions of the trier of fact; or (4) violate some public policy of greater social importance. The rules also are designed to keep a trial moving forward without being buried under an avalanche of information having little relevance toward proving or disproving a particular fact.

Today, the rules of evidence reflect the balancing of the value of evidence against the dangers of admitting it.

27-220 Admissibility of evidence

All relevant evidence is admissible, except as otherwise provided by the United States Constitution, the Virginia Constitution, statute, rules of evidence, and other rules prescribed by the Virginia Supreme Court (for purposes here, collectively referred to as the rules of evidence).

Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, i.e., it tends to prove or disprove a material issue in the case. It is not necessary for the evidence to directly prove an ultimate issue in the case in order to be relevant; it is admissible as relevant if it constitutes a link in the chain of proof.
The admissibility of relevant evidence is not absolute. The rules of evidence may prevent relevant evidence from being admitted. For example, a zoning official may be prevented from testifying that a neighbor of a zoning violator told her that the violator had 37 junked vehicles on his property. Although evidence about the junked vehicles may be relevant, it would likely not be admissible because it is hearsay, discussed in section 27-233.

If the evidence is not relevant; i.e., if it does not tend to prove or disprove any material issue in the case, it is not admissible.

27-230 Rules of evidence every zoning official should know

A zoning official is routinely the key witness in a zoning enforcement action. There are several fundamental rules of evidence that every zoning official should know when preparing a zoning enforcement case for court.

27-231 A witness must have personal knowledge of the matter

A witness may not testify to a matter unless evidence is introduced that is sufficient to support a finding that the witness has personal knowledge of the matter. Personal knowledge is typically established by the witness’ own testimony. This requirement is easily satisfied when the testifying zoning inspector has observed the condition of the property and performed other related functions, such as reviewing records to confirm whether a particular permit or approval was granted.

27-232 A witness who forgets while testifying may have his memory refreshed

A witness should testify from memory. However, a witness may forget some or all of the facts about which he is called to testify, either because of nervousness, the passage of time, or the sheer volume of facts he is asked to recall. One way to refresh a witness’ memory is to ask him leading questions. Another way is to allow the witness to examine materials, usually writings, which relate to the matter forgotten. The materials relied upon need not be admitted into evidence, and they need not even be otherwise admissible.

After examining the materials, the witness may either: (1) put aside the material and testify from an independent recollection; or (2) although not having actual independent recollection, testify directly from the material placed before him. In the latter situation, if the witness has some independent recollection of the matter, he may use the notes to refresh his memory, provided he made a correct record of the details at the time of the event.

27-233 The hearsay rule prohibits the admission of out-of-court statements unless an exception applies

Hearsay is an oral or written statement, other than one made by a declarant while testifying in court, offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception applies. Although there are numerous exceptions to the hearsay rule, the zoning official should be familiar with the following four:

- **Admissions by party-opponents**: An admission is an out-of-court statement offered against a party, that is the party’s own statement or that of an authorized representative, and it is admissible. The admission may be a statement of fact, an opinion, or a legal conclusion. The admission is not binding or conclusive and may be denied, rebutted, or explained away. As a practice suggestion, the zoning official should pay attention to and document every out-of-court statement made by a zoning violator and his or her representatives.

- **Recorded recollection**: A recorded recollection is an original memorandum or record made at or near the time of an event concerning a matter about which a witness once had firsthand knowledge. If the witness does not have a present recollection of the event and vouches for the accuracy of the memorandum or record, it may be read into the record. As a practice suggestion, the zoning official should take contemporaneous notes or prepare a report of each zoning inspection and each conversation with persons pertaining to the zoning violation immediately following the inspection or conversation.
• Records of documents affecting an interest in property and statements in those records: The record of a document purporting to establish or affect an interest in property (e.g., a deed), and statements in those documents, are admissible. Recitals of fact in a deed or deed of trust are *prima facie* evidence of those facts. As a practice suggestion, the zoning official should conduct a search of the owner of the property in the circuit court’s records, and obtain an authenticated copy of the deed from the clerk of the court.

• Official records and reports: Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth the activities of the office or agency, or matters observed within the scope of the office or agency’s duties, are admissible. Official records, and the statements contained in those records, are *prima facie* evidence of the facts stated. The official zoning map and written notices of violation are official records. As a practice suggestion, the locality’s zoning department should have one person formally designated as the custodian of all records in the department. Prior to going to court, that person should prepare copies of the relevant portions of the official zoning map and all written notices of violation provided to the zoning violator and have them authenticated.

27-234 Illustrative evidence and photographs

The use of illustrative evidence to clarify testimony is both proper and common. Illustrative evidence includes such visual aids as sketches and maps.

Photographs are admissible either to illustrate the testimony of a witness, or as independent evidence of matters revealed by the photograph. In order to assure that the photographs will be admissible in court, the witness should be able to testify that the photograph is a fair and accurate representation of her observations. The witness need not have taken the photograph, and neither the witness nor the photographer is required to testify about the technical details (e.g., shutter speed, film speed and type, lens focal length) of the photograph in order for it to be admissible.

27-235 Judicial notice

The doctrine of judicial notice allows the court to streamline the trial process by eliminating the formalities of the rules of evidence for certain evidentiary matters that are beyond any reasonable dispute. When the doctrine applies, certain facts and laws are accepted as established.

A court *may* take judicial notice of those facts that are either: (1) so generally known within the jurisdiction (e.g., Monticello is in Albemarle County); or (2) so easily ascertainable by reference to reliable sources (e.g., the time the sun set on a particular date), that reasonably informed people in the community would not regard them as reasonably subject to dispute. Facts that have been judicially noticed include those pertaining to the location and boundaries of cities and counties, natural features such as rivers and mountains, man-made features such as railroads and bridges, natural phenomena, times, dates and days, and the effects of weather.

A court *must* take judicial notice of the laws of the United States, the Commonwealth or any subdivision of the Commonwealth. *Virginia Code § 8.01-386(A)* (civil cases); *Virginia Code § 19.2-265.2(A)* (criminal cases). This means that a court must take judicial notice of a locality’s ordinances, including its zoning ordinance. In taking notice, the court may consult any book, record, register, journal or other official document or publication purporting to contain, state, or explain the law, and may consider any evidence or other information or argument that is offered on the subject. *Virginia Code § 8.01-386(B)* (civil cases); *Virginia Code § 19.2-265.2(B)* (criminal cases). To assist the court, staff should prepare authenticated copies of the relevant sections of the zoning ordinance and highlight the relevant provisions or be certain that the court has an always-updated copy of the code.

27-300 Determining whether a zoning violation exists, and proving it

In most cases, zoning officials must establish the condition of the property on a particular date or series of dates as being in violation of one or more zoning regulations. There are three key elements to establish a violation: (1) the ownership and occupancy of the property; (2) the applicable zoning of the property; and (3) the unlawful condition or use of the property. A methodical approach should be taken to determine whether a zoning violation exists.
The principles discussed in this section apply in civil zoning enforcement actions and discuss the sources for various pieces of evidence and how to get them before the court. The reality is that most zoning enforcement cases are fairly simple in nature, and the zoning inspector can testify about all three elements (ownership/occupancy, applicable zoning and regulations, and the condition of the property), without introducing all of the documentary evidence discussed below.

27-310 Establishing ownership and occupancy of the property; other violators

The first element to be established is the ownership and occupancy of the property. Although ownership and occupancy is typically not in issue by the time a zoning enforcement case gets to court, the issue can be raised, particularly in a criminal enforcement action.

27-311 Ownership

Ownership of the property may be established by:

• **Deed**: An authenticated copy of the last recorded deed showing that the zoning violator is the owner of the property.

• **Official records**: An authenticated copy of the locality’s public real estate records pertaining to the property.

• **Admissions of the party-opponent**: Testimony that the zoning violator, a party to the zoning enforcement action, admitted that he is the owner of the property.

Establishing ownership by deed alone may be insufficient if the deed was recorded many years prior to the enforcement action and there is no evidence presented of a recent title search. In *Harlow v. City of Richmond*, 1995 Va. App. LEXIS 954, 1995 WL 264311 (1995) (unpublished), the Virginia Court of Appeals held that ownership was not established by deeds recorded 8 and 19 years before the date of the alleged offense. The court said that the deeds were “too remote in time to prove ownership.” The court rejected the city’s additional evidence that the appellant had applied or offered to apply for a variance on one parcel, and that he obtained a building permit. The problem faced by the city in *Harlow* should be addressed by presenting additional evidence showing current ownership status; e.g., evidence that a search of the land records up to the present did not show that the ownership had since changed, presenting official real estate records, or testifying about admissions by the owner.

27-312 Occupancy

Occupancy of the property may be established by:

• **Leases and similar documents**: A lease, rental agreement or similar document obtained from the owner or the occupant.

• **Admissions of the party-opponent**: Testimony that the zoning violator, a party to the zoning enforcement action, admitted that he is the occupant of the property.

• **Testimony based on observations**: A witness may testify as to who was present on the property each time a zoning inspection was conducted.

Even when establishing occupancy, the zoning official should keep in mind the *Harlow* decision, and develop evidence showing the current occupancy status.

27-313 Who is responsible when the landowner and the occupant are not the same

Zoning violations in Albemarle County are enforced primarily through civil penalties, and Albemarle County Code § 18-36.3 states that the following people are responsible for the condition of their property and subject to
civil penalties:

Any person, whether owner, lessee, principal, agent, employee or otherwise, who violates any provision of this chapter as provided in section 36.1, or permits either by granting permission to another to engage in the violating act or by not prohibiting the violating act after being informed by the zoning administrator that the act violates this chapter as provided in section 36.2 . . .

This language is typical. It would appear to be obvious that the owner is always responsible for the condition of his or her own property because the owner has control over its use and condition in most cases. The issue can become murky where the property is occupied by someone other than the owner and the owner has relinquished all control over the property’s condition, or where third parties are responsible for its condition. Note, however, that the regulation does not impose responsibility for complying with the zoning ordinance on only those persons directly responsible for the condition of the property. An owner who “permits any such violation” is also responsible.

If the locality desires to enforce its regulations against the owner where an occupant is the direct violator, the zoning administrator must send a written notice of violation (see section 27-500) to both the owner and the occupant of the property. See Virginia Code § 15.2-2204(H) (requiring that when any “applicant” requesting a written order, requirement, decision or determination is not the owner of the real property in issue, written notice must be provided to the owner within 10 days) and Virginia Code § 15.2-2311(A) (a BZA decision is binding on the owner of the real property that is the subject of an appeal only if the owner has been provided notice of the zoning violation or written order in accordance with that section; actual notice or participation in the appeal waives the owner’s right challenge the validity of the BZA’s decision due to lack of notice).

There is little Virginia case law on the issue of whether the owner, the occupant, or some third party is ultimately responsible for the condition of the property. In City of Charlottesville v. Rice, 22 Va. Cir. 327 (1990), the landowner contracted to have aluminum siding and windows installed on his house, which was located in a historic preservation district. The contract provided that the contractor would obtain all required building permits. When cited for a zoning violation because the contractor failed to obtain all of the required permits, the landowner claimed that he was not liable because the contract provided that the contractor would obtain the permits. The court ruled in favor of the city, holding that the historic preservation district regulations applied to landowners, and the duty to comply could not be delegated or assigned to another person.

There also is little case law nationally on this issue. The cases that have considered the issue generally hold that so long as the landowner had actual or constructive knowledge of the violating conditions and the power to stop the violation, he can be liable for the violation. In County of Kendall v. Rosenwinkel, 353 Ill. App. 3d 529, 818 N.E.2d 425 (2004), the court held that a landowner can be held criminally liable for a zoning violation created by an occupant only if the owner had knowledge of the violation and had the power to obtain the occupant’s compliance or the power to evict the tenant after receiving knowledge of the violation. “Where an owner has knowledge of a zoning violation on his or her property as a result of a tenant’s acts, and the owner has the power to stop the violation but does nothing, he or she is promoting or facilitating the violation.” Rosenwinkel, 353 Ill. App. 3d at 545, 818 N.E.2d at 439. This approach also has been followed in Town of Boothbay v. Jenness, 2003 ME 50, 822 A.2d 1169 (2003), Commonwealth v. DeLoach, 714 A.2d 483 (Pa. 1998) and City of Webster Groves v. Erickson, 789 S.W.2d 824 (Mo. App. E.D., 1990).

Steps to Ensure the Landlord is Responsible

- Authorize separate penalties against a landowner landlord by assuring that the zoning ordinance provides that any person who violates, or permits another to violate, is responsible.
- Assure that the landlord has notice of the violation by always sending a written notice of violation to the landowner and the occupant.
- Provide the landowner a reasonable opportunity to obtain the occupant’s compliance or eviction by not proceeding with further enforcement until the 30-day period in which to appeal the notice of violation to the BZA has expired.
Although a lesser standard may apply when zoning violations are enforced in a civil proceeding, the zoning official should ensure that the landowner has notice of the violation if he or she is not physically occupying the property.

27-314 Identifying the correct violator

When the landowner or zoning violator is a natural person, identifying the correct violator is simple. When the landowner or zoning violator is an entity such as a corporation or a limited liability company (“LLC”), the zoning official must be certain to determine the correct name of the entity and proceed against that entity, rather than the corporate officers or the LLC's members or manager, even if the corporation is a one-person operation or the LLC has only one or two members. In Jordan v. Commonwealth, 36 Va. App. 270 (2001), the Virginia Court of Appeals made this point perfectly clear. In a public nuisance action, the Commonwealth proceeded against the two members of an LLC that had no other employees, even though fee simple title to the property at issue was held by the LLC. The Commonwealth argued that the members were the owners in fact because they were the sole members in the LLC, shared its profits, and held themselves out to be the owners. The court held that the Commonwealth had failed to establish that the individual members were the owners of the property. In sum, the simple rule is that if the landowner is a corporation, LLC or some other legal entity and is violating the zoning ordinance, the zoning enforcement action should proceed against the entity, not any natural person.

When the landowner or zoning violator is a land trust, the zoning official must determine the correct names of the trustees of the land trust, and identify the violator as, for example, “John Doe, Trustee, and Jane Doe, Trustee, of the Doe Land Trust.”

27-315 Whether someone who is not an owner or occupant may be a violator

Occasionally, the charged violator may be neither an owner nor an occupant of the property. The typical situation is the adult-aged son who stores his junk on his parent’s property, and the son is neither an owner nor an occupant (a resident or lessee) of the property.

Whether an enforcement action may be successfully brought against that person depends on the language in the zoning ordinance. If the ordinance provides that “any person” may violate the zoning ordinance, or otherwise does not limit the class of violators to owners and occupants, then an enforcement action may be brought against anyone who fits within that broader class and need not be either an owner or occupant. Turner v. City of Harrisonburg, 2013 Va. App. LEXIS 275, 2013 WL 5537129 (2013) (Va. Ct. App.) (unpublished) (defendant was lawfully convicted of violating the zoning ordinance even though he neither owned nor occupied the property where the violation occurred, because the zoning ordinance provided that “any person” found in violation of the zoning ordinance was guilty of a class 1 misdemeanor).

27-320 Establishing the applicable zoning regulations

The second element to be established is the applicable zoning regulations that prohibit the condition or use. The zoning official must know what she needs to prove in order to establish a violation. This information is contained in the text of the zoning ordinance – in the definitions, the district regulations, and in other regulations. There are two facts that must be established:

- The zoning of the property: The zoning of the property may be established by introducing an authenticated copy of the relevant portion of the official zoning map, or by having the court take judicial notice of the map.
- The applicable zoning regulations: The applicable zoning regulations may be established by having the court take judicial notice of the zoning ordinance and, in particular, those regulations relevant to the action.

The applicable zoning regulations should be reduced to their fundamental elements. This exercise allows the zoning official to know precisely what she will have to prove in court, and to be certain that no element of a violation is overlooked.
Once each element of the violation is confirmed, the zoning official should then identify what facts will establish each element of the violation to be proven. Some of these facts will be obvious, others will not. It may be useful to discuss this with other zoning officials to learn from their experience.

27-330 Establishing the condition or use of the property

At this stage of the investigation, the zoning official must collect the evidence pertaining to the unlawful use or condition of the property, and then connect that evidence to the applicable zoning regulations.

27-331 Identify what evidence needs to be collected

The zoning official should first identify what facts will establish each element of the violation that must be proven. Some of these facts will be obvious, others will not. It may be useful to discuss this with other zoning officials to learn from their experience.

To assure the evidence collected will establish a violation, the zoning official should carefully determine the elements of the violation to be proven.

27-332 Collect the evidence

The zoning official must collect the evidence in a form that will be admissible in court. The following evidence would be gathered from an inspection of the property. See section 27-400 regarding obtaining search warrants to enter property and conducting warrantless searches.

- **Observations**: The zoning official may testify as to what he observed while on the property, from adjacent property, or from public property, such as a road. The relevant observations should be reflected in notes or a report describing the observations.

- **Photographs**: Photographs can be powerful evidence of the condition of a property. Photographs should be taken by persons who have some knowledge of the basics of photography to assure proper focus, lighting, and composition.

- **Detailed field notes**: For some violations, detailed information may need to be collected that cannot be reflected in more general notes describing the zoning official's observations. For example, if the violation is a junkyard comprised of inoperable vehicles, detailed field notes may be necessary to document how each vehicle was determined to be inoperable (e.g., VIN number, and whether inoperability is based on a missing license, outdated tags, disassembled for more than 60 days or some other criterion).

- **Observations by others**: Neighbors of the violating property may be able to testify about their observations of the property, and their testimony may be particularly useful for those violations that are transitory in nature (e.g., the storage of commercial vehicles on residential property at night), or when the owner is claiming nonconforming status. Testimony from neighbors may also be invaluable in those cases where the zoning violation seems to be minor or trivial. The neighbors' participation will show the court that, while the violation may not seem like much to a disinterested third party, it shows the court that the violation is, in reality, disrupting the neighborhood and is important to them.

- **Search public records**: The title to the property needs to be researched. Recorded deeds need to be located and authenticated copies need to be obtained.

27-333 Connect the evidence to the applicable zoning regulations

The final step in the process is to connect the evidence to the applicable zoning regulations to confirm that a violation exists. The zoning official should have evidence supporting a determination that each element of the violation exists.

*Ihnken* is a civil rights case brought by a concert promoter whose permit was summarily revoked. It provides a fairly familiar scenario when a hasty response to a complaint of an alleged zoning violation ran afoul of certain established principles. A measured response to the alleged violation likely would have avoided this lawsuit.

**The Facts:** A concert promoter rented land from the owner of a farm for a 4-day music and arts festival. The landowner obtained a zoning permit from the county’s zoning administrator for the festival. On the first night of the concert, the police received numerous noise complaints. The next morning, a county commissioner received an angry email from a constituent about the noise the night before. After a meeting between the sheriff and the zoning administrator, and with the endorsement of the county commissioners, the zoning administrator revoked the permit and the remainder of the festival was cancelled. The promoter sued various county officials alleging, among other things, a violation of his procedural due process rights because the permit was revoked without a hearing.

**The Issue:** Whether the county’s summary revocation of a permit for a music festival – while the festival taking place, because the music was exceeding the county’s noise standards – violated the concert promoter’s procedural due process rights.

**The Court’s Ruling:** In rejecting the county’s request to dismiss the promoter’s complaint, the court found that the county officials had violated the promoter’s procedural due process rights when it revoked the permit without a hearing, because: (1) the revocation occurred in the morning when there was no violation of the noise ordinance; (2) the noise ordinance did not authorize summary revocations; instead it only provided that a violation of the noise ordinance was a misdemeanor; (3) although the zoning ordinance authorized the zoning administrator to revoke a permit for violating a condition of a permit, this provision addressed only the legal authority to revoke, but not the process to revoke; and (4) the zoning ordinance provided no summary process before revoking the permit.

**Its Implications:** This case has the following implications:

- Although the permit was issued to the landowner, not the concert promoter, the court concluded that the concert promoter had a property interest in the permit because of his contractual relationship with the landowner.

- Any provision in a locality’s regulations that provide for a permit or other approval to be revoked should be viewed as only providing the legal authority to revoke; procedural due process requires notice and the opportunity to be heard; the process due in land use cases is not extensive.

- Permits for single events should be clearly stated; in this case, the parties disagreed over the allowed duration of the festival and what hours music was allowed (the court noted that the landowner was less than forthright about the nature of the festival).

**The Aftermath:** After discovery, the defendants’ motion for summary judgment on the procedural due process claim was denied. *Ihnken v. Gardner*, 2014 U.S. Dist. LEXIS 122345 (D. Md. 2014) (notice of a pre-deprivation hearing did not occur when county official state that the issue would be “addressed” in the morning).

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27-400 Authority to enter private property

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 Virginia Constitution contains a similar prohibition. These constitutional protections apply to zoning inspections even when zoning violations are enforced civilly, instead of criminally.

The Fourth Amendment protects citizens from warrantless searches of private property where the owner has a reasonable expectation of privacy in the place searched. In other words, the “Fourth Amendment protects the curtilage of a house and . . . the extent of the curtilage is determined by factors that bear upon whether an individual may reasonably expect that the area in question should be treated as the home itself.” *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 1139 (1987), quoted in *Robinson v. Commonwealth*, 273 Va. 26, 639 S.E.2d 217 (2007). Searches of property conducted without a search warrant are *per se* unreasonable under the Fourth Amendment. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006). However, not every observation by a government official is a search within the meaning of the Fourth Amendment. Rather, a search occurs when an expectation of privacy...
that society is prepared to consider reasonable is infringed. *Illinois v. Andreas*, 463 U.S. 765, 103 S. Ct. 3319 (1983); *United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996).

Before entering private property, particularly occupied private property, the zoning official should request permission from the owner or the occupant to enter the property to conduct the inspection. When requesting consent, the zoning official should explain to the owner or occupant that a complaint has been received about some use or activity on the property and that an investigation is being conducted to determine compliance with the zoning ordinance. In most cases, the owner or occupant will grant consent. Express consent for locality officials to enter and inspect property provided on a land use application is valid, provided that the entry and inspection is related to compliance with the laws for which the land use approval was sought. *McNeice v. Town of Waterford*, 607 Fed. Appx. 103 (2d Cir. 2015) (building permit application) (unpublished). When consent is refused, and entry into portions of the property for which a reasonable expectation of privacy may exist is necessary in order for the zoning official to complete the investigation, a search warrant may be required and the zoning official should consult with the locality’s attorney.

### Four Reasons Why The Nonconsensual Warrantless Inspection of Occupied Property Should be Avoided

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<th>Reason</th>
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<td><strong>Whether zoning violations are enforced in civil or criminal proceedings, zoning inspectors must respect the Fourth Amendment’s prohibition against warrantless searches and the landowner’s right to a reasonable expectation of privacy.</strong></td>
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<td><strong>Nonconsensual warrantless inspections of occupied property put the safety of the zoning inspector at risk.</strong></td>
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<tr>
<td><strong>Nonconsensual warrantless inspections of occupied property may be perceived as overzealousness by the general public, potentially damaging the reputation and effectiveness of the locality’s zoning enforcement program.</strong></td>
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<tr>
<td><strong>Nonconsensual warrantless inspections of occupied property may only heighten the suspicions of the landowner and possibly reduce his cooperation towards compliance.</strong></td>
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This section provides three different procedures for obtaining warrants to conduct inspections: (1) administrative search warrants issued by a judge of the circuit court; (2) criminal search warrants issued by a judge or magistrate; and (3) inspection warrants issued by a magistrate or court of competent jurisdiction. This section ends with a review of the law pertaining to warrantless inspections.

### 27-410 Administrative search warrants

A zoning violation that will be enforced in a civil proceeding may require that the zoning official obtain an administrative search warrant. The locality’s attorney should work with the zoning official to secure the warrant, and will prepare all the paperwork.

### Seeking an Administrative Search Warrant: One Approach

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<td><strong>Call the judge’s secretary to let her know that the zoning administrator will be applying for an administrative search warrant to allow the county’s zoning inspectors to enter the property. Also inform the court that the purpose of the inspection is to determine whether a violation of the zoning ordinance exists on the property.</strong></td>
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<td><strong>Inform the secretary when the papers (affidavits, supporting exhibits, and a proposed administrative search warrant) will be delivered.</strong></td>
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<td><strong>Ask the secretary for available times for the judge to meet with the zoning officials and the county attorney, if he or she desires, to answer questions about the application.</strong></td>
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<td><strong>Ask the secretary to inform the county attorney’s office as soon as the administrative search warrant is issued because it has a short life.</strong></td>
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Under Virginia Code §§ 19.2-393 through 19.2-397, the following rules and procedures apply:

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<td><strong>Authority to issue warrant</strong>: An administrative search warrant is issued by the judge of the circuit court. <em>Virginia Code § 19.2-393</em>.</td>
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• **Affidavit required, showing probable cause:** An administrative search warrant may be issued only upon a showing of probable cause, supported by an affidavit particularly describing the place, things or persons to be inspected and the purpose for which the inspection for testing is to be made. *Virginia Code § 19.2-394*. The affidavit must contain either a statement that consent to inspect has been sought and refused, or explain that the facts or circumstances reasonably justify the failure to seek consent in order to effectively enforce the zoning ordinance. *Virginia Code § 19.2-394*.

• **Probable cause explained:** Probable cause in the criminal sense is not required. *Probable cause* exists if either reasonable legislative or administrative standards for conducting the inspection are satisfied with respect to the particular place, things or persons, or there exists probable cause to believe that there is a condition, object, activity or circumstance which legally justifies the inspection. *Virginia Code § 19.2-394*; *Mosher Steel v. Teig*, 229 Va. 95, 103, 327 S.E.2d 87, 94 (1985) (the “warrant application must provide the judicial officer with factual allegations sufficient to justify an independent determination that the inspection program is based on reasonable standards and that the standards are being applied . . . in a neutral and nondiscriminatory manner”); *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967).

### Suggested Items to Seek in an Administrative Search Warrant

- Authority to take photographs and video.
- Authority to obtain soil and water samples, especially if the nature of the violation, such as a junkyard, may have conditions in which hazardous substances may be stored on the property, where it is likely that spills may be observed, or where materials may be buried.
- Authority to bring a police officer or sheriff’s deputy for the sole purpose of providing security for the zoning inspectors, particularly if the zoning inspectors have received threats from the violator or the relationship between the zoning inspectors and the violator has been contentious.
- Ask that the 10-day life of the administrative search warrant be extended beyond 10 days, particularly in the winter when weather may prevent or delay access to the property, or when law enforcement officers will be accompanying the zoning inspectors.
- Ask that the warrant authorize the inspection to be conducted without the owner or the occupant being present, provided that prior notice of the date and time of the inspection is given.

• **Examination of affidavit by the issuing judge:** The issuing judge may examine the affidavit under oath or affirmation to verify the accuracy of any matter indicated by the statement in the affidavit. *Virginia Code § 19.2-394*.

• **Issuance of administrative search warrant; contents:** An administrative search warrant is a written order, made in the name of the Commonwealth, signed by a judge of the circuit court. The order must: (1) describe, either directly or by reference to any accompanying or attached supporting affidavit, the property or premises where the inspection is to occur, *Virginia Code § 19.2-393*; and (2) specify the duration of the warrant, which period shall not exceed ten days unless extended by the judge. *Virginia Code § 19.3-395*. The description of the property or premises to be searched must be sufficiently accurate so that the zoning official executing the warrant and the owner or custodian of the property or premises can reasonably determine from the warrant the activity, condition, circumstance, object or property of which inspection is authorized. *Virginia Code § 19.2-393*.

• **Conducting the inspection:** An inspection pursuant to a warrant may not be made in the absence of the owner, custodian or possessor of the particular place, things or persons unless specifically authorized by the issuing judge upon a showing that the authority is reasonably necessary to effectuate the purpose of the regulation being enforced. *Virginia Code § 19.2-396*. An entry pursuant to the warrant shall not be made forcibly, except that the issuing judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of an immediate threat to public health or safety, or where the facts establish that reasonable attempts to serve a previous warrant have been unsuccessful. *Virginia Code § 19.2-396*. In the case of entry into a dwelling, prior consent must be sought and refused and notice that a warrant has been issued must be given at least twenty-four hours before the warrant is executed, unless the issuing judge finds that failure to seek consent is justified and that there is a reasonable suspicion of an immediate threat to public health or safety. *Virginia Code § 19.2-396*. In Albemarle County, the zoning administrator routinely requests the court to authorize a police officer to accompany the zoning inspectors during the inspection for safety reasons.
- **Return of warrant**: After the administrative search warrant has been executed and the inspection conducted, the warrant must be returned to the issuing judge within the time specified in the warrant. *Virginia Code § 19.2-395.*

### 27-420 Criminal search warrants

A zoning violation that will be enforced criminally may require that the zoning official obtain a criminal search warrant. The locality’s attorney should work with the zoning official and the locality’s law enforcement agency in securing the warrant, and will prepare all paperwork.

Under Virginia Code §§ 19.2-52 through 19.2-60, the following rules and procedures apply:

- **Authority to issue warrant**: A criminal search warrant is issued by any judge, magistrate or “other person having authority to issue criminal warrants.” *Virginia Code § 19.2-52.*

- **Affidavit required, showing probable cause**: A criminal search warrant may be issued only upon a complaint on oath supported by an affidavit. *Virginia Code § 19.2-52.* The affidavit may be made by any person, and must reasonably describe the place or thing to be searched, the things to be searched for, and briefly allege the material facts constituting probable cause for issuing the warrant. *Virginia Code § 19.2-54.* The affidavit must also allege substantially the offense requiring the search. *Virginia Code § 19.2-54.*

- **Probable cause explained**: *Probable cause in the criminal sense is a probability of criminal activity. “The task of the issuing magistrate is simply to make a ‘practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and the basis of knowledge of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place.” Lebedun v. Commonwealth, 27 Va. App. 697, 706, 501 S.E.2d 427, 431 (1998).*

- **Issuance of criminal search warrant; contents**: A criminal search warrant must: (1) be directed to a police officer, *not to the zoning administrator,* (2) identify the affiant; (3) recite the offense in relation to which the search is to be made; (4) name or describe the place to be searched (the property by tax map and parcel number and/or address); (5) describe the property to be searched; (6) recite that the magistrate has found probable cause to believe that the property constitutes evidence of a crime identified in the warrant, or tends to show that a person named or described in the warrant has committed or is committing a crime; (7) command that the place be forthwith searched, either in day or night, and that the objects described in the warrant, if found, be seized; (8) state the date and time the search warrant was issued; and (9) have the affidavit attached to the search warrant. *Virginia Code § 19.2-56.* Additional rules apply to search warrants for records or other information pertaining to a subscriber to, or customer of, an electronic communication service or remote computing service, whether a domestic corporation or a foreign corporation, that is transacting or has transacted any business in Virginia. *Virginia Code § 19.2-56.*

- **What may be searched and seized**: A criminal search warrant may be issued for the search of or for specified places, things or persons, and any object or thing, including documents, books, papers or records constituting evidence of a zoning violation may be seized. *Virginia Code § 19.2-53.*

- **Conducting the inspection**: An inspection pursuant to a criminal search warrant must be conducted within 15 days by the police officer or other law enforcement officer to whom it is delivered. No other person may be permitted to be present during or participate in the execution of the warrant except: (1) the owners and occupants of the place to be searched when permitted to be present by the officer in charge of the search; and (2) persons designated by the officer in charge of the search to assist or provide expertise in the conduct of the search. *Virginia Code § 19.2-56.*

- **Return of warrant**: The officer executing the warrant must endorse the date of execution on the warrant and file it, with an inventory of any property seized, and the accompanying affidavit, within three days after the execution

Unlike administrative search warrants, criminal search warrants must be executed by law enforcement officers, and the zoning officials play secondary roles, assisting and lending their expertise to the officers in charge.

27-430 Inspection warrants to inspect dwellings

A zoning ordinance may provide for the issuance of inspection warrants by a magistrate or court of competent jurisdiction. Virginia Code § 15.2-2286(A)(15). The authority to inspect under an inspection warrant issued under Virginia Code § 15.2-2286(A)(15) is limited to dwellings.

Under this procedure, the zoning administrator or her agent must present sworn testimony to a magistrate or court of competent jurisdiction, and if the sworn testimony establishes probable cause that a zoning violation has occurred, the magistrate or court may grant an inspection warrant “to enable the zoning administrator or his agent to enter the subject dwelling for the purpose of determining whether violations of the zoning ordinance exist.” Virginia Code § 15.2-2286(A)(15). The zoning administrator or his or her agent must make a reasonable effort to obtain consent from the owner or tenant of the dwelling before requesting an inspection warrant. Virginia Code § 15.2-2286(A)(15).

27-440 Warrantless searches

In the context of a typical zoning inspection, the areas of a property subject to Fourth Amendment protections (i.e., in which an owner is deemed to have a reasonable expectation of privacy) are the home and the curtilage of the home. Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735 (1984); Robinson v. Commonwealth, 273 Va. 26, 639 S.E.2d 217 (2007); Jefferson v. Commonwealth, 27 Va. App. 1, 497 S.E.2d 474 (1998). “This area around the home is ‘intimately linked to the home, both physically and psychologically,’ and is where ‘privacy expectations are most heightened.’ [citations omitted].” Covey v. Assessor of Ohio County, 777 F.3d 186, 192 (4th Cir. 2015) [plaintiffs’ complaint successfully alleged a plausible Fourth Amendment violation where deputy assessor ignored “no trespassing” sign, searched the house’s curtilage, including the walk-out basement patio). Achieving certain governmental interests, such as enforcing a locality’s zoning regulations, will likely not justify the inspector’s actions and the search may be found to be “unduly intrusive.” Covey, 777 F.3d at 195 (“What began as a mere regulatory violation turned into an affront to the Coveys’ constitutional rights when Crews entered the curtilage and the Coveys’ home”). In the end, however, the assessor prevailed when the Fourth Circuit Court of Appeals later affirmed the trial court’s grant of summary judgment in favor of the defendant assessors. Covey v. Assessor of Ohio County, 2016 U.S. App. LEXIS 20806 (4th Cir. 2016) (unpublished).

As a general proposition, the curtilage of the home is the area immediately surrounding the home “to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” Oliver, 466 U.S. at 180, 104 S. Ct. at 1742. Four factors are considered to determine whether an area is within the curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134 (1987). The curtilage can be conceived as an area inside a line that divides the private confines of the home from the surrounding open fields.

27-441 Various areas within the curtilage in which a reasonable expectation of privacy may or may not exist

It is recognized that absent any affirmative attempts to discourage trespassers, owners or possessors of private property impliedly consent to have members of the general public intrude upon certain, limited areas of their property. Robinson v. Commonwealth, 273 Va. 26, 34-35, 639 S.E.2d 217, 222 (2007) (“Implied consent can be negated by obvious indicia of restricted access, such as posting ‘no trespassing’ signs, gates, or other means that deny access to uninvited persons”); Shaver v. Commonwealth of Virginia, 30 Va. App. 789, 520 S.E.2d 393 (1999). This consent
extends to those areas of the property which would be used when approaching a house in an ordinary attempt to speak with the occupant, such as the driveway, the front sidewalk, the front porch and any other particular path. See, generally, 1 Wayne R. LaFave, Search and Seizure § 2.3(f), at 600-03 (4th ed. 2004). The courts have said that the police have the same right as any other member of the public to enter these areas where the owner has granted implied consent to enter. Shaver, 30 Va. App. at 796, 520 S.E.2d at 397 (“If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.”). The scope of this implied consent does not also encompass the right to conduct a general search of the premises. Thus, if a zoning inspector searching for evidence of a zoning violation strays from the “path” that is impliedly open to the public, he or she has exceeded the scope of the implied consent and, as a result, the search conducted without a warrant is unreasonable.

Following are some very general guidelines as to how the Fourth Amendment may be applied to a warrantless search of various areas of residential property during a zoning inspection:

- **Driveway and walkway to front door:** Absent express orders from the person in possession of the property against a possible trespass, there is no reasonable expectation of privacy in the driveway and the walkway to the front door. Robinson v. Commonwealth, 273 Va. 26, 639 S.E.2d 217 (2007); United States v. Taylor, 90 F.3d 903 (4th Cir. 1996).

- **Fenced backyard:** There is a reasonable expectation of privacy within a fenced backyard. Kearney v. Commonwealth, 4 Va. App. 202, 355 S.E.2d 897 (1987) (reasonable expectation of privacy existed in inoperable truck located behind fence, twenty feet from home).

- **Unfenced backyard:** Whether a reasonable expectation of privacy exists in an unfenced backyard depends on whether the area is within the curtilage of the home, but at the very least the area of a residential backyard immediately adjacent to the home’s backyard is within the curtilage. Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735 (1984). However, the warrantless entry into areas other than a residence’s front entrance does not always violate the Fourth Amendment. Alvarez v. Montgomery County, 147 F.3d 354 (4th Cir. 1998).

- **Items in plain view:** There is no reasonable expectation of privacy in items that are in plain view to the public. Taylor, supra. This includes items within a house that are observed from the street or even through a front window when the government official is at the front door. Taylor, supra. An owner or occupant likely has a reasonable expectation of privacy for what may be observed from those windows that are beyond the walkway to the front door or beyond public view.

- **Looking into windows on dwellings:** Beyond what can be seen through open windows either from public vantage points or from the walkway to the front door as discussed above, an owner or occupant likely has a reasonable expectation of privacy with respect to any other windows. The zoning official should be aware of Virginia Code § 18.2-130, which makes it a crime to “enter upon the property of another and secretly or furtively peep, spy or attempt to peep or spy into or through a window, door or other aperture of any building, structure, or other enclosure of any nature occupied or intended for occupancy as a dwelling.”

It is impossible to consider all of the possible factual scenarios in which a Fourth Amendment question may arise. A zoning official should consult the locality’s attorney for guidance. In any case, the zoning official should first seek the express consent of the person in possession of the property before entering private property. For the public areas of non-residential property, an owner’s or occupant’s reasonable expectation of privacy is significantly less or nonexistent.

**27-442 Undeveloped and unoccupied areas where no reasonable expectation of privacy exists**

There is no reasonable expectation of privacy in open fields (undeveloped and unoccupied lands), even if the actions would be a trespass under the common law. Oliver v. United States, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741 (1984) (“an individual may not demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home”); Hester v. United States, 265 U.S. 57, 44 S. Ct. 445 (1924).
This rule applies even if the property has been posted with “No Trespassing” signs. Oliver, supra. The fact that an inspector ignores a “no trespassing” sign, even in light of a state or local rule to adhere to such signs, “does not per se amount to a violation of the Fourth Amendment.” Covey v. Assessor of Ohio County, 777 F.3d 186, 194 (4th Cir. 2015) (plaintiffs’ complaint successfully alleged a plausible Fourth Amendment violation where deputy assessor ignored “no trespassing” sign, searched the house’s curtilage, including the walk-out basement patio).

27-443 Extraordinary measures to observe a zoning violation

Although zoning officials who enter the areas of the curtilage that are impliedly open to the public are “free to keep their eyes open,” an official who uses overly intrusive means of investigation, such as the use of binoculars, ladders or other sensory-enhancing devices, may exceed the scope of the landowner’s implied consent discussed in section 27-441.

Following are some guidelines as to the extent to which a zoning inspector should go in observing the portion of a property within the curtilage without a warrant and without the consent of the owner. The criminal cases cited below are from other jurisdictions and are not zoning cases. They are provided for illustrative purposes only.

- **Binoculars**: Binoculars are usually characterized as low-powered visual aids. Whether using binoculars is an unreasonable search generally appears to turn on whether the binoculars allow the law enforcement officer to see more clearly what he or she can otherwise see unaided (no reasonable expectation of privacy and not a search), or whether it allows him or her to see what otherwise could not be seen (a search). Compare United States v. Whaley, 779 F.2d 585 (11th Cir. 1986) (use of binoculars to view criminal activities in basement from 40 yards was permissible to aid observations that could be made with the naked eye) with People v. Arno, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979) (use of binoculars by police officer who stationed himself on a hilltop 200 to 300 yards from the defendants’ building at an altitude approximately that of the sixth or seventh floor of the building was a search because his observations were not observable to anyone not using an optical aid); see also Rook v. State, 679 N.E.2d 997 (Ind. 1997) (use of binoculars to view defendant carrying a marijuana plant in his backyard was not an unreasonable search); Colorado v. Oymes, 920 P.2d 880 (1996) (police officer’s view of interior of defendant’s home with binoculars from nearby field not a search); Oregon v. Carter, 101 Ore. App. 281, 790 P.2d 1152 (1990), reversed on other grounds at 316 Ore. 6, 848 P.2d 599 (1993) (police officer’s use of binoculars to view plant inside window of home from adjoining land not a search); Wisconsin v. Peck, 143 Wis.2d 624, 422 N.W.2d 160 (1988) (use of binoculars to view garden plots near defendant’s rural home not a search).

- **Telescopes**: Telescopes are usually characterized as high-powered visual aids. The rule applicable to binoculars applies to telescopes as well — whether their use constitutes a search generally appears to turn on whether they allow the law enforcement officer to see more clearly what she can otherwise see unaided (no reasonable expectation of privacy and not a search), or whether it allows her to see what otherwise could not be seen (a search). However, by their very nature as high-powered visual aids, telescopes do much more than allow one to see more clearly what can be seen unaided and, therefore, their use without a search warrant likely constitutes an unreasonable search. United States v. Taborda, 635 F.2d 131 (2d Cir. 1980) (use of telescope constituted a search); United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976) (use of high-powered telescope constituted a search).

- **Artificial vantage points over a fence**: Physical barriers such as fences indicate a desire by the landowner to keep certain areas of property private. See, State v. Christensen, 131 Idaho 143, 953 P.2d 583 (1998) (no implied invitation to enter where the entrance to the driveway was obstructed by a closed gate posted with a “no trespassing” sign). Creating an artificial vantage point over a fence may be an unreasonable search. Whether the measures to look over a fence or other barriers are reasonable will depend, in large part, on the height of the fence. People v. Smola, 174 Mich. App. 220, 435 N.W.2d 8 (1989) (standing on car bumper to look over 6-foot fence is not a search because no reasonable expectation that fence would shield backyard from observation); State v. Corra, 88 Ore. App. 339, 745 P.2d 786 (1987) (standing on rock to peer over 6-foot fence not a search; many people tall enough to see over fence); Sarantopoulos v. State, 629 So.2d 121 (1993) (standing on tip toes to look over 6-foot fence not a search); United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972) (viewing backyard from neighbor’s porch was not a search); United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987) (mounting a
video camera on a power pole to observe a backyard over a 10-foot fence was a search, even though portions of the backyard were surrounded by a 5-foot fence). In sum, if the fence was 7 feet in height or taller, and the backyard could not otherwise be observed from a neighbor’s property, the courts would likely have found these observations to be searches requiring a warrant.


- **Breaching a locked or posted gate.** When the curtilage is fenced and the gate is locked or is posted with a “no trespassing” or “keep out” sign, breaching the gate is a search because, in effect, the fence and the locked or posted gate extend the walls of the house (to which a greater expectation of privacy exists) to the area enclosed by the fence. *See Robinson v. Commonwealth*, 273 Va. 26, 34-35, 639 S.E.2d 217, 222 (2007) (“Implied consent can be negated by obvious indicia of restricted access, such as posting ‘no trespassing’ signs, gates, or other means that deny access to uninvited persons”); *see, e.g., Ciraolo, supra; Alvarez, supra; State v. Brocuglio*, 64 Conn. App. 93, 779 A.2d 793 (2001).

Although questions regarding extraordinary measures often arise during training sessions, the reality is that these measures should rarely be needed in a zoning investigation because, as noted in section 27-441, most landowners allow the zoning official to enter the property to observe.

### 27-500 The notice of violation

The zoning administrator’s authority includes the authority to order “in writing the remedying of any condition found in violation of the ordinance.” *Virginia Code § 15.2-2286(A)(4).* The zoning administrator exercises this authority in an individual case by issuing a notice of official determination of violation, also known as a **notice of violation or NOV**.

The notice of violation plays a crucial role in the enforcement process, even though it does so on the administrative level: (1) it advises the owner or occupant of the property that a condition or use of the property is in violation of the zoning ordinance, and orders the owner or occupant to bring it into compliance within a specified period of time; (2) it puts the owner or occupant on notice that if he or she desires to challenge the zoning administrator’s determination that a zoning violation exists, he or she must appeal the determination to the BZA within 30 days; (3) if the owner or occupant fails to file a timely appeal, the determinations made in the notice of violation are **things decided** (see chapter 15), and are no longer subject to challenge or defense in a judicial enforcement proceeding.

For these reasons, the notice of violation should be carefully prepared and contain all of the following:

- **Key identifying information:** The notice of violation should the following information: (1) the name and address of the owner of the property; (2) the name and address of the occupant of the property, if different; (3) the tax map and parcel number of the property; (4) the street address of the property; and (5) the zoning designation of the property.

- **Date of the inspection of the property/date of the violation:** The notice of violation should identify the date the property was inspected that resulted in the determination that a violation exists on the property.

- **Determination of nonconforming status:** The notice of violation should make an affirmative determination of the nonconforming status of the property. In most cases, the use or activity does not have nonconforming status, and this determination eliminates the issue from the proceeding immediately, unless it is appealed to the BZA. It also eliminates one key defense if the zoning violation is enforced in a civil proceeding in court.
• **Description of the violation and the supporting facts**: The notice of violation should identify each violation, identify the regulation of the zoning ordinance violated, and summarize the relevant facts supporting the conclusion that the use or activity violates the cited regulation. For example, in *Mills v. Board of Supervisors of the County of Henrico*, August 23, 2013 (unpublished), Mills, over a period of years, cared for feral cats by setting out food to attract them to her yard. Sometimes she captured the cats, took them to a veterinarian for rabies vaccinations, and had them spayed or neutered. In 2011, the county issued a notice of violation, informing her that she was in violation of the county code because “[c]aring for feral cats in an R-4 district is not a permitted use.” Mills appealed to the BZA, the BZA affirmed, and she appealed that decision to the circuit court. Although the circuit court ruled that the regular caring of feral cats was not customarily incidental to a permitted principal use in an R-4 zoning district and therefore is not a permissible accessory use in that district, it also ruled that the notice of violation was overbroad and was unenforceable. In an unpublished order, the Virginia Supreme Court ruled that, because neither Mills nor the county assigned error to the trial court’s finding that the notice of violation was overbroad, it became the “law of the case” and the county could not enforce the notice. If the violation still existed, the county could, of course, issue a new, more specific notice of violation.

• **Description of corrective action required**: The notice of violation should explain to the owner/occupant what steps must be taken in order for the property to be in compliance with the zoning ordinance.

• **Description of timeline for corrective action**: The notice of violation should explain that the property must be brought into immediate compliance, and that a re-inspection will be conducted on a certain date. This statement should also clearly state that compliance by the date of the re-inspection does not absolve the owner/occupant of the original violation. The goal of requiring immediate compliance is to assure that there is no perception by the owner/occupant that the violation will be allowed to continue without consequence until some future date. On the other hand, conducting the re-inspection on a certain date in the future recognizes the reality that some violations cannot be corrected immediately.

• **Notice of right to appeal**: Virginia Code § 15.2-2311 requires that the notice of violation include a “statement informing the recipient that he may have a right to appeal the notice of a zoning violation . . . within thirty days . . . and that the decision shall be final and unappealable if not appealed within thirty days. The appeal period shall not commence until the statement is given.”

• **Notice of the applicable fee and other information**: Virginia Code § 15.2-2311 requires that a notice of violation inform the recipient of the applicable appeal fee and provide a reference to where additional information may be obtained regarding filing an appeal.

The notice of violation can be either hand delivered or mailed by regular or certified mail. Experience has shown that the experienced zoning violator has learned to refuse the notice of violation sent by certified mail. Written notice of a zoning violation or a written order of the zoning administrator sent by registered or certified mail to, or posted at, the last known address of the property owner as shown on the current real estate tax assessment books or real estate tax assessment records, is deemed sufficient notice to the property owner and shall satisfy the notice requirements under general law. *Virginia Code § 15.2-2311(A).*

### 27-600 The zoning official goes to court

When zoning violations are not corrected by the owner or occupant after the zoning administrator issues a notice of violation, the locality may enforce its zoning regulations by filing an action in court. The locality’s attorney should work closely with the zoning official in preparing the case for court.

Following are some basic guidelines to assist zoning officials for those cases that will go to court.

#### 27-610 Understand the case

There are three fundamental steps that the zoning official must take when preparing for court:
• **Assemble the documentary and demonstrative evidence.** After consulting with the zoning official and the zoning administrator about what zoning regulations, maps, deeds, records, and photographs will be used in court, the locality’s attorney should assemble these documents in a form that is appropriate to submit as evidence. The zoning official should have previously obtained the zoning map, deeds, and other records and had them authenticated.

• **Understand each zoning regulation the defendant has violated.** The zoning official must completely understand each zoning regulation the defendant has violated, and this understanding must be comprehensive to enable her to recall and explain every clause, every exception, and prior administrative interpretations.

• **Know the facts.** The zoning official must have first-hand knowledge of the facts surrounding the violation to be able to recite every material fact accurately without resorting to notes. The material facts the zoning official must know include: (1) the name of the owner of the property and, if different, the name of the occupant of the property; (2) the tax map and parcel number of the property; (3) the street address of the property; (4) that the property is located within the locality; (5) the zoning of the property, including overlay districts; (6) the relevant zoning history of the property including proffers, special use permits, variances, and other zoning approvals; (6) the date a violation was determined to exist on the property; (7) the nature of the violation; (8) the facts supporting the determination that a violation existed; and (9) the condition of the property just before the trial date (which is not relevant to whether a violation existed, but may be information the court will want to know).

Neither the law nor the facts need to be particularly complicated in the overwhelming majority of the cases and documentary and demonstrative evidence other than photographs may not be necessary. The zoning official can keep her case simple by understanding which zoning regulations and facts are relevant to the court and focusing on those regulations and facts. For example, if the warrant in debt alleges that the defendant’s property was used in violation of the zoning ordinance on May 19 of the year, the zoning official should focus on the facts surrounding the violation on that date alone, even if the property was inspected on other dates.

### 27-620 Communicate and work with the locality’s attorney

In all but the routine zoning enforcement cases, the zoning official who will be a witness in a case should prepare an outline of the facts establishing the alleged violation, and then forward this to the locality’s attorney. The zoning official should take great care in assuring that the outline includes facts sufficient to establish each element of the violation. However, the outline must be edited to omit those facts that are irrelevant because they neither establish, nor tend to establish, an element of the violation.

Based on the outline prepared by the zoning official, the locality’s attorney will then prepare questions for the zoning official-witness. In addition, the attorney should meet with the zoning official prior to court to prepare the zoning official for court. Working together during the final stages of preparation assures that: (1) there is admissible evidence to establish every element of the violation; (2) the legal issues and the evidence are reduced only to those necessary to establish a violation; (3) the zoning official is prepared to respond to questions on both direct examination (questions by the attorney) and cross-examination (questions by the defendant); and (4) weaknesses in the case are acknowledged and addressed.

For the simple routine zoning enforcement cases, the zoning official and the locality’s attorney should develop a simpler procedure to prepare.

### 27-630 General rules for testifying

The testimony of a zoning official is critical in a zoning enforcement case. The most effective witness is sincere, direct, well-prepared, and unemotional. The zoning official’s testimony, brought out through the locality’s attorney’s questions, will educate the court about the facts in the case. The zoning official should paint the picture as clearly as possible, but without exaggeration. The truth will best be served by a deliberate and succinct recitation of facts the zoning official knows to be true.
The typical zoning enforcement case is tried before a judge (not a jury), so when the zoning official is testifying, she must pay close attention to what the judge is and is not saying. Likewise, in most cases the judge’s knowledge of the case is based on the information contained in the pleadings, which may contain very little details about the case, without the benefit of a full elaboration of the facts that comes through testimony, documents, and photographs. Thus, the zoning official should not assume that the judge fully understands the nature of the case or the violation until the legal issues have been presented and the facts laid out.

Following is a list of fundamental rules for the zoning official to follow when testifying in court:

- Tell the truth.
- Give responsive answers.
- Listen to the question asked and think before answering; answer only the question that is asked; do not anticipate questions and the answer you will give; let the examiner finish each question.
- Do not give rambling or evasive answers; a simple “yes” or “no” answer may be all that is required; if the locality’s attorney wants elaboration, she will ask for it.
- Do not guess an answer if you do not in truth know or remember the answer; however, you may testify that you think something is probably true, or probably untrue.
- If you need to explain an answer, do so.
- Do not ask the court if you can answer a question “off the record.”
- If you do not understand the question, or have any doubt about it, ask to have the question restated.
- Do not answer over an objection made by a party; stop talking until the judge rules and you are asked a new question or instructed to answer the original question.
- Speak loudly, slowly, and clearly, and strive for clarity, crispness, and conviction.
- Look at the judge when answering questions.
- Do not memorize your testimony.
- Speak in your own words.
- Lean forward, keep your head up and make eye contact, and use hands for illustration.
- Do not kid or joke.
- Be courteous to the judge and the other party’s attorney.
- Admit mistakes.
- Do not show anger or hostility at any time, particularly during cross-examination.
- Do not argue or attempt to advocate a particular position; be factual, direct, and straightforward; leave advocacy to the locality’s attorney.
• If asked, do not be reluctant to admit on the stand that you have reviewed your testimony with your locality’s attorney or that you have otherwise prepared for court.

A zoning official may be cross-examined by the defendant or his attorney. The primary purpose of cross-examination is to shake the witness’ belief in what he has said. Stating the truth defeats this tactic. The cross-examination may stray from the search for the facts, and wander in an attempt to show bias or favoritism. When the cross-examination heads in this direction, the zoning official should not feel badgered by these questions. The other side may be searching for a way to discredit your direct testimony. The best way for the zoning official to handle cross-examination like this is to always state the truth and answer each question concisely, politely and honestly.

27-640 Courtroom decorum

The zoning administrator and the zoning officials who will be attending a court hearing in a zoning enforcement action should comply with the following rules of courtroom decorum:

• The zoning administrator or other representative of the locality sits at the plaintiff’s table with the locality’s attorney; all other zoning officials should be seated in the spectator section of the courtroom; any witnesses may be asked by the court to wait outside the courtroom while other witnesses are testifying.

• Dress conservatively and neatly.

• Do not read, chew gum, sleep, or talk while in the courtroom when court is in session.

• Do not talk to the defendant if he or she is represented by an attorney unless that attorney is present or gives express consent to do so.

• Do not talk to the defendant’s attorney in the courtroom, hallways, or restrooms unless the locality’s attorney is present.

• When seated in court, do not react to favorable or unfavorable testimony.

• When called to testify during direct examination, do not take any notes or papers to the stand unless the locality’s attorney has first reviewed them.

• Be courteous and polite at all times, especially if the defendant’s attorney is obviously hostile.

If the zoning official is unable to recall the details of the foregoing rules, courtroom decorum can be attained by maintaining professionalism and giving the court the respect it deserves.

27-700 Defenses commonly raised in zoning enforcement proceedings

There are several defenses that may be raised in a zoning enforcement proceeding. Most of them have little or no merit.

27-710 The use is nonconforming

As noted in section 27-500, the notice of violation should make a determination as to the nonconforming status of the use at issue. If this determination is made and it is not appealed to the BZA, it becomes a thing decided and may not be raised as a defense in a civil enforcement proceeding. See chapter 18 for a detailed discussion of nonconformities; see chapter 14 for a discussion of the thing decided rule.
The locality has delayed bringing the enforcement for so long that it should not be allowed to enforce its regulations against the violating landowner

In most Virginia localities, zoning enforcement is triggered by a citizen’s complaint unless the violation is apparent to a zoning inspector from a public location, such as a road. As a result, it is possible for zoning violations to go unnoticed by the locality for years, sometimes decades. The passage of time, however, in no way makes an illegal use legal or prevents the locality from enforcing its zoning regulations. In fact, under Virginia Code § 15.2-2209 (civil penalties), each day during which a violation is found to exist is a separate offense. Thus, for as long as the violation continues, there is no running of a statute of limitations if a locality delays bringing an enforcement action.

The idea that an illegal use should be allowed to continue simply because of the length of time it has existed appears to be loosely based on the doctrine of *laches*. *Laches* is an equitable defense that may be raised by a party who claims that the failure to assert a known right for an unexplained length of time under circumstances that are prejudicial to the party raising the defense. *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987). Assuming for the sake of argument that the defense of laches applies against a locality, the landowner would contend that since the illegal use has continued for so long without the locality bringing an enforcement action, the illegal use should be immune from enforcement. Fortunately, laches does not apply against localities in the discharge of their governmental functions, and this includes the enforcement of its zoning regulations. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 349 S.E.2d 351 (1986).

In *Dick Kelly Enterprises*, the landowner argued that the doctrine should apply because it had been illegally operating an apartment building on land zoned for a motel use for six years before the city enforced its zoning regulations. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the circuit court rejected the landowner’s claim that laches should prevent the county from enjoining him from operating his illegal vehicle light service business because the county had not enforced its regulations against his property for over 40 years, the business was now his sole source of income, and because he was no longer able to work away from his home due to his and his wife’s medical conditions.

In *Staples v. Prince William County*, 81 Va. Cir. 308 (2010), a county zoning regulation restricted campers from staying in a campground for more than 14 consecutive days. When the county responded to a complaint that some guests were staying longer than 14 consecutive days, the landowners sought to enjoin the county from enforcing the regulation (which also was a special exception condition) against them. The landowners claimed that the county had known about long-term visitors to the campground for over 40 years and that its failure to enforce the regulation barred the county from now doing so under principles of waiver, laches and estoppel. Although the circuit court said that the “equities in this case can seem unsettling,” the court rejected the landowners’ argument and concluded that “the doctrine in Virginia is nevertheless clear that the equitable principles of waiver, estoppel, and laches do not operate against local governing bodies performing governmental functions.” *Staples*, 81 Va. Cir. at 323.

Even if laches applied, it would not apply in most cases because the locality does not unreasonably delay enforcing the zoning regulations; rather, it simply does not know that a violation exists. It is also hard to imagine that a landowner could suffer prejudice in such a case. To put it simply, an illegal use does not become a legal use solely because it has escaped detection from zoning inspectors for a lengthy period of time.

Selective enforcement

Unaware that most localities have a team of zoning officials dedicated to zoning enforcement handling hundreds of cases each year, some defendants think that they alone have been singled out for enforcement and they raise the claim that the locality is selectively enforcing its regulations against them.

In *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992), the landowner contended that it was denied equal protection because the city *selectively enforced* its motel ordinance and
singled it out for punishment, while others also unlawfully operated motels as apartments. The Virginia Supreme Court held that this contention had no merit, stating:

Of course, the mere enforcement of the law against one individual and not against others does not amount to a denial of equal protection of the laws. *Union Tanning Co. v. Commonwealth*, 123 Va. 610, 639, 96 S.E. 780, 788 (1918) (taxpayer’s equal protection argument rejected when state imposed seven years of previously omitted personal property tax assessments). And, while protection of the laws will be extended equally to all individuals in the pursuit of their lawful activities, no individual has the right to demand protection of the laws in the commission of an unlawful act. *See Sims v. Cunningham*, 203 Va. 347, 353, 124 S.E.2d 221, 225, *cert. denied*, 371 U.S. 840, 83 S.Ct. 68 (1962).

Because the use of the subject property is unlawful, the so-called “retaliatory prosecution” defense is not applicable to this enforcement action against such unlawful conduct.


In selective enforcement claims where First Amendment issues are involved (such as when a violation of the locality’s sign regulations are in issue), the party claiming selective enforcement must demonstrate that the locality’s enforcement process had a discriminatory effect and that it was motivated by a discriminatory purpose. *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524 (1985). Thus, the party claiming selective enforcement must show not only that similarly situated individuals were treated differently, but that there was “clear and intentional discrimination.” *Sylvia Development Corporation v. Calvert County*, 48 F.3d 810, 825 (4th Cir. 1995). Following are several factors that will be considered: “(1) evidence of a ‘consistent pattern’ of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.” *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625, 635 (4th Cir. 2016).

A variation on this theme is the claim by the defendant that he or she knows of other zoning violations in the locality that have not been abated. Obviously, there is no requirement that all other violations in the locality be abated before the locality may proceed against that defendant, and the defendant is certainly not entitled to some form of immunity from enforcement until those violations are abated.

**27-740 The zoning ordinance is vague**

The claim that a zoning ordinance is vague, and therefore void, should be taken seriously. The void-for-vagueness doctrine requires that a legislative enactment define a criminal offense with sufficient definiteness and certainty that “ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983); *Vaughn v. City of Newport News*, 20 Va. App. 530 (1995) (regulation prohibiting “outside storage of goods, materials and equipment” not void for vagueness).

Although absolute precision is not required, a law must afford a reasonable degree of certainty so that a person is not left to guess at what conduct is prohibited. *Turner v. Jackson*, 14 Va. App. 423 (1992). *See section 6-213 for further discussion of the vagueness of a law as a procedural due process issue.*

Even if a locality enforces its zoning regulations only in civil proceedings, it should take a claim that its zoning regulations are vague seriously and amend its regulations if necessary.
Chapter 28

Notice Requirements for Land Use Proposals

28-100 Introduction

Many types of land use proposals that come before the governing body, the planning commission, the architectural review board, and the BZA require that notice of the proposal be published, and that individual notice of the proposal be provided to interested persons or entities. The purpose for providing notice of a land use proposal is to give those property owners most directly affected an opportunity to be heard. See Lawrence Transfer and Storage Corp. v. Board of Zoning Appeals of Augusta County, 229 Va. 568, 331 S.E.2d 460 (1985); Conner v. Board of Supervisors of Prince William County, 7 Va. Cir. 62 (1981); see Chang v. Fairfax County Board of Supervisors, 26 Va. Cir. 456 (1988) (the purpose of the notice provisions “is to attract specific persons to the hearing, i.e., the landowner of the parcel affected by the zoning change and his adjacent neighbors”; abutting landowners “are as important to the process as the landowner directly affected”). Generally, the notice describes the matter under consideration and suggests parameters for the actions to be taken. McLean Hamlet Citizens, Inc. v. Fairfax County Board of Supervisors, 40 Va. Cir. 69 (1995). The statutory notice requirements are minimum requirements. There is no penalty for providing more notice than the minimum required by law.

The key notice requirements applicable to land use proposals are set forth in Virginia Code § 15.2-2204. Other key notice requirements are found in Virginia Code § 15.2-107 (ordinances imposing or changing fees) and Virginia Code § 15.2-2285(C) (zoning text and map amendments). In addition, Albemarle County’s zoning and subdivision ordinances have notice requirements for certain proposals such as site plans and subdivision plats for which notice is not required under state law. All of these notice requirements are set out in the table on the following page. The general public notice requirements for ordinances contained in Virginia Code § 15.2-1427(F) do not apply to zoning and subdivision text amendments and zoning map amendments subject to the public notice requirements of Virginia Code § 15.2-2204. See Gas Mart v. Board of Supervisors of Loudoun County, 269 Va. 334, 611 S.E.2d 340 (2005).

Failure to comply with the mandatory statutory notice and hearing requirements renders the action void ab initio (i.e., from the beginning). See Parker v. Miller, 250 Va. 175, 459 S.E.2d 904 (1995) (even though notice of the hearing to consider a variance was posted adjacent to the applicant’s property and properly published in a newspaper, the variance was void because no written notice was given to the abutting owner as required by law); City of Alexandria v. Potomac Greens Associates, 245 Va. 371, 429 S.E.2d 225 (1993) (ordinance enacted after one public hearing, where two are required, is void ab initio); Town of Vinton v. Falcon Corp., 226 Va. 62, 306 S.E.2d 867 (1983) (town could not adopt an amendment to its zoning ordinance without first complying with statutory notice and public hearings, even as an emergency measure).

In most cases, the notice is a precursor to one or more public hearings before the governing body, the planning commission, or the BZA. For example, at least two public hearings are required for zoning text amendments and zoning map amendments. Virginia Code § 15.2-2285. In those cases, at least one public hearing must be held by the planning commission and at least one public hearing must be held by the governing body. Only one public hearing is required for variances and appeals to the BZA. Virginia Code § 15.2-2309. Other proposals for which some notice may be required (e.g., certificates of appropriateness, subdivision plats, site plans) do not result in public hearings, but are proceedings where public input may be invited.

28-200 The three forms of public notice and the land use proposals to which they apply

Generally, there are three forms of public notice that may be required for a particular land use proposal: (1) publication in a newspaper of general circulation; (2) individual notice to the applicant, the abutting lots, and other specified interested parties; and (3) posting signs on or near the affected parcels (an optional form of notice, and the far right column in the table below includes the posted notice required under the Albemarle County Zoning Ordinance). The notice laws prescribe the mode of the notice (publication in a newspaper, individual notice, and posting signs) and the manner, as provided below:
<table>
<thead>
<tr>
<th>Type of Proposal</th>
<th>Published Notice</th>
<th>Individual Notice to Affected Owners</th>
<th>Individual Notice to Abutting Owners</th>
<th>Individual Notice to Incorporated Property Owners(^3) Associations</th>
<th>Individual Notice to Adjoining Localities</th>
<th>Individual Notice to Military Bases, Military Installations, Military Airports, and Public Use Airports</th>
<th>Posted Notice(^1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive Plan Amendments</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes, if proposal is within ½ mile of adjoining locality</td>
<td>Yes, if proposal involves any parcel within 3,000 feet of the boundary of the facility</td>
<td>No</td>
</tr>
<tr>
<td>Reviews under Virginia Code § 15.2-2232</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Zoning and Subdivision Text Amendments</td>
<td>Yes</td>
<td>No, unless proposal would decrease dwelling unit density or is establishing a historic district</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Zoning Map Amendments (25 or fewer parcels)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Optional if proposal in planned development and any association member owns property within 2,000 feet of proposal, commission or agent may require</td>
<td>Yes, if proposal is within ½ mile of adjoining locality</td>
<td>Yes, if proposal involves any parcel within 3,000 feet of the boundary of the facility</td>
<td>Yes, if proposal is owner-initiated</td>
</tr>
<tr>
<td>Zoning Map Amendments (More than 25 parcels) or Decrease of Residential Density</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Optional if proposal in planned development and any association member owns property within 2,000 feet of proposal, commission or agent may require</td>
<td>Yes, if proposal is within ½ mile of adjoining locality</td>
<td>Yes, if proposal involves any parcel within 3,000 feet of the boundary of the facility</td>
<td>Yes, if proposal is owner-initiated</td>
</tr>
<tr>
<td>Special Use Permits allowing a change in use or an increase by greater than 50% the bulk or height of an existing building</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes, if proposal is within ½ mile of adjoining locality</td>
<td>Yes, if proposal involves any parcel within 3,000 feet of the boundary of the facility (applies only to special use permits for a change in use)</td>
<td>Yes</td>
</tr>
<tr>
<td>Variances, Appeals of Official Determinations, Interpretations of District Maps</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes, by practice</td>
</tr>
<tr>
<td>Subdivision Plats and Site Plans</td>
<td>No</td>
<td>No</td>
<td>Yes, in Albemarle County, prior to Site Review Committee Meeting</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Certificates of Appropriateness(^2)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

1 By ordinance, a defect in posted notice does not invalidate the action taken.
2 By ordinance, notice is provided to the board of supervisors and the planning commission.
Following is a list of the state statutes and county ordinances that establish the notice requirements for these land use proposals:

- **Comprehensive plan amendments**: Virginia Code § 15.2-2229 requires that notice be given as provided in Virginia Code § 15.2-2204.

- **Review under Virginia Code § 15.2-2232**: Virginia Code § 15.2-2232 requires that notice be given as provided in Virginia Code § 15.2-2204.

- **Zoning ordinance and subdivision ordinance text amendments**: Virginia Code §§ 15.2-2253 (subdivision) and 15.2-2285 (zoning) require that notice be given as provided in Virginia Code § 15.2-2204. If the proposed amendment would impose or increase fees, the notice requirements of Virginia Code § 15.2-107 must be satisfied.

- **Zoning map amendments**: Virginia Code § 15.2-2285 requires that notice be given as provided in that section and Virginia Code § 15.2-2204. Effective July 1, 2017, no special notice of a proposed amendment to proffers is required to be given to the owners of other parcels subject to the same existing proffers. Instead, Virginia Code § 15.2-2302(A) requires only the notice required by Virginia Code Virginia Code § 15.2-2204(B). The prior law required written notice of the application to the other owners within 10 days after receipt of the application. Virginia Code § 15.2-2306 requires that before a locality designates a local historic district, written notice of the public hearing on the designation is given to the owners of all property proposed for designation.

- **Special use permits**: Virginia Code § 15.2-2204(C) and (D) require that notice be given in specific circumstances; see Virginia Code § 15.2-2310 requiring special use permits considered by BZA’s to be noticed as provided in Virginia Code § 15.2-2204.

- **Variances, appeals of official determinations, and interpretations of district maps**: Virginia Code §§ 15.2-2309(2) (variances), 15.2-2309(3) (appeals), and 15.2-2309(4) (district map interpretations) require that notice be given as provided therein and in Virginia Code § 15.2-2204. Virginia Code § 15.2-2204(H) also requires that notice of an application for a written order, requirement, decision or determination that is subject to appeal to the BZA must be given to the owner of the real property that is the subject of the application within 10 days of the application if the owner is not the applicant.

- **Subdivision plats**: Albemarle County Code § 14-218(F) (preliminary plats) requires that notice be given as provided therein.

- **Site plans**: Albemarle County Code § 18-32 (initial and final site plans) requires that notice be given as provided therein.

- **Certificates of appropriateness**: Albemarle County Code § 18-30.6.7 requires that notice be given to the board of supervisors and the planning commission.

### 28-300 Published notice (advertisement)

Land use proposals requiring published notice must satisfy the publication requirements of the applicable laws. Generally, there are four key tasks.

<table>
<thead>
<tr>
<th>Four Key Tasks to Prepare a Published Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Select an appropriate newspaper in which to publish the notice.</td>
</tr>
<tr>
<td>- Select the appropriate dates for publication.</td>
</tr>
<tr>
<td>- Write the contents of the notice.</td>
</tr>
<tr>
<td>- Submit the notice to the newspaper in sufficient time for it to be published on the appropriate dates.</td>
</tr>
</tbody>
</table>
28-310  Publication in a newspaper published or having general circulation in the locality

Notice must be published in “some newspaper published or having general circulation in the locality.” *Virginia Code § 15.2-2204(A)*. If the notice is not published in a newspaper that is published in the locality, it must be a newspaper having general circulation in the locality. A newspaper of general circulation is one that satisfies the requirements of *Virginia Code § 8.01-324*.

### Requirements for a Newspaper to Qualify as a Newspaper of General Circulation

- Must have a *bona fide* list of paying subscribers.
- Must have been published and circulated at least once a week for 24 consecutive weeks without interruption for the dissemination of news of a general or legal character.
- Must have a general circulation in the area in the locality.
- Must be printed in English.
- Must have a second class mailing permit.

Albemarle County typically publishes its notices in *The Daily Progress*, which is not only published within the county, but also satisfies the statutory requirements for a newspaper of general circulation.

28-320  When a notice must be published

The following proposals require that a public notice be published: comprehensive plan amendments, reviews under *Virginia Code § 15.2-2232*, zoning and subdivision text amendments, zoning map amendments, special use permits allowing a change in use or an increase by greater than 50% the bulk or height of an existing building, variances, appeals of official determinations to the BZA, and interpretations of district maps by the BZA.

A public notice for a land use proposal must be published once a week for two successive weeks in the same newspaper, with *not less than six days* elapsing between the first and second publication. *Virginia Code § 15.2-2204(A)*. The public hearing must be held *not less than five days nor more than twenty-one days* after the second public notice appears in the newspaper. *Virginia Code § 15.2-2204(A)*. Confused? Read on.

28-321  General requirements

In order to assure that these publication requirements are satisfied, consider the following:

- **Two publications**: The notice is published twice, once each in two successive weeks. In Albemarle County, notices for planning commission meetings are typically published on the Mondays eight and fifteen days prior to the meeting. Notices for board of supervisors meetings are typically published on the Mondays nine and sixteen days prior to the meeting. For notices for other bodies, count back one week (seven days) and two weeks from the public hearing and schedule the two publication dates. When an alternative publication date is required in order to hold a public hearing on a particular meeting date, count back at least five days from the public hearing for the second published notice, and at least six additional days for the first published notice.

- **Publications at least six days apart**: The first and second publications must be at least six days apart. The easiest way to make certain this requirement is satisfied is to always publish notices on the same day of the week, such as a Monday, and space the publications one week apart.

- **Public hearing not less than five nor more than 21 days after second publication**: The second publication must be not less than five nor more than 21 days after the second publication. The requirement that the second publication be at least five days prior to a planning commission hearing means that, for a Tuesday hearing, the second advertisement must have been published the preceding Thursday at the latest. *See 1983-84 Va. Op. Atty. Gen. 479.*
Simplify the task by always publishing notice at the same intervals and on the same day of the week before a public hearing.

*Example 1:* If the planning commission hearing date is Tuesday, October 24, the first public notice would typically be published on Monday, October 9 and the second would be published on Monday, October 16. The earliest date the second notice could be published is Tuesday, October 3 (not more than 21 days prior to public hearing), and the latest it could be published is Thursday, October 19 (not less than five days prior to public hearing). The first notice would be published one week earlier, with not less than six days lapsing between the first and second notice.

Of course, from time to time, this routine will have to be adjusted to accommodate unforeseen circumstances.

A public notice is deemed to be published on the date the newspaper is available to the public, rather than the date shown on the publication. *1983-84 Va. Op. Atty. Gen. 47.*

| Timeline |
|-----------------|-----------------|-----------------|-----------------|
| ← Not Less Than 6 Days After First Publication | Not More Than 21 Days Prior To Hearing Date → | Not Less Than 5 Days Prior To Hearing Date → |

↑ \(\uparrow\) ↑ \(\uparrow\)

First Publication     Second Publication     Hearing Date

See *Virginia Code § 1-210* regarding the computation of time.

### 28-322 Requirements when fees will be imposed or increased

If a proposed ordinance will *impose or increase a fee* under the zoning or subdivision ordinance, the advertising requirements of *Virginia Code § 15.2-107* apply. In addition to the requirements of *Virginia Code § 15.2-2204*, proposed ordinances that will impose or increase fees must include the following: (1) the actual dollar amount or percentage change, if any, of the proposed levy, fee, or increase; (2) a specific reference to the *Virginia Code* section or other authority for enacting the proposed levy, fee, or increase; and (3) designation of “the place or places where the complete ordinance, and information concerning the documentation and justification for the proposed fee, levy or increase, are available for examination by the public, no later than the time of the first publication.” *Virginia Code § 15.2-107. See also the last bullet in section 28-333(3).*

### 28-330 The contents of the published notice

*Virginia Code § 15.2-2204(A)* requires that three pieces of information be included in a published notice: (1) a reference to the place or places within the locality where copies of the proposed plans, ordinance or other proposals may be examined; (2) a statement of the time and place of the hearing at which persons affected may appear and present their views on the proposal intended to be adopted; and (3) a descriptive summary of the proposal.

Without a doubt, the descriptive summary is the critical piece of information that may cause a published notice to be found to be deficient, and it is discussed at length in sections 28-332 and 28-333.
28-331 Statements of the time and place of the hearing and where documents may be found

The notice is referred to in Virginia Code § 15.2-2204(A) as a notice of intention to adopt a proposal, or an amendment thereof. No particular words are required to satisfy the requirement that the notice express an intention to adopt a proposal. *Gas Mart v. Board of Supervisors of Loudoun County*, 269 Va. 334, 611 S.E.2d 340 (2005) (statement in the public notice that the board would consider the proposed amendments satisfied this requirement because no particular words were required and it could be reasonably inferred that the board intended to take some action on the proposed amendments).

*Example 2:* “Notice is hereby given that the Board of Supervisors of Albemarle County, Virginia, will consider the adoption of an ordinance to amend Chapter 18, Zoning, of the Albemarle County Code and will hold a public hearing to receive public comments on the proposed ordinance on May 4, 2011, at 10:00 a.m. in Lane Auditorium in the Albemarle County Office Building, 401 McIntire Road, Charlottesville, Virginia.”

The notice also must include a “reference to the place or places within the locality where copies of the proposed” matter “may be examined.” *Virginia Code § 15.2-2204.* Once again, no particular words are required to satisfy this requirement, provided that a fair reading of the notice would indicate where the particular documents could be found. See *Gas Mart, supra* (in a public notice for a zoning text amendment and a zoning map amendment, an inaccurate reference to the documents as “applications and related documents” did not invalidate the public notice on this ground). However, it is preferable for the public notice to follow the language of the statute to the fullest extent possible.

*Example 3:* “A copy of the full text of the ordinance is on file in the office of the Clerk of the Board of Supervisors and in the Department of Community Development, County Office Building, 401 McIntire Road, Charlottesville, Virginia.”

*Example 4:* “A copy of the map showing the lands to be rezoned by this amendment is on file in the office of the Clerk of the Board of Supervisors and in the Department of Community Development, County Office Building, 401 McIntire Road, Charlottesville, Virginia.”

If the ordinance will impose or increase a fee under the zoning or subdivision ordinance, the notice must designate “the place or places where the complete ordinance, and information concerning the documentation and justification for the proposed fee, levy or increase, are available for examination by the public, no later than the time of the first publication.” *Virginia Code § 15.2-107.*

*Example 5:* The complete ordinance, and information concerning the documentation and justification for the proposed fees, are available for examination by the public in the office of the Clerk of the Board of Supervisors, Albemarle County Office Building, 401 McIntire Road, Charlottesville, Virginia, and may be inspected between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. The proposed fees are authorized by Virginia Code § 15.2-2241(9).

28-332 The descriptive summary: what it must do

*Virginia Code § 15.2-2204(A)* states that each published notice “shall contain a descriptive summary of the proposed action . . .” Although the Virginia Code does not define what a descriptive summary is, the Virginia Supreme Court has given meaning to that phrase in two key cases arising in Spotsylvania and Loudoun Counties. In both cases, the Court found that the locality had failed to provide a descriptive summary of the proposal that satisfied the requirements of Virginia Code § 15.2-2204(A). It is also worth noting that in both cases, the challenged actions were downzonings.

In *Glacebrook v. Board of Supervisors of Spotsylvania County*, 266 Va. 550, 587 S.E.2d 589 (2003), the Virginia Supreme Court held that a rezoning was void *ab initio* where the published notice listed the zoning districts to be affected, the zoning ordinance section numbers and titles, and stated that the proposed rezoning would affect *development standards*. In actuality, the development standards referred to in the notice were regulations pertaining to
maximum density, road frontage, open space requirements, minimum lot requirements, and other characteristics. The Court said that:

No citizen could reasonably determine, from the notice, whether he or she was affected by the proposed amendments except in the most general sense of being located in a particular type of zoning district. Nor could a citizen determine whether the proposed amendments affected zoning issues that were of interest or concern to the citizen. Given the number of issues subsumed under the heading of “development standards,” using that heading as a descriptive summary fails to inform citizens of the universe of possible zoning ordinance amendments in any meaningful way.

Glazebrook, 266 Va. at 556, 587 S.E.2d at 592-593.

The Glazebrook court also explained what is expected to be included in a descriptive summary meeting the requirements of Virginia Code § 15.2-2204(A):

<table>
<thead>
<tr>
<th>What a Descriptive Summary Must Do</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The descriptive summary must be “a statement that covers the main points concisely, but without detailed explanation, in a manner that serves to describe an object for the knowledge and understanding of others.” If the notice does not cover the main points of the proposed amendment and does not accurately describe the proposal, it does not satisfy Virginia Code § 15.2-2204(A). Glazebrook, supra.</td>
</tr>
<tr>
<td>• The descriptive summary may not merely direct readers to the physical location of the actual text of the proposed amendments. The required information must be in the descriptive summary itself. Glazebrook, supra.</td>
</tr>
</tbody>
</table>

The Virginia Supreme Court also considered the requirements for a descriptive summary in Gas Mart v. Board of Supervisors of Loudoun County, 269 Va. 334, 611 S.E.2d 340 (2005), a case challenging the public notice given prior to a controversial downzoning in a portion of Loudoun County in 2003. In Gas Mart, the Court found fatal flaws in the descriptive summaries for both the zoning text amendment and the zoning map amendment.

With respect to the zoning text amendment at issue in Gas Mart, one of the proposals advertised was titled “Provisions to implement the Conservation Design policies in the Revised General Plan.” This was the only reference to the conservation design policies in the public notice. In finding that this statement was not a “descriptive summary” as required by Virginia Code § 15.2-2204(A), the Court said:

There is no description or summary of the content of those policies and the notices do not indicate the particular areas of the County that would be affected by the proposed policies. Clearly, the lone statement fails to cover the main points in a manner that informs the public regarding the content of the policies and the affected areas of the County.

Gas Mart, 269 Va. at 346-347, 611 S.E.2d at 346-347.

With respect to the zoning map amendment, the plaintiffs claimed that the descriptions of the areas to be rezoned were inadequate. The description stated that “most of” the existing lands zoned A-3, A-10 and CR “in the western portion of the County” would be rezoned to either AR-1 or AR-2. In holding that the descriptive summary was inadequate, the Court said:

In setting forth a description of the areas proposed to be rezoned, the Board failed to state any specific geographic boundaries or landmarks that would have allowed the public to ascertain the areas that would be affected by these amendments. Thus, landowners were compelled to try to determine what the Board meant by “most of . . . the western portion of the County.” In addition, the description also proved to be inaccurate and misleading . . . [T]he areas now zoned AR-1 and AR-2, described as located in the western portion of the County, actually extended as far east as the northeastern border of the County . . .
Because the descriptive summaries of the proposed zoning text and zoning map amendments were deficient, the Gas Mart court concluded that the notice failed to satisfy Virginia Code § 15.2-2204 and the zoning text and zoning map amendments were invalid.

From Glazebrook and Gas Mart, the following requirements for a descriptive summary emerge:

- **Describe the main points concisely**: The main points of the proposal must be described concisely, but without detailed explanation, in a manner that serves to describe it for the knowledge and understanding of the public. Thus, it is not enough for the summary to merely list section headings. Rather, the summary must, at a minimum, describe the substance of the main points and explain the effects of the proposal being considered, and it needs to do so in a manner that informs the intended audience. For example, in Rohr v. Board of Supervisors of Fauquier County, 75 Va. Cir. 167 (2008), a published notice of a proposed rezoning and special exception for a “shopping center of more than 50,000 square feet” was found to be sufficient even though it failed to refer to a big box store of approximately 150,000 square feet. In ruling on a demurrer and plea in bar in favor of the county, the court said that the notice was sufficient because it described the action to be taken, the subject of the actions (construction of a shopping center), and the location of the actions, adding that the “fact that all of the details of the proposal were not contained in the actual ad itself, does not render it defective.”

- **Be accurate**: The proposal must be accurately described so that the public has a reasonable understanding of what the proposal is and, if adopted, what it would do. However, the notice given need not “contain an accurate forecast of the precise action which the County Board will take upon the subjects mentioned in the notice of hearing.” Ciaffone v. Community Shopping Corp., 195 Va. 41, 50, 77 S.E.2d 817, 822 (1953), cited in Little Piney Run Estates, LLC v. Loudoun County Board of Supervisors, 74 Va. Cir. 400 (2007). Inaccuracies and vagueness that are misleading will be found to render the notice insufficient. For example, in Little Piney Run Estates, supra, the county conceded that its published notice erroneously identified a side yard requirement in conjunction with a broader rezoning decision. The court said that “logic would dictate that a conceded error in publication, even if not a main point, could not be relied upon in adopting the relevant amendment to the ordinance. Such a Notice would not be notice of a ‘proposed action’ since it was never the Board’s intention to consider or propose such an Amendment as was advertised.” In Rohr, supra, the plaintiff contended that the omission of one parcel identification number (“PIN”) and the transposing of numbers in another PIN in the published notice rendered the notice defective. In granting the county’s plea in bar, the court said that these errors were not sufficient to create any genuine confusion since a citizen, reading the notice, would reasonably be able to determine if he or she would be affected by the proposed action since the notice did accurately refer to specific boundaries and landmarks (street references).

- **Explain the substance of plans and other documents being implemented**: Cross-references to plans and other documents that the proposal will implement are insufficient. The relevant substance of cross-referenced plans or documents must be explained.

- **Identify lands affected by comprehensive plan and zoning map changes**: For changes to comprehensive plan designations and zoning map amendments, include specific geographic boundaries or landmarks, addresses, and tax map and parcel numbers where practical.

**28-333 Writing the descriptive summary**

A descriptive summary should address the what, where, and how of the proposal. It is worthwhile to take the time and care to go well beyond the minimum descriptive summary required by Virginia Code § 15.2-2204(A) and to provide more than the minimum required by law. It is imprudent to even consider preparing a published notice that fails to satisfy the minimum requirements of the law in the hopes of minimizing public awareness of the proposal or to save on advertising costs. The descriptive summary should include the following information in order to satisfy Virginia Code § 15.2-2204(A):
1. Identify the type of proposal being considered

Identifying the type of proposal being considered (e.g., zoning text amendment, zoning map amendment, special use permit, variance, appeal of a decision of the zoning administrator) is the easiest part of the descriptive summary. Care should be taken to ensure, for example, that rezonings with proffers are identified as such, and that applications for multiple approvals, such as rezonings with special use permits, identify all of the actions to be taken.

2. Identify the location of the lands to be affected by the proposal

Proposals other than comprehensive plan amendments and generally-applicable zoning text amendments affect specific parcels or defined areas of land. For those proposals, the public notice must identify the location of the lands to be affected by the proposal, if it is approved.

For the rezoning of a very large number of parcels, identify the lands by specific geographic boundaries or landmarks (e.g., “all of the parcels east of State Route 231, north of its intersection with State Route 22”). For smaller rezonings and other proposals affecting one or a limited number of parcels, identify the lands by their street address(es), if practical, or by their tax map and parcel numbers with a reference to a nearby street intersection (e.g., “approximately 500 feet west on Hydraulic Road from its intersection with Seminole Trail”) or other identifiable landmarks.

3. Explain how the proposal would change the status quo

Describing how the proposal would change the status quo if it was approved is the heart of the descriptive summary and the most difficult to write because it requires a fundamental understanding of the proposal and the ability to distill its essence into a concise but understandable statement. This part of the descriptive summary is a concise but detailed statement explaining the main points of what the proposal, if approved, would do. For many types of proposals, the “main points” are self-evident:

- **Zoning map amendment**: Identify the existing zoning of the property and the proposed zoning of the property, and state the general usage and density range, if any, of the proposed zoning of the property, and the general usage and density range, if any, recommended by the comprehensive plan. *Virginia Code § 15.2-2285(C)* (applies to the public notice requirements for the hearing before the governing body).

- **Zoning text amendment**: Identify all of the main points and then summarize those main points in a concise manner that nevertheless captures the essence of the change that would result from the proposal, all in language that can be understood by the public. The writer of the descriptive summary for a zoning text amendment must have a comprehensive understanding of the amendment, understand its impacts, and understand the interests of the stakeholders. The descriptive summary must then concisely summarize those main points in a manner that informs the intended audience. A descriptive summary for a broad zoning text amendment can be difficult.

- **Special use permit**: Identify the existing zoning of the property and identify the additional use that would be allowed by the special use permit. A description of the scale of the special use would be informative.

- **Variance**: Identify the existing zoning of the property, the applicable regulation sought to be varied, and the nature and extent of the variation requested.

- **Appeal of official determination**: Summarize the determination being appealed, and briefly explain the stated basis for the appeal.

- **Zoning or subdivision ordinance fees**: In addition to identifying the time, date, and place of the public hearing, identify: (1) the actual dollar amount or percentage change, if any, of the proposed levy, fee, or increase; (2) a specific reference to the Virginia Code section or other authority for enacting the proposed levy, fee, or increase; and (3) “the place or places where the complete ordinance, and information concerning the
documentation and justification for the proposed fee, levy or increase, are available for examination by the public, no later than the time of the first publication.” Virginia Code § 15.2-107.

28-340 Omissions or errors in a published notice

Omissions or errors in a published notice may invalidate not only the notice, but also all of the proceedings and actions that follow. Gas Mart v. Board of Supervisors of Loudoun County, 269 Va. 334, 611 S.E.2d 340 (2005); Glazebrook v. Board of Supervisors of Spotsylvania County, 266 Va. 550, 587 S.E.2d 589 (2003); see, however, Little Piney Run Estates, LLC v. Loudoun County Board of Supervisors, 74 Va. Cir. 400 (2007), where the court upheld the validity of the notice provided for a rezoning, generally, except for a portion pertaining to the proposed side yard setbacks, which the county conceded contained an error, and the court apparently invalidated only that portion of the rezoning pertaining to the side yard setbacks. Below is a list of the steps in the publication process where things can go wrong:

<table>
<thead>
<tr>
<th>Where Things Can Go Wrong</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The newspaper is not published within the locality or is not a newspaper of general circulation.</td>
</tr>
<tr>
<td>• The published notice is published only once prior to the hearing.</td>
</tr>
<tr>
<td>• The two notices are published less than 6 days apart.</td>
</tr>
<tr>
<td>• The second notice is published less than 5 days prior to the hearing.</td>
</tr>
<tr>
<td>• The second notice is published more than 21 days prior to the hearing.</td>
</tr>
<tr>
<td>• The published notice omits a reference to the place or places within the locality where copies of the proposed plans, ordinance, or other proposals may be examined.</td>
</tr>
<tr>
<td>• The published notice omits or incorrectly states the time and place of the hearing.</td>
</tr>
<tr>
<td>• The published notice omits the descriptive summary of the proposed action.</td>
</tr>
<tr>
<td>• The descriptive summary fails to cover the main points of the proposal concisely in a manner that informs the intended audience because:</td>
</tr>
<tr>
<td>-- It omits or incorrectly identifies the type of proposal being considered.</td>
</tr>
<tr>
<td>-- It omits or incorrectly identifies the location of the lands to be affected by the proposal.</td>
</tr>
<tr>
<td>-- It omits or incorrectly explains how the proposal would change the status quo.</td>
</tr>
<tr>
<td>• The published notice for a zoning map amendment before the governing body: the descriptive summary fails to describe the comprehensive plan designation’s general usage and density range, if any.</td>
</tr>
<tr>
<td>• The published notice for a zoning map amendment before the governing body: the descriptive summary fails to describe the existing and proposed zoning districts’ general usage and density range, if any.</td>
</tr>
<tr>
<td>• For ordinances imposing or increasing fees, the descriptive summary omits or incorrectly identifies:</td>
</tr>
<tr>
<td>-- The actual dollar amount or percentage change.</td>
</tr>
<tr>
<td>-- The reference to the Virginia Code section or other authority for enacting the proposed fee.</td>
</tr>
</tbody>
</table>

An erroneous reference to a tax map and parcel number, the magisterial district, or extraneous identifying information such as the lands’ acreage, should not invalidate the notice if the descriptive summary contains other correct and more commonly recognized identifying information such as a street address or a location description (e.g., “in the northwest corner of the intersection of Route 29 and Hydraulic Road”) that would put a reasonable person on notice.

28-400 Individual notice

In addition to the published notice required, a number of land use proposals may require that individual notice be provided to an interested class of persons and entities under Virginia Code § 15.2-2204(B), (C), and (D). In addition, Virginia Code § 15.2-2204(H) requires that notice of an application for a written order, requirement, decision, or determination that is subject to appeal to the BZA must be given to the owner of the real property that is the subject of the application within 10 days of the application if the owner is not the applicant.

A locality may require that individual notice be provided for other land use proposals. For example, in Albemarle County, subdivision plats and site plans require individual notice to abutting landowners before the Site Review Committee meeting.

28-410 The contents of an individual notice

Neither Virginia Code § 15.2-2204 nor any other statute expressly states the information required to be in an individual notice. Thus, it is presumed that the information required to be in a published notice under Virginia Code § 15.2-2204(A) should be included in an individual notice: (1) a reference to the place or places within the locality where copies of the proposed plans, ordinance, or other proposals may be examined; (2) a statement of the time and place of the hearing at which persons affected may appear and present their views on the proposal intended to be adopted; and (3) a descriptive summary of the proposal. Virginia Code § 15.2-2204(A). See section 28-330 et seq. for a complete discussion of the required information.

The sole exception to Virginia Code § 15.2-2204’s silence as to the contents of an individual notice is Virginia Code § 15.2-2204(D), which requires that the notice provided to a military commander of a military facility or owner of a public-use airport advise them of the opportunity to submit comments or recommendations. See section 28-440 for the individual notice requirements provided to military facilities and public-use airports.

For subdivision plats and site plans in Albemarle County, the notice requirements are addressed in the subdivision and site plan regulations.

28-420 Individual notice to abutting owners

Abutting property owners and their agents and occupants (hereinafter collectively referred to as the owners) are entitled to individual notice about some proposals. Virginia Code § 15.2-2204(B). For certain proposals, the occupant of the affected lands may be an eligible recipient of the notice in lieu of the owner.

<table>
<thead>
<tr>
<th>Type of Proposal</th>
<th>Notice to Abutting Owners / Owners’ Agent</th>
<th>Notice to Abutting Occupants (alternative to Owners / Agents)</th>
<th>Notice to Owners Across Street</th>
<th>How Notice Must Be Sent</th>
<th>When Notice Must be Sent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive Plan Amendments</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Zoning Map Amendments (25 or fewer parcels)¹,²</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Registered or certified mail³</td>
<td>5 days before Commission hearing</td>
</tr>
<tr>
<td>Zoning Map Amendments (more than 25 parcels)¹,²</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>First class mail³, ⁴</td>
<td>5 days before Commission hearing</td>
</tr>
<tr>
<td>Special Use Permits (assuming notice otherwise required)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>First class mail³, ⁴, ⁵</td>
<td>5 days before Commission or BZA hearing</td>
</tr>
<tr>
<td>Variances, Appeals of Official Determinations, Interpretations of District Maps (assuming affecting 25 or fewer parcels)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>First class mail³, ⁴, ⁵</td>
<td>5 days before BZA hearing</td>
</tr>
</tbody>
</table>
Notice requirements also would apply to zoning text amendments that decrease density; provided that notice of a proposed text amendment is not required to owners or owners’ agents of affected parcels if they are shown on a subdivision plat approved and recorded under state law and the locality’s subdivision ordinance and are less than 11,500 square feet in area. *Virginia Code § 15.2-2204(B).*

2. When a proposed zoning map amendment involves a tract of land of not less than 500 acres owned by the Commonwealth or the federal government, and the proposed change affects only a portion of the “larger tract,” notice need be given only to the owners of those parcels that abut the affected area of the larger tract. *Virginia Code § 15.2-2204(B).*

3. One notice sent to the last known address of the owner as shown on the current real estate tax assessment books or current real estate tax assessment records is deemed to be adequate compliance.

4. A representative of the locality must make an affidavit that the notices were mailed and file the affidavit in the project file. *Virginia Code § 15.2-2204(B).*

5. Notice of a BZA hearing by first class mail is authorized by *Virginia Code § 15.2-2309.*

Determining whether a parcel is abutting property entitled to notice has caused some problems and uncertainty in the past. *Abutting* property is any parcel whose boundary line touches the parcel that is the subject of the proposal and any parcel that is immediately across the street from the parcel that is the subject of the proposal. *Virginia Code § 15.2-2204(B)* (regarding parcels immediately across the street). Because a proposal affects the legal status of the entire parcel, and not just that portion that may take advantage of the authorized use, lands on the same parcel that surround the proposed use do not qualify as abutting property. *Lawrence Transfer and Storage Corp. v. Board of Zoning Appeals of Augusta County,* 229 Va. 568, 331 S.E.2d 460 (1985). Abutting parcels within an adjoining locality also are considered to be abutting property. *Virginia Code § 15.2-2204(B); 1981-1982 Va. Op. Atty. Gen. 464* (the fact that an abutting parcel is in another locality is irrelevant to the question as to whether written notice must be provided).

If there is any question as to whether a parcel abuts the subject parcel, written notice to the owner, agent, or occupant of that parcel should be given. Remember, little more than the cost of the required postage is at stake, but failure to provide notice to each abutting owner entitled to notice may invalidate the action taken.

See the illustrations in section 28-480.

**28-430 Individual notice to incorporated property owners’ associations in planned developments**

The planning commission or the agent may require that individual notice be provided to incorporated property owners’ associations if any portion of the property proposed for a zoning map amendment of 25 or fewer parcels is within a planned unit development and there are association members owning property located within 2,000 feet of the property as may be required by the commission or its agent. *Virginia Code § 15.2-2204(B).*

<table>
<thead>
<tr>
<th>Type of Proposal</th>
<th>Notice to Incorporated Owners’ Associations</th>
<th>How Notice Must Be Sent</th>
<th>When Notice Must Be Sent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Comprehensive Plan Amendments</strong></td>
<td>No</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Zoning Map Amendments (25 or fewer parcels)</strong></td>
<td>May be required by Planning Commission or agent</td>
<td>Registered or certified mail¹</td>
<td>5 days before Commission hearing</td>
</tr>
<tr>
<td><strong>Zoning Map Amendments (more than 25 parcels)</strong></td>
<td>No</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Special Use Permits (for a change in use or to increase by greater than 50% of the bulk or height of an existing or proposed building, but not including renewals of previously approved special use permit)</strong></td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
Virginia Code § 15.2-2204 does not specify to whom the notice is to be mailed. Presumably it should be mailed to the address for the association on record with the State Corporation Commission. See the illustrations in section 28-480.

28-440 Individual notice to an adjoining locality within one-half mile of a proposal

Individual notice must be provided to an adjoining locality for certain proposals affecting any parcel within one-half mile of a boundary of the adjoining locality. Virginia Code § 15.2-2204(C).

<table>
<thead>
<tr>
<th>Type of Proposal</th>
<th>Notice to Adjoining Locality</th>
<th>How Notice Must Be Sent</th>
<th>When Notice Must be Sent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive Plan Amendments</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>10 days before Commission hearing</td>
</tr>
<tr>
<td>Zoning Map Amendments (25 or fewer parcels)</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>10 days before Commission hearing</td>
</tr>
<tr>
<td>Zoning Map Amendments (more than 25 parcels)</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>10 days before Commission hearing</td>
</tr>
<tr>
<td>Special Use Permits (for a change in use or to increase by greater than 50 % of the bulk or height of an existing or proposed building, but not including renewals of previously approved special use permit)</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>10 days before Commission or BZA hearing</td>
</tr>
<tr>
<td>Variances, Appeals of Official Determinations, Interpretations of District Maps</td>
<td>No</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Subdivision Plats and Site Plans</td>
<td>No</td>
<td>NA</td>
<td>NA</td>
</tr>
</tbody>
</table>

1. Notice must be mailed to the locality’s chief administrative officer (e.g., the county administrator, county executive, county manager, city manager, town manager) or his or her designee. Virginia Code § 15.2-2204(C). Virginia Code § 15.2-2204(C) does not specify the manner in which the notice is to be delivered. See the illustrations in section 28-480.

28-450 Individual notice to military facilities and public-use airports within 3,000 feet of a proposal

Individual notice must be provided to any “military base, military installation, military airport, excluding armories operated by the Virginia National Guard, or licensed public-use airport” (hereinafter, “military facility” and “public-use airport”) for certain proposals affecting any parcel within 3,000 feet of a boundary of the military facility or public-use airport. Virginia Code § 15.2-2204(D).

<table>
<thead>
<tr>
<th>Type of Proposal</th>
<th>Notice to Adjoining Locality</th>
<th>How Notice Must Be Sent</th>
<th>When Notice Must be Sent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive Plan Amendments</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>30 days before Commission hearing</td>
</tr>
<tr>
<td>Zoning Map Amendments (25 or fewer parcels)</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>30 days before Commission hearing</td>
</tr>
<tr>
<td>Zoning Map Amendments (more than 25 parcels)</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>30 days before Commission hearing</td>
</tr>
<tr>
<td>Special Use Permits (for a change in use only)</td>
<td>Yes</td>
<td>First class mail¹</td>
<td>30 days before Commission or BZA hearing</td>
</tr>
</tbody>
</table>

¹. All notices must be sent by first class mail except as provided by other provisions of this section.
1. Notice must be mailed to the military facility’s commander or to the owner of the public-use airport. Virginia Code § 15.2-2204(D). Virginia Code § 15.2-2204(D) does not specify the manner in which the notice is to be delivered.

**28-460 Individual notice to an electric utility with a certificated service territory**

Individual notice must be provided to any electric utility with a certificated service territory for any proposal to adopt or amend a comprehensive plan if the plan designates or alters previously designated corridors or routes for electric transmission lines of 150 kilovolts or more, and the utility’s certificated service territory includes all or any part of the designated electric transmission corridors or routes. Virginia Code § 15.2-2204(G). The notice must be provided at least 10 days before the planning commission hearing. Virginia Code § 15.2-2204(G).

Because Virginia Code § 15.2-2204(G) neither specifies the manner in which the notice is to be delivered nor to whom, first class mail should be sufficient.

**28-470 Omissions or errors in individual notice**

A zoning decision is invalid if the locality fails to provide the required individual notice to an abutting owner. Parker v. Miller, 250 Va. 175, 459 S.E.2d 904 (1995); Lawrence Transfer and Storage Corp. v. Board of Zoning Appeals of Augusta County, 229 Va. 568, 331 S.E.2d 460 (1985); Chang v. Fairfax County Board of Supervisors, 26 Va. Cir. 456 (1988). However, only an owner who failed to receive the individual notice may bring a timely action challenging the decision on that ground. See Virginia Code § 15.2-2204(B); see also Chang, supra (misaddressed notice to abutting owner did not satisfy the notice requirements; the fact that the public hearing was well-attended does not cure the defect in the notice). However, abutting owners who fail to receive individual notice but who participate in the proceedings (and thereby waived their right to challenge the inadequacy of the notice under Virginia Code § 15.2-2204) cannot challenge the failure of individual notice to be provided to third parties who failed to timely file a judicial challenge. Wintergreen Property Owners Association v. Board of Supervisors of Nelson County, 70 Va. Cir. 39 (2005).

A lengthy continuance in a public hearing that has not been closed may require that individual notice be re-sent. See 1996 Va. Op. Atty. Gen 62 (six-month lapse).

**28-480 Illustrations**

The illustrations in this section are intended to explain to whom individual notice should be provided.

### Illustration 1: Identifying All Abutting Owners

<table>
<thead>
<tr>
<th></th>
<th>X₁</th>
<th>X₂</th>
</tr>
</thead>
<tbody>
<tr>
<td>Y₁</td>
<td></td>
<td></td>
</tr>
<tr>
<td>X₃</td>
<td></td>
<td></td>
</tr>
<tr>
<td>X₄</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The owners of Parcels X₁ through X₆ are entitled to notice as abutting owners under Virginia Code § 15.2-2204. In Albemarle County, if the developer also owns Parcel X₃ and is processing a site plan, notice must also be provided to the owners of Parcels Y₁ and Y₂, because their parcels abut a parcel owned by the developer.
Illustration 2: Less Than Entire Parcel Proposed to be Rezoned

<table>
<thead>
<tr>
<th>X₁</th>
<th>X₂</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>X₃</td>
<td>X₄</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>X₅</td>
<td>X₆</td>
</tr>
</tbody>
</table>

Although only a portion of the parcel will be rezoned, Parcels X₁ through X₆ are entitled to notice as abutting parcels. *Lawrence Transfer and Storage Corp v. Board of Zoning Appeals of Augusta County*, 229 Va. 568 (1985).

Illustration 3: Railroad Tracks

<table>
<thead>
<tr>
<th>X₁</th>
<th>X₂</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The practice in Albemarle County is to treat Parcels X₁ and X₂ as abutting parcels and to send notice to their owners, even though the railroad is the “abutting owner” within the meaning of Virginia Code § 15.2-2204.

Illustration 4: Parcels Split by I-64 or Other Roads

<table>
<thead>
<tr>
<th>X₁</th>
<th>X₂</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notice: Portions of parcels that straddle both sides of I-64, though physically separated, are most likely still a single legal parcel. Therefore, notice must be sent to Parcels X₁, X₂ and X₃ as abutting parcels unless the portions of the subject parcel are determined by the zoning administrator to be separate legal parcels.
Illustration 5: Relying on Tax Maps

What the tax map shows: The reality:

Notice mistakenly not sent to Parcel X₁ because the map incorrectly shows that Parcel X₁ is believed to not be abutting. Notice must be sent because Parcel X₁ actually abuts. Staff should err on the side of caution and send notice to lots that may be abutting where tax map lines are reasonably close.

Illustration 6: Parcel within ½ mile of City

Notice to the city’s chief administrative officer, the city manager, is required for CPAs, ZMAs, and SPs that allow a change in use or increase by 50% or more of the bulk or height of existing or approved building.

Illustration 7: Parcel Abuts City Limits

Assuming that parcels X₁ and X₅ are in the City and the rest of the lands are in the County, notice must be sent to Parcels X₁ through X₅ as abutting parcels. The notice requirements don’t depend on jurisdictional boundaries.
28-500 Posted notice in Albemarle County

In Albemarle County, if a zoning map amendment is initiated by a landowner, the zoning administrator must erect a sign on the parcel indicating that it is subject to a public hearing. Albemarle County Code § 18-33. Likewise, a parcel subject to a special use permit application must be posted. Although not expressly required by the zoning ordinance, the practice of the zoning administrator is to post notice on a parcel subject to a public hearing on a variance.

The posted notice must be erected at least fifteen days before the planning commission hearing and remain until after the board of supervisors’ action on the petition. Albemarle County Code § 18-33. The sign is erected within ten feet of a boundary of the parcel abutting a street and must be placed so that it is clearly visible from the street. Albemarle County Code § 18-33.

The failure to post a sign does not invalidate the proceeding. Albemarle County Code § 18-33.

28-600 Permissible variation between the notice given and the action taken

Beyond complying with the requirements established by statute and ordinance, some flexibility remains in the action that the decision-maker may take. The actual action taken need only be reasonably foreseeable from the notice; it need not be specifically predicted by the notice. McLean Hamlet Citizens, Inc. v. Fairfax County Board of Supervisors, 40 Va. Cir. 69 (1995).

Following are some examples that clarify the scope of the action that may be taken without, in most cases, providing additional notice or conducting an additional public hearing. Although the cases cited below all pertain to zoning map amendments, the principles expressed apply to other proposals as well. See, e.g., Davis v. Stafford County Board of Supervisors, 20 Va. Cir. 122 (1990) (a special use permit cannot be granted that goes beyond the scope of what was advertised in the notice for the hearing).

• Changes to a draft comprehensive plan amendment from the advertised plan: In Northern Virginia Community Hospital, LLC v. Loudoun County Board of Supervisors, 72 Va. Cir. 174 (2006), the hospital challenged the notice provided for the county’s countywide health care facilities plan, claiming that the draft underwent substantial modification by the board of supervisors without further advertised notice. The court found that “the notice adequately informed
the public that the amendments would address, among other things, the location and type of health care facilities in the County” and that “a resident of Loudoun County interested in where health care facilities might be located in the County would need look no further than the advertisement to embolden their interest in the public debate on the issue.” The court added that “refinements [to the plan] during the course of public debate become but a subset of the notice, so long as the action taken lies within the scope of the original proposal.” The court concluded that the refinements did not substantially depart from the notice.

- **Rezoning to a less intensive use classification than advertised**: Virginia Code § 15.2-2285 does not require that a governing body hold an additional noticed public hearing when property is rezoned to a less intensive zoning classification than was contained in the original notice. *Notestein v. Board of Supervisors of Appomattox County*, 240 Va. 146, 393 S.E.2d 205 (1990); *Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983) (notice advertised rezoning to C-2 or C-6; no further notice required when property rezoned to R-5, a less intensive district). As a practical matter, any citizen interested in opposing the proposal or any less intensive use classification would or should be present to be heard at the hearing on the request for the more intensive use. *Notestein*, *supra*; *Pyles*, *supra*.

- **Rezoning to a more intensive use classification than advertised**: A governing body may not rezone land to a zoning classification that is more intensive than that contained in the public notice without providing a revised notice and an additional public hearing. *Virginia Code § 15.2-2285(C)*. In a rezoning, the planning commission must conduct an additional public hearing before recommending a zoning classification that is more intensive than that contained in the public notice. *Albemarle County Code § 18-33*.

- **Rezoning less than the entire area advertised**: A governing body may rezone less than the entire area of land identified in the notice without providing additional notice and another public hearing. *Puffenbarger v. Board of Supervisors of Goochland County*, 3 Va. Cir. 321 (1985).

- **Rezoning more than the entire area advertised**: A governing body may not rezone more land than was described in the original public notice without referring the proposal back to the planning commission for further public hearings providing a revised notice that includes the additional land. *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967).
Chapter 29

Meeting Procedures and the Freedom of Information Act

29-100 Introduction

This chapter examines the requirements for conducting meetings under the Virginia Freedom of Information Act.

The Virginia Freedom of Information Act ("FOIA"): [E]nsures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.

Virginia Code § 2.2-3700(B).


<table>
<thead>
<tr>
<th>Eight Important Principles To Know About Meetings Under FOIA and Other Laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>• A meeting may exist when three members of a public body are physically assembled (see discussions pertaining to electronic communications in this chapter); if a quorum of the public body is less than three, then a meeting exists whenever a quorum is established.</td>
</tr>
<tr>
<td>• If three or more members of a public body are assembled, but not for the purpose of conducting business (e.g., at a dinner or a VDOT informational meeting), a meeting under FOIA is not established provided they do not transact business.</td>
</tr>
<tr>
<td>• Electronic communications such as email communications between three or more members of a public body may be an unlawful meeting if the communications are conducted in real time; email communications where there are periods of time between each correspondence are unlikely to constitute a meeting.</td>
</tr>
<tr>
<td>• Public meetings are the rule; closed meetings are the exception.</td>
</tr>
<tr>
<td>• A closed meeting is permitted only when an express statutory exemption (from the public meeting requirement) applies.</td>
</tr>
<tr>
<td>• A meeting may be established under FOIA even though a quorum is not established.</td>
</tr>
<tr>
<td>• If a quorum is not established, the only action the public body may take at a meeting is to adjourn the meeting.</td>
</tr>
<tr>
<td>• If the number of members of a public body allowed to participate in a matter otherwise falls below that constituting a quorum because one or more members are disqualified because of a conflict of interest, the remaining members constitute a quorum for the conduct of business and have the authority to act for the public body.</td>
</tr>
</tbody>
</table>

This chapter also examines the manner in which meetings are conducted by public bodies, and these procedures are governed by statute, the general rules of parliamentary procedure, and rules of procedure adopted by the public body.

29-200 Public bodies subject to FOIA

A public body is any legislative body, authority, board, bureau, commission, district or agency of the locality. Virginia Code § 2.2-3701. This definition includes the governing body, the planning commission, the board of zoning appeals, the architectural review board, the public recreational facilities authority, and the board of appeals established under the Virginia Uniform Statewide Building Code.
A public body is also any committee, subcommittee or other entity, however designated, of a public body created to perform delegated functions of the public body or to advise the public body, including those committees, subcommittees or entities comprised of private sector or citizen members. Virginia Code § 2.2-3701. This definition includes not only those committees established by the governing body or the planning commission that are comprised solely of a limited number of its members, but also those committees comprised primarily of private sector or citizen members, including those established by ordinance such as an agricultural and forestal district advisory committee, and those ad hoc committees established by a governing body such as a committee established to study and report on a specific topic such as a historic preservation committee, or a natural heritage committee. Subcommittees created from these committees are also public bodies.

The critical factors in determining whether a committee or subcommittee, including a citizens’ advisory committee, is a public body are: (1) whether it was created by a public body; and (2) whether it was created to perform a function of the public body or to advise the public body. AO-11-07. Thus, a citizen advisory committee created by a mayor to advise the mayor is not a public body because, although a public official, the mayor was not a public body, the committee did not perform delegated functions of a public body, and the committee did not advise a public body. 1978-79 Va. Op. Atty. Gen. 316. Similarly, a farmers’ market rules committee was not a public body because it was established by the city manager to advise the city manager, not the city council. AO-04-13; see also AO-07-13, discussing a range of different types of committees. On the other hand, a citizen advisory group created by the Commonwealth Transportation Board (“CTB”) was a public body because the CTB was a public body and the group was created to advise the CTB; likewise, a task force created by a county board of supervisors composed of 20 citizens was a public body because the board was a public body and the task force was created to advise the public body. Opinions collected in AO-11-07; see also AO-10-07, where a development review team formed by county staff, comprised of 10 county staff members, four outside consultants, two members of the board of supervisors, two members of the planning commission, and one church representative, was not itself a public body; however, the two board members and two commission members each may have constituted public bodies if they were designated by their respective bodies to perform delegated functions of, or to provide advice to, their respective bodies. Finally, a task force established by multiple public bodies to advise the respective governing bodies is itself a public body subject to FOIA. AO-03-09.

29-300 What constitutes a meeting

Whether members of a public body are engaged in a meeting is an important determination because, with limited exceptions described in section 29-400, public notice of a meeting must be provided and agendas must be posted prior to the meeting, and the meeting itself must be conducted in public.

The members of the public body are required to be physically assembled to engage in a lawful public meeting. Virginia Code §§ 2.2-3707(B). A public body may not conduct a meeting where the public business is discussed or transacted through means of electronic communications, except as provided in Virginia Code § 2.2-3708.2. If the requisite number of members is present, a meeting is established regardless of whether the assemblage is formal or informal, votes will be cast or decisions made (e.g., work sessions are public meetings), or minutes will be taken. FOIA does not define the term informal assemblage.

A meeting exists under FOIA when three or more members of a public body are physically assembled and the purpose for assembling is to discuss or transact the business of the public body by those members. Virginia Code § 2.2-3701 (definition of “meeting”). A meeting is established regardless of whether the assemblage is formal or informal, votes will be cast, decisions will be made, or minutes will be taken. A meeting also exists under FOIA if a quorum, if less than three, of a committee or other public body is physically assembled to discuss or transact the business of that committee or public body. The business of a public body includes both procedural and substantive issues. 2011 Va. AG LEXIS 60. Examples of public business include not voting, peripheral discussions surrounding the vote, deliberating policy, preparing to take action, and even conversations about scheduling, commenting on draft minutes, and discussing items to place or remove from the agenda. 2011 Va. AG LEXIS 60.

If the purpose of a gathering of three or more members of the public is not to discuss or transact any of its public business, and the gathering or attendance was not called or prearranged for either of those purposes, the
gathering is not a meeting under FOIA. Virginia Code § 2.2-3701 (definition of “meeting”). In addition, the gathering of three or more members at a public forum, candidate appearance, or debate is not a meeting under FOIA if the purpose of the gathering is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the public body as a whole, or any of its members, in its conduct of its public business, is a topic of discussion or debate. Virginia Code § 2.2-3701 (definition of “meeting”).

The most difficult analysis as to whether a meeting is established under FOIA typically arises when three or more members of a public body are in a situation where, for example, two of the members of the public body are members of a committee, the members of one public body attend the meeting of another public body, or the members of the public body attend meetings to gather information about matters of interest to their body.

These topics are considered in more detail in sections 29-310, 29-320, and 29-330 below. Public officials are cautioned that whether or not an issue is the public body’s business can be a fairly nebulous concept that can reach not only into the past and into the near future, but also can be related in varying degrees to matters that clearly are the public body’s business. The public official should apply these rules in a manner that promotes the purpose of FOIA that the government’s business be conducted in public.

29-310 Gatherings of three or more Board members that are meetings under FOIA

Any gathering outside of a regular or special meeting will be a meeting of the Board if 3 or more members assemble for the purpose of discussing or transacting public business.

<table>
<thead>
<tr>
<th>Nature of the Gathering</th>
<th>Example</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Gatherings of three or more members of a public body to meet with citizens off-site to receive their input on a pending matter</td>
<td>A gathering of three members of a school board, after receiving invitations from the citizens, to meet with about 20 of them to discuss the impact of a proposed school on the surrounding community, was a meeting under FOIA. Topics discussed at the meeting included issues such as traffic, the size of the school, and the citizens’ exclusion from the planning process. This gathering was a meeting under FOIA because the proposed school was a current issue pending before the school board. AO-15-04.</td>
<td>This example is different from the example (D) in the table in section 29-330, which is not a meeting under FOIA. The key difference is that, in the example here, the matter that was the topic of the gathering was pending before the school board at the time, in the example (D) in the table in section 29-330, the matter that was being discussed was not pending before the city council.</td>
</tr>
<tr>
<td>B. Gatherings of three or more members of a public body at a press conference on the status of public business pending before the public body</td>
<td>A gathering of three members of the governing body of a baseball stadium authority at a press conference, where the purpose of the press conference was to announce potential sites for stadium construction and financing schemes, was a meeting under FOIA because the press conference related to the business of the authority. AO-13-03 (attendance at the press conference was limited to the media and to those invited, so members of the public who were not invited were excluded).</td>
<td>The opinion does not state whether the members of the governing body who attended actually participated by speaking at the press conference; it merely states that the three members attended the press conference. The result, however, makes sense – if three or more members of a public body received a staff report on a matter pending before the public body but asked no questions and did not otherwise discuss the matter, it would still be a meeting of the public body.</td>
</tr>
<tr>
<td>C. Gatherings of three or more members of a public body to tour a site, either with or without the owner or the applicant present, pertaining to pending public business</td>
<td>A gathering of three members of a wetlands board to tour a site for which a dredging permit application with the wetlands board had been filed was a meeting under FOIA because touring the site necessarily involved the discussion or transaction of public business. AO-04-00.</td>
<td>An example of this situation is when a governing body tours a site before it considers the application for a rezoning or a special use permit pertaining to the site.</td>
</tr>
<tr>
<td>Nature of the Gathering</td>
<td>Example</td>
<td>Comments</td>
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<tr>
<td>D. Gatherings of three or more members of a public body arranged by others to discuss public business of the public body</td>
<td>A gathering of three members of a board of supervisors with a representative of the Commonwealth Transportation Board (“CTB”) to discuss a decision by the board of supervisors relating to the extension of a state highway was a meeting, even though the meeting was arranged at the request of the representative of the CTB. AO-06-0.2</td>
<td>Even though the meeting in the example was not arranged by the board members, their accepting and attending the meeting was presumably the reason the meeting was found to have been prearranged to discuss public business. This interpretation closes what otherwise would be a loophole in FOIA if third parties could arrange meetings of public bodies and circumvent the requirements of FOIA. We assume that, in the example, the board still had pending public business related to the decision it had already made.</td>
</tr>
<tr>
<td>E. Gatherings of three or more members of a public body that are a continuation of a discussion of the public body's public business after its meeting has adjourned</td>
<td>Where three or more members of a public body continue discussions of public business after a public meeting has adjourned, the gathering is a meeting under FOIA, even if the members are discussing the business with staff. AO-46-01.</td>
<td>Because discussions are commonplace at the end of a meeting, members of a public body should be mindful of the rule against three or more its members discussing public business, particularly if the topic of the discussion is still pending or is likely to return to the public body in the near future. If the public body has taken final action, and the topic is no longer pending and is not likely to return in the near future, the discussion would not be a meeting under FOIA (see example (D) in the table in section 29-330).</td>
</tr>
</tbody>
</table>

### 29-320 Gatherings of members of a public body when they are serving on committees that are meetings under FOIA

Committees established by public bodies are public bodies themselves. When members of a public body compose or are members of a committee, their gathering may be a meeting under FOIA, even when the committee is composed of only two members of the public body.

If two members of the public body are designated or appointed to perform a particular task and to report back to the public body, the two-member delegation is a public body. 1990 Va. AG LEXIS 126 (attending a meeting with representatives from another public body to discuss joint service agreements or other governmental issues affecting both public bodies).

<table>
<thead>
<tr>
<th>Nature of the Gathering</th>
<th>Example</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Gatherings of both members of a two-member committee to discuss public business of the committee</td>
<td>A gathering of both members of a two-member committee appointed by a public body is a meeting if the purpose of the gathering is to discuss or transact business of the committee. Shenandoah Publishing House, Inc. v. Shenandoah County Board of Supervisors, 30 Va. Cir. 419 (1993); see 1981 Va. AG LEXIS 248.</td>
<td>A meeting under FOIA exists in this situation if two committee members appointed by the public body gather to discuss or transact the business of the committee. However, two members of the public body appointed to a committee may discuss the business of their main public body and the gathering is not a meeting under FOIA. The rule is the same when two members of a three-member committee (which is a quorum) gather for the purpose of discussing or transacting the business of the committee.</td>
</tr>
</tbody>
</table>
**Nature of the Gathering** | **Example** | **Comments**
--- | --- | ---
**B. Gatherings of three members of a four-member joint committee** | A gathering of three members of a four-member joint committee, composed of two members of one public body and two members of another public body, for the purpose of discussing public business of the joint committee, was a meeting of the joint committee under FOIA. *AO-11-03.* | As with example (A), above, the gathering in this example is a meeting under FOIA only if the committee members have gathered to discuss or transact the business of the joint committee.

**C. Gatherings during committee meetings of the main public body at which the remaining members of the main public body attend and participate.** | A committee composed solely of members of the board of supervisors, whose meetings were attended by the entire membership of the board, is a meeting of the board because the non-committee members participate in the committee meeting. *AO-03-14.* | A similar, but different, scenario is analyzed in example (H) in the table in section 29-330, where two board members serve on a committee and a third member attends the meeting of the committee.

### 29-330 Gatherings of Board members that are not a meeting under FOIA

If the purpose of a gathering is not to discuss or transact any public business of the public body, and the gathering or attendance was not called or prearranged for either of those purposes, the gathering is not a meeting under FOIA. The Attorney General has explained that informal meetings of members of a public body need not be “random” in order for the gathering to not be a meeting. In essence, this rule “recognizes that members of public bodies may be at the same social engagement, political event, community forum, or like events” without triggering the meeting requirements under FOIA. 2004 Va. AG LEXIS 1. Nonetheless, given the purpose of FOIA to promote open government and the policy that FOIA be liberally construed to achieve its purpose, members of a public body should avoid those situations to the extent possible where there even appears to be a meeting under FOIA to the outside observer.

**Nature of the Gathering** | **Example** | **Comments**
--- | --- | ---
**A. Social functions attended by three or more members of a public body, where there is some general connection to the public body’s public business.** | A gathering of members of the city council at a party to recognize the outstanding service performed by present and retiring members of the city council is not a meeting because social functions attended by three or more members of a public body are not meetings under FOIA, provided that the function was not prearranged for the purpose of discussing or transacting public business. *1982 Va. AG LEXIS 92.* | In the social function situation, if the function was not called or pre-arranged for the purpose of discussing public business, a gathering is not a meeting under FOIA, even if some public business is spontaneously discussed. Nonetheless, members of the public body should avoid even the appearance of a meeting under FOIA by not discussing any public business or, at least, avoiding having more than two members participating in a spontaneous discussion at the same time.

**B. Social functions attended by three or more members of a public body that are purely social.** | Where three or more members of a public body are invited to a function, such as a dinner, the assemblage is not a meeting of the public body under FOIA if the function was not called or pre-arranged for the purpose of discussing or transacting public business and, in fact, no public business was actually discussed. *AO-46-01.* | Same comment as in (A), above.
<table>
<thead>
<tr>
<th>Nature of the Gathering</th>
<th>Example</th>
<th>Comments</th>
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</thead>
<tbody>
<tr>
<td>C. Gatherings of two members of a public body</td>
<td>Discussions between two members of a public body who are neither a committee nor acting on behalf of the public body are not meetings under FOIA. 1999 Va. AG LEXIS 68.</td>
<td>Two members of a public body may gather at any time to discuss the public business of the public body or anything else.</td>
</tr>
<tr>
<td>D. Gatherings of three or more members of a public body where the purpose is not to discuss or transact pending public business.</td>
<td>A gathering of three members of city council who met with citizens at a city intersection, after receiving individual invitations from concerned citizens, to meet with the citizens at the intersection, was not a meeting under FOIA. The citizens were concerned about the lack of a stop sign at an intersection and other issues related to traffic safety. The Virginia Supreme Court characterized the gathering as a citizen-organized informational forum, there was no evidence that the purpose of the gathering was to discuss or transact any public business, and there was no evidence that the city council had any business pending before it on the issue of traffic controls, nor was it likely to have those matters come before it in the near future. Beck v. Shelton, 267 Va. 482 (2004).</td>
<td>In order for a gathering to discuss public business to be a meeting under FOIA, the public business being discussed must be pending at the time, or at least be a matter that will be coming to the public body in the near future. A discussion of prior issues, or issues that might come before the public body at some unknown later date, lack that necessary link. Compare this to example (A) in the table in section 29-310, where the subject of the meeting was a matter pending before the school board.</td>
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<tr>
<td>E. Gatherings of two members of a public body with two members of another public body.</td>
<td>A gathering of two members of one public body and two members of another public body is not a meeting of either public body. 1981 Va. AG LEXIS 118.</td>
<td>As explained in example (B) in the table in section 29-320, the answer would be different if the two members were a public body-appointed committee of two. In that situation the gathering of the two members would be a meeting under FOIA if the purpose was to discuss or transact committee business. 1999 Va. AG LEXIS 68; AO-11-05.</td>
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<tr>
<td>F. Gatherings of three or more members of a public body at an informational forum where the purpose is not to discuss or transact public business and participation is limited to asking clarifying questions.</td>
<td>A gathering of three members of a town council who met with members of a community organization, after receiving invitations from the organization to attend their meeting regarding a pending development, was not a meeting under FOIA. The participation in the meeting by the three members of the town council who attended was limited to asking clarifying questions; they did not debate any issues relating to the proposed development of the town land, did not deliberate public policy, did not prepare to take any action, and the only comment made by one of the members of town council was a statement that private organizations make better decisions than the council. AO-02-02.</td>
<td>This opinion is a rather broad application of the public forum exception. Members of a public body may rely on it to attend and participate in, for example, informational forums sponsored by the Virginia Department of Transportation to explain upcoming transportation projects, and charrettes sponsored by a private organization or the locality. Like social functions, individual members of a public body can avoid even the appearance of establishing a meeting under FOIA at a charrette if no more than two are participating in the same group or, better yet, each member attending joins a separate group.</td>
</tr>
<tr>
<td>G. Gatherings of two members of a public body who are members of a three-member committee, where the purpose is to discuss a topic other than the business of that committee.</td>
<td>A gathering by two members of a three-member board of supervisors (which would also be a quorum of that board) who met with the county administrator to discuss the county administrator’s inability to attend the Virginia Association of Counties conference and the topics he wished to have considered at the conference, was not a meeting under FOIA because the purpose of the meeting was not the business of the board of supervisors. Nageotte v. Board of Supervisors of King George County, 223 Va. 259 (1982).</td>
<td>The example is being applied to the situations where two members of a public body are part of a three-member committee. The court’s decision in Nageotte is a reminder that the public business being discussed or transacted must be the business of the particular public body (in this case, the committee).</td>
</tr>
<tr>
<td>Nature of the Gathering</td>
<td>Example</td>
<td>Comments</td>
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<tr>
<td><strong>H. Gatherings of three members of a public body, where two members serve on a committee that is meeting, and the third member attends but does not participate.</strong></td>
<td>A gathering of three members of the main public body, where two of those members serve on a committee, and a third member attends the committee meeting, is not a meeting of the main public body under FOIA, provided that the third member merely attends and observes the proceedings, but does not participate. <em>AO-03-14.</em> When the third member “strays from merely observing to participating in the discussion or transaction of public business, then it turns the committee meeting into a meeting” of the main public body, <em>AO-03-14.</em></td>
<td>It is common for up to two members of a main public body to be appointed to serve on committees that include other public officials and citizens and involve a matter of public business. The example is an important 2014 opinion that clarified some uncertainty in how this situation is to be handled. The fact that the third member of the main public body does not participate in the committee meeting is one of the key factors that distinguishes this example from example (C) in section 29-320.</td>
</tr>
<tr>
<td><strong>I. Gatherings of three members of a public body appointed by the public body to serve on the governing board of a private body.</strong></td>
<td>When three members of a board of supervisors are appointed by the board to the board of trustees of a private hospital association, the three members of the board of supervisors do not establish a meeting of that board when they are gathered to conduct the business of the private body, even though they may be acting in the “public interest.” <em>1983 Va. AG LEXIS 82.</em></td>
<td>The example again reinforces the point that a meeting under FOIA exists if three or more members of the public body gather to discuss or transact the business of the public body. In the example, a meeting under FOIA did not exist because the three members of the board of supervisors were discussing and transacting hospital business.</td>
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</table>

Whether the gathering of three or more members of a public body will be a meeting under FOIA depends on whether three or more members are physically assembled and the purpose for assembling is to discuss or transact the business of the Board by those members. *Virginia Code § 2.2-3701 (definition of ‘meeting’).* Some exceptions apply, such as the rules that apply to a committee, as discussed in section 29-320.

### 29-340 Whether electronic communications may be meetings under FOIA

A meeting may not be conducted through electronic or other communication means where the members are not physically assembled to discuss or transact public business. *Virginia Code § 2.2-3707(B); see AO-16-02 (FOIA prohibits any local public body from conducting a meeting via teleconference, audio-visual conference, or other kind of electronic connection; any meeting of a local public body must be held where all of the participating members are assembled in one physical location; no member of a local public body may participate in a meeting of that public body unless that member is physically present at the meeting); but see section 29-350 discussing Virginia Code § 2.2-3708.2, which allows a member of a public body to participate in a meeting through electronic communication means in specific circumstances.*

One of the compelling questions arising in recent years is whether email and other electronic communications between members of a public body constitute an unlawful meeting under FOIA. In *Beck v. Shelton,* 267 Va. 482, 593 S.E.2d 195 (2004), a case involving some members of the Fredericksburg City Council, one of the issues was whether the use of email by three or more members of the city council constituted an unlawful meeting under FOIA. The circuit court had ruled that exchanges of email between more than two city council members constituted a meeting of the public body, and the failure of the council to publish notice and otherwise hold such a meeting in a public manner violated FOIA. The shortest interval between any email being sent and a response being received was more than four hours; the longest interval was more than two days.

The Virginia Supreme Court reversed the holding of the circuit court, relying in part upon a 1999 Attorney General’s opinion that distinguished between email communications exchanged in a chat-room or instant messaging environment, in which simultaneous communications between members occur, and emails sent through a system that is essentially a form of written communication. The key issue in the Supreme Court’s analysis was whether there was an *assemblage* of the public body, which the Court reasoned requires simultaneity: “While such simultaneity may be present when email technology is used in a ‘chat room’ or as ‘instant messaging,’ it is not present when email is
used as the functional equivalent of letter communication by ordinary mail, courier or facsimile transmission.” Beck, 267 Va. at 490, 593 S.E.2d at 199.

In Hill v. Fairfax County School Board, 284 Va. 306, 727 S.E.2d 75 (2012), the Virginia Supreme Court again held that the exchange of emails between members of a local school board regarding the possible closure of a school did not constitute a meeting within the meaning of the Freedom of Information Act because the emails were not sufficiently simultaneous to constitute a meeting. The Court also noted that the emails that had been distributed to more than two school board members merely conveyed information unilaterally, in the manner of an office memorandum, rather than generating group conversations or responses.

The Virginia Supreme Court’s holdings in Beck and Hill reveal that the three most important considerations will be the number of members of the public body involved, the simultaneity of the communications, and whether the communications are generating discussion among the public body’s members.

In the absence of simultaneity, an undefined term, most email communications among members of a public body will continue to be considered similar to traditional correspondence, such as letters sent by mail or other means, and will not violate the public meeting requirements of FOIA. Members of public bodies must avoid engaging in interactive group email or other real-time electronic communication discussions with other members concerning official business of the public body, especially where responses are exchanged immediately between three or more members.

Although neither the Beck nor Hill courts found the non-simultaneous email communications to be assemblages in violation of FOIA, it is clear that FOIA encourages and requires that a public body’s business be conducted at public meetings. With this in mind, the following is offered as guidance pertaining to electronic communications:

- **Distributing information:** The distribution of information between staff and members, as well as among members, is permitted. See AO-07-09 (no violation of FOIA where department director contacted by telephone individual members of board in one-on-one conversations about rescheduling a board meeting and other administrative matters).

- **Organizing meetings:** Establishing meeting dates, times and locations is prohibited if these are matters being decided by the public body because these actions can be taken only at a public meeting. However, information about a member’s availability can be gathered by the use of electronic written communications and notices of meetings can be distributed electronically.

- **Discussion of pending matters by three or more members in real time:** Discussing any pending matter by three or more members of the public body is prohibited if it is discussed in real-time electronic communications.

- **Discussion of pending matters by three or more members but not in real time:** Discussing any pending matter by three or more members of the public body is permitted if the communications are not in real-time, but through conventional email communications where there is some meaningful time interval between communications. Note that the Beck court did not decide what an acceptable minimum interval might be before the communication is considered to be in real-time.

- **Discussion of pending matters by two members:** Discussing a pending matter is permitted if it is discussed by not more than two members of the public body, whether the discussion is in a real-time electronic communication or through a conventional email communication. However, if other members of the public body are copied on these communications, then the discussion may be prohibited if at least one copied member is “present” in real-time, regardless of whether the copied members actively participate in the discussion by sending communications to the other “present” members.

- **Taking action:** Taking any action on any matter by the public body is prohibited because such action must be taken only at a public meeting.
Without further belaboring the point, these guidelines should be applied in a manner that is mindful of the spirit of FOIA.

29-350 Participation in a meeting through electronic communication means

A member of a public body may participate in a public meeting through electronic communication means from a remote location that is not open to the public if: (1) the public body has adopted a written policy allowing for and governing participation of its members by electronic communications means, including an approval process for participation; (2) a quorum of the public body is physically assembled at the body’s primary or central meeting location; and (3) the public body makes arrangements for the voice of the remote member to be heard. *Virginia Code § 2.2-3708.2(C).* The two circumstances under which a member of a local public body may participate remotely are as follows:

- **Disability:** If a member notifies the chair that she is unable to attend a meeting due to a temporary or permanent disability or other medical condition that prevents her physical attendance.
- **Personal matter:** On or before the day of a meeting, a member notifies the chair that he is unable to attend the meeting due to a personal matter and identifies with specificity the nature of the personal matter. Participation by a member through electronic communication means due to a personal matter is limited each calendar year to two meetings of the public body.

*Virginia Code § 2.2-3708.2(A)(1).* The minutes must reflect the remote location from which the member participated. *Virginia Code § 2.2-3708.2(A)(2).* The remote location need not be open to the public. *Virginia Code § 2.2-3708.2(A)(2).* If the member participated remotely due to a disability or other medical condition, the minutes must include that fact; if the member participated remotely due to a personal matter, the minutes must include the specific nature of the personal matter cited by the member. *Virginia Code § 2.2-3708.2(A)(2).* Lastly, if a member’s participation from a remote location on the basis of a personal matter is disapproved because participation would violate the public body’s policy, the disapproval must be recorded in the minutes with specificity. *Virginia Code § 2.2-3708.2(A)(2).*

*Virginia Code § 2.2-3708.2(A)(3)* authorizes a public body to meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with Virginia Code § 44-146.17, provided that: (1) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location; and (2) the purpose of the meeting is to address the emergency.

29-400 Types of meetings

There are various types of meetings and they can be divided into two general categories. The first category is based on whether the meeting is open or closed to the public.

<table>
<thead>
<tr>
<th>Type</th>
<th>Key Features</th>
<th>When May Be Held</th>
<th>Notice or Procedure Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public meeting</td>
<td>A meeting at which the public may attend</td>
<td>All meetings of a public body are public meetings unless another type is expressly authorized</td>
<td>Must give notice of the date, time and location of the meeting by placing a written notice in a prominent location specified by law at least 3 working days before meeting, and provide written notice to everyone requesting the notice</td>
</tr>
</tbody>
</table>
The second category is based on the circumstances under which the meeting is called, i.e., whether the meeting is a regularly scheduled meeting, a special meeting, or an emergency meeting.

### A Comparison of Public and Closed Meetings

<table>
<thead>
<tr>
<th>Type</th>
<th>Key Features</th>
<th>When May Be Held</th>
<th>Notice or Procedure Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Closed Meeting</td>
<td>A meeting at which the public is excluded, held in conjunction with a public meeting</td>
<td>A public body may hold a closed meeting only for one of the specific purposes authorized in Virginia Code § 2.2-3711; may be held only in conjunction with a public meeting; may not take formal action in a closed meeting</td>
<td>Must approve motion to go into closed meeting; must certify in public meeting after closed meeting that only matters lawfully exempt from public meeting were discussed</td>
</tr>
</tbody>
</table>

### A Comparison of Regular, Special and Emergency Meetings

<table>
<thead>
<tr>
<th>Type</th>
<th>Key Features</th>
<th>When May Be Held</th>
<th>Notice or Procedure Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regular Meeting</td>
<td>A public meeting that is regularly scheduled and whose date was set during the public body’s organizational meeting</td>
<td>At the date, time and location set during the public body’s organizational meeting</td>
<td>Must give notice of the date, time and location by placing a written notice in a prominent location at which notices are regularly posed, in the office of the clerk of the public body or, if there is no clerk, the office of the chief administrator for the public body; the notice must be posted at least 3 working days prior to the meeting</td>
</tr>
<tr>
<td>Special meeting</td>
<td>A public meeting that is other than a regularly scheduled public meeting</td>
<td>At any time, provided it is called by the requisite number of members of the public body and appropriate notice is given</td>
<td>Must give notice of the date, time and location of the meeting by placing a written notice as required for a regular meeting; the timing of the posed notice must be reasonable under the circumstances</td>
</tr>
<tr>
<td>Emergency meeting</td>
<td>A public meeting of a governing body arising from an unforeseen circumstance that requires immediate action</td>
<td>At any time by a governing body</td>
<td>Must give notice that is reasonable under the circumstances, and it must be given contemporaneously with the notice to the members of the governing body conducting the meeting</td>
</tr>
</tbody>
</table>

**29-410 Public meetings**

A public meeting is a meeting at which the public may be present. *Virginia Code § 2.2-3701*. All meetings of a public body are public meetings, unless a closed meeting is authorized for a specific purpose. *Virginia Code § 2.2-3707*. FOIA guarantees citizens the right to be present at meetings and to witness the operations of government; however, it does not guarantee a right to participate in those meetings. *AO-22-03* (also explaining that FOIA does not require that public bodies provide for public comment periods at its regular meetings, nor does it set forth procedures for accepting public comment).

A meeting may have portions that are both public and closed. A public body may only hold a closed meeting in the context of an open meeting. The public body must make a motion in open meeting to convene a closed meeting, and at the conclusion of the closed portion of the meeting, reconvene in open session to certify the closed meeting. *AO-02-04*.

**29-420 Closed meetings**

A closed meeting is a meeting from which the public is excluded. *Virginia Code § 2.2-3701*. The overwhelming majority of the FOIA-related case law and numerous opinions of the Freedom of Information Advisory Council focus on a number of issues surrounding closed meetings.

**29-421 When a public body may go into a closed meeting**

Public bodies may hold closed meetings only for the specific purposes authorized in Virginia Code § 2.2-3711.
The General Assembly has authorized public bodies to go into a closed meeting for many reasons; however, a number of those apply only to specific public bodies. For public bodies serving localities, the authorized purposes for convening a closed meeting range from discussing personnel matters to actual or probable litigation, the acquisition of real property for a public purpose, and the award of a public contract involving the expenditure of public funds.

Of the numerous reasons to convene a closed meeting, only one is relevant for the purposes of this handbook—the so-called litigation or legal consultation exemption set forth in Virginia Code § 2.2-3711(A)(7) (litigation) and (8) (consultation on specific legal matters). This exemption allows a public body to go into a closed meeting to discuss matters pertaining to actual or probable litigation or for consultation regarding specific legal matters. The litigation exemption allows the public body to consult “with legal counsel and briefings by staff members or consultants.” The specific legal matters exemption allows the public body to consult “with legal counsel employed or retained by a public body . . . requiring the provision of legal advice by such counsel.” Although the litigation exemption does not necessarily require that the attorney for the public body calling the closed meeting be the legal counsel with whom the public body is consulting, the FOI Advisory Council has informally opined that that is what the statute probably requires.

The term probable litigation means litigation that has been specifically threatened or about which the public body or its legal counsel has a reasonable basis to believe will be filed. Virginia Code § 2.2-3711(A)(7); see also Parvin v. Virginia Department of Transportation, 15 Va. Cir. 349 (1989) (the filing of a notice of intent by a highway construction contractor is sufficient to threaten litigation to permit defendants’ correspondence with the Attorney General to achieve attorney-client privilege status, as well as work product status, under FOIA).

The specific legal matters exemption permits closed meetings for consultation with legal counsel employed or retained by a public body “regarding specific legal matters requiring the provision of legal advice by such counsel.” The Attorney General has opined that this exemption applies only to discussions of specific legal transactions or disputes and may not be used to justify closed meetings involving more general issues, even those that eventually may have legal consequences. 1992 Va. Op. Atty. Gen. 1. Stated differently, the specific legal matters exemption requires more than a desire to discuss general legal matters and may not be used as a catch-all exception to FOIA’s open meeting requirement and does not justify the discussion of general legal matters in a closed meeting, absent an appropriate, specific, legal issue. 1986-87 Va. Op. Atty. Gen. 31. For example, this exemption would not allow a public body to go into a closed meeting to discuss general legal matters such as those pertaining to the purposes of zoning and the steps in the rezoning process (1985-86 Va. Op. Atty. Gen. 103) or the discussion of general water and sewer policy issues (AO-01-07).

The exemption also provides that a public body may not exclude the public and close a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter under discussion. Rather, the attorney must be a participant in the discussion in the closed meeting.

29-422 The procedure to go into a closed meeting

A public body must follow specific procedures when going into, conducting, and concluding a closed meeting. Before a closed meeting may convene, the public body must take an affirmative recorded vote during a public meeting approving a motion that:

• Identifies the subject matter;
• States the purpose of the meeting; and
• Makes a specific reference to the applicable statutory exemption from the public meeting requirements.

Virginia Code § 2.2-3712(A). The matters contained in the motion must be set forth in detail in the minutes. Virginia Code § 2.2-3712(A).

The Freedom of Information Advisory Council has observed that “there is often confusion in differentiating...
between the subject and the purpose of a closed meeting. Conceptually, it may be helpful to think of the subject as what the meeting is about, while the purpose is why the meeting is to be held.” AO-13-09. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting is not sufficient to satisfy the requirements for holding a closed meeting. Virginia Code § 2.2-3712(A). Thus, public bodies may run afoul of the rules for convening a closed meeting when they fail to adequately identify the subject matter and the purpose for convening the closed meeting. In Shenandoah Publishing House v. Winchester City Council, 37 Va. Cir. 149 (1995), the city council convened a closed meeting on a motion that recited the “personnel exemption” set forth in FOIA. The circuit court found that the statutory method for closing a meeting was not strictly followed where only a general reference tracking the statutory language for the closed meeting was given. “[N]o specific purpose was stated which reasonably identified the subject matter to be discussed at the closed session incident to motion to close.” Although the closed meeting discussion pertained to issues that fell within the personnel exemption, the city council had technically violated FOIA. The Freedom of Information Advisory Council has provided the following guidance on the required specificity of the motion in identifying the subject:

The subject need not be so specific as to defeat the reason for going into closed session, but should at least provide the public with general information as to why the closed session will be held. For example, a public body might state that the subject of a closed session would be to discuss disciplinary action against an employee of the public body. This statement goes a step beyond just stating that the purpose of the meeting is to consider a personnel matter, but does not go so far as to disclose the identity of the individual being discussed and defeat the reason for the closed session. In these circumstances, a proper motion should indicate that the public body was entering [the] closed meeting to discuss possible disciplinary action or termination of a Council appointee as authorized by Virginia Code § 2.2-3711(A)(1). Such a motion sufficiently identifies the subject matter and purpose of the closed meeting without compromising confidentiality.

AO-24-04; see also AO-02-10 (mere reference to “legal contracts” is insufficient because it does not identify the subject of the contracts).

On the subject of properly identifying the purpose of the closed meeting in the motion, the Freedom of Information Advisory Council has also said:

In identifying the purpose of a closed meeting, it is helpful to keep in mind the introductory language of subsection A of § 2.2-3711: Public bodies may hold closed meetings only for the following purposes. This introductory language makes clear that the exemptions themselves identify the purposes for which closed meetings may be held.

AO-13-09.

Public bodies also may run afoul of the rules for convening a closed meeting when the stated exemption does not allow the actual purpose for the closed meeting discussion. In White Dog Publishing, Inc. v. Culpeper County Board of Supervisors, 272 Va. 377, 634 S.E.2d 334 (2006), the board of supervisors went into a closed meeting for the stated purpose of discussing “the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body,” as provided in Virginia Code § 2.2-3711(A)(30). The actual purpose of the board’s discussion was to consider the application or enforcement of the scope or terms of a previously awarded public contract. The Virginia Supreme Court held that the board’s closed meeting was in violation of FOIA because the purpose for the “award of a public contract” exemption is to:

[P]rotect a public body’s bargaining position or negotiating strategy vis-a-vis a vendor during the procurement process. Under that exemption, the terms or scope of a public contract are proper subjects for discussion in a closed meeting of a public body only in the context of awarding or forming a public contract, or modifying such contract, and then only when such discussion in an open meeting would adversely affect the public body’s bargaining position or negotiating strategy.
regarding the contract.


The _White Dog_ court concluded that the exemption did not allow the board to convene a closed meeting in order to consider the application or enforcement of the scope or terms of a previously awarded public contract. In so concluding, the Court reminded public bodies that, because the provisions of FOIA are to be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government, any exemption from public access to meetings will be narrowly construed and no meeting may be closed to the public unless specifically made exempt under FOIA or other specific provisions of law.

In _City of Danville v. Laird_, 223 Va. 271, 288 S.E.2d 429 (1982), the city council moved to go into a closed meeting to discuss legal matters using language that did little more than recite the language from the statute and failed to specify which item on the agenda the motion pertained. However, the motion was made at a special meeting of the city council in which the only items on the agenda pertained to actual pending litigation. Under these facts, the Virginia Supreme Court held that the motion was valid.

**29-423 What may be discussed, who may participate, and reaching a tentative decision, in a closed meeting**

During a closed meeting, a public body must restrict its discussion only to those matters specifically exempted (e.g., the litigation that was threatened during the meeting) and identified in the motion convening the closed meeting. _Virginia Code § 2.2-3712(C); see Shenandoah Publishing House v. Warren County School Board, 41 Va. Cir. 113 (1996)_ (when a public body enters into a closed meeting, the jurisdiction of FOIA is triggered, and the permissible range of the action and discussion is limited by the particular exemption).

The courts will narrowly construe the permissible scope of the discussion in a properly convened closed meeting. _White Dog Publishing, Inc. v. Culpeper County Board of Supervisors_, 272 Va. 377, 634 S.E.2d 334 (2006) (discussed in section 29-422). In _White Dog_, the board went into a closed session under the “award of public contract” exemption, and under that exemption it could not consider the application or enforcement of the scope or terms of a previously awarded public contract. In _Marsh v. Richmond Newspapers, Inc._, 223 Va. 245, 288 S.E.2d 415 (1982), the Virginia Supreme Court upheld the trial court’s finding that the scope of a closed meeting held by the Richmond city council to discuss legal matters exceeded the permissible scope of the closed meeting. The trial court had found that, although the city council contended that the meeting was exempt because it was to receive a briefing by the mayor, an attorney, and by city staff pertaining to potential litigation of pending anti-annexation bills and alternatives to litigation. In fact, the court found that there was little, if any, discussion of legal matters or potential litigation but, instead, the focal point of the discussion was a city proposal that the counties of Henrico and Chesterfield cooperate by assuming a proportionate share of the cost of services and facilities provided by the city for the benefit or residents of all three jurisdictions. The Virginia Supreme Court also found that the mayor was not appearing as an attorney for the city but, rather, was representing the city in his official capacity as an advocate of regional cooperation. In _Media General Operations, Inc. v. City Council of Richmond_, 64 Va. Cir. 406 (2004), the circuit court held that the city council exceeded the scope of a closed meeting under the “performance evaluation” exemption in _Virginia Code § 2.2-3711(A)(1)_ to discuss the performance of the city manager because it related to rising crime in the city. See also _1992 Va. Op. Atty Gen. 1 _ (summarizing opinions in which the legal consultation exemption was considered, and concluding that the exemption applies only to discussions of specific legal transactions or disputes and may not be used to justify closed meetings involving more general issues, even though those issues eventually may have legal consequences).

Persons who are not members of the public body may attend a closed meeting if they are deemed necessary or if their presence will reasonably aid the public body in its consideration of the matters. _Virginia Code § 2.2-3712(L)_. Minutes may be taken during a closed meeting, but are not required. _Virginia Code § 2.2-3712(H)_. In _Mannix v. Washington County Board of Supervisors_, 27 Va. Cir. 397 (1992), the circuit court considered the situation where a staff person attending a closed meeting raised an issue that was beyond the scope of the stated purpose for the closed
meeting. The circuit court said that the employee was not subject to the same rules under FOIA as the board members, and the court declined to hold the board “responsible for the spontaneous utterances that any such non-member might unwittingly make.” The court said that the board erred in taking up the discussion of the issue raised by the employee, and that “the proper action would have been for the chairman to simply declare the non-member out of order and forbid any further discussion on the topic.”

Members of a public body may reach a tentative decision while still in a closed meeting. AO-01-03 (the law recognizes that during a closed meeting, the course of the discussion may lead the members of the public body to take an informal vote to ascertain their position or to reach an informal agreement, and FOIA allows members to poll each other individually about their position on a matter of public business); AO-13-02 (use of a “straw poll” in closed meeting is permitted by FOIA). However, as discussed in section 29-424, no action may be taken in a closed meeting.

**29-424 Reconvening in a public meeting at the conclusion of a closed meeting**

At the conclusion of a closed meeting, the public body must immediately reconvene in a public meeting and take a roll call or other recorded vote to be included in the minutes certifying that, to the best of each member’s knowledge, only public business matters lawfully exempt from the public meeting requirements and identified in the motion that convened the closed meeting were heard, discussed or considered in the closed meeting. Virginia Code § 2.2-3712(D). See Appendix C for a sample certification. A member of the public body who believes that there was a departure from the exemption identified in the motion must so state prior to the vote, and indicate the substance of the departure that, in his opinion, has taken place. Virginia Code § 2.2-3712(D).

A resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting is not effective unless the public body reconvenes in a public meeting and takes a vote of the membership on the matter. Virginia Code §§ 2.2-3711(B), 2.2-3712(G). If the members of the public body reached a tentative agreement or decision during the closed meeting, that tentative decision is not binding on any of the members, and a public body cannot act upon the decision until it identifies the substance of the issue and takes a vote in an open meeting, because no decision becomes effective until then. AO-01-03.

**29-430 Special meetings**

Governing bodies and planning commissions are authorized to convene special meetings. See, e.g., Virginia Code §§ 15.2-1417 (board), 15.2-2214 (commission). A special meeting is a meeting that is other than a regularly scheduled meeting. In Albemarle County, the rules of procedure of those bodies allow either the chairman or two or more members of the body to call a special meeting, and provide how notice will be provided to the bodies’ members.

**29-440 Emergency meetings**

A governing body may also convene emergency meetings. An emergency meeting is a meeting arising from an unforeseen circumstance that requires immediate action. See Virginia Code § 2.2-3701.

**29-500 Notice requirements for regular, special, and emergency meetings**

For regular meetings, the public body must give notice of the date, time and location of the meeting by placing a written notice in a prominent location at which notices are regularly posted, in the office of the clerk of the particular public body or, if there is no clerk, the office of the chief administrator for the public body (e.g., in Albemarle County, the office of the director of planning is the chief administrator for the planning commission and the architectural review board; the office of the zoning administrator is the chief administrator for the BZA). Virginia Code § 2.2-3707(C). The notice must be posted at least three working days prior to the meeting. Virginia Code § 2.2-3707(C). A public body must give notice of the time, date, and location of its meetings, even if the only item on the agenda for the meeting is a closed meeting. AO-02-04. The failure of the public body to post the written notice of a meeting required by Virginia Code § 2.2-3707(C) renders any vote taken at the meeting null and void. 2009 Va. Op. Atty. Gen. LEXIS 2, 2009 Va. Op. Atty. Gen. WL 103686; 2009 Va. Op. Atty. Gen. LEXIS 4, 2009 Va. Op. Atty.
For special meetings, the public body must give the notice required above that is reasonable under the circumstances, and it must be given contemporaneously with the notice to the members of the public body conducting the meeting. *Virginia Code § 2.2-3707(D)*. Further, the rules of the public body may require, for example, that the secretary of those bodies notify the general news media of the time and place of the special meeting and the matters to be considered.

For emergency meetings, the governing body must give notice that is reasonable under the circumstances, and it must be given contemporaneously with the notice to the members of the public body conducting the meeting. *Virginia Code § 2.2-3707(D)*.

In addition to posting notice, notice of all meetings must also be provided directly to any person who files an annual written request for notification with the public body. *Virginia Code § 2.2-3707(E)*. The notice must be in writing, but may be provided by electronic means if the person requesting notice does not object. *Virginia Code § 2.2-3707(E)*. Finally, at least one copy of all agenda packets and, unless exempt from public disclosure under FOIA or other state law, all materials furnished to members of a public body for a meeting must be made available for public inspection at the same time those documents are furnished to the members of the public body. *Virginia Code § 2.2-3707(F)*. FOIA also encourages posting notices by electronic means. *Virginia Code § 2.2-3707(C)*.

### 29-600 Conducting a meeting

Public bodies act only at authorized meetings as a corporate body and not by the actions of its members separately and individually. *Campbell County v. Howard*, 133 Va. 19, 112 S.E. 876 (1922) (applying to boards of county supervisors); *Sandlin v. Fauquier County Board of Zoning Appeals*, 23 Va. Cir. 53 (1991) (the individual members of the BZA act only as an entity), citing *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099 (1985).

### 29-610 Following applicable rules of parliamentary procedure

Most boards and commissions have adopted rules of parliamentary procedure to guide them through the various procedural issues that arise in the course of a meeting, such as the order of business and voting procedures. Public bodies may also adopt in whole or in part other rules of parliamentary procedure, such as Robert’s Rules of Order.

These rules of procedure should, of course, be followed. Parliamentary rules exist for the simple purpose of facilitating and rendering orderly the public body’s official actions, and the custom of following these rules is simply procedural. *Shannon Fredericksburg Motor Inn, Inc. Spotsylvania County Board of Supervisors*, 9 Va. Cir. 418 (1977). Failure to comply with the parliamentary procedures will not invalidate an action when the requisite number of members has agreed to the particular measure. *County of Prince William v. Rau*, 239 Va. 616, 391 S.E.2d 290 (1990); *Shannon Fredericksburg Motor Inn, supra* (procedural rules are not jurisdictional).

In *Centex Homes v. Loudoun County Board of Supervisors*, 74 Va. Cir. 54 (2007), the board approved a rezoning application at one meeting but at its next meeting, following a successful motion to reconsider, the rezoning was denied. The plaintiffs contended that the board’s denial was ineffective, claiming that the board’s approval of the rezoning at the prior meeting was effective on that date. No notice of the board’s reconsideration of the rezoning was provided. The circuit court concluded that the board’s reconsideration complied with its rules of procedure and upheld the board’s decision to deny the rezoning, which allowed a matter to be reconsidered “during the same or succeeding meeting” upon a proper motion by a board member “voting with the prevailing side or who [had] not voted on the question.” *Centex Homes*, 74 Va. Cir. at 55. The court also relied in part on this passage from *1975-76 Va. Op. Atty. Gen. 403*, in which the Attorney General opined:

> [l]ocal governing bodies often enact rules of procedure which provide for reconsideration of ordinances. Such rules usually provide that an ordinance which has been defeated can be reconsidered if a motion to that effect passes at or before the next ensuing regular meeting of the
governing body. In such circumstances, the reconsidered ordinance is not treated as a new ordinance, and regular notice and hearing requirements do not apply.

Centex Homes, 74 Va. Cir. at 56. In Madison v. Loudoun County Board of Supervisors, 82 Va. Cir. 106 (2011), the circuit court declined to grant a writ of mandamus in a facial challenge to a rule of procedure of the county’s historic district review committee. The rule authorized the committee to reconsider the plaintiff’s application for a certificate of appropriateness. The court held that because the county’s zoning regulations authorized the committee to adopt operating procedures, which included the process for reconsideration, the plaintiff’s facial challenge to the rule failed.

In Board of Supervisors of Fairfax County v. Board of Zoning Appeals, 2018 Va. Cir. LEXIS 23 (2018), the BZA first affirmed a decision of the zoning administrator on appeal. After receiving an emailed request for a rehearing from the appellants after the period for which a request for a rehearing could be timely made, the BZA reversed the decision of the zoning administrator. The circuit court concluded that the board of supervisors and the zoning administrator had standing to challenge the procedure used for decision-making by the BZA in a declaratory judgement proceeding. In the subsequent decision on the merits of the declaratory relief action, the circuit court concluded that the BZA’s by-law giving it the ability to reconsider a decision was invalid. Board of Supervisors of Fairfax County v. Board of Zoning Appeals, 2018 Va. Cir. LEXIS 625 (2018). Among other things, the reconsideration by-law allowed the BZA to reconsider and taking action without complying with the notice requirements of Virginia Code § 15.2.2204.

29-620 Establishing and maintaining a quorum

Establishing and maintaining a quorum is essential in order for a public body to transact business. A quorum is usually comprised of a majority of the members of the public body. For a locality's governing body, a majority of the governing body constitutes a quorum. Virginia Code § 15.2-1415. However, some public bodies may have unique definitions of a quorum. For many years, the Albemarle County Public Recreational Facilities Authority’s rules provided that a quorum was established by a majority of the members plus one. Thus, a quorum for the nine-member body was six, rather than five.

29-621 No action may be taken unless quorum present other than to adjourn meeting

A public body may not take a valid action unless a quorum is present. Virginia Code § 15.2-1415 (board of supervisors), § 15.2-2215 (planning commission), § 15.2-2308(B) (board of zoning appeals); see also the rules of procedure adopted by the board of supervisors, the planning commission and the board of zoning appeals. Their continuing presence is necessary in order that the public body may act. Jakabcin v. Town of Front Royal, 271 Va. 660, 628 S.E.2d 319 (2006). An exception to this rule applies when a member is disqualified under the State and Local Government Conflict of Interests Act, and is discussed in section 29-623(2). Absent a quorum, the only action the public body may take is to adjourn the meeting. Jakabcin, supra. The acts of members of a public body in the absence of a quorum, except to adjourn a meeting, are void. Jakabcin, supra. Until adjournment, the public body may at most receive information from staff and have discussions before adjourning the meeting. The public body may not open public hearings, debate the merits of agenda items, or take informal votes on agenda items.

29-622 A meeting under FOIA may exist even though a quorum is not present

It is possible for a meeting to exist under FOIA without the quorum that would allow the public body to take action on a matter. For example, a meeting is established under FOIA for a seven-member body when the third member arrives; though a quorum is not established until the fourth member arrives.

A meeting and a quorum would be established for public bodies of various sizes as follows:

<table>
<thead>
<tr>
<th>Membership</th>
<th>Meeting</th>
<th>Quorum</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

29-16
Establishing a quorum when members absent or disqualified

Questions may arise about establishing a quorum when members of a public body are absent or are disqualified from participating in an item because of a conflict of interest. The simple answer is that the number of members required to be present to establish a quorum does not change because members are absent. *Jakabin v. Town of Front Royal*, 271 Va. 660, 628 S.E.2d 319 (2006).

In *Jakabin*, the town council was faced with a controversial rezoning. Two members of the six-member council disqualified themselves under the State and Local Government Conflicts of Interest Act (see chapter 30); a third member absented himself from the public hearing and the first reading of the ordinance required under the town charter, stating in a letter that he was recusing himself from participating without stating any reason. The three remaining members of the town council held the public hearing and the first reading of the ordinance on the rezoning. At the second reading of the ordinance, the two disqualified members again disqualified themselves – one left the room, the other remained. The council member who had absented himself from the prior meeting stated in a letter that he was “legally entitled to participate and vote on the matter,” but was absent again. After the second reading of the ordinance, the rezoning was approved with three affirmative votes, four council members present (one who was disqualified), and two who were absent (one who was disqualified).

1. **Absent member**

   The *Jakabin* court had this to say about the council member who decided to absent himself from the meetings, even though he was not disqualified from participating in the matter:

   In our system of representative government, the voters must of necessity rely on their elected legislative representatives to protect their interests, to defend their freedoms, to advocate their views and to keep them informed. Elected representatives who voluntarily absent themselves from meetings of the governing body to which they have been elected cannot fully discharge those duties. For that reason, penalties are often provided for the unauthorized absences of members.

   *Jakabin*, 271 Va. at 666, 628 S.E.2d at 322.

   These principles apply to appointed members of other public bodies as well, though they are undoubtedly strongest when applied to elected officials. See, e.g., *Virginia Code § 15.2-2212*, authorizing a governing body to remove a planning commissioner from office if the commissioner is absent from any three consecutive commission meetings, or is absent from any four commission meetings within any 12-month period.

2. **Disqualified member**

   The key issue in *Jakabin* was whether the number required to establish a quorum changed because two members of the town council disqualified themselves because of conflicts of interest. *Virginia Code § 2.2-3112(C)*, which is part of the State and Local Government Conflict of Interests Act, provided at the time:

   If disqualifications of officers or employees in accordance with this section leave less than the number required by law to act, the remaining members shall have authority to act for the agency by majority vote.

   *Jakabin*, 271 Va. at 667, 628 S.E.2d at 322.

   In *Jakabin*, the Virginia Supreme Court considered whether the application of *Virginia Code § 2.2-3112(C)*
allowed the three town council members to act at the public hearing and the first reading of the ordinance, because two members were disqualified. In other words, did section 2.2-3112(C) have the effect of reducing the membership of the town council from six to four (because two members were disqualified and absent), so that the three members present constituted a quorum? Even with two members disqualified, the town council’s required quorum was still four, and the unexcused absence by the other council member did not change that. The Court held that Virginia Code § 2.2-3112(C) did not change the underlying quorum requirements for a public body to act and that the public hearing and the first reading of the ordinance were a nullity because the three members present were not a quorum. Because the town charter required two readings and the ordinance received only one lawful reading before its adoption, the ordinance as well as the related approvals, were invalid.

After Jakabin, Virginia Code § 2.2-3112(C) was amended (highlighted in italics) to provide in relevant part:

Notwithstanding any other provision of law, if disqualifications of officers or employees in accordance with this section leave less than the number required by law to act, the remaining member or members shall constitute a quorum for the conduct of business and have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members.

The portion of Virginia Code § 2.2-3112(C) that was not amended remains significant – it does not change the sole grounds under which the quorum may be reduced – disqualification under the State and Local Government Conflict of Interests Act. Under this interpretation, the law is applied as follows:

<table>
<thead>
<tr>
<th>Hypotheticals</th>
<th>Effect of Virginia Code § 2.2-3112(C)</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 member public body for which a quorum to act is 4; 4 members are disqualified because of a conflict of interest under the State and Local Government Conflict of Interests Act</td>
<td>Virginia Code § 2.2-3112(C) provides that, notwithstanding the general law for quorums, the 3 remaining members would constitute a quorum and have the authority to act</td>
</tr>
<tr>
<td>7 member public body for which a quorum to act is 4; 3 members are absent from the meeting because they are on vacation and a 4th member is disqualified because of a conflict of interest under the State and Local Government Conflict of Interests Act</td>
<td>Virginia Code § 2.2-3112(C) does not apply and the 3 remaining members do not constitute a quorum with the authority to act; the failure to establish a quorum under the general law was not due solely to the disqualification of the members of the public body under the State and Local Government Conflict of Interests Act</td>
</tr>
</tbody>
</table>

The Virginia Conflict of Interest and Ethics Advisory Council, in an opinion dated April 24, 2017, analyzes Virginia Code § 2.2-3112(C) differently. The Council concluded that the savings clause (“Notwithstanding any other provision of law”) allows the number required for a quorum to be reduced even when some members are absent for reasons other than being disqualified due to a conflict of interest. Thus, the Council states, “if five members of a seven-member public body are in attendance at a meeting and constitute a quorum, and then two of those members are disqualified due to a conflict under the Act, the remaining three members constitute a quorum, pursuant to subsection C of § 2.2-3112. It is immaterial whether or not the absent members could have participated, or for what reasons they are absent.” Virginia Conflict of Interest and Ethics Advisory Council, Formal Advisory Opinion 2017-F-001. The savings clause in Virginia Code § 2.2-3112(C), however, only allows for the number of members required for a quorum to be reduced; it did not change the condition under which a quorum may be reduced – disqualifications of officers or employees because of conflicts of interest under Virginia Code § 2.2-3112 – and no other reason.

29-630 Maintaining control of the meeting; disruptions

Although members of the public may have the right to speak at a public meeting, the right to do so is not unlimited. “Officials presiding over such meetings must have discretion . . . to cut off speech which they reasonably perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner. [citation omitted].” Steinburg v. Chesterfield County Planning Commission, 527 F.3d 377, 385 (4th Cir. 2008); Mannice v. Commonwealth of Virginia, 31 Va. App. 271, 281, 522 S.E.2d 885, 890 (2000) (“the chairman of a public meeting has a legitimate interest in conducting the meeting in an
orderly and efficient manner").

The First Amendment to the United States Constitution provides:

Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.


The federal courts have identified two key functions of the First Amendment’s Free Speech Clause: (1) to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail; and (2) to ensure that the government has not regulated speech based on hostility – or favoritism – towards the underlying message expressed.

The United States Supreme Court has said that the First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (italics added). “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than about abstract discussion.” *Sullivan*.

Under the First Amendment’s Free Speech Clause, a locality “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). Any restriction in a public body’s meeting rules that maintains decorum versus merely Preventing disruption may run the danger of being content-based (and, therefore, being in violation of the First Amendment). *Griffin v. Bryant*, 30 F. Supp. 3d 1139 (D.N.M. 2014).

Reasonable and content-neutral time, place, and manner restrictions on speech are permissible under the First Amendment.

The chair of a public body is fully authorized to declare a disruptive person at a meeting to be out of order, to direct that the person sit down and be quiet, and to have him or her forcibly ejected from the meeting room upon resistance or refusal to cease and desist. *Mannix*, supra (defendant properly convicted of disorderly conduct and obstruction of justice where, during the “citizen’s comments” session on an issue before the board of supervisors, he posed argumentative questions to the county attorney and, after being instructed by the chairman to confine his remarks to the issue at hand, he became argumentative and accusatory toward the chairman; after being declared out of order and refusing to take his seat, defendant was then forcibly removed from the meeting room).

Determining whether particular speech or behavior is disruptive must be based on the chair’s reasonable perception of disruption. There must be actual disruption or a specific and significant fear of disruption, not merely undifferentiated fear or a remote apprehension of disruption. As one court has said, “government officials in America occasionally must tolerate offensive or irritating speech.” When a speaker is disrupting a meeting, the Chair may take a series of steps to end the disruption, beginning with a warning and escalating all the way to asking the police to remove the speaker for disorderly conduct.

Following are 10 types of speech and behavior that may or may not be disruptive. These examples are from the case law collected from throughout the United States. Some types of permitted speech and behavior, such as complaining about public officers or employees, may nonetheless be disruptive if the complaints are, for example, yelled from the audience or are irrelevant to the issue at hand.

- **Refusing to stop speaking after the time limit expires**: Speakers are disruptive when they speak beyond the established time limit.
• **Speaking when not at the podium or yelling from the audience:** Speakers are disruptive when they: (1) are not at the podium and yell from the audience; or (2) heckle the public body from the audience by cupping their hands and yelling when a member of the public body attempts to speak.

• **Refusing to speak to issues relevant to the agenda item:** A speaker who speaks during a public hearing for an extended period on issues that are irrelevant to the matter at issue is disrupting the meeting. This rule applies only during public hearings pertaining to specific matters. It does not apply to persons speaking during periods on the agenda when speakers are invited to speak about anything.

• **Being unduly repetitious:** Speakers are disruptive when they are unduly repetitive.

• **Using profanity:** Speakers are not disruptive when they use profanity that does not cause an actual disruption (e.g., speaker said “God damn”). A public body may prohibit speech that is obscene because a speaker has no First Amendment right to use obscene language. Profanity is not necessarily obscenity. In the First Amendment context, obscenity is speech that, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. This is not a standard that is easily administered during a meeting.

• **Demonstrative conduct:** Speakers are not disruptive when they make silent gestures toward the public body, including the Nazi salute, provide that they do not otherwise disrupt the meeting. On the other hand, speakers are disruptive when they dump debris on the floor at a public meeting to dramatize a point.

• **Speaking about public officers or employees:** Speakers are not disruptive when they: (1) question the fitness of public officers or employees; (2) discuss specific public officers or employees; (3) complain about public officers or employees; (4) make personal attacks on public officers or employees; or (5) raise objections about how a public body conducts its business.

• **Speaking about groups or members of the public:** Speakers are not disruptive when they: (1) speak about groups or individuals even when the speech has racist or sexist overtones, involves overbroad caricatures of certain groups or citizens, or is sophomoric and offensive; (2) speak about groups or individuals even when the speech uses virulent ethnic and religious epithets or scurrilous caricatures; or (3) make defamatory attacks on groups or individuals.

• **Speech that offends or agitates persons in the audience:** Speakers are not disruptive: (1) merely because members of the public body or the audience are offended by what the speakers say; (2) merely because of the listeners’ reactions to what the speakers saying; or (3) because they will speak about a particular topic, even when the public body knows that the speech is assertedly or demonstrably offensive to some members of the public.

• **Speech that threatens violence:** Speakers who threaten violence are disruptive; the speech must: (1) threaten illegal acts; (2) be fighting words (words that, by their very utterance, tend to incite an immediate breach of the peace) because the First Amendment does not apply to that kind of speech; or (3) be incitement to imminent violence (violence that is truly imminent) because the First Amendment does not apply to that kind of speech.

A public body may take reasonable steps to assure that a meeting is not disrupted by a non-member. Robert’s Rules of Order states:

Any nonmembers allowed in the hall during a meeting, as guests of the organization, have no rights with reference to the proceedings. An assembly has the right to protect itself from annoyance by nonmembers, and its full authority in this regard – as distinguished from cases involving disorderly members – can be exercised by the chair acting alone. The chair has the power to require nonmembers to leave the hall, or to order their removal, at any time during the meeting; and the nonmembers have no right of appeal from such an order of the presiding officer. However, such
an order may be appealed by a member.

Robert's Rules of Order, Newly Revised, 10th ed., 628. Robert’s Rules of Order also advises that the chair should “be guided by a judicious appraisal of the situation.”

29-640 Motions

All matters requiring a vote of the public body must be preceded by an appropriate motion by a member, and a seconding of that motion by another member.

The motion should clearly state the intent of the motion maker, and include a reference to any conditions that are included with the motion. One nationally-known parliamentarian recommends that motions be stated: “It is moved that . . .” rather than “I make a motion that . . .” Ericson, Notes and Comments on Robert's Rules, 7.

Although the action reflected by the motion may come in various forms, for those decisions by the governing body, as well as decisions of other public bodies that are not making mere recommendations, the best practice may be to merely have the body adopt a resolution that reflects its decision along with any conditions.

<table>
<thead>
<tr>
<th>Acting Body</th>
<th>Sample Motion Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governing body</td>
<td>It is moved that we approve Zoning Map Amendment 2017-555, with the proffers.</td>
</tr>
<tr>
<td></td>
<td>It is moved that we approve Special Use Permit 2017-777, with the . . .</td>
</tr>
<tr>
<td></td>
<td>... following conditions . . .</td>
</tr>
<tr>
<td></td>
<td>... conditions stated in the staff report.</td>
</tr>
<tr>
<td></td>
<td>... conditions stated in the staff report, amended as follows . . .</td>
</tr>
<tr>
<td></td>
<td>It is moved that Zoning Map Amendment 2017-888 be denied, for the following reasons . .</td>
</tr>
<tr>
<td></td>
<td>It is moved that we adopt the resolution [approving or denying] the application . .</td>
</tr>
<tr>
<td>Planning commission</td>
<td>It is moved that we recommend that Zoning Map Amendment 2017-555, with the proffers, be approved.</td>
</tr>
<tr>
<td></td>
<td>It is moved that we recommend that Special Use Permit 2017-777, be approved with the . .</td>
</tr>
<tr>
<td></td>
<td>... following conditions . . .</td>
</tr>
<tr>
<td></td>
<td>... conditions stated in the staff report.</td>
</tr>
<tr>
<td></td>
<td>... conditions stated in the staff report, amended as follows . . .</td>
</tr>
<tr>
<td></td>
<td>It is moved that we recommend that Zoning Map Amendment 2011-888 be denied for the following reasons . .</td>
</tr>
<tr>
<td>Board of Zoning appeals</td>
<td>It is moved that we approve Variance 2017-222, with the following conditions . .</td>
</tr>
<tr>
<td></td>
<td>It is moved that we affirm the decision of the zoning administrator in Appeal 2017-333.</td>
</tr>
<tr>
<td>Architectural review board</td>
<td>It is moved that we approve the certificate of appropriateness for ARB 2017-111 with the . .</td>
</tr>
<tr>
<td></td>
<td>... following conditions . . .</td>
</tr>
<tr>
<td></td>
<td>... conditions stated in the staff report.</td>
</tr>
<tr>
<td></td>
<td>... conditions stated in the staff report, amended as follows . . .</td>
</tr>
<tr>
<td></td>
<td>It is moved that we recommend that the board of supervisors adopt the following guidelines . .</td>
</tr>
<tr>
<td></td>
<td>It is moved that we adopt the resolution [approving or denying] the certificate of appropriateness . .</td>
</tr>
</tbody>
</table>

The motion then must be seconded. The purpose of a second is to prevent time from being consumed by the public body having to dispose of a motion that only one person wants to see introduced. Ericson, supra, 12. Thus, requiring a second restores balance between individual members and the majority by requiring that at least one other member believe that the motion is worth talking about. Ericson, supra, 13. A second need not be made by a member who actually supports the motion.

When a motion has been made and seconded, the chair should then state the motion: “It is moved and seconded that . . .” At that point, the debate may begin. If the debate begins without a second, neither the debate nor any ensuing action is out of order. Because the reason for requiring a second is to ensure that at least one other
member thinks the motion is worth talking about, once debate begins, the rationale for a second has been satisfied. *Ericson, supra,* 13. Likewise, an adopted motion is not defective if a second was not made because, if a motion receives a majority vote, the rationale for a second has been satisfied. *Ericson, supra,* 14.

29-650 Debate

A public body’s rules of procedure may specify how the debate should be conducted. Ericson recommends that the chairman follow this procedure:

- **Recognize the maker of the main motion first:** The maker of the main motion should be recognized first. This is not only a courtesy to the motion maker. It also requires the motion maker to assume the burden of proof. The maker of the motion may not speak against the motion; however, if he no longer supports the motion, he may withdraw it.

- **Alternate debate:** After the maker of the motion has spoken, the debate should alternate between those who support the motion and those who oppose it.

- **All members speak before members speak a second time:** Members who have not yet spoken should be recognized before other members are allowed to speak a second time.

*Ericson, supra,* 9. These procedures are most necessary in large assemblies. Local public bodies, however, are small and they typically do not have this level of formality. The debates are typically informal discussions among the members.

On most matters, the debate reaches a natural conclusion and the chairman asks the public body whether it is ready to vote or is ready for the question. However, the debate on any motion may be terminated by any member moving the previous question. The motion may be made in various forms, such as: “I move the previous question,” “I call the previous question,” or “I move that we close the debate.” *Ericson, supra,* 53-58. The motion on the previous question must be seconded, and may not be debated before the vote.

29-660 Voting

An action is valid only if it is authorized by a majority vote of those members present and voting. The two exceptions to this rule are appeals and applications for variances considered by the BZA, where a vote of the majority of the membership of the BZA (i.e., three members of a five-member BZA, even if only three members are present) is required to reverse a determination by the zoning administrator or to grant a variance. *Virginia Code* § 15.2-2312.

On a final vote by the governing body on any ordinance or resolution, the name of each member voting and how he or she voted must be recorded (i.e., a roll call vote is required). *Virginia Constitution, Article VII,* § 7; *Town of Madison v. Ford*, 255 Va. 429, 498 S.E.2d 235 (1998). Thus, for example, a roll call vote is required on a zoning text amendment or a zoning map amendment. A voice vote is authorized on all other matters considered. On those matters for which a planning commission is making a recommendation to the governing body, the governing body may prefer that the commission vote by a roll call vote so that it has a clear understanding as to which commissioners voted for and against the matter. Voting by secret or written ballots is prohibited. *Virginia Code* § 2.2-3710.

A member of a public body may vote on a matter even if he or she was not present for the public hearing or the presentation of all of the evidence. For legislative matters, there is little law on point. As explained by the circuit court in *Hutton v. Town of Elkton*, 57 Va. Cir. 278, 280 (2002):

For ages, members of all types of public bodies vote on issues and legislation when they have not been present at all or some of the hearings and debates which are normally conducted before voting on particular legislation. Therefore, the Court holds that Council members are not
disqualified from voting on an issue simply because they failed to attend a public hearing on the issue.

For non-legislative matters, “the officer who makes the determinations must consider and appraise the evidence,” but need not necessarily receive the evidence in the first instance. *Morgan v. United States*, 298 U.S. 468, 482, 56 S. Ct. 906, 912 (1936), overruled in part in *Morgan v. United States*, 313 U.S. 409, 61 S. Ct. 999 (1941); *Southwest Bank of Virginia v. Peoples Bank, Inc.*, 216 Va. 788, 789, 224 S.E.2d 130, 131 (1976) (allowing absent members of the State Corporation Commission to vote on a matter where they reviewed the record before voting on the matter; “consideration of the evidence by those responsible for making the decision is all that due process requires”). To “consider and appraise” the evidence does not mean that each member of a public body read all of the evidence or even that he or she read any of it; rather, it is sufficient for a member to read a summary or analysis prepared by subordinates (e.g., a staff report) (*2 Davis, Administrative Law, § 11.03 (1958*)) and to listen to a recording of the proceeding. Thus, on non-legislative matters, when a hearing is continued to another date, or the decision is made after the hearing, an absent member may vote on a matter provided that he or she has considered and appraised the evidence before the decision. The member should state on the record that he listened to a full tape recording of the prior proceedings on the matter, read the written materials, and considered all aspects of the matter. *Southwest Bank, supra*.

29-670 Minutes

Minutes must be recorded at all public meetings. *Virginia Code* § 2.2-3707(I). However, committees or subcommittees appointed by a public body are not required to record minutes unless a majority of the governing body is on the committee or subcommittee. *Virginia Code* § 2.2-3707(I). Minutes may be taken during closed meetings, but are not required. *Virginia Code* § 2.2-3712(I).

Minutes must be in writing and include: (1) the date, time and location of the meeting; (2) the members of the public body recorded as present and absent; and (3) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. *Virginia Code* § 2.2-3707(I).

29-680 Photographing and recording meetings

Any person may photograph, film, record or otherwise reproduce any portion of a public meeting. *Virginia Code* § 2.2-3707(H). A public body may adopt rules governing the placement and use of equipment necessary for broadcasting, filming or recording a meeting in order to prevent interference with the proceedings. *Virginia Code* § 2.2-3707(H). However, a public body may not prohibit or prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. *Virginia Code* § 2.2-3707(H). In addition, *Virginia Code* § 2.2-3707(H) prohibits a public body from conducting a meeting required to be open in any building or facility where recording devices are prohibited.
Chapter 30

Conflicts of Interest

30-100 Introduction


The purpose of COIA (Virginia Code § 2.2-3100 et seq.) is to assure the citizens of the Commonwealth that the judgment of public officers and employees will not be compromised or affected by inappropriate conflicts. Virginia Code § 2.2-3100. The Attorney General has stated that COIA provides minimum rules of ethical conduct for state and local government officers and employees and contains three general types of restrictions and prohibitions: (1) it details certain types of conduct that are improper for such officers and employees; (2) it restricts the ability of such officers and employees to have personal interests in certain contracts with their own or other governmental agencies; and (3) it restricts the participation of such officers and employees in transactions of their governmental agencies in which they have a personal interest. 2014 Va. Op. Atty. Gen. WL 200906. This chapter primarily focuses on the third type of conflict – those pertaining to personal interests in transactions.

### Summary of the Key Elements of the State and Local Government Conflicts of Interest Act

- Applies to public officials having a personal interest in a transaction or a personal interest in a contract.
- A personal interest in a transaction arises from the public official’s, or a member of the public official’s immediate family’s, ownership of property or interest in a business, income, or by representing or providing services to a client who has a pending transaction.
- A public official having a personal interest in a transaction must disclose that interest in the manner required by COIA; provided that a personal interest in a transaction that affects the public generally need not be disclosed.
- A public official having a personal interest in a transaction is disqualified from participating in the transaction if the transaction applies solely to property or a business in which the public official has a personal interest or if no express exception allowing participation applies.
- A public official having a personal interest in a transaction may participate in the transaction after disclosing his personal interest if one of the three common exceptions apply:
  - The public official is a member of a business, profession, occupation or group of three or more persons, the members of which are affected by the transaction.
  - The party to the transaction is a client of the public official’s firm but the public official does not personally represent or provide services to the client.
  - The transaction affects the public generally, even though her personal interest, as a member of the public, may also be affected.
- A public official who believes she may have a conflict of interest should consult with the counsel for the public body and obtain a written opinion from the locality’s attorney or from the Commonwealth’s Attorney, after providing a full disclosure of the facts; if the public official is later charged with a knowing violation, the locality’s attorney’s opinion is evidence that the public official did not knowing violate COIA, the Commonwealth’s Attorney’s opinion immunizes the public official from prosecution.
- The acceptance of money, gifts and honoraria is also prohibited under COIA.
- A knowing violation of COIA is either a class 1 or class 3 misdemeanor, depending on the violation, and constitutes malfeasance in office; penalties may include criminal fines and penalties, forfeiture of office, forfeiture of the value derived from the violation, and civil penalties in the amount of the value derived.
COIA is a very technical act and the reader is advised to consult counsel (see section 30-600) for an in-depth review of the law and to receive guidance on how to proceed if and when a conflict of interest exists. A knowing violation of COIA has serious consequences. A knowing violation is a misdemeanor (Virginia Code § 2.2-3120) and constitutes malfeasance in office (Virginia Code § 2.2-3122). In addition to criminal fines and penalties, a knowing violation may result in forfeiture of the office or employment (Virginia Code § 2.2-3122), the forfeiture of the value derived from the violation, and civil penalties in the amount of the value derived from the violation (Virginia Code § 2.2-3124).

COIA does not address all conflicts of interest and those situations are addressed in section 30-800.

30-200 Definitions of key terms

A conflict of interest will be found to exist under COIA if the public official has a personal interest in the transaction. Except as expressly stated otherwise, the term public official includes members of the locality’s public bodies, advisory agencies, committees (collectively referred to as a public body) and employees.

30-210 Personal interest

A personal interest is a financial benefit or liability accruing to a public official or to a member of his or her immediate family. Virginia Code § 2.2-3101. A member of the immediate family is a spouse and any child who resides in the same household as the officer or employee and who is a dependent of the officer or employee. Virginia Code § 2.2-3101. A personal interest exists in any of the following situations:

- **Ownership in a business**: Ownership in a business, if the ownership interest exceeds three percent of the total equity of the business.

- **Income from property or business**: Annual income that exceeds, or may reasonably be anticipated to exceed, $5,000 from ownership in real or personal property or a business.

- **Salary, compensation, benefits paid or provided by business or governmental agency**: Salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, $5,000 annually.

- **Ownership of property**: Ownership of real or personal property, if the interest exceeds $5,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property.

- **Personal liability on behalf of business**: Personal liability incurred or assumed on behalf of a business, if the liability exceeds three percent of the asset value of the business.

- **Option for ownership of business or real property**: An option for ownership of a business or real or personal property if the ownership interest will consist of ownership in a business or real or personal property.

A business is a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, trust or foundation, or any other individual or entity carrying on a business or profession, whether or not for profit. Virginia Code § 2.2-3101. A public official with a personal interest in a business also has a personal interest in any related business entity. A personal interest exists in a parent-subsidiary relationship when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation. A personal interest exists in an affiliated business if one business has a controlling ownership interest in the other, if a controlling owner in one business is also a controlling owner in the other, or if there is shared management or control between the two businesses.
COIA requires a public official to be keenly aware of the business interests of his partners and the ownership interests of any businesses in which he has a personal interest.

30-220 Transaction

A transaction is any matter considered by the governmental or advisory agency, whether in a committee, subcommittee, or other entity of the agency or before the agency itself, on which official action is taken or contemplated. Virginia Code § 2.2-3101. Thus, under COIA, a transaction is any matter before the locality for which official action will or may be taken (e.g., review and approval of any type of land use-related application) by the governing body, planning commission, architectural review board, BZAs, a department, or any other public official.

In the realm of land use approvals, the types of matters that would be a transaction under COIA range from an applicant-initiated comprehensive plan amendment to a building permit, and everything in between, and would also include matters pertaining to zoning enforcement, official determinations by the zoning administrator, and appeals thereof to the BZA. In the situation where a public official has provided representation or services, the transaction need not necessarily be the matter for which the public official or member of his immediate family provided the representation or services to the client. See section 30-400.

COIA applies to a public official only to the extent that the transaction is or might be considered by the governmental agency or advisory agency for which the public official is a member. Thus, for example, COIA does not prohibit a BZA member (or require disclosure) from representing a client in a zoning map amendment before the planning commission or the governing body because the BZA would never take official action on the zoning map amendment. However, members of governing bodies must be much more cautious since they represent the locality as a whole, and almost every matter may at some point be considered by the governing body.

30-230 Personal interest in a transaction

A personal interest in a transaction is a personal interest of a public official in any matter considered by his or her agency. Virginia Code § 2.2-3101. A personal interest exists when a public official or a member of his immediate family has a personal interest in property or a business, or represents an individual or business and the property, business or represented individual or business: (1) is the subject of the transaction; or (2) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. Virginia Code § 2.2-3101.

30-300 Applicable rules when a personal interest in a transaction exists

If a personal interest in a transaction is determined to exist, a public official is not automatically prohibited from participating in the transaction. The table below provides a summary of a number of typical situations when a public official may need to determine whether a conflict of interest exists under COIA.

<table>
<thead>
<tr>
<th>Situations When a Public Official Must Determine Whether a Conflict of Interest Exists</th>
<th>Relationship</th>
<th>Personal Interest</th>
<th>Disclose and Disqualify or Merely Disclose</th>
</tr>
</thead>
</table>
| Official has an interest in a business | Personal interest if the official’s interest is more than 3% of the total equity of the business | • Disqualified if the transaction applies solely to the business (e.g., it is the applicant) or no other exception applies.  
• Must only disclose if the transaction affects a group of 3 or more (e.g., neighboring business is the applicant; official’s business is in the neighborhood). |
| Official receives annual income from ownership in real or personal property or a business | Personal interest if the official’s annual income exceeds, or may be reasonably anticipated to exceed, $5,000 (e.g., receives $11,000 in stock dividends from business) | • Disqualified if the transaction applies solely to the property or business (e.g., it is the applicant) or no other exception applies.  
• Must only disclose if the transaction affects a group of 3 or more (e.g., neighboring business is the applicant; official’s property or business is in the neighborhood). |
The following rules determine whether the public official must disclose the interest and disqualify, or merely disclose the interest.

30-310 Disclosure and disqualification is required if the transaction applies solely to the property or business in which the official has a personal interest or no exception allowing participation applies

A public official must disqualify himself from participating in a transaction and publicly disclose that interest if the transaction applies solely to property or business in which he has a personal interest. Virginia Code § 2.2-3112(A).

Example 1: A public official is a member of the planning commission whose ownership is 7% of the total equity of a business that has filed an application for a rezoning. The planning commissioner has a personal interest in the transaction, is disqualified from participating in the transaction, and must disclose his interest in writing.

Also, recall that a public official also has a conflict of interest if a member of his immediate family has a qualifying personal interest.

Example 2: The son of a county officer has recently moved back home to save money and has joined a small partnership engaged in land planning in which he owns 10% of the partnership’s total equity. The son is assisting another planner in the firm on a proposed comprehensive plan amendment for a proposed project in the county. The son is a dependent of the county officer, who is a member of the planning commission. The county officer has a personal interest in the transaction because a dependent residing in her household has a personal interest in a transaction now pending before the county.

A public official also must disqualify himself if none of the exceptions set out in section 30-320 apply. Virginia Code § 2.2-3112(A). For example, a public official must disqualify himself from participating in a transaction if he has
represented or provided services to a client on the matter that is the subject of the transaction. See section 30-400 for a further discussion.

Disqualification means that the public official may not participate in the discussion leading to a vote or decision. Virginia Code § 2.2-3112(A); see section 29-623 for a discussion of the effects of disqualification on maintaining a quorum. Disqualification also means that the public official may neither attend a closed meeting regarding the transaction nor discuss the matter with other governmental officers or employees at any time. Virginia Code § 2.2-3112(A). In other words, the disqualified public official should not have any contact with any other public officials, including staff, regarding the matter that creates the conflict.

The disclosure must be in writing and must: (1) identify the transaction involved; (2) state the existence of the interest; and (3) state the full name and address of the business and the address or parcel number for the real property if the interest involves a business or real property. Virginia Code § 2.2-3115(F). The disclosure form must be retained in the public records of the agency for five years in the office of the administrative head of the public body. Virginia Code § 2.2-3115(F).

30-320 Disclosure is required if the transaction applies to not only the property or business in which the official has a personal interest but other properties or businesses, and an exception allowing participation applies

There are a limited number of exceptions from the requirement that a public official having a personal interest in a transaction be disqualified from participating in the transaction. Because COIA is to be liberally construed to achieve its legislative purposes, the exceptions below should apply only when the circumstances squarely fall within their statutory parameters.

These exceptions allow participation in the transaction after proper disclosure of the interest. Proper disclosure includes being able to affirmatively state that even though the public official has a personal interest in the transaction, she is able to participate in the transaction fairly, objectively, and in the public interest. If the public official is unable to make that declaration, she should consider whether it is appropriate not to participate in the matter to avoid an appearance of impropriety, even though she does not have a conflict of interest requiring disqualification under COIA. See section 30-800 regarding avoiding the appearance of impropriety.

The three exceptions examined below are the most common under COIA. Although there are others, they have limited applicability. The reader should always bear in mind that no exception allowing participation applies when the transaction pertains solely to the public official’s property or business.

<table>
<thead>
<tr>
<th>Exception</th>
<th>Type of Disclosure</th>
<th>Contents of Disclosure</th>
<th>Timing of Disclosure</th>
</tr>
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</table>
| Public official is a member of a group of three or more members affected by the transaction | Oral or in writing | • Identify the transaction involved;  
• Identify the nature of the personal interest affected by the transaction;  
• State the fact that she is a member of a business, profession, occupation, or group the members of which are affected by the transaction; and  
• State that she is able to participate in the transaction fairly, objectively, and in the public interest.  
Virginia Code § 2.2-3115(H) | • If oral, prior to participation and at a time when it can be recorded in written minutes of the public body.  
• If in writing, prior to participation, to be filed with the clerk or administrative head of his governmental or advisory agency; if reasonable time is not available to file the disclosure prior to participation, then by the end of the next business day.  
• Thereafter, must orally disclose the existence of the interest during each meeting of the governmental or advisory agency at which the transaction is discussed.  
Virginia Code § 2.2-3115(H) |
## Disclosure Requirements for Three Common Exceptions

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<thead>
<tr>
<th>Exception</th>
<th>Type of Disclosure</th>
<th>Contents of Disclosure</th>
<th>Timing of Disclosure</th>
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</table>
| Party to the transaction is a client of the public official’s firm but the public official does not represent or provide services to the party/client | Oral or in writing | - Identify the transaction involved;  
- State that a party to the transaction is a client of his firm;  
- State that he does not personally represent or provide services to the client; and  
- State that he is able to participate in the transaction fairly, objectively, and in the public interest. | If oral, prior to participation and at a time when it can be recorded in the written minutes of the public body.  
- If in writing, prior to participation, to be filed with the clerk or administrative head of his governmental or advisory agency; if reasonable time is not available to file the disclosure prior to participation, then by the end of the next business day. |
| The transaction affects the public generally | No disclosure required | Not applicable | Not applicable |

### 30-321 Groups of three or more members

A public official may participate in a transaction if he is a member of a business, profession, occupation, or group of three or more persons, the members of which are affected by the transaction, and the interest is disclosed. *Virginia Code § 2.2-3112(B)(1).*

*Example 3:* A public official is a member of the BZA and the transaction is a variance to be considered by the BZA within the BZA member’s neighborhood. The BZA member is a member of the group of three or more persons owning land in proximity to the parcel that is the subject of the transaction, and she may participate in the transaction if she makes the required disclosure.

The disclosure may be either oral or in writing and must: (1) identify the transaction involved; (2) identify the nature of the personal interest affected by the transaction; (3) state the fact that she is a member of a business, profession, occupation, or group the members of which are affected by the transaction; and (4) state that she is able to participate in the transaction fairly, objectively, and in the public interest. *Virginia Code § 2.2-3115(H).* If the public official is unable to make the statements in the declaration of interest without reservation, she should not participate in the matter and disqualify herself from participating. The disclosure form must be retained in the public records of the agency for five years in the office of the administrative head of the public body. *Virginia Code § 2.2-3115(H)*.

### 30-322 No personal representation of a client

A public official may participate in a transaction when a party to the transaction is a client of his firm if he does not personally represent or provide services to the client, and the interest is disclosed. *Virginia Code § 2.2-3112(B)(2).* See section 30-400 for a complete discussion of public officials representing or providing services to a party to a transaction. If the public official previously represented or provided services to the client regarding the matter, or currently represents the client on other matters, the exception does not apply and she is disqualified from participating in the transaction.

*Example 4:* A public official is a member of the board of supervisors and her law firm represents the applicant for a special use permit, though she does not and never has represented the client. The board member may participate in the transaction if she makes the required disclosure.

The disclosure may be either oral or in writing and must: (1) identify the transaction involved; (2) state that a party to the transaction is a client of her law firm; (3) state that she does not personally represent or provide services to the client and has never done so; and (4) state that he is able to participate in the transaction fairly, objectively, and in the public interest. *Virginia Code § 2.2-3115(I).* If the public official is unable to make the statements in the declaration of interest without reservation, he should not participate in the matter and disqualify himself from...
participating in the transaction. The disclosure form must be retained in the public records of the agency for five years in the office of the administrative head of the public body. Virginia Code § 2.2-3115(I).

30-323 Application to the public generally

A public official may participate in a transaction if it affects the public generally, even though her personal interest, as a member of the public, may also be affected by the transaction. Virginia Code § 2.2-3112(B)(3).

Example 5: A public official is a member of the architectural review board and the board is considering architectural guidelines for structures along designated highways. The board member owns a parcel along one of the designated highways having a value of $65,000 and his parcel would be subject to the guidelines. Because the architectural guidelines would apply to the public generally, the board member may participate in the transaction.

There are no disclosure requirements for this exception.

30-400 The representation or provision of services to a client who is a party to a transaction

In the context of this section, a personal interest in a transaction exists when a public official or a member of his immediate family, or a member of his firm represents or provides services to any individual or business (“client”) and the property, business or individual: (1) is the subject of the transaction; or (2) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. Virginia Code § 2.2-3101. Under this situation, a personal interest in a transaction arises regardless of whether the representation or the services pertain to the matter that will or may be considered by the locality.

The terms represent and provide services are not defined in COIA, so they are given their commonly understood meanings. Represent means to “act the part of, in the place of, or for (another person) usu. by legal right,” Webster’s Third New International Dictionary (2002), or to “function as the official and authorized delegate or agent” for someone else or to “act as a spokesperson for” someone else. Webster’s II New Riverside University Dictionary (1994). Attorneys, engineers, civil engineers, surveyors, architects, landscape architects, planners and other professionals often represent clients on land use applications pending before a locality by, among other things, acting as the client’s spokesperson at meetings or in discussions with individual public officials. Provide services means to “provide information or other assistance” to another. Webster’s Third New International Dictionary (2002) (definition of “service”). A wide range of professionals also may provide services to clients who have land use applications pending before a locality. Public officials must be aware that a conflict of interest arises by merely providing services to a client, regardless of whether they are also representing the client before the locality.

Because COIA fails to define represent or provide services, there may be some ambiguity as to when a public official is representing or providing services to a third party, and not merely assisting the third party in their official capacity. At the very least, some kind of working relationship is required between the public official and the client in order for COIA to apply. There may be occasions when the distinctions between providing services and providing information may blur, in which case counsel should be consulted (see section 30-600). The following examples illustrate situations when a public official is representing or providing services to a client.

Example 6: A county official who is an engineer is hired to represent an applicant for a subdivision and seeks to meet with county staff over the requirements of the subdivision ordinance and the possibility of obtaining exceptions to certain requirements. The county official has a personal interest in the transaction and is disqualified because he is representing the client on a matter pending before the county.

Example 7: A county official assists a friend in filling out the form for appealing a decision of the architectural review board to the board of supervisors. The county official assists the friend for no charge. The county official would likely not have a personal interest in the transaction and would
not be disqualified under COIA because the assistance was not provided in the context of a working relationship.

**Example 8:** A county official who is an architect is hired to design a house for a landowner in an abutting locality. The landowner is also an applicant for a special use permit for a commercial use on a separate, commercially zoned parcel in the county. The county official has a personal interest in the transaction and is disqualified because he is currently providing services to the applicant.

| Common Situations Where a Public Official Represents or Provides Services to a Client |
|---------------------------------------------|-------------------------------|
| **Situation** | **Disqualification and Disclosure, or Only Disclosure** | **Key Factors** | **Other** |
| The public official (or a member of his immediate family) represents or provides services to a client who is a party to the transaction | Disqualification and disclosure | Because the client, not the transaction, is the critical factor, disqualification is required even if: | In his or her public capacity, the public official is disqualified from participating in the transaction |
| | | • The representation or services pertain to a matter outside of the public official’s locality | • In his or her private capacity as a representative or service provider to a client, the public official is prohibited from discussing the matter with other public officials at any time |
| | | • The representation or services were provided before any application was filed with the locality | • The term firm is not defined in COIA; its common meaning is a “commercial partnership of two or more persons” |
| | | • The public official is no longer representing or providing services to the client of the firm on the matter | • Public officials who are attorneys, architects, engineers and other professionals should be aware that their profession’s own ethical standards may require a higher standard of conduct |
| The party to the transaction is a client of the public official’s (or a member of her immediate family’s) firm but the public official does not personally represent or provide services to the client | Disclosure | Because the client, not the transaction, is the critical factor: | Does not apply to disqualified public officers |
| | | • The exception requiring disclosure but not disqualification of the public official does not apply if the public official previously represented or provided services to the client regarding the matter | |
| | | • The exception requiring disclosure but not disqualification of the public official does not apply if the public official currently represents the client on other matters | |
| Disqualified public employees may represent themselves or family members | Disclosure | Employee may not receive compensation for services | |

The following examples illustrate some situations when a public official has a conflict of interest because of the work of a member of his immediate family.

**Example 9:** A city employee’s spouse is an attorney, and she provided legal services pertaining to a rezoning prior to the rezoning application being filed with the city. The city employee has a personal interest in the transaction and is disqualified because his spouse provided legal services to a client on a matter now pending before the city.

**Example 10:** The son of a county official, a recent college graduate who has moved back home after graduating, is working in a local planning firm as an intern. The son is assisting another planner in the firm on a proposed comprehensive plan amendment for a proposed project in the county. The son is a dependent of the county official, who is a member of the planning commission. The county official has a personal interest in the transaction because a dependent residing in her household has provided services to a client on a matter now pending before the county.
Note that the county official in Example 10 would also have a personal interest in a transaction on any project in the county proposed by the planning firm’s client, even if her son assisted the planner only on a project for the planning firm’s client that would be located in an abutting locality.

These rules require that public officials not only be cognizant of their own activities, but also those of their spouses and other members of the immediate family. Note also that when a personal interest arises from representing or providing services, a personal interest in a transaction exists regardless of the amount of income or other financial benefit received for the representation or services, i.e., the $5,000 income or ownership interest thresholds that apply to other personal interests under COIA do not apply where representation or the provision of services is the issue.

30-410 Disclosure and disqualification is required if the public official represents or provides services to a client who is a party to the transaction

Subject to the two circumstances noted in sections 30-420 and 30-430 below, if a public official, or a member of his immediate family, represents or provides services to a client, the public official is disqualified from participating in any transaction pertaining to that client. The following examples illustrate some of the effects of disqualification.

Example 11: A city official who is an engineer is hired to represent an applicant for a subdivision and seeks to meet with city staff over the requirements of the subdivision ordinance and the possibility of obtaining exceptions to certain requirements. Because the city official has a personal interest in the transaction, he may not have any discussions with city officials or employees and may not meet with city staff to discuss the subdivision or send any writings discussing the subdivision.

Example 12: A county employee’s spouse is an attorney, and she provided legal services to an applicant on a rezoning prior to the rezoning application being filed. Because the county employee has a personal interest in the transaction, he must not participate in any way in the review of the application or discuss the rezoning with any county officer or employee. In addition, the county employee has a personal interest in all other transactions pertaining to the applicant that are pending, or that may be pending, before the county.

In the scenarios presented in Examples 11 and 12, public officials must be certain that they not initiate discussions with other public officials they know to be representing or providing services to a client. In such a situation, the disqualified officials should be notified that they may not discuss the matter with any other public officials and that another person must represent the applicant on the matter in discussions with the locality’s staff.

The consequences arising from a conflict apply whether the public official’s role is characterized as being in a public capacity (e.g., as a public official) or in a private capacity (e.g., as a representative or service provider to a private client). In his or her public capacity, the public official is disqualified from participating in the transaction. Virginia Code § 2.2-3112(A). In his or her private capacity as a representative or service provider to a client, the public official is prohibited from discussing the matter with other public officials at any time. Virginia Code § 2.2-3112(A). Prohibited discussions include both oral and written communications, regardless of the formality of the communication, the setting of the discussion, or the substance of the communication itself, so long as it pertains to the matter.

Example 13: A county official is a member of the planning commission and an architect in a solo practice. A bank desires to locate a new branch in the county and hires the county official to perform architectural services. Before the site plan is filed, the bank hires an engineering firm to represent the bank, complete and submit the preliminary site plan, and act as the bank’s contact person. The site plan will be reviewed and approved administratively by county staff. Because the county official is providing services to the bank, he may not meet with county staff to discuss the site plan or send any writings discussing the site plan. In addition, the county official has a personal
interest in all other transactions pertaining to the bank that are pending, or that may be pending, before the county.

In Example 13, if discussions with county staff are going to take place on the matter, the public official must have somebody else communicate with staff.

Because a transaction includes any matter on which official action is taken or contemplated (Virginia Code § 2.2-3101), the transaction, as well as the disqualification and resulting prohibition on participation, may begin long before a land use application is filed with the locality. Thus, a public official who is representing or providing services to a client is prohibited from contacting the locality’s public officials to discuss a proposed application for ideas, solicit preliminary feedback or the locality’s receptiveness to a proposal, or participate in a pre-application conference, even before an application is filed.

30-420 Disclosure required if the party to the transaction is a client of the public official’s firm and the public official does not personally represent or provide services to the client

A public official whose firm represents or provides services to a client has a personal interest in a transaction. Virginia Code § 2.2-3112(B)(2). However, if the public official does not personally represent or provide services to the client, disclosure, but not disqualification, is required. Virginia Code § 2.2-3112(B)(2). If the public official previously represented or provided services to the client regarding the matter, or currently represents the client on other matters, the exception allowing only disclosure does not apply and she is disqualified from participating in the transaction.

The term firm is not defined in COIA so it is given its commonly understood meaning. Firm in this context means a “commercial partnership of two or more persons,” Webster’s II New Riverside University Dictionary (1994), “a partnership of two or more persons not recognized as a legal person distinct from the members composing it,” or “a business unit or enterprise.” Webster’s Third New International Dictionary (2002). Consistent with the liberal interpretation to be given COIA, the term firm covers an array of business entities involving two or more persons.

Example 14: A city official is a member of the planning commission and an attorney in a local three-member law firm. A developer is a client of the firm, but the city official does not personally represent the developer on its special use permit application, never provided services to the developer on the application, and does not represent the developer in any other matters. The city official must disclose the relationship, but is not disqualified from participating in the special use permit or any other matter of the developer when it comes to the planning commission, and may discuss the matter with other city officers or employees.

Example 15: A county official is a member of the architectural review board and an architect in a local four-member architectural firm. A local car dealership desires to update its buildings and the county official prepares some preliminary architectural drawings. The project is then assigned to another architect in the firm. Four months later, a site plan amendment is filed with the county. Because the county official previously provided services to his firm’s client on the transaction, he is disqualified from participating in the site plan or any other matter of the car dealership pending before the county, regardless of whether the filed site plan does not rely on the preliminary architectural drawings prepared by the county official.

Example 16: A city official is a member of the board of supervisors and an engineer. She represents and provides services to a developer on a subdivision proposed in an abutting locality. She is disqualified from participating in any transaction pertaining to the developer in her locality.

Attorneys and other professionals should be aware that their own profession’s ethical requirements may require a higher standard of conduct and that compliance with COIA may not satisfy those professional ethical requirements. See section 30-322 for the disclosure requirements.
30-430  Disqualified employees may represent themselves or a member of their immediate family in the transaction if they receive no compensation

A public employee who has a personal interest in a transaction and is disqualified from participating in a transaction may represent himself or a member of his immediate family in a transaction, provided that the employee does not receive compensation for the representation and complies with the applicable disqualification and disclosure requirements of COIA. *Virginia Code § 2.2-3112(C).*

*Example 17:* A county employee and her husband own 35 acres that they wish to subdivide with a private street. Although the county employee may not participate in the transaction as a county employee, she may represent herself and her husband in discussions with public officials, as well as at the planning commission meeting where the private street request would be considered, provided that she receives no compensation and satisfies the disqualification and disclosure requirements of COIA.

This exception applies only to employees and does not apply to officers.

30-500  Other prohibited conduct

In addition to those situations when a public official may have a personal interest in a transaction discussed above, COIA prohibits certain interests in contracts and other general conduct.

30-510  Contracts

*Virginia Code § 2.2-3107* prohibits members of governing bodies from having a personal interest in any contract with the governing body, any governmental agency that is a component part of the locality and subject to the control of the locality’s governing body, or any contract other than any governmental agency if the official’s governing body appoints a majority of the members of the governing body of the second governmental agency. There are three exceptions pertaining to: (1) a contract of employment if the member was employed by the locality prior to July 1, 1983 in accordance with the former Conflict of Interests Act or the employment began before the member became a member of the governing body; (2) a contract for the sale of goods or services by a governmental agency at uniform prices available to the public; and (3) a contract awarded to a member of a governing body as a result of competitive sealed bidding, subject to certain restrictions and requirements.

*Virginia Code § 2.2-3109* prohibits all other public officials and employees of a locality from having a personal interest in any contract with the agency of which he is an officer or employee other than his own contract of employment. In addition, *Virginia Code § 2.2-3109* prohibits all other public officials and employees of a locality from having a personal interest in any contract with any other governmental agency that is a component of the locality’s government unless the contract is awarded as a result of competitive sealed bidding or competitive negotiation under the *Virginia Public Procurement Act*, is awarded under a procedure embodying competitive principles as authorized under the *Virginia Public Procurement Act*, or is awarded after a finding by the administrative head of the governmental agency that competitive bidding or negotiation is contrary to the best interest of the public.

There are numerous exceptions in *Virginia Code §§ 2.2-3109, 2.2-3109.1* (contracts related to hospital authorities) and 2.2-3110 including those for: (1) certain personal interests of employees in contracts for goods or services or of employment contracts; (2) an officer’s or employee’s personal interest in a contract of employment with any other governmental agency that is a component part of his locality; (3) contracts for the sale of goods or services by a governmental agency at uniform prices available to the public; (4) contracts for the sale, lease, or exchange or real property between the locality and the public official or employee; and (5) contracts for goods and services when the contract does not exceed $500.

30-520  Personal benefits, money, gifts, and other things of value

*Virginia Code § 2.2-3103 et seq.* prohibits a range of conduct in which the public officer or employee
(collectively, “public official”) obtains personal benefits, money, gifts, and other things of value, including:

- **Soliciting or accepting money or other thing of value for services:** Except for special benefits authorized by law, a public official may not solicit or accept money or other things of value for services performed within the scope of his official duties, except the compensation, expenses, or other remuneration paid by the locality.

- **Offering or accepting money or other thing of value for employment, appointment, or promotion:** A public official may not offer or accept money or any other thing of value in consideration of obtaining employment, appointment, or promotion of any person with any governmental or advisory agency.

- **Offering or accepting money or other thing of value to use position for contract purposes:** A public official may not offer or accept any money or other thing of value for or in consideration of the use of his public position to obtain a contract for any person or business with any governmental or advisory agency.

- **Using confidential information for personal or another’s gain:** A public official may not use for her own economic benefit, or that of another party, confidential information which she has acquired by reason of her public position and which is not available to the public.

- **Accepting money or other benefit that may influence performance:** A public official may not accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties. This rule does not apply to any political contribution actually used for political campaign or constituent service purposes and reported as required by Virginia Code § 24.2-900 et seq.

- **Accepting an opportunity that may influence performance:** A public official may not accept any business or professional opportunity when he knows that there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties.

- **Accepting honoraria:** A public official may not accept any honoraria for any appearance, speech, or article in which the public official provides expertise or opinions related to the performance of her official duties. The term *honoraria* does not include any payment for or reimbursement to a person for her actual travel, lodging, or subsistence expenses incurred in connection with the appearance, speech, or article or, in the alternative, a payment of money or anything of value not in excess of the *per diem* deduction allowable under section 162 of the Internal Revenue Code.

- **Accepting a gift where its timing and nature question impartiality:** A public official may not accept a gift from a person who has interests that may be substantially affected by the performance of the public official’s official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the public official’s impartiality in the matter affecting the donor.

- **Accepting gifts frequently so as to raise appearance of impropriety:** A public official may not accept gifts from sources on a basis so frequent as to raise an appearance of the use of her public office for private gain.

- **Retaliating against person for expressing views on matters of public concerns or for exercising protected rights:** A public official may not use his public position to retaliate or threaten to retaliate against any person for expressing views on matters of public concern or for exercising any right that is otherwise protected by law. However, this prohibition does not restrict the authority of any public employer to govern conduct of its employees, and to take disciplinary action, in accordance with applicable law, and does not limit the authority of a constitutional officer to discipline or discharge an employee with or without cause.

Each of these prohibitions will be liberally construed to apply as broadly as reasonable under the circumstances.

Virginia Code § 2.2-3103.1 prohibits public officials or a member of his immediate family from soliciting, accepting, or receiving any single gift with a value in excess of $100 or any combination of gifts with an aggregate value in excess of $100 within any calendar year for himself or a member of his immediate family from any person.
that he or a member of his immediate family knows or has reason to know is: (1) a registered lobbyist; (2) a lobbyist’s principal; or (3) a person, organization, or business who is or is seeking to become a party to a contract with the locality of which the public official is an officer or employee. Virginia Code § 2.2-3103.1(B). Gifts with a value of less than $20 are not subject to aggregation. Virginia Code § 2.2-3103.1(B). Four key exceptions apply to local public officials:

- **Gifts composed of food, beverages, entertainment, cost of admission.** A public official or a member of his immediate family may accept or receive a gift of food and beverages, entertainment, or the cost of admission with a value in excess of $100 when the gift is accepted or received while in attendance at a widely attended event and is associated with the event. Virginia Code § 2.2-3103.1(D). A widely attended event is an “event at which at least 25 persons have been invited to attend or there is a reasonable expectation that at least 25 persons will attend the event and the event is open to individuals who are: (i) members of a public, civic, charitable, or professional organization, (ii) who are from a particular industry or profession, or (iii) who represent persons interested in a particular issue.” Virginia Code § 2.2-3103.1(A). These gifts must be reported on the disclosure form prescribed by Virginia Code § 2.2-3117. Note that offers of a ticket, coupon, or other admission or pass is not a gift unless it is used; note also that “attendance at a reception or similar function where food, such as hors d’oeuvres, and beverages that can be conveniently consumed by a person while standing or walking are offered,” is not a gift. Virginia Code § 2.2-3101 (definition of “gift”).

- **Gifts from foreign dignitaries.** A public official or a member of his immediate family may accept or receive a gift from a foreign dignitary with a value exceeding $100 for which the fair market value or a gift of greater or equal value has not been provided or exchanged. Virginia Code § 2.2-3103.1(E). The gift shall be accepted on behalf of the locality and archived in accordance with guidelines established by the Library of Virginia. These gifts must be disclosed as having been accepted on behalf of the locality, but the value of the gift is not required to be disclosed. Virginia Code § 2.2-3103.1(E).

- **Gifts from lobbyists, lobbyist’s principals, or persons seeking contracts who are also personal friends.** A public official or a member of his immediate family may accept or receive certain gifts with a value in excess of $100 from a registered lobbyist, lobbyist’s principal, or person seeking a contract with the locality if the gift was made on the basis of a personal friendship. Virginia Code § 2.2-3103.1(F). Whether the donor is a personal friend will be evaluated by these factors: (1) the circumstances under which the gift was offered; (2) the history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them; (3) to the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and (4) whether the donor has given the same or similar gifts to other persons required to file the disclosure form prescribed in Virginia Code § 2.2-3117. Virginia Code § 2.2-3103.1(F).

- **Gifts of travel and related expenses from lobbyists, lobbyist’s principals, or persons seeking contracts.** A public official or a member of his immediate family may accept or receive gifts of travel, including travel-related transportation, lodging, hospitality, food or beverages, or other thing of value, with a value in excess of $100 that is paid for or provided by a registered lobbyist, lobbyist’s principal, or person seeking a contract with the locality when the public official has submitted a request for approval of such travel to the Virginia Conflict of Interest and Ethics Advisory Council and has received the approval of the Council pursuant to Virginia Code § 30-356.1. Virginia Code § 2.2-3103.1(G). These gifts must be reported on the disclosure form prescribed in Virginia Code 2.2-3117. Virginia Code § 2.2-3103.1(G).

Virginia Code § 2.2-3103.2 provides that a person will not be in violation of any provision prohibiting the acceptance of gifts if: (1) “the gift is not used by such person and the gift or its equivalent in money is returned to the donor or delivered to a charitable organization within a reasonable period of time upon the discovery of the value of the gift and is not claimed as a charitable contribution for federal income tax purposes”; or (2) “consideration is given by the donee to the donor for the value of the gift within a reasonable period of time upon the discovery of the value of the gift provided that such consideration reduces the value of the gift to an amount not in excess of $100 as provided in” Virginia Code § 2.2-3103.1(B) or (C).
30-600 Obtaining an opinion as to whether a conflict of interest exists

A public official should review pending matters and agenda materials for possible conflicts of interest and then request an opinion as to whether a conflict exists. If the public official believes that a conflict of interest may exist, the official should contact the locality’s attorney’s office so that it is aware of the possible conflict, provide advice and, if necessary, prepare a required disclosure statement before the matter is considered.

30-610 Request an advisory opinion from the locality’s attorney’s office, the Commonwealth’s Attorney, or the Virginia Conflict of Interest and Ethics Advisory Council

If a public official believes that a conflict of interest may exist, she may make a written request for an advisory opinion from the locality’s attorney’s office (Virginia Code § 2.2-3121(B)), or the Commonwealth’s Attorney (Virginia Code § 2.2-3126(B)), or for a formal opinion or written informal advice from the Virginia Conflict of Interest and Ethics Advisory Council (Virginia Code § 30-356(5)).

If the public official relies in good faith on the written opinion of the Commonwealth’s Attorney or the formal opinion or written informal advice of the Council, she is immune from prosecution for a knowing violation of COIA, regardless of whether the opinion is later withdrawn, provided the alleged violation occurred prior to the opinion being withdrawn. Virginia Code § 2.2-3121(B).

If the public official relies on the written opinion of the locality’s attorney, and is prosecuted for a knowing violation of COIA, he may introduce a copy of the opinion at trial as evidence that he did not knowingly violate COIA. Virginia Code § 2.2-3121(C).

The public official should disclose all of the facts in writing to the locality’s attorney, the Commonwealth’s Attorney, or the Council. It also is important that the opinion request be made in sufficient advance of the public body’s consideration of the matter to allow adequate time for the matter to be thoroughly reviewed and the advisory opinion to be written. Finally, if the public official will participate in the matter based on the advisory opinion, the official should have the written opinion prior to participation.

30-620 Request Attorney General to review Commonwealth’s Attorney opinion, and judicial review

If the opinion given by the Commonwealth’s Attorney indicates that the facts would constitute a violation of COIA, the public official affected by the opinion may request that the Attorney General review the opinion. Virginia Code § 2.2-3126(B). A conflicting opinion by the Attorney General acts to revoke the opinion of the Commonwealth’s Attorney. Virginia Code § 2.2-3126(B).

Regardless of whether an opinion of the Commonwealth’s Attorney or the Attorney General has been requested and rendered, any person has the right to seek a declaratory judgment or other judicial relief as provided by law. Virginia Code § 2.2-3126(B).

30-700 Penalties for a knowing violation of COIA

A knowing violation of COIA has serious consequences. A knowing violation is either a class 1 or a class 3 misdemeanor, depending on the section of COIA violated, and constitutes malfeasance in office. Virginia Code §§ 2.2-3120, 2.2-3122. In addition to criminal fines and penalties, a knowing violation may result in forfeiture of the office or employment, the forfeiture of the value derived from the violation, and civil penalties in the amount of the value derived from the violation. Virginia Code §§ 2.2-3122, 2.2-3124(A). There also are civil penalties of $250 for failing to timely file a disclosure form. Virginia Code § 2.2-3126(B).
Avoiding the appearance of impropriety even though a conflict of interest requiring disqualification does not exist under COIA

COIA does not address all conflicts of interest. There may be circumstances when a public official’s interest in a transaction may not be a conflict under COIA, but which may lend itself to an appearance of impropriety. These situations may arise, for example, when a party to a transaction is a personal friend, a family member who is not a member of the immediate family as defined under COIA, or is a club or other organization to which the public official is a member, but does not have the requisite ownership interest to trigger COIA. In those cases, it is incumbent upon the public official to determine whether participating in the transaction presents an appearance of impropriety. 2005 Va. Op. Atty. Gen. LEXIS 14, 2005 Va. Op. Atty. Gen. WL 1104519.

In determining whether an appearance of impropriety exists, the public official should consider: (1) whether the appearance of a conflict is unacceptable; and (2) whether the appearance of a conflict will affect the confidence of the public in the public official’s ability to perform his duties impartially. 2005 Va. Op. Atty. Gen. LEXIS 14, 2005 Va. Op. Atty. Gen. WL 1104519. If either of these elements is present, the public official should seriously consider abstaining from participating in the matter. At the same time, however, a public official, particularly an elected public official, should not hastily abstain from a matter. See section 29-623 for a discussion of the duties of elected public officials to not absent themselves from matters to which they are not disqualified.
Chapter 31

Civil Liability of the County and Its Officials Arising from Land Use Decisions

31-100  Introduction

This chapter provides a brief summary of the potential civil liability of county officers and employees in the performance of their duties under Virginia and federal law. It is not an exhaustive analysis of the law because this is a subject that could easily consume volumes in statutory and case law analysis.

31-200  Sovereign immunity of the county1 for torts under Virginia law

In *Seabolt v. County of Albemarle*, 283 Va. 717, 719, 724 S.E.2d 715, 716 (2012), the Virginia Supreme Court summarized the county’s liability for torts as follows:

“At common law, the Commonwealth was immune from liability for torts committed by its officers, employees and agents... That immunity continues to apply in the absence of a legislative waiver by which the Commonwealth consents to be sued in its own courts.” *Doud v. Commonwealth*, 282 Va. 317, 320, 717 S.E.2d 124, 125 (2011) (citations omitted). Counties, as political subdivisions of the Commonwealth, enjoy the same tort immunity as does the sovereign. *Mann v. County Bd. of Arlington County*, 199 Va. 169, 175, 98 S.E.2d 515, 519 (1957); *Fry v. County of Albemarle*, 86 Va. 195, 197–99, 9 S.E. 1004, 1005–06 (1889). Consequently, “a county cannot be sued unless and until that right and liability be conferred by law.” *Mann*, 199 Va. at 174, 98 S.E.2d at 518–19.

In short, a county is not liable for tortious injuries caused by the negligence of its officers, servants or employees. *Mann v. Arlington County Board*, 199 Va. 169, 98 S.E.2d 515 (1957). This sovereign immunity exists because counties are integral parts of the State, created for civil administration. In the absence of a statute waiving immunity, counties enjoy the same immunity as the State. *Mann, supra*.

However, a county is not immune from liability on an implied contract theory when it wrongfully takes, damages, or converts to its use the property of the plaintiff. *Bell Atlantic-Virginia, Inc. v. Arlington County*, 254 Va. 60, 486 S.E.2d 297 (1997) (company adequately alleged inverse condemnation against county resulting from damage to company’s underground utility facilities resulting from county’s installation and maintenance of its waterworks and sewage disposal systems); *Nelson County v. Coleman*, 126 Va. 275, 101 S.E. 413 (1919) (county took plaintiff’s land without just compensation where it condemned portion of plaintiff’s land for public road, but the road was mistakenly constructed on portion of plaintiff’s land that was not condemned); *Kitchen v. City of Newport News*, 275 Va. 378, 657 S.E.2d 132 (2008) (inverse condemnation claim against city resulting from flooding). For example, a county may be liable under this theory where it fails to maintain its own drainage easement, resulting in damage to private property caused by flooding. *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993).

31-300  Official immunity for a county’s officers and employees for torts under Virginia law

In order to allow county officers and employees to act free of fear from liability for every mistake, error or omission, an official immunity is provided under State law that applies except in the most egregious situations, as discussed below.

31-310  Members of the county’s boards and commissions

Members of the board of supervisors, planning commission, BZA and architectural review board are immune from liability for the exercise of discretion or governmental authority, and are immune from suit arising out of the exercise or failure to exercise their discretionary or governmental authority. *Virginia Code § 15.2-1405*. This immunity

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1 Because this chapter emphasizes the County of Albemarle and counties generally, a discussion of cities, towns, and their governing bodies is not included.
is known as official immunity. However, the immunity does not apply to conduct constituting the misappropriation of funds, intentional or willful misconduct, or gross negligence. *Virginia Code § 15.2-1405.*

### 31-320 Employees

County employees enjoy official immunity from personal liability in certain circumstances. The Virginia Supreme Court has established a four-factor test for determining whether official immunity is available:

- **Nature of the function employee performs:** The employee must perform a vitally important public function.
- **Extent of the county’s interest and involvement in the function:** The county must have an official interest and direct involvement in the function.
- **Degree of control and direction exercised over the employee:** The county must exercise control and direction over the employee.
- **Whether alleged or wrongful act involves the exercise of judgment and discretion:** The act must not be a mere ministerial act.


### 31-330 Factors that may eliminate official immunity

The courts have determined that official immunity does not apply to certain acts. The following factors may eliminate official immunity:

- **Performance of a ministerial duty:** Official immunity does not apply to the performance of a ministerial duty. *Heider v. Clemens,* 241 Va. 143, 400 S.E.2d 190 (1991). A ministerial duty is defined as “one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.” *Dovel v. Bertram,* 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945). For example, the review and approval of a subdivision plat or site plan that satisfies all applicable requirements of the county’s subdivision and zoning ordinances is a ministerial duty.

- **Gross negligence:** Official immunity does not apply to gross negligence. *Glasco v. Ballard,* 249 Va. 61, 452 S.E.2d 854 (1995); *Meagher v. Johnson,* 239 Va. 380, 389 S.E.2d 310 (1990). Unlike ordinary or simple negligence, which is defined as the failure to exercise care of an ordinary person under the circumstances, gross negligence is the “utter disregard of prudence amounting to a complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care.” *Burns v. Gagnon,* 283 Va. 657, 678, 727 S.E.2d 634, 647 (2012). “It must be such a degree of negligence as would shock fair minded [people] although something less than willful recklessness.” *Green v. Ingram,* 269 Va. 281, 290-291, 608 S.E.2d 917, 922 (2005).

- **Intentional misconduct:** Official immunity does not apply to intentional misconduct. *Fox v. Deese,* 234 Va. 412, 362 S.E.2d 699 (1987). An official or employee engages in intentional misconduct when he or she understands the nature and consequences of conduct with the purpose and intent to cause harm to another.

- **Acting outside the scope of employment:** Official immunity does not apply when an employee acts outside the scope of employment. *Fox v. Deese,* 234 Va. 412, 362 S.E.2d 699 (1987). An official or employee acts outside the scope of employment when he or she performs acts that are not authorized, permitted or sanctioned in any way as part of one’s employment duties and responsibilities.

or negligence, but implies the conscious doing of a wrong because of a dishonest purpose or fraudulent or wrongful intent.


Actions under federal law which challenge local land use decisions are typically takings claims under 42 U.S.C. § 1983 (“section 1983”). Section 1983 was adopted by Congress as part of the Civil Rights Act of 1871, and it provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .


31-410 The nature of the rights protected in the land use context under section 1983

Property rights are protected under section 1983. Actions brought under section 1983 in the land use context may come in various forms, including the following:

- Claims alleging procedural due process and equal protection claims under the Fifth and Fourteenth Amendments arising from the adoption and implementation of land use regulations.

- Claims alleging the taking of private property arising from decisions on rezonings and the special use permits and variances where the decision denies the owner of all economically viable use of his land.

- Claims alleging the condemnation of private property (i.e., the taking of private property) without compensation arising from an involuntary exaction of a physical interest in land as a precondition to approving a development permit, and the exaction is either not rationally related to the need or is excessive.

See chapter 6 for a discussion of the standards and prerequisites for raising constitutional issues such as due process, equal protection and takings in the land use context.

The federal courts, and in particular the Fourth Circuit Court of Appeals, have expressed an “extreme[ ] reluc-tan[ce] to upset the delicate political balance at play in local land-use disputes.” *Henry v. Jefferson County Commission*, 637 F.3d 269, 278 (4th Cir. 2011); *Shooting Point, L.L.C. v. Cumming*, 368 F.3d 379, 385 (4th Cir. 2004) (quotations omitted). Thus, the Fourth Circuit said in *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (1992), that “Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every run of the mill dispute between a developer and a town planning agency. [internal quotations and citations omitted]. In most instances, therefore, decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately -- and intimately -- affected.” With these principles in mind, following is a general analysis of the standards for section 1983 actions.
31-420 Liability of a county

A county may be liable for damages under section 1983 in cases where local “policy or custom, whether made by its lawmakers or by those whose edicts represent official policy,” has “caused” or has been the “moving force” behind the alleged federal constitutional or statutory violation. *Monell v. New York Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). This rule also applies to claims against a county seeking prospective relief such as injunctive or declaratory relief. *Los Angeles County v. Humphries*, 562 U.S. 29, 37, 131 S. Ct. 447, 452-453 (2010).

Generally, a policy must be one that has been formally adopted by the board of supervisors. A *custom* is a practice that is so permanent and well-settled as to have the force of law. *Monell*, *supra*. For example, the duration and frequency of a practice warrants a finding of either actual or constructive knowledge by the governing body that the practices are customary among the employees. *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987).

In addition to a policy or custom, other theories available to establish section 1983 liability of a county include: (1) the conduct of an individual policymaker that is attributed to the county; and (2) the county’s failure to do something (e.g., to provide for the training, supervision or control of its employees, to use proper hiring techniques, to impose discipline upon employees). *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061 (1992); *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989).

If there is no federal constitutional or statutory violation, there is no county liability under section 1983. *See Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991). In addition, the county is not vicariously liable under the doctrine of *respondeat superior* for money damages arising from the unconstitutional or illegal conduct of its officers or employees. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986).

However, with one exception noted below, a county does not enjoy any immunities that it might have under state law, or any of the immunities that attach to the county’s officers and employees. Thus, the county is unable to rely on the defense of sovereign immunity, or any other state statutory or common law immunities, in a section 1983 suit. In addition, the county does not share in the absolute or qualified immunities that may be available to its officers or employees (discussed below). In such a case, individual officers or employees may be dismissed from a section 1983 lawsuit based on absolute or qualified immunity, and the county may remain a defendant. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980).


31-430 Liability of county officers and employees

When county officers and employees are sued in their *official* capacity, the lawsuit is treated as an action against the county itself, and liability exists only if it is shown that the alleged constitutional violation is shown to have been caused by a policy or custom of the local government. *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991); *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989). Any judgment runs against the county, not the individuals.

When county officers or employees are sued in their *personal or individual* capacity under section 1983, whether for damages or injunctive relief, the action is treated as one against the named individuals, and any judgment runs only against the individuals themselves. The existence of a governmental policy or custom that may have caused the individual employees’ conduct is irrelevant.

County officers and employees sued in their personal or individual capacity are afforded both absolute and qualified immunities under the circumstances described below. An absolute immunity provides complete and unconditional immunity from a section 1983 action seeking money damages, and the immunity extends not only to liability, but also the suit itself. Absolute immunity provides immunity regardless of the conduct or motive of the officer or employee involved.
In the land use context, absolute immunity exists when local legislative officials act in their legislative (as opposed to administrative or executive) capacities. Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966 (1998). The primary rationale for this immunity is that the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. Bogan, supra.

Qualified immunity may apply when county officers and employees are engaged in discretionary functions that do not violate clearly established statutory or constitutional rights about which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982); Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987); Pennington v. Teafel, 396 F. Supp. 2d 715 (N.D.WV. 2005). The immunity depends on the objective reasonableness of the officer’s or employee’s conduct. The Harlow standard strives to strike a balance between: (1) the need to protect government officials from undue interference with their duties and from disabling threats of liability and to encourage public service; and (2) the need for the law to provide a remedy to persons whose constitutional or statutory rights have been violated by government officials. Under this standard, officials are held financially liable for their violations of federal rights only where they are genuinely culpable, i.e., where the law governing the rights that they have in fact violated is so clear at the time of their conduct that a reasonably competent person, in the same position, would not have believed the conduct to be lawful. The scope of the immunity is broad, protecting “all but the official who is plainly incompetent, or knowingly violates the law.” Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).

The Harlow standard requires that county officers and employees acknowledge their continuing responsibility to be aware of the prevailing legal standards applicable to the constitutional and statutory rights of citizens. As these standards change, officials need to stay knowledgeable and aware of them. Because certain rights are so clearly established, government officers and employees are deemed to have imputed knowledge of them and may be held personally liable for violating such rights in a section 1983 suit. As to whether a constitutional right is clearly established, the focus is not on the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged. Pritchett v. Alford, 973 F.2d 307 (4th Cir. 1992). In addition, the manner in which the clearly established right applies to the actions of the official must also be apparent. Maciariello v. Summer, 973 F.2d 295 (4th Cir. 1992).

The United States Supreme Court explained in Ashcroft v. Al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011) that “a Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right are sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’ Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987). We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” See also Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508 (2002) (rejecting the proposition that qualified immunity is inapplicable only if the very action in question has previously been held unlawful); Hutchinson v. Lennessee, 2011 U.S. App. LEXIS 13617, 2011 WL 2580349 (4th Cir. 2011) (unpublished) (there is no requirement that the precise right allegedly violated already have been recognized specifically by a court before such right may be held "clearly established" for qualified immunity purposes). Thus, the absence of a court decision holding identical conduct to be unlawful does not prevent a court from denying a qualified immunity defense. Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999). “Officials can still be on notice that their conduct violates established law even in novel factual circumstances.” Hope, 536 U.S. at 741, 122 S. Ct. at 2516.

The breadth of the doctrine of qualified immunity gives public officials the necessary latitude to pursue their duties “without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law.” Tarantino v. Baker, 825 F.2d 772 (4th Cir. 1987).

Finally, one of the most important defenses for county officers and employees in a section 1983 action in the land use context is the availability of an adequate state remedy. Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981), overruled in part on other grounds in Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662 (1986). For example, a section 1983 action alleging a taking is defensible because an inverse condemnation remedy is available under Virginia law.
31-440 Liability of supervisory employees

Supervisory employees such as department heads may be sued based upon the alleged unconstitutional conduct of subordinate employees. In such actions, the supervisors are sued in their personal capacities based upon their own culpable action or inaction (e.g., the failure to provide training for or to control their subordinates). These claims are made not against the county, but against the supervisory employees themselves. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985).

Like the county, supervisory employees are not vicariously liable under the doctrine of *respondeat superior* for the unconstitutional conduct of subordinate employees. Instead, supervisory liability will depend on whether: (1) the supervisory employee had actual or constructive knowledge that his/her subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) the supervisory employee’s response to that knowledge was so indifferent as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) there was an affirmative causal link between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff. *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).

31-500 Insurance

Albemarle County participates in a group self insurance plan provided localities by the Virginia Association of Counties (“VACO”). Coverage extends to individual officers and employees of the county on both claims made and an occurrence basis.

The policy has a $1 million liability limit, with a $4 million umbrella policy limit. This means that this is the maximum amount the insurer will pay as compensation for any one claim. Under the policy, multiple claims arising from a single occurrence or series of related occurrences are considered as one claim for the purposes of the liability limit. However, claims having a common origin, but having different allegations, are considered as separate occurrences and have a separate liability limit applied. Intentional acts are covered, with an exclusion for willful and wanton acts. In addition to the liability limit, the policy pays for all expenses, including defense costs (attorney’s fees), court costs applicable to the defense, and plaintiff’s attorney’s fees awarded pursuant to 42 U.S.C. § 1988 (federal civil rights attorney’s fee recovery statute).

A county officer or employee is covered under the policy if he or she is an elected or appointed official, employee, agent or authorized volunteer of the county, acting in an authorized governmental or proprietary capacity and within the course and scope of employment or authorization. The policy does not cover any person who has: (1) gained any profit or advantage illegally; (2) acted in a fraudulent or dishonest manner; or (3) committed a willful or wanton act. However, the policy will defend covered parties where these allegations are made except where a legal determination is made that any of the three exclusionary acts described above has occurred.
Chapter 32

The Americans with Disabilities Act and the Fair Housing Act

32-100 Introduction

Title II of the Americans with Disabilities Act ("ADA") provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Public entities include counties, cities and towns. 42 U.S.C. § 12131(A). Zoning qualifies as a public program or service and the enforcement of a zoning ordinance constitutes an activity of a locality within the meaning of Title II. A Helping Hand v. Baltimore County, 515 F.3d 356 (4th Cir. 2008); see also START, Inc. v. Baltimore County, 295 F. Supp. 2d 569 (D. Md. 2003) (the administration of zoning laws is a “service, program, or activity” within the meaning of the ADA).

A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against disabled persons. Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Although the federal government has stated that the Fair Housing Act ("FHA") does not preempt local zoning laws, the Act nonetheless can preempt the way a locality’s zoning regulations are administered.

Under the FHA, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of a person residing in or intending to reside in that dwelling. 42 U.S.C. § 3604(f)(1)(B). Discrimination under the FHA includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). A handicap under the FHA is the same as a disability under the Americans with Disabilities Act. Dadian, supra. See Virginia Code § 51.5-45, which pertains to the rights of persons with disabilities to housing accommodations.

The FHA, the ADA, and the Rehabilitation Act are “separate but interrelated federal laws that protect persons with disabilities from discrimination.” Wisconsin Community Services, Inc. v. City of Milwaukee, 465 F.3d 737, 746 (7th Cir. 2006).

32-200 The ADA protects qualified individuals with a disability

Under the ADA, a person is a qualified individual with a disability if he or she has: (1) a mental or physical impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2); see also Virginia Code § 36-96.1:1. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, speaking, or working. Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act, dated August 18, 1999. An individual may be
regarded as having an impairment, regardless of whether or not he in fact has a substantially limiting impairment. A Helping Hand v. Baltimore County, 515 F.3d 356 (4th Cir. 2008) (on appeal from trial court granting a Rule 50 motion in favor of the clinic on this issue, holding that the clients of a methadone clinic could not be regarded as significantly impaired in a major life activity where they were regarded as criminals and undesirables, but were not necessarily regarded as significantly impaired in their ability to work, learn, care for themselves, or interact with others); see Clinte v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998).

The term qualified individual with a disability does not include persons who pose “a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation.” Doe v. University of Maryland Medical System Corporation, 50 F.3d 1261 (4th Cir. 1995). It also does not include current users of illegal controlled substances, persons convicted for the illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders. See Joint Statement, supra.

Examples of disabilities from zoning cases in which the ADA may be at issue include drug and alcohol rehabilitation facilities, mental health facilities, and physical disabilities that prohibit the reasonable use of a dwelling. See section 32-220 for a discussion of the cases considering these disabilities.

32-210 A locality must reasonably accommodate a qualified individual with a disability in the administration of its zoning regulations

A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against disabled persons. Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

The United States Department of Justice explains this requirement as follows:

[Localities] are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks. In addition, [localities] may consider granting exceptions to the enforcement of certain laws as a form of reasonable modification. For example, a municipal ordinance banning animals from city health clinics may need to be modified to allow a blind individual who uses a service animal to bring the animal to a mental health counseling session.

The ADA and City Governments: Common Problems, U.S. Department of Justice, Civil Rights Division, Disability Rights Section.

Whether a requested accommodation is reasonable is highly fact-specific and determined on a case-by-case basis by balancing the cost to the locality and the benefit to the disabled person. Dadian, supra. Whether a requested accommodation is necessary requires a showing that the desired accommodation will affirmatively enhance a disabled person’s quality of life by ameliorating the effects of the disability. Dadian, supra. The focus is on whether the accommodation in the case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change. Dadian, supra (allowing front driveway access to elderly landowners’ home, one of whom suffered from osteoporosis and had difficulty walking, was not so at odds with village’s general prohibition against such driveways and would not cause an unreasonable change to the ordinance because the plaintiffs were not requesting a change to the ordinance itself, but application of the hardship exception in their case). 28 C.F.R. § 35.130(b)(7).
Reasonable accommodation is not mandated when zoning laws are applied in a non-discriminatory manner. Get Back Up, Inc. v. City of Detroit, 2015 WL 1089662 at 4 (6th Cir. 2015) (where zoning regulations required conditional use permit for substance abuse facility in business zoning district, facial challenge to the zoning ordinance failed because the ordinance did not allow any materially similar use to operate by right in the zoning district and, therefore, the ordinance did not discriminate against the disabled).

For example, the Department of Justice has explained to a complainant why a city’s denial of a rezoning that would have allowed an office use in a predominantly single family neighborhood did not violate the ADA. The complainant was the owner of a consulting firm that employed 5 people, two of whom had disabilities (one recovering from alcoholism; the other having chronic depression) who sought the rezoning to relocate his business in the neighborhood. The letter explains:

The evidence shows that the City’s decision to deny the rezoning application for your property has the same effect on your employees without disabilities as it does on your employees with disabilities. Further, the evidence shows that the City has an established policy of maintaining the area where your property is located as a predominantly single family area, and that this policy has the same effect on people without disabilities as it does on people with disabilities. The evidence shows that the City’s decision to deny your rezoning application was made for reasons that are not discriminatory under the ADA. Therefore, we have determined that no violation of title II occurred.

Letter dated March 14, 1994, Coordination and Review Section of the Civil Rights Division of the United States Department of Justice.

32-220 Examples of typical zoning cases in which the ADA is in issue

Following are some examples of the types of cases that appear to dominate the zoning case law in which the ADA is in issue:

- **Drug and alcohol rehabilitation programs:** The anti-discrimination provision of the ADA prohibits zoning decisions by a locality that discriminate against drug and alcohol rehabilitation programs, the clients of which are “qualified individuals with a disability.” MX Group, Inc. v. City of Covington, 293 F.3d 326, 345 (6th Cir. 2002) (agreeing with the trial court’s finding that “the blanket prohibition of all methadone clinics from the entire city is discriminatory on its face.”); Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999) (holding that the ADA applies to zoning decisions barring methadone clinics within 500 feet of residential areas); Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37 (2d Cir. 1997) (holding that the ADA applies to zoning decisions involving a drug and alcohol rehabilitation center); Habit Management, Inc. v. City of Lynn, 235 F. Supp. 2d 28 (D.Mass. 2002) (no showing that the placement of methadone clinics in industrial or business zones poses any significant risk); A Helping Hand v. Baltimore County, 515 F.3d 356 (4th Cir. 2008).

- **Mental health facilities:** The anti-discrimination provision of the ADA applies to mental health facilities. Pathways Psychological v. Town of Leonardtown, 133 F. Supp. 2d 772 (D.Md. 2001).

- **Variance from regulations to allow reasonable use of home:** The anti-discrimination provision of the ADA prohibits zoning decisions by a locality that fail to reasonably accommodate persons with a disability to allow them the same housing opportunities without a disability. In Trovato v. City of Manchester, 992 F. Supp. 493 (D.N.H. 1997), a mother and daughter who both had muscular dystrophy were denied a variance that would allow them to build a paved parking space in the front of their home. The court found that the denial of the paved parking space adversely affected the plaintiffs’ use and enjoyment of their home, and that their request was reasonable. In Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001), an elderly couple, one of whom suffered from osteoporosis and had difficulty walking, sought a hardship exception from the village’s prohibition against front
driveway accesses. The court found that in denying the permit, the village failed to provide a reasonable accommodation from its regulations.

- **Variance from setback for ramp to provide access to building:** If a zoning ordinance requires a certain setback between a business entrance and a curb, but the business must encroach into the setback to ramp its entrance, the zoning authority may be required to issue a variance as a reasonable modification to the setback regulations. *ADA Best Practices Tool Kit for State and Local Governments* (last updated September 14, 2009) (granting a variance to allow a ramp to be built in a setback is a reasonable modification of a locality’s rules and policies to avoid discrimination against people with disabilities). Thus, the zoning procedures must allow for some process whereby requests for exemptions or special permits for such purposes may be considered. These requests must be granted where reasonable.

The ADA Amendments Act of 2008 (“ADAAA”) changed the burden of proof that must be shown to establish a disability. As amended by the ADAAA, “[a]n individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A). *CRC Health Group, Inc. v. Town of Warren, 2014 WL 2444435* at 10 (D. Me. 2014) (partial grant of summary judgment for methadone treatment facility on ground that moratorium on facilities was intentional facial discrimination under the ADA; facility made requisite threshold showing that its prospective clients were disabled for purposes of the ADA); *compare RHJ Medical Center, Inc. v. City of DuBois*, 564 F. App’x 660 (3rd Cir. 2014) (under the Under the “regarded as” test, methadone treatment facility failed to show that the city regarded the clinic’s potential patients as suffering under an impairment that “substantially limits one or more major life activity[y]”.

This section has provided only a brief overview of the application of the ADA to local zoning regulations. Zoning issues arising under the ADA may also trigger the application of the Fair Housing Act.

**32-300 The FHA prohibits discriminatory housing practices**

The FHA operates to invalidate “any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice. . . ” 42 U.S.C. § 3615. The *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act*, dated August 18, 1999, explains that the FHA prohibits localities from:

- Using land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example of this situation would be an ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area.

- Taking action against, or denying a permit, for a home because of the disability of individuals who live or would live there. An example of this situation would be a decision that denied a building permit for a home because it was intended to provide housing for persons with mental retardation.

- Refusing to make reasonable accommodations in land use and zoning policies and procedures where such accommodations may be necessary to afford persons or groups of persons with disabilities an equal opportunity to use and enjoy housing.

A locality will most often face a challenge to its zoning laws when they are applied against handicapped persons in such a way that: (1) handicapped persons are prevented from using and enjoying their home in the same manner as non-handicapped persons, *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001) or (2) the locality defines family in a way so that persons with handicaps are disqualified from living in single family residential neighborhoods. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643 (W.D.Pa. 2003).
The use and enjoyment of the home

The FHA prohibits zoning regulations and decisions that fail to reasonably accommodate persons with a handicap to allow them the same housing opportunities without a handicap.

In *Trovato v. City of Manchester*, 992 F. Supp. 493 (D.N.H. 1997), a mother and daughter who both had muscular dystrophy were denied a variance that would have allowed them to build a paved parking space in the front of their home. The court found that the denial of the paved parking space adversely affected the plaintiffs’ use and enjoyment of their home, and that their request was reasonable.

In *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001), an elderly couple, one of whom suffered from osteoporosis and had difficulty walking, sought a hardship exception from the village’s prohibition against front driveway accesses. The court found that in denying the permit, the village failed to provide a reasonable accommodation from its regulations.

These cases are also discussed in the context of the ADA in section 32-220.

Allowing persons with disabilities to live in facilities within single family residential neighborhoods

Congress intended for the FHA to apply to zoning ordinances and other laws that would restrict the placement of group homes. H.R.Rep. No. 100-711, at 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2185 (stating that the amendments “would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps”).

The United States Supreme Court has instructed that zoning regulations describing who or how many people may compose a family unit so as to include any number of people related by blood, marriage or adoption but no more than a limited number of unrelated people living together as a household unit, are subject to review under the FHA. *City of Edmonds v. Oxford House*, 514 U.S. 725, 115 S. Ct. 1776 (1995); see 42 U.S.C. § 3607(b)(1), exempting from FHA scrutiny reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling, and removing from the FHA’s scope only total occupancy limits, i.e., numerical ceilings that serve to prevent overcrowding in living quarters.

In multiple cases, the courts have found a violation of the FHA where localities attempted to prevent or restrict persons with disabilities from living in the single family-zoned homes of their choice, even when the occupancy did not meet the locality’s definition of a family under the applicable zoning ordinances. See, e.g., *Oxford House, Inc. v. Township of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (violation of the FHA even though the occupancy did not meet the town’s definition of family and was not the “functional and factual equivalent of a natural family” as provided under the zoning ordinance); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992) (proof of permanency and stability not required for related occupants, but required for nonrelated occupants, was held to be discriminatory); *Oxford House Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) (occupancy limitations were discriminatory); *United States v. Town of Garner*, 720 F. Supp. 2d 721 (E.D.N.C. 2010) (in denying town’s motion to dismiss on ripeness grounds, the court held that the town may have constructively denied Oxford House’s reasonable accommodation request either by granting an accommodation in the form of a zoning text amendment that left the proposed use as still being in violation of the zoning ordinance or by failing to act on subsequent requests for reasonable accommodation).

The purpose of the FHA’s requirement for reasonable accommodation is to facilitate the integration of persons with disabilities into all communities. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643 (W.D. Pa. 2003). Thus, the FHA “prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled.” *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002).
Note that Virginia Code § 15.2-2291 imposes a limitation on a locality’s zoning power by requiring that a zoning ordinance consider a residential facility in which no more than eight mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, as residential occupancy by a single family. A residential facility means any group home or other residential facility for which the Department of Behavioral Health and Developmental Services is the licensing authority. Virginia Code § 15.2-2291(A). A zoning ordinance may not impose conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. Virginia Code § 15.2-2291(A). A group home serving eight unrelated adults who do not meet these criteria does not qualify under Virginia Code § 15.2-2291(A) for treatment as a single-family residence insofar as zoning is concerned. 1995 Va. Op. Atty. Gen. 286.

32-330 Examples provided by the Department of Justice and the Department of Housing and Urban Development

The Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act, dated August 18, 1999, provides several useful examples as to how the FHA applies to zoning regulations:

- Regulations must treat groups of unrelated persons equally: Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the FHA. For example, assume that a city’s zoning ordinance defines a family to include up to six unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission. If that ordinance also disallows a group home for six or fewer people with disabilities in a certain district or requires the home to seek a use permit, the ordinance’s requirements would conflict with the FHA because it treats persons with disabilities differently than persons without disabilities.

- Regulations may generally limit the number of unrelated persons who may live together; reasonable accommodation may be required: A locality may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups. Thus, in the case where a family is defined to include up to six unrelated people, an ordinance would not, on its face, violate the FHA if a group home for seven people with disabilities was not allowed to locate in a single family zoned neighborhood, because a group of seven unrelated people without disabilities would also be disallowed. However, as discussed below, because persons with disabilities are also entitled to request reasonable accommodations in rules and policies, the group home for seven persons with disabilities would have to be given the opportunity to seek an exception or waive. If the criteria for reasonable accommodation are met, the permit would have to be given in that instance, but the ordinance would not be invalid in all circumstances.

- Regulations may impose on group homes the same restrictions as on other groups of unrelated persons; reasonable accommodation may be required: Even though a zoning ordinance imposes on group homes the same restrictions it imposes on other groups of unrelated people, a locality may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. For example, it may be a reasonable accommodation to waive a setback requirement so that a paved path of travel can be provided to residents who have mobility impairments. A similar waiver might not be required for a different type of group home where residents do not have difficulty negotiating steps and do not need a setback in order to have an equal opportunity to use and enjoy a dwelling.

- Reasonable accommodation determined on a case-by-case basis: Not all requested modifications of rules or policies are reasonable. Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. What is reasonable in one circumstance may not be reasonable in another. For example, assume that a locality does not allow groups of four or more unrelated people to live together in a single-family neighborhood. A group home for four adults with mental retardation would very likely be able to show that it will have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an “ordinary family.” In this circumstance, there would be no undue burden or expense for the locality nor would the single-family character of the neighborhood be fundamentally altered. Granting an exception or waiver to
the group home in this circumstance would not invalidate the ordinance. The locality would still be able to keep groups of unrelated persons without disabilities from living in single-family neighborhoods.

- **Reasonable accommodation not required if significant burden on the locality or fundamental change to the neighborhood:** A 50-bed nursing home would not ordinarily be considered an appropriate use in a single-family neighborhood, for obvious reasons having nothing to do with the disabilities of its residents. Such a facility might or might not impose significant burdens and expense on the community, but it would likely create a fundamental change in the single-family character of the neighborhood. On the other hand, a nursing home might not create a “fundamental change” in a neighborhood zoned for multi-family housing. The scope and magnitude of the modification requested, and the features of the surrounding neighborhood are among the factors that would be taken into account in determining whether a requested accommodation is reasonable.

- **Whether a locality can assure that a neighborhood does not have more than its fair share of group homes:** The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the FHA. However, if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.
Chapter 33

The Federal Laws Applicable to Railroads

33-100 Introduction

Congress and the courts long have recognized a need to regulate railroad operations at the federal level. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998). A number of federal laws are controlling, but three commonly found to preempt state and local attempts to regulate railroad activities are the Interstate Commerce Commission Termination Act of 1995, the Federal Railroad Safety Act of 1970, and the Noise Control Act of 1972.

The state and local issues examined in this section are limited to those that are primarily related to land use. The general principal arising from the statutory and case law is that, if a railroad is engaged in transportation-related activities, federal law will preempt state and local attempts to regulate.

33-200 The Interstate Commerce Commission Termination Act of 1995

The Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) (49 U.S.C.A. §10101 et seq.) abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. 49 U.S.C. § 10501(b).

The ICCTA preempts state and local regulation, i.e., “those state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation.” Norfolk Southern Railway Company v. City of Alexandria, 608 F.3d 150, 157-158 (4th Cir. 2010) (city ordinance regulating the transportation of bulk materials, including ethanol, and city permit unilaterally issued to the railroad under the ordinance regulating the transport of ethanol to the railroad’s transload facility, was preempted by the ICCTA). Thus, the ICCTA preempts the state and local regulation of matters directly regulated by the Surface Transportation Board, such as the construction, operation, and abandonment of rail lines. Emerson v. Kansas City S. Ry. Co., 503 F.3d 1126 (10th Cir. 2007); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439 (5th Cir. 2001). Whether a state or local regulation is preempted requires a factual assessment of whether the action would have the effect of preventing or unreasonably interfering with railroad transportation. Emerson, supra.

Following is a summary of state and local permitting or preclearance requirements preempted by the ICCTA because, by their nature, they could be used to deny a railroad the ability to perform part of its operations or to proceed with activities authorized by the Surface Transportation Board (collected in Emerson, supra):


- Preconstruction permitting (building permit) and inspection requirements related to the use, construction, and occupation of a railroad crew building staffed around the clock and occupied by railroad employees who work in and on the trains. Norfolk Southern Railway Co. v. City of Toledo, 2015 WL 45537, at 5-6 (N.D. Ohio 2015)

- Environmental and land use permitting. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).


Following is a summary of areas of state and local regulations directly regulated by the Surface Transportation Board and, therefore, are preempted by the ICCTA (*collected in Emerson, supra*):

• State statutes regulating railroad operations. *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (state and local regulations such as those attempting to limit the duration that crossings are blocked are operational requirements and are preempted); *R.R. Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002) (state statute regulating railroad operations preempted); *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002) (holding that state law imposing limitation on duration at which crossing may be blocked by train, which is related to train speed, was preempted).


• Attempts to condemn railroad tracks or nearby land. *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005) (attempt to use eminent domain to acquire portion of property abutting a rail line for municipal bicycle trail preempted); *Wis. Cent. Ltd. V. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D.Wis. 2000) (attempt to use state’s condemnation statute to condemn an actively used railroad track preempted).

• State negligence and nuisance claims. *Friberg, supra* (state claims of negligence and negligence per se concerning a railroad’s alleged blockages of road leading to plaintiff’s business were preempted); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493 (S.D.Miss. 2001) (state law nuisance and negligence claims that would interfere with operation of railroad switchyard preempted).

Following is a summary of state and local activities not preempted by the ICCTA:

• Voluntary agreements entered into by the railroad. *PCS Phosphate Co. v. Norfolk Southern Corp.*, 559 F.3d 212, 221 (4th Cir. 2009) (quoting the Surface Transportation Board that “voluntary agreements may be seen as reflecting the carrier’s own determination and admission that the agreements would not unreasonably interfere with interstate commerce,” though this rule is not absolute).

• Traditional police powers over the development of railroad property such as electrical, plumbing and fire codes, at least to the extent that the regulations protect the public health and safety, are settled and defined, and can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved or rejected without the exercise of discretion on subjective questions. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2nd Cir. 2005). The regulations may not discriminate against rail carriers or unreasonably burden rail carriage. *Southern Norfolk, supra*.

• Zoning regulations applied to railroad-owned land used for non-railroad purposes by a third party. *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

• Miscellaneous laws and acts determined to not have anything to do with transportation. *Emerson, supra* (summary judgment for railroad was reversed because the railroad’s acts of depositing old railroad ties and other debris into a drainage ditch abutting plaintiff’s property, which allegedly caused the flooding of plaintiffs’ property, were not preempted because they had nothing to do with transportation); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) (state regulation of solid waste disposal facility serving railroad was not preempted).

• State statute requiring railroads to pay for pedestrian crossings across railroad tracks. *Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533 (6th Cir. 2008) (determined not to be preempted by the ICCTA).
The Context: There are several federal laws that either preempt, or partially preempt, local regulation of railroad activities pertaining to rail transportation. Among them is the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) (49 U.S.C.A. §10101 et seq.), which abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. 49 U.S.C. § 10501(b).

The Issue: Whether a locality’s regulatory and permitting scheme pertaining to the transportation of ethanol in the locality were preempted by the ICCTA.

The Case: Norfolk Southern began operating an ethanol transloading facility in the city near two residential neighborhoods, an elementary school, a metro station and other populated areas. Tank trucks loaded at the facility transported the ethanol, a highly flammable material, on city streets. The city ordinance regulated the transportation of bulk materials and required that the railroad obtain a haul permit from the city in order for the tank trucks, owned by private trucking companies, to transport ethanol through the city from the railroad’s transload facility.

The city argued that its regulations controlled only the trucks leaving the transloading facility, not the transloading process itself, and the regulations did not regulate any aspect of the movement of trains, the unloading or transloading of trains, the time of day during which transloading could occur, or the number of trucks that could be filled with ethanol. The court held that the ICCTA preempted state and local regulation, i.e., “those state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation.”

The city also argued that its regulations were valid under its police powers because they protected public health and safety, a narrow exception allowed under the ICCTA if certain prerequisites were satisfied. While noting the laudable basis for the regulations, the court nonetheless held that they were preempted because: (i) they allowed the city to halt or significantly diminish the transloading operation by declining to issue haul permits or by increasing the restrictions placed on those permits; (ii) they entailed extended or open ended delays in permit issuance; and (iii) involved the exercise of discretion.

Its Implications: This case has the following implications:

- This case is consistent with other decisions throughout the country finding that the ICCTA preempts local regulations on matters pertaining to rail transportation.

- “Rail transportation” will be broadly construed under the ICCTA to effectuate the Act’s purposes.

- In addition to the ICCTA, the Federal Railroad Safety Act of 1970 and the Noise Control Act of 1972 are two other common federal laws pertaining to railroads that deal with issues such as train speed, the length of time railroad crossings are blocked, and noise from train horns.

- Laudable purposes, such as protecting public health and safety, will not save a regulatory scheme from state or federal preemption if the elements for preemption are present.


Issues regarding state and local regulation of train speed and the duration that railroad crossings are blocked are also considered under the Federal Railroad Safety Act of 1970 (“FRSA”). The FRSA contemplates a comprehensive...
and uniform set of safety regulations in all areas of railroad operations. *Chicago Transit Authority v. Flohr*, 570 F.2d 1305 (7th Cir. 1977). The purpose of the FRSA is to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101.

The FRSA includes a preemption provision that, among other things, allows state and local governments to regulate only those matters on which the Secretary of Transportation has not yet regulated. The Secretary regulates train speeds, which depend on the classification of the tracks. *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002) (holding that state law imposing a limitation on the duration at which a crossing may be blocked by a train, which is related to train speed, was preempted); see also *CSX Transportation, Inc. v. City of Mitchell*, 105 F. Supp. 2d 949 (S.D.Ind. 1999) (granting summary judgment to railroad and enjoining city from enforcing law prohibiting railroad from blocking crossing for more than 10 minutes); *Drieson v. Iowa, Chicago & Eastern Railroad Corporation*, 777 F. Supp. 2d 1143 (N.D. Iowa 2011) (partial summary judgment for railroad; federal regulations governing the movement of trains, including blocked crossings as they pertained to air brake testing requirements, preempted state and local laws).

In *Plymouth*, the attorney general argued that the crux of the state statute was not train speed, but “the time that trains may block highway traffic.” The court of appeals was unpersuaded by this contention, explaining that “the amount of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed at which the train is traveling.” The court concluded that the statute would require the railroad to modify either the speed at which its trains travel or their length, and would also restrict the railroad’s performance of federally mandated air brake tests. The court also concluded that numerous federal regulations covered the speed at which trains may travel and, thus, the federal regulations “substantially subsume the subject matter of the relevant state law.” *Plymouth*, 283 F. 3d at 817.

Congress intended that the ICCTA and the FRSA coexist. While the Surface Transportation Board must adhere to federal policies encouraging “safe and suitable working conditions in the railroad industry,” the ICCTA and its legislative history contain no evidence that Congress intended for the Surface Transportation Board to supplant the Federal Railroad Administration’s authority over rail safety under the FRSA. *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517 (6th Cir. 2001). Rather, the agencies’ complementary exercise of their statutory authority accurately reflects Congress’s intent for the ICCTA and the FRSA to be construed in pari materia. *Tyrrell*, supra.

33-400 The Noise Control Act of 1972

Issues regarding state and local regulation of train noise are evaluated under the Noise Control Act of 1972 (“NCA”), which establishes the maximum noise levels for rail cars engaged in interstate commerce. The preemption provision under the NCA has been described as being “decidedly narrow.” *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496 (5th Cir. 1999).

Many cases in this area are based on state nuisance claims brought by abutting landowners. Generally, if the noise generated by the train has a transportation purpose and is within the NCA’s noise limits, state and local regulation is preempted. *Rushing*, supra (holding that a triable issue of fact existed based on the plaintiffs’ lay opinion that the railroad’s expert’s opinion regarding compliance was based on sound measurements which did not reflect the true sound level plaintiffs typically heard); *Jones v. Union Pacific RR*, 79 Cal.App.4th 793 (2000) (holding that plaintiff’s nuisance claim could proceed against the railroad for excessive idling and horn blowing near plaintiff’s home because plaintiff had adequately alleged that these activities did not have a transportation purpose but were, instead, done solely to harass the plaintiff).

With respect to train horns, the “Train Horn Rule” (49 CFR Part 222) requires locomotive engineers to begin to sound train horns at least 15 seconds, and no more than 20 seconds, in advance of public grade crossings. There are other requirements and exceptions under the Rule. Localities have an opportunity to mitigate the effects of train horn noise by establishing “quiet zones.” See the United States Department of Transportation Federal Railroad Administration’s webpage regarding the Train Horn Rule and quiet zones at [www.fra.dot.gov](http://www.fra.dot.gov).
Chapter 34

The Religious Land Use and Institutionalized Persons Act of 2000

34-100 Introduction

The religious liberties protected by the First Amendment (see section 6-500) also must be considered in light of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). RLUIPA has been described as follows:

As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion.

Westchester Day School v. Village of Mamaroneck, 386 F.3d 183, 189 (2d Cir. 2004). Another court has observed that "to a significant extent, RLUIPA merely codifies existing Supreme Court precedent." Roman Catholic Bishop v. City of Springfield, 760 F. Supp. 2d 172, 192 (D. Mass. 2011). In giving meaning to the terms used within RLUIPA, the Act must be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the] Act and the Constitution." 42 U.S.C. § 2000cc-3(g).

This section examines four key provisions of RLUIPA – the prohibition against substantially burdening religious exercise under 42 U.S.C. § 2000cc(a)(1), the equal terms provision under 42 U.S.C. § 2000cc(b)(1), the prohibition against intentional discrimination under 42 U.S.C. § 2000cc(b)(2), and the prohibition against total exclusion and unreasonable limitations under 42 U.S.C. § 2000cc(b)(3). See chapter 21 for a discussion of the application of RLUIPA to decisions made by an architectural review board as part of review of the design of a structure. See also Virginia Code § 57.2-02 (restating an individual’s freedom of religion and prohibiting a locality from unduly burdening that right).

### The Four Key Requirements of RLUIPA

- **Substantial burden on religious exercise prohibited:** “No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000cc(a)(1) (italics added).

- **Treatment on equal terms required:** “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1) (italics added).

- **Discrimination prohibited:** “No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” 42 U.S.C. § 2000cc(b)(2) (italics added).

- **Total exclusion and unreasonable limitations prohibited:** “No government shall impose or implement a land use regulation that - (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” 42 U.S.C. § 2000cc(b)(3) (italics added).

Note that the substantial burden provision protects individuals as well as religious assemblies and institutions. The equal terms and non-discrimination provisions protect only religious assemblies and institutions. The total exclusion provision applies only to religious assemblies, and the unreasonable limitations provision protects religious assemblies, institutions and structures.

In considering RLUIPA, the reader should be mindful of several things. First, RLUIPA has generated a lot of litigation and the body of law is constantly evolving and being refined. Second, the Fourth Circuit Court of Appeals,
whose jurisdiction includes Virginia, has had very few opportunities to consider the land use component of RLUIPA. Third, the other federal circuit courts of appeals are not uniform in how they have applied RLUIPA. Fourth, RLUIPA cases are fact-intensive, so the pleadings and the evidence in each case are critical to the outcome.

34-200 RLUIPA prohibits a locality from imposing or implementing a land use regulation that imposes a substantial burden on religious exercise, with very limited exceptions

A key provision of RLUIPA states:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest. (italics added)

42 U.S.C. § 2000cc(a)(1). The five key elements of this provision, identified in the italics above, are addressed in sections 34-210 through 34-250.

34-210 Whether a locality made an individualized assessment of the proposed uses of property under its land use regulations

RLUIPA applies to land use regulations, which are defined to mean “a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land.” 42 U.S.C. § 2000cc-5(5). The claimant must have an ownership, leasehold, easement, servitude, or other property interest in the land or a contract or option to acquire such an interest. 42 U.S.C. § 2000cc-5(5).

A locality may not impose a substantial burden on a religious exercise when a locality makes an individualized assessment of the proposed uses for the property involved. 42 U.S.C. § 2000cc(a)(2)(B) (though not discussed here, under 42 U.S.C. § 2000cc(a)(2)(B), the Act is also triggered when a regulation impacts interstate commerce).

Zoning ordinances “by their nature impose individual assessment regimes” because their application to particular parcels “necessarily involve[s] case-by-case evaluations of the propriety of proposed activity against extant land use regulations.” Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Penn. 2002). Thus, applications for rezonings affecting a single or a limited number of parcels, special use permits, site plans, variances, certificates of appropriateness, waivers and modifications are all types of individualized assessments that may trigger RLUIPA. See, e.g., Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005) (rezoning); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (ordinance amendment); Westchester Day School v. Village of Mamaroneck, 386 F.3d 183 (2d Cir. 2004) (special use permit); Guru Nanak Sikh Society v. County of Sutter, 456 F.3d 978 (9th Cir. 2006) (conditional use permit); Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005) (special exception); Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (landmark demolition permit).

RLUIPA does not apply to eminent domain. Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250 (W.D. N.Y. 2005) (eminent domain is “conspicuously absent” from RLUIPA’s definition of land use regulation); see also St. John’s United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887 (N.D. Ill. 2005). RLUIPA also does not apply to other governmental decisions that only may indirectly affect land use. See Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002) (city decision not to close a segment of a public street to allow a church to make private use of it was not subject to RLUIPA because the decision not to close the road was not a zoning or landmarking law).

34-220 Whether the affected acts are a religious exercise

The question of whether the affected acts are a religious exercise requires one to first determine whether the person or group is engaged in a religion, followed by determining whether the acts are an exercise of that religion.
Whether one is engaged in a religion, as opposed to a “way of life,” is guided by considerations that “present a most delicate question.” Wisconsin v. Yoder, 406 U.S. 205, 215-216, 92 S.Ct. 1526, 1533 (1972). The courts will examine whether the beliefs more closely resemble personal and philosophical choices consistent with a way of life, or whether they are based on deep religious convictions shared by an organized group based upon some organizing principle or authority. Thus, in Moore-King v. County of Chesterfield, 708 F.3d 560, 571 (4th Cir. 2013), the Fourth Circuit Court of Appeals concluded that a fortune teller was not practicing a religion and was not entitled to Constitutional protections where she had declared on her website that she “pretty much goes with [her] inner flow” rather than follow any particular religion or organized recognized faith. The court concluded that her beliefs more closely resembled personal and philosophical choices consistent with a way of life, not deep religious convictions shared by an organized group that were based upon some organizing principle or authority other than herself.

When assessing whether an action qualifies as a religious exercise, courts may not judge the significance of the particular belief or practice in question. Abdulhaseeb v. Calbone, 600 F.3d 1301, 1314 (10th Cir. 2010). Additionally, RLUIPA does not require that an activity be “fundamental” to the particular religion to be considered a religious exercise. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 663 (10th Cir. 2006). A religious exercise need not be mandatory in order to be protected under RLUIPA. Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001). “It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.” Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148 (1989) (pre-RLUIPA). However, the belief applicable to the religious exercise must be “sincerely held.” Werner v. McCotter, 49 F.3d 1476, 1479 fn. 1 (10th Cir. 1995) citing Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972).

Religious exercise includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7). 42 U.S.C. § 2000cc-5(7) defines the term to mean “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” Certainly, religious exercise is not confined to religious worship, since many religions offer services beyond traditional worship as part of their religious offerings. Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

However, Congress never intended for every activity carried out by a religious institution or individual to be considered religious exercise.

In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within [RLUIPA's] definition of ‘religious exercise.’ For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building’s operation would be used to support religious exercise, is not a substantial burden on ‘religious exercise’.

Whether a use falls within the meaning of religious exercise under RLUIPA will depend on the facts of the particular case. Following is a sampling of cases where the courts considered whether various activities were religious exercise:

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<td>The church of Wicca, which adheres to a fairly complex set of doctrines relating to the spiritual aspect of the Wiccans’ lives, many of which parallel those of recognized religions, is religious exercise. Dettmer v. Landon, 799 F.2d 929, 931-932 (4th Cir. 1986).</td>
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146 Cong. Rec. at S 7776.
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<td>Rabbi who held meetings at his house in a residential zoning district on Friday nights and Saturday mornings, in addition to other meetings for Torah study and celebrating holidays, was engaged in religious exercise. <em>Kosnikov v. Orange County</em>, 410 F. 3d 1317, 1323 (11th Cir. 2005).</td>
<td>Fortune telling, which was based upon the appellant’s set of beliefs, was not religious exercise because her beliefs more closely resembled personal and philosophical choices consistent with a way of life, not deep religious convictions shared by an organized group that were based upon some organizing principle or authority other than herself. <em>Moon-King v. County of Chesterfield</em>, 708 F.3d 560, 571 (4th Cir. 2013) (appellant herself declared on her website that she “pretty much goes with [her] inner flow” rather than follow any particular religion or organized recognized faith).</td>
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<td>The removal of religious artifacts such as crosses and stained glass windows depicting scenes in the life of Jesus Christ, a process known as deconsecration, before the sale or demolition of a church, is religious exercise. <em>Roman Catholic Bishop of Springfield v. City of Springfield</em>, 760 F. Supp. 2d 172 (D. Mass. 2011).</td>
<td>The development and construction of an apartment complex is not a religious exercise even though it will be owned by a religious institution. <em>Greater Bible Way Temple of Jackson v. City of Jackson</em>, 733 N.W.2d 734 (Mich. 2007).</td>
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<td>The establishment of a parish center is religious exercise because it is a “reasonable extension” of church’s religious use of its property. <em>Mintz v. Roman Catholic Bishop of Springfield</em>, 424 F. Supp. 2d 309 (D. Mass. 2006).</td>
<td>City’s delay in issuing demolition permit, which in turn delayed institution’s ability to sell its property in order to fund its religious mission, was not religious exercise. <em>California-Nevada Annual Conference of the Methodist Church v. City and County of San Francisco</em>, F. Supp. 3d ___ N.D. Cal. 2014.</td>
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<td>Activities such as community outreach, social events, including a concert series, feeding members and nonmembers of the congregation, and providing a student lounge and meditation room may fall within religious exercise. <em>Episcopal Student Foundation v. City of Ann Arbor</em>, 341 F. Supp. 2d 691, 695 (E.D. Mich. 2004) (affidavit stated that the plaintiff’s religious mission and beliefs included “providing a spiritual community for its members, creating a progressive and creative worship experience for its members, offering meditation, prayer and study groups for its members, and continually working to welcome new members into the congregation”).</td>
<td>A day school for the disabled that would be owned and operated by a third party for-profit business on church property was not religious exercise, even though the church asserted that having the school was an exercise of its “sincere religious belief” to minister to emotionally and mentally disabled children, because the church failed to allege sufficient facts to show that the curriculum and administration of the day school was anything other than secular. <em>Calvary Christian Center v. City of Fredericksburg</em>, U.S. Dist. 77489 (E.D. Va. 2011) (adding: “It is difficult to find that an organization can declare a secular activity to be part of its religious doctrine, and then rent space to a for-profit business to conduct that activity”).</td>
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<td>Providing shelter to the homeless was an essential religious exercise to the members of the church. <em>Family Life Church v. City of Elgin</em>, 561 F. Supp. 2d 978 (N.D. Ill. 2008).</td>
<td>“[A]ny church activity that furthers [the church’s] worship program” is not religious exercise. <em>North Pacific Union Conference Association of the Seventh-Day Adventists v. Clark County</em>, 118 Wash.App. 22, 31 (2003) (the court rejected the church’s definition of worship, saying that such a broad definition would allow the church to build a school, hospital, or retail store in the agricultural zoning district in which the church owned land).</td>
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<td>The lease of church property to a third party to hold catered social events is not religious exercise. <em>Third Church of Christ v. City of New York</em>, 617 F. Supp. 2d 201, 209 (S.D. N.Y. 2008) affirmed on other grounds at 626 F. 3d, 667 (2d 2010) (but holding that the city’s actions violated the</td>
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34-230 Whether a zoning regulation or its implementation imposes a substantial burden on religious exercise

When dealing with concepts such as whether a land use regulation or decision substantially burdens religious exercise, the standard is more abstract than concrete. The several federal courts of appeal that have addressed whether a land use regulation or decision imposes a substantial burden on religious exercise have not adopted a uniform standard.1

Whether a particular local land use regulation or decision imposes a substantial burden on religious exercise may be the most difficult element of 42 U.S.C. § 2000cc(a)(1). The legislative history of RLUIPA indicates that the term was supposed to have the same meaning given to it by the courts in Free Exercise Clause cases. The Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, has held that, in order to state a substantial burden claim under RLUIPA, a plaintiff “must show that a government’s imposition of a regulation regarding land use, or application of such a regulation, caused a hardship that substantially affected the plaintiff’s right to religious exercise.” Andon, LLC v. City of Newport News, 813 F.3d 510, 514 (4th Cir. 2016).

A substantial burden on religious exercise will be found to exist under RLUIPA when a “government regulation puts substantial pressure on [a religious institution] to modify its behavior.” Bethel World Outreach Ministries v. Montgomery County Council, 706 F.3d 548 (4th Cir. 2013) (in reversing the trial court’s grant of summary judgment for the county, the court found that the church had proffered considerable evidence that its current facilities in other locations inadequately served its needs, there was a material question of fact that the county substantially burdened religious exercise where the church sought to relocate its facilities to land it owned within an agricultural reserve which, at the time the church acquired the land, the county’s zoning regulations allowed institutional uses such as churches but, when the church’s applications were pending, the zoning regulations were amended to prohibit any institutional uses; discussed in more depth on pages 34-6 and 34-7). This standard closely follows the standards adopted by other federal appellate courts in land use cases under RLUIPA. See, e.g., Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (“significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly”); Vision Church, United Methodist v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006); as explained in Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) (when

1In the context of whether certain regulations adopted to implement the Affordable Care Act imposed a substantial burden on religious beliefs, the United States Supreme Court has said that “it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function ... in this context is to determine’ whether the line drawn reflects ‘an honest conviction,’ [citation omitted], and there is no dispute that it does.” Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 686, 134 S. Ct. 2751, 2779 (2014).

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<td>Allowing the homeless to sleep in designated outdoor areas on church property was religious exercise where the church explained that its outdoor sanctuary formed an integral part of its religious mission and that the police’s removal of the homeless interfered with the church’s ministry and homeless outreach program. Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002) (church representative stated that the church was “commanded by scripture to care for the least, the lost, and the lonely of this world” and in ministering to the homeless, the church was “giving the love of God . . . .”).</td>
<td>equal terms provision of RLUIPA, discussed in section 34-300 below).</td>
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speaking of substantial burden, “courts appropriately speak of government action that directly coerces the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits”).

“Any land-use regulation that a [religious institution] would like not to have to comply with imposes a ‘burden’ on it, and so the adjective ‘substantial’ must be taken seriously lest RLUIPA be interpreted to grant [religious] institutions a blanket immunity from land use regulation.” World Outreach Conference Center v. City of Chicago, 591 F.3d 531, 539 (7th Cir. 2009); see also Living Water Church of God v. Charter Township of Meridian, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished) (“If the term ‘substantial burden’ is not to be read out of the statute, RLUIPA cannot stand for the proposition that a construction plan is immune from a town’s zoning ordinance simply because the institution undertaking the construction pursues a religious mission”). Thus, the courts have rejected any definition that finds a substantial burden arising from the mere existence of any obstacle to the religious institution’s desired use. Vision Church, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (rejecting an interpretation where the slightest obstacle to religious exercise incidental to the regulation of land use – however minor the burden – could then constitute a substantial burden.

Substantiality “is a relative term – whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question.” World Outreach Conference Center, 591 F.3d at 539. In other words, whether a burden is substantial in any given case cannot be determined by any bright-line legal test but, instead, must be determined by the facts in the particular case. A burden need not be found to be insuperable to be held substantial. Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).

Borrowing from Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 349-352 (2d Cir. 2007), the court in Wesleyan Methodist Church of Canisteo v. Village of Canisteo, 792 F. Supp. 2d 667 (W.D. N.Y. 2011) summarized several factors to consider when determining whether a zoning decision imposes a substantial burden on religious exercise:

### Relevant Factors When Considering Whether a Zoning Decision Imposes a Substantial Burden

- A denial that is final or absolute is more likely to impose a substantial burden than a conditional denial.
- A conditional denial may impose a substantial burden if the condition itself is a burden on free exercise, the required modifications are economically unfeasible, or the locality’s stated willingness to consider a modified plan is disingenuous.
- Even a final denial will not impose a substantial burden if it will have a minimal impact on the institution’s religious exercise.
- A finding of substantial burden is less likely when the religious institution has other alternatives available to it, such as where it can readily build somewhere else.
- Generally applicable burdens, neutrally imposed, are not substantial.
- A substantial burden may exist where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully since the arbitrary application of laws to religious institutions may reflect bias or discrimination against religion.

These factors run through the RLUIPA case law, and the cases can be distilled into the following themes, which are further addressed in sections 34-231, 34-232 and 34-233:

### When a Substantial Burden is Likely or Unlikely to be Found

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<td>When the locality has applied its zoning regulations in an arbitrary, capricious or otherwise unlawful way, such as when it changes the rules in the middle of the process because of religion (e.g., what was a by right use now requires a special use permit), the decision is not based on substantial evidence, there are endless delays in the process, the policies and standards are vague and subjective or are inconsistently applied, unreasonable limitations are imposed that eliminate viable alternatives, legal errors are made to thwart the process, or ignorance of RLUIPA by decision-makers; the courts are quite adept at identifying these machinations.</td>
<td>When the religious institution’s sole claim is that complying with a locality’s procedural or substantive requirements, and the related costs, delay and uncertainty in the process, imposes a substantial burden on religious exercise.</td>
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### When a Substantial Burden is Likely or Unlikely to be Found

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<td>• When the locality has applied its zoning regulations in a neutral way (i.e.,) it has conducted a straightforward analysis of the impacts of the applications and its decision is based solely on the applicable standards and not on the fact that the applicant is a religious institution and has denied the application, but the religious institution has no other alternatives within the locality and the decision of the locality is final.</td>
<td>• When the locality has applied its zoning regulations in a neutral way (i.e.,) it has conducted a straightforward analysis of the impacts of the applications and its decision is based solely on the applicable standards and not on the fact that the applicant is a religious institution and has denied the application, but the religious institution has other alternatives within the locality.</td>
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<td>• When the locality changes its zoning regulations from allowing the religious institutional use to disallowing it, after the religious institution sought to establish its building or use.</td>
<td>• When the locality’s zoning regulations do not allow the religious institutional use, the religious institutions seeks to establish the use by some kind of discretionary approval, which is disapproved for legitimate land use reasons.</td>
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*Bethel World Outreach, supra,* warrants additional discussion since it establishes the controlling law on these issues in Virginia. In that case, the church bought a 119 acre parcel within Montgomery County, Maryland’s “rural density transfer zone” in its agricultural reserve in 2004 hoping to build a 3000-seat church. At the time, the church membership was large enough that it had to hold multiple services in two different locations, and the church was unable to provide a number of programs to its members because of the size of its membership. Lands in the rural density transfer zone were subject to easements that restricted residential development but, in 2004, did not restrict private institutional uses. In 2005, the county’s governing body denied the church’s request for public water and sewer and in 2006, it denied another church’s request for approval of a private well and sewer system large enough to handle its proposed 1500 seat church in the rural density transfer zone. The governing body also amended its water and sewer plan to restrict the size of private well and sewer systems in the rural density transfer zone. In 2007, the church downsized its plans and applied for approval of an 800-seat church and sought approval of a private well and sewer system that satisfied the county’s new private well and sewer system restrictions. While that application was pending, the county amended its zoning regulations to prohibit private institutional uses in the rural density transfer zone. The church sued the county, alleging violations of RLUIPA and the United States Constitution’s Free Exercise of Religion (1st Amendment) and Equal Protection (14th Amendment) clauses. The trial court ruled in favor of the county on all claims and the church appealed.

As noted at the beginning of this section, the court adopted the following standard for determining whether a locality had substantially burdened religious exercise in the context of a land use matter: a substantial burden on religious exercise will be found to exist under RLUIPA when a “government regulation puts substantial pressure on [a religious institution] to modify its behavior.” In reversing the trial court’s grant of summary judgment in favor of the county on this issue, the court held that the church had presented sufficient evidence of material facts that the county had substantially burdened the church’s religious exercise under that standard. There are four additional significant points in the court’s analysis: (1) at the time the church bought its land, the zoning regulations allowed religious institutions; this key fact distinguished the church’s situation from those in other cases where a religious institution bought land in a zoning district where religious institutions were not allowed and were later denied a required discretionary approval; (2) when the county amended its zoning regulations, the amendments imposed a blanket prohibition on all types of private institutions, rather than provide for a case-by-case determination as to whether a particular institution should be allowed; (3) a religious institution is not required to produce evidence showing that the land use regulation targeted it; and (4) the substantial burden provision of RLUIPA protects against both non-discriminatory and discriminatory conduct by the locality.

**34-231 The neutral application of generally applicable and legitimate land use regulations will usually not be found to impose a substantial burden on religious exercise**

The courts have cautioned against relying solely on the effect of a land use regulation or decision on the religious institution or its members as the basis for determining whether the locality has imposed a substantial
burden on religious exercise. Free exercise jurisprudence cautions that “an effect focused analysis may run up against the reality that ‘the freedom asserted by [some may] bring them into collision with [the] rights asserted by’ others and that ‘it is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin.” Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 349-350 (2d Cir. 2007), quoting Lyng v. NW. Indian Cemetery Protective Association, 485 U.S. 439, 108 S. Ct. 1319 (1988).

Thus, under both the Free Exercise Clause and RLUIPA, a number of courts have held that land use regulations and decisions do not impose a substantial burden on religious exercise where they are “neutral and traceable to municipal land planning goals” and where there is no evidence that governmental actions were taken “because [the applicant] is a religious institution.” Westchester Day School, 504 F.3d at 350, quoting Vision Church, United Methodist v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (“costs, procedural requirements, and inherent political aspects” of the application process which are “incidental to any high-density urban land use” are not sufficient to establish a substantial burden); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227, fn. 11 (11th Cir. 2004) (“Reasonable ‘run of the mill’ zoning considerations do not constitute substantial burdens”).

In Andon, LLC v. City of Newport News, 813 F.3d 510 (4th Cir. 2016), the plaintiffs claimed that the city violated RLUIPA when its board of zoning appeals denied a variance from a setback regulation that would have allowed a commercially zoned property to be used for a community facility (e.g., a place of worship). Before the variance application was filed, the congregation was aware of the need for the variance but nonetheless entered into a lease agreement with the landowner, which was contingent upon the landowner obtaining the variance. The plaintiffs alleged that the board of zoning appeals’ denial of the variance caused delay in obtaining a “viable worship location” and uncertainty as to whether the congregation would be able to “go forward with the lease of the property.” An affidavit attached to the complaint stated that because of size, location, or price, an alternative location could not be found. The trial court dismissed the complaint, concluding that the plaintiffs had failed to allege a violation of RLUIPA, and the plaintiffs appealed.

The Fourth Circuit Court of Appeals affirmed, concluding that the board of zoning appeals’ denial of the variance did not substantially burden religious exercise. Significant to the court was the fact that the plaintiffs proceeded with knowledge of the need for the variance. Therefore, “the alleged burdens they sustained were not imposed by the [board of zoning appeals] action denying the variance, but were self-imposed hardships.” Andon, 813 F.3d at 515. This, the court said, “generally will not support a substantial burden claim under RLUIPA because the hardship was not imposed by governmental action altering a legitimate, pre-existing expectation that a property could be obtained for a particular land use.” Andon, supra.

A religious institution’s obligation to comply with a locality’s zoning regulations is consistent with RLUIPA’s legislative history:

This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.


Congress’s rationale is clear: any contrary interpretation would provide religious groups with carte blanche to pick and choose which zoning requirements to follow. . . . See Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (“Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind.”). Certainly, RLUIPA was not intended to grant religious groups such unbounded discretion.
Generally, then, the courts have said that religious institutions must comply with a locality’s procedural and substantive requirements under its zoning regulations, even though those requirements may be costly, cause delay, and create a certain level of uncertainty. Following is a sampling of cases that have addressed challenges to various facets of a locality’s legitimate land use regulations:

- **Procedural requirements**: A locality’s procedural zoning requirements, such as the requirement to file an application, pay an application fee, and seek an approval, do not impose a substantial burden on religious exercise. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (holding that the city’s requirement that the college file a “complete” application for a building permit was not a substantial burden even though failing to comply with the ordinance rendered the college unable to provide education or worship on its property; the college was “simply adverse to complying with the PUD ordinance’s requirements” and that the city’s requirements imposed “no restriction whatsoever” on the college’s religious exercise); *Konikov v. Orange County*, 410 F. 3d 1317, 1323 (11th Cir. 2005); (“[R]equirements for variances, special permits, or other relief provisions [do] not offend RLUIPA’s goals”); *Civil Liberties for Urban Believers*, supra (procedural requirements, among other aspects of the application process, are not sufficient to establish a substantial burden); *Roman Catholic Bishop of Springfield*, supra (rejecting church’s claim that requiring it to file an application before demolishing a church was not a substantial burden despite allegations of delay, uncertainty and expense); *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978, 987 (N.D. Ill. 2008) (“[w]hile surely inconvenient, the eight-month application process [plaintiff] encountered did not rise to the level of a substantial burden”); *Christian Methodist Episcopal Church v. Montgomery*, 2007 U.S. Dist. LEXIS 5133, 2007 WL 172496 (D. S.C. 2007) (town’s zoning laws requiring landowners to apply for a special use permit or to assign their rights to do so to the church-tenant did not substantially burden religious exercise).

- **Substantive requirements**: Under RLUIPA, religious institutions have no right to establish their use wherever they choose within the locality, and they are subject to a locality’s substantive zoning requirements. See, e.g., *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006) (requirements that the church obtain a special use permit and comply with the building size limitation established by the village’s assembly ordinance did not impose a substantial burden); *Konikov, supra* (requirement that rabbi obtain a special use permit to operate a religious facility from his home did not impose a substantial burden); *Wesleyan Methodist Church of Canisteo, New York v. The Village of Canisteo*, 792 F. Supp. 2d 667, 674 (W.D. N.Y. 2011) (no substantial burden was alleged where the village refused to grant permission to build a church in a light industrial zoning district where the requirements of that zoning district were a generally applicable burden “neutrally imposed on churches and secular organizations”); *Christian Methodist Episcopal Church*, supra (church’s claim that it should be allowed to operate wherever it so chose, without regard to zoning rules, was unreasonable and not supported by RLUIPA or by the First Amendment).

- **Cost to comply**: The cost to comply with a locality’s zoning regulations does not, in and of itself, impose a substantial burden. *Civil Liberties for Urban Believers*, supra (costs and other requirements are incidental to any high-density urban land use and are not sufficient to establish a substantial burden); *Roman Catholic Bishop of Springfield*, supra (rejecting the church’s claim that requiring it to file application before demolishing church was not a substantial burden despite allegations of “delay, uncertainty and expense”); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (no substantial burden because “monetary and logistical burdens do not rise to the level of a substantial burden”).

In sum, religious institutions must comply with a locality’s neutral and generally applicable zoning regulations and the mere requirement to comply, in and of itself, is not a substantial burden on religious exercise. However, there are two common situations discussed in sections 34-232 and 34-233 below, in which a substantial burden may be found.
When a religious institution seeks to locate or relocate within a locality, or to expand its existing facilities, the neutral application of generally applicable and legitimate land use regulations may be found to impose a substantial burden on religious exercise if the religious institution does not have reasonable alternatives in the locality or has no opportunity to reapply for a needed permit.

The use, building, or conversion of real property for the purpose of religious exercise is considered to be a religious exercise by the person or entity that uses or intends to use the property for that purpose. 42 U.S.C. § 2000cc-5(7). It appears that most of the zoning disputes under RLUIPA pertain to a religious institution’s desire to locate or relocate within a locality, or to expand its existing facilities.

There is no requirement under RLUIPA that religious institutions be allowed by right in any zoning district within the locality. Vision Church, United Methodist v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006). In addition, there is no requirement that a majority, or even a significant minority, of the total area of a locality be available for religious uses. Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (all that is required is that there be “plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community”); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (rejecting the congregation’s claim that the town’s regulations limiting religious institutions to one of its eight zoning districts imposed a substantial burden on religious exercise); Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) (pre-RLUIPA) (city’s zoning scheme which designated only 10 percent of the city’s area for a use classification on which a church could be built did not substantially burden religious exercise because faith could be practiced in alternative locations such as homes, schools and other churches).

There also is no requirement that the cheapest land within the locality be available for religious uses. Lakewood, 699 F.2d at 307 (court rejected the congregation’s claim that the zoning ordinance imposed a substantial burden because land in commercial zoning districts in which churches were permitted was more expensive and less conducive to worship than the lot owned by the church; although the “lots available to the Congregation may not meet its budget or satisfy its tastes,” the Free Exercise Clause did “not require the City to make all land or even the cheapest or most beautiful land available to churches”). Lakewood is cited with approval in Timberline Baptist Church v. Washington County, 211 Ore. App. 437 (2007), a RLUIPA case.

The following table provides a sampling of the case law in some of the typical RLUIPA situations. Some of these cases appear again in section 34-233, below.

<table>
<thead>
<tr>
<th>Is the locality imposing a substantial burden on religious exercise?</th>
<th>No substantial burden</th>
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<tbody>
<tr>
<td><strong>Substantial burden</strong></td>
<td><strong>No substantial burden</strong></td>
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<tr>
<td>A request to locate in the locality or to establish a use</td>
<td>There was no substantial burden on religious exercise where the township granted a special use permit for a religious school, but denied the special use permit required to allow the gross floor area to exceed 25,000 square feet. Living Water Church of God v. Charter Township of Meridian, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished) (finding that the inability of the church to construct its “ideal building” did not constitute a substantial burden).</td>
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<tr>
<td>There was a substantial burden on religious exercise where the city denied the church’s request to rezone land from residential to institutional to allow a church use, where the city rejected a variety of viable options offered by the church, the options offered by the city were not viable, and the court found that the city was simply playing a delay game with the church and was convinced that the city was acting in a discriminatory manner. Saints Constantine &amp; Helen Hearts International, Inc. v. Prince George’s County, 851 F.3d 647 (4th Cir. 2017) (unpublished)</td>
<td>There was a substantial burden on religious exercise where the county denied applications for water and sewer designation changes on a religious institution’s land near a reservoir, even on the same day the county approved 25 other applications and the religious institution was the sole applicant seeking a religious land use. Reaching Hearts International, Inc. v. Prince George’s County, 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished).</td>
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<tr>
<td>There was a request to locate in the locality or to establish a use</td>
<td>There was no substantial burden on religious exercise where the church sought to establish a facility on its property, and the village regulations allowed up to a 55,000 square foot facility, which experts estimated would be able to meet the needs of an 800 to 1,000 member congregation, where the church at the time had 120 members, had previously submitted plans for a 56,200 square foot facility, and could submit amended plans to comply with the village regulations.</td>
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### Is the locality imposing a substantial burden on religious exercise?

<table>
<thead>
<tr>
<th>Substantial burden</th>
<th>No substantial burden</th>
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<td><strong>Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005).</strong></td>
<td><strong>Vision Church, United Methodist v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006).</strong></td>
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<td>There was sufficient evidence of material facts to show that there was a substantial burden on religious exercise where, at the time the church bought its land, the zoning regulations allowed religious institutions but while the church’s development applications were pending the county amended its zoning regulations and imposed a blanket prohibition on all private institutions in the district. Bethel World Outreach Ministries v. Montgomery County Council, 706 F.3d 548 (4th Cir. 2013) (adding that the church was not required to produce evidence showing that the land use regulation targeted it and that the substantial burden provision of RLUIPA protects against both non-discriminatory and discriminatory conduct by the locality).</td>
<td>There was no substantial burden on religious exercise where a locality did not permit religious institutions in a particular zoning district, “because then every zoning ordinance that didn’t permit churches everywhere would be a prima facie violation of RLUIPA.” Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (explaining that “[w]hen there is plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community, the fact that they are not permitted to build everywhere does not create a substantial burden. . . . Any such organization would have to show that a paucity of other land available for churches made the exclusion from the [desired] zone a substantial burden to it”).</td>
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<td>There was a substantial burden on religious exercise where the county denied two conditional use permits for properties in different zoning districts because the denials barred the organization from constructing a building in the county since: (1) the county’s “broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak”; and (2) Guru Nanak agreed to all mitigation measures (regarding traffic, noise, and other impacts) suggested by the planning department, but the county nonetheless denied the permits. Gurm Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).</td>
<td>There was no substantial burden on religious exercise where five religious institutions that located in the city were faced with the scarcity of affordable land available for development in residential zones, along with the costs, procedural requirements, and inherent political aspects of the special use, zoning map amendment and planned development approval processes, because these conditions were “incidental to any high-density urban land use”; while “they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago.” Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).</td>
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<td>There was a substantial burden on religious exercise where the village denied a religious school’s request for a permit to expand to provide adequate facilities for religious instruction, where the village’s justifications for its denial did “not bear the necessary substantial relation to public health, safety or welfare, and the zoning board’s findings [were] not supported by substantial evidence.” Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 351 (2nd Cir. 2007) (noting in an example, however, that there would have been no substantial burden on religious exercise if the school could easily rearrange its existing classrooms to meet its religious needs).</td>
<td>There was no substantial burden on religious exercise where the township denied a special use permit that would have allowed the church to exceed 25,000 square feet gross floor area (increasing the size of the church and school from approximately 11,000 square feet to 35,000 square feet), even though: (1) it prevented the church from expanding to its desired size; (2) it required the church to apply for another permit to make any change to the special use permit for the religious school; and (3) it required the church to develop new plans to comply with the limitation on the gross floor area; the court said that the fact that the church’s “current facility is too small does not give the church free reign to construct on its lot a building of whatever size it chooses, regardless of limitations imposed by the zoning ordinance.” Living Water Church of God v. Charter Township of Meridian, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished) (adding that if church had proffered evidence that it cannot carry out its missions and ministries due to the township’s denial, outcome might be different).</td>
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<td>There was a substantial burden on religious exercise where the city denied the church’s request for a certificate of occupancy for a building it owned, previously used for worship by others, because the site did not have sufficient on-site parking under the current regulations, and the city denied the church’s variance from the parking</td>
<td>There was no substantial burden on religious exercise where the city’s zoning ordinance allowed the property to be used as a church and the only restriction on its expansion was providing adequate parking, because the church could use the entire facility as it existed and it could be expanded as the church desired with either a variance from the minimum</td>
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<tr>
<td>Is the locality imposing a substantial burden on religious exercise?</td>
<td>Substantial burden</td>
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<td>requirements. Lighthouse Community Church of God v. City of Southfield, 2007 U.S. Dist. LEXIS 28, 2007 WL 756647 (E.D. Mich. 2007) (holding that the city’s denials precluded the church from using its building for religious worship purposes).</td>
<td>parking requirements, a shared on-site parking arrangement, or by obtaining sufficient off-site parking, even though the church contended that the existing smaller facility was “less than ideal” and that it did not have the space to provide the necessary training, auditing and other religious services mandated by Scientology. Church of Scientology of Georgia, Inc. v. City of Sandy Springs, 843 F. Supp. 2d 1328 (N.D. Ga. 2011).</td>
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<td>There was a substantial burden on religious exercise where the jury found that the county had applied the zoning ordinance non-neutrally, which resulted in unequal treatment of the church’s special use permit application to expand its building, where there was evidence that: (1) the church had been treated less favorably than a similarly situated school; (2) the county treated the church’s application as a new application even though it was an existing use; and (3) the county used a “less advantageous” method to determine whether the church’s proposed use was over-intensive. Rocky Mountain Christian Church v. Board of County Commissioners, 612 F. Supp. 2d 1163 (D. Colo. 2009) affirmed at 613 F.3d 1229 (10th Cir. 2010).</td>
<td>There was no substantial burden on religious exercise where the city denied the church’s request for a conditional use permit to relocate three blocks to a site parking arrangement, even though the church contended that the existing smaller facility was “less than ideal” and that it did not have the space to provide the necessary training, auditing and other religious services mandated by Scientology. Church of Scientology of Georgia, Inc. v. City of Sandy Springs, 843 F. Supp. 2d 1328 (N.D. Ga. 2011).</td>
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<td>There was a substantial burden on religious exercise where the city denied the church’s request to rezone a lot and grant a conditional use permit to allow a church use on land currently zoned industrial, which would have allowed the church to relocate within the city, where its current location was too small to support the congregation and its activities, where the church established that there were no suitable alternate sites, and the church’s core beliefs required it to be able to meet in one place at one time, rather than in multiple services at its current site. International Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037 (9th Cir. Cal., 2011) (holding that the trial court “erred in determining that the denial of space adequate to house all of the Church’s operations was not a substantial burden”).</td>
<td>There was no substantial burden on religious exercise where the synagogue sought to relocate in a downtown business district, even though religious institutions were not allowed in that district; the court rejected the synagogue’s claim that the town’s regulations limiting religious institutions to one of its eight zoning districts, thereby requiring the synagogue’s members to walk to temple, substantially burdened religious exercise; the court noted that the limited amount of land available in the town was merely a hardship faced by all potential landowners and that the inconvenience of having to walk “a few extra blocks” did not rise to the level of a substantial burden required by RLUIPA. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).</td>
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<tr>
<td>There was a substantial burden on religious exercise where the city denied the church’s request for a conditional use permit to relocate three blocks from its current location which lacked on-site parking which the church contended posed particular difficulties for elderly church members and those with disabilities, and the church contended that the current facility was too small to accommodate a growing congregation; the court said that the city had “effectively barred any use” by the church at the new location, and this was distinguishable from a minor or insubstantial burden resulting from, for example, a limitation on the building’s size or occupancy. Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003).</td>
<td>There was no substantial burden on religious exercise where the synagogue asserted on summary judgment that, because its congregation had grown and its current site had become inadequate and the proposed location was larger and would alleviate the problem, RLUIPA required the city to allow the synagogue to relocate absent a compelling governmental interest; the court found that the city’s denial of the conditional use permit did not impose a substantial burden and instead said that it was “not concerned simply with the inadequacy of [the synagogue’s] current location or the adequacy of the proposed location.” The court said it was required to determine whether the city’s application of its zoning regulations imposed pressure so significant as to require the synagogue’s congregation to forego their religious beliefs. Williams Island Synagogue v. City of Aventura, 329 F. Supp. 2d 1319, 1326 (S.D. Fla. 2004).</td>
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<td>There was a substantial burden on religious exercise where the conditional use permit granted by the city was for only one-half the duration requested by the church, and where the city allowed no reasonable expectation that it would be extended; the court noted that the church experienced</td>
<td>There was no substantial burden on religious exercise where the village denied the church permission to relocate to a lot that was zoned light industrial, even though the church alleged that its current facilities were inadequate because, from the pleadings, it was clear that the requirements of the</td>
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Is the locality imposing a substantial burden on religious exercise?

<table>
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<tr>
<th>Substantial burden</th>
<th>No substantial burden</th>
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<td>“outright hostility to its application,” decision-making that was “seemingly arbitrary and pretextual,” and ignorance about RLUIPA. Grace Church v. City of San Diego, 555 F. Supp. 2d 1126 (S.D. Cal. 2008).</td>
<td>light industrial zoning district imposed a neutral burden on not only the church but also on secular organizations, and the church conceded that it had several alternatives available to it. Wesleyan Methodist Church of Canisteo v. Village of Canisteo, 792 F. Supp. 2d 667 (W.D. N.Y. 2011).</td>
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34-233 The arbitrary, capricious, or unlawful application of generally applicable and legitimate land use regulations will likely result in a finding that the locality substantially burdened religious exercise

A substantial burden on religious exercise may be found if land use regulations are imposed on a religious institution arbitrarily, capriciously, or unlawfully. Westchester Day School v. Village of Mamaroneck, 504 F.3d 338 (2d Cir. 2007). The arbitrary application of laws to religious institutions may reflect bias or discrimination against religion. Westchester Day School, Vision Church, United Methodist v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006).

The courts will likely find that a locality has acted arbitrarily and capriciously in applying its standards in the following circumstances:

**Seven Trouble Areas**

- The locality’s decision is not based on substantial evidence.
- The locality engages in endless delays in the process.
- The locality’s standards are vague and subjective.
- The locality imposes unreasonable limitations that eliminate viable alternatives.
- The locality commits legal errors or displays ignorance about its obligations under RLUIPA.
- The locality inconsistently applies its policies and standards.
- The locality treats religious assemblies and institutions differently than nonreligious assemblies and institutions.

- **Absence of substantial evidence:** Decisions by localities that deny an application but which are not supported by substantial evidence are likely to be found to substantially burden religious exercise. In Westchester Day School, 504 F.3d at 351, the court concluded that the village’s justifications for its denial of a religious school’s application “set forth in the Resolution [did] not bear the necessary substantial relation to public health, safety, or welfare, and the zoning board’s findings are not supported by substantial evidence”; see also Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005) (where the court held that the decision-maker could not justify its decision to deny the church’s application, that the city had no legitimate concerns on which to base its denial, and the city acted with standardless discretion).

- **Endless delays in the process:** Schemes by localities to endlessly delay action on an application may be found to substantially burden religious exercise. In Saints Constantine & Helen, supra, the church sought to build a new church on a lot requiring a zoning approval and the city rejected a variety of viable options offered by the church and the options offered by the city were not viable. The court said the city was simply playing a delay game with the church and was convinced that the city was acting in a discriminatory manner. In Layman Lessons, Inc. v. City of Millerville, Tenn., 636 F. Supp. 2d 620 (M.D. Tenn. 2008), the court found that the city imposed a substantial burden when it effectively barred the religious organization from using its own property for religious exercise. The evidence showed that the city used a proposed ordinance that had not yet taken effect to delay issuing a certificate of occupancy that the religious organization should have been entitled to by-right. However, delay of a land use approval alone, in the absence of evidence tying the locality’s actions to intentional discrimination, does not necessarily establish that religious exercise has been substantially burdened. Vision Church, supra (religious exercise was not substantially burdened where the church was still seeking permission to build on its property seven years after it was purchased; noting that the delay issue should have more properly been considered as a land use matter in state court).
Standards that are vague and subjective: If a locality’s zoning regulations rely on vague and subjective standards, the courts may find that the religious institution has been substantially burdened by a decision under those standards unless the locality makes a strong evidentiary showing to support its decision. Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978, 989 (9th Cir. 2006) (holding that the county’s denial of two conditional use permits for separate properties amounted to a substantial burden and citing its main concern being that the county’s “broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak”); Cambodian Buddhist Society of Connecticut v. Newtown, 2005 Conn. Super. LEXIS 3158, 2005 WL 3370834 (2005) affirmed at 285 Conn. 381, 941 A.2d 868 (2008) (noting that architectural harmony and integrity of the neighborhood were “intrinsically vague” however the town’s decision was upheld on the basis of other standards where the evidence was sufficient); compare Living Water Church of God v. Charter Township of Meridian, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished), in which the court held that the church failed to establish a substantial burden merely because the township considered matters not contained in the zoning ordinance, where the town based the denial of a special use permit to allow the gross floor area to expand beyond 25,000 square feet on the ground that the size of the proposed church and school facilities was “out of proportion to similarly situated schools and combined church and school facilities in the township,” even though there were no such appropriate ratios in the township’s comprehensive plan or zoning ordinance.

Unreasonable limitations that eliminate viable alternatives: Schemes by localities to allow only those options that are not viable to the religious institution may be found to substantially burden religious exercise. See Guru Nanak, 456 F.3d at 992 (stating that the effect of the county’s two denials, which included disregarding Guru Nanak’s proposed mitigation conditions, was “to shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve” to the extent that a substantial burden was imposed); Saints Constantine & Helen, supra (city’s rejection of an option proposed by a church to limit its property’s use to a church use through the creation of an overlay district based on the city’s misunderstanding of its effect, combined with the city’s insistence that the church seek a conditional use permit, which was not a viable option because the city’s regulations required that construction begin within one year, and the church had to engage in fundraising, which imposed a substantial burden). Note also that RLUIPA provides that a government cannot “impose or implement a land use regulation that (1) totally excludes religious assemblies from a jurisdiction; or (2) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” 42 U.S.C. § 2000cc(b)(3) (discussed in section 34-500).

Legal errors or ignorance: The locality’s legal errors or ignorance about RLUIPA may reflect a discriminatory motive. In Saints Constantine & Helen, 396 F.3d at 899-900, the court said that “repeated legal errors by the City’s officials casts doubt on their good faith” in an attempt to mask a discriminatory motive, and that the city was “flaunting as it were its own incompetence.” In Grace Church v. City of San Diego, 555 F. Supp. 2d 1126 (S.D. Cal. 2008), the court noted the city’s decision-makers’ ignorance about the city’s obligations under RLUIPA as one of its reasons for finding a substantial burden.

Inconsistent application of policies and standards: Government officials who inconsistently apply policies and standards and disregard relevant findings “without explanation” may substantially burden religious exercise. Guru Nanak Society, supra.

Unequal treatment: A locality that grants approvals to nonreligious entities but denies similar approvals for religious organizations supports an inference of intentional discrimination by the locality. In Reaching Hearts International, Inc. v. Prince George’s County, 584 F. Supp. 2d 766 (D. Md. 2008) affirmed at 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished), the trial court upheld a jury finding of substantial burden resulting from the county’s denial of Reaching Hearts’ (“RHI”) applications for water and sewer designation changes on its land near a reservoir, where on the same day the county approved 25 other applications including one for a residential subdivision that would cross a stream flowing directly into the reservoir, and RHI was the sole applicant seeking a religious land use. There was extensive evidence that RHI was unable to build any structure on the property without the approval. The court noted that the instant case was distinguishable from those cases in which the religious institutions were seeking to expand their facilities. The court also noted that staff had recommended approval of the application but that the county council ultimately voted to deny the application based on statements of one of the councilors that he did not want a church to be built on RHI’s
property due to the “[v]ery hostile” reaction of a local community association which did not want another church application to be approved in that neighborhood.

Where the arbitrary, capricious, or unlawful nature of a locality’s “challenged action suggests that a religious institution received less than even-handed treatment, the application of RLUIPA’s substantial burden provision usefully backstops the explicit prohibition of religious discrimination in the later section of the Act.” Westchester Day School, 504 F.3d at 351; see sections 34-300, 34-400 and 34-500 for a discussion RLUIPA’s religious discrimination provisions.

34-240 Whether a substantial burden on religious exercise is justified by a compelling governmental interest

RLUIPA does not define compelling governmental interest. Like substantial burden, the meaning of compelling governmental interest must be ascertained from the case law.

A compelling governmental interest is an interest of “the highest order” because “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566, 113 S. Ct. 2217, 2244 (1993). “Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation” on religious exercise. Sherbert v. Verner, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795 (1963). The traditional examples of compelling governmental interests include the allocation and collection of taxes, maintaining the integrity of the social security system, eradicating racial discrimination in education, the operation of military conscription laws, enforcing child labor laws, and protecting public health and safety. Testimony of Steven K. Green, Legal Director, Americans United for Separation of Church and State, before the House Committee on the Judiciary, Subcommittee on the Constitution, July 14, 1998.

The following table provides a sampling of the RLUIPA cases that have considered whether a particular governmental interest is compelling:

<table>
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<th>The interest</th>
<th>Whether it is compelling</th>
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<tr>
<td>Controlling traffic volume</td>
<td>Not in this case in the absence of specific evidence. Westchester Day School v. Village of Mamaroneck, 386 F.3d 183 (2d Cir. 2004) (acknowledging that traffic concerns may be a compelling governmental interest, but not finding a compelling interest when the case returned to the court of appeals because the trial court determined that the actual basis for the zoning board of adjustment’s denial of the special use permit was undue deference to the opposition of a small group of neighbors); but see Mintz v. Roman Catholic Bishop, 424 F. Supp. 2d 309 (D. Mass. 2006) (though not expressly ruling out traffic concerns as being compelling, the court noted that they “were not universally considered compelling”).</td>
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<td>Retaining consistency with the comprehensive plan</td>
<td>No, because although the policies of the comprehensive plan are legitimate, they are not compelling. Rocky Mountain Christian Church v. Board of County Commissioners, 612 F. Supp. 2d 1163 (D. Colo. 2009) affirmed on other grounds at 605 F.3d 1081 (10th Cir. 2010).</td>
</tr>
<tr>
<td>Protecting a public drinking water impoundment</td>
<td>Not in this case because the county had approved other developments around the reservoir and, therefore, its desire to protect the reservoir in this case was pretextual, rather than compelling. Reaching Hearts International, Inc. v. Prince George’s County, 584 F. Supp. 2d 766 (D. Md. 2008) affirmed at 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished) (evidence also showed that other governmental bodies charged with and familiar with the county’s environmental policies did not perceive any negative environmentally-based reasons upon which to deny RHI’s applications).</td>
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<tr>
<td>Aesthetic concerns or historic preservation</td>
<td>No, because a locality has a substantial interest, but not a compelling interest, in aesthetics. American Legion Post 7 v. City of Durham, 239 F.3d 601 (4th Cir. 2001) (flag case); Keeler v. Mayor and City Council of Cumberland, 940 F. Supp. 879 (D. Md. 1996) (historic preservation is not a compelling governmental interest); Manns v. Martin, 131 Wn.2d 318 (1997) (“City’s interest in preservation of aesthetic and historic structures is not compelling”); First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203 (1992) (city’s interest in preserving historic structures was not compelling enough to justify infringement on free exercise).</td>
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Kampfner/July 2019
<table>
<thead>
<tr>
<th>The interest</th>
<th>Whether it is compelling</th>
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<tr>
<td>requiring the landowners to sign the application for a land use permit, or to assign the right to do so to a tenant, rather than to allow the tenant-church to sign the application without requiring the landowners to be involved in the application process; Bikur Cholim, Inc. v. Village of Saufnern, 664 F. Supp. 2d 267 (S.D. N.Y. 2009) (“while upholding zoning laws may be considered a compelling interest, the [locality] must demonstrate that the enforcement in those zoning laws is compelling in this particular instance, not in the general scheme of things”); Murphy v. Zoning Commission of the Town of Milford, 289 F. Supp. 2d 87 (D. Conn. 2003) (protecting the public health and safety is a compelling governmental interest; thus, a locality has a compelling governmental interest in enforcing its land use regulations).</td>
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<tr>
<td>Preserving lands in an industrial park for industrial uses</td>
<td>Not in this case because religious uses were allowed by conditional use permit, several parcels in the industrial park were already occupied by non-industrial uses, and 100 acres of the 600 acre industrial park were slated for non-industrial uses. Grace Church v. City of San Diego, 555 F. Supp. 2d 1126 (S.D. Cal. 2008).</td>
</tr>
<tr>
<td>Generating tax revenue</td>
<td>No, because revenue generation “is not the type of activity that is needed to protect public health or safety” and “[i]f revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities.” Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (also noting that the city’s regulations were not aimed at revenue generation).</td>
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The court in *Grace Church v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008) stated that “[o]ne way to evaluate a claim of compelling interest is to consider whether in the past the governmental actor has consistently and vigorously protected that interest. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 547, 113 S. Ct. at 2234, 124 L. Ed. 2d at 499 (‘A law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprotected.’)"
A locality must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general. *Westerchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004); *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006), citing *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211 (2006); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267 (S.D. N.Y. 2009) (“While upholding zoning laws may be considered a compelling interest, the Village must demonstrate that the enforcement in those zoning laws is compelling in this particular instance, not in the general scheme of things”). Speculation and claims of “doubts” and “serious questions” will not establish a compelling governmental interest. *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) (holding that the government’s “speculation [did] not establish a compelling interest” when the government articulated only “doubts” and “serious questions” about plaintiff’s actions in the absence of extrinsic evidence). Specific evidence is required. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972) (holding that the government must present “specific evidence” of the alleged compelling interests and how those interests were advanced by the government’s actions in order to carry its burden under strict scrutiny review).

34-250 Whether the substantial burden on religious exercise is the least restrictive means possible to achieve the compelling governmental interest

If a land use regulation substantially burdens religious exercise, it is valid under RLUIPA only if it serves a compelling governmental interest using the least restrictive means possible to achieve that interest. 42 U.S.C. § 2000cc(a)(1). This means that the locality must show that there are no alternative forms of regulation that would fulfill the compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267 (S.D. N.Y. 2009). For example, assuming for the sake of argument that controlling the amount of traffic was a compelling governmental interest, and the amount of traffic generated by a religious institution was at issue, any related conditions imposed must address the number of cars, not the number of people. *Murphy v. Zoning Commission of the Town of Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003). The locality must prove that any “plausible, less restrictive alternative would be ineffective” in achieving its goals. *Bikur Cholim*, 664 F. Supp. 2d 267 at 292 quoting *United States v. Playboy Entertainment Group*, 529 U.S. 498, 120 S. Ct. 1878, 1891 (2000).

As a practical matter, the outright denial of a religious institution’s land use application will rarely be the least restrictive means of achieving a compelling governmental interest when reasonable conditions of approval could address the asserted interest. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013) (even assuming that a blanket prohibition on private institutions in zoning district served compelling governmental interests, the county failed to present any evidence that its interest in preserving the integrity of the district could not be served by less restrictive means, such as a minimum lot size requirement or an individualized review process); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (“The City has not demonstrated that there is no other way to provide for revenue without taking the property and preventing [plaintiff] from building its church. Municipalities have numerous ways of generating revenue without preventing tax-free religious land uses... [T]he City has done the equivalent of using a sledgehammer to kill an ant.”); *Bikur Cholim*, 664 F. Supp. 2d at 292 (if an application can be granted with various restrictions or conditions, a reasonable factfinder can find that there are less restrictive alternatives to further the locality’s interests).

In *Reaching Hearts International, Inc. v. Prince George’s County*, 584 F. Supp. 2d 766 (D. Md. 2008) *affirmed* at 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished ), the trial concluded that, even if the county established a compelling governmental interest in protecting a public drinking water reservoir from nearby development, it failed to carry its burden because its actions in denying Reaching Heart’s (“RHI”) applications were not the least restrictive means of furthering any alleged compelling interests. The court found that the county failed to meet its burden because it “did not commission, examine, or adduce any evidence at trial in the form of data, studies, or reports indicating what (if any) impact RHI’s water and sewer category change applications or subdivision proposal would have on Rocky Gorge Reservoir. The absence of qualitative and quantitative evidence on the county’s part undermined any assertion that it fully and adequately considered any alternatives to its outright denials of RHI’s applications. In addition, the fact that another county, which accounted for significantly more of the drainage into the reservoir, had less restrictive impervious surface coverage requirements than Prince George County’s further undermined its claim that its denial was employing the least restrictive means. Finally, the county’s
own expert testified that various methods existed to purify and mitigate any impacts on water quality due to any water runoff concerns from RHI’s proposed plans (and the corresponding impervious surfaces, which could contribute to water runoff concerns).

34-300 RLUIPA requires that a locality treat a religious assembly or institution on equal terms with nonreligious assemblies and institutions

A key provision of RLUIPA provides:

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000e(c)(1). This provision is known as the equal terms provision of RLUIPA.

To state an equal terms violation, the religious assembly or institution has the burden of showing: (1) that it is a religious assembly or institution; (2) subject to a land use regulation; (3) that treats the religious assembly or institution on less than equal terms; (4) with a nonreligious assembly or institution. Covenant Christian Ministries, Inc. v. City of Marietta, 654 F.3d 1231, 1245 (11th Cir. 2011).

As noted above, one who asserts a claim under the equal terms provision must show that it is a religious assembly or institution. Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3rd Cir. 2007). This provision does not apply to persons. In Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230-1231 (11th Cir. 2004), the court adopted the following definitions:

An “assembly” is “a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment),” WEBSTER’S 3D NEW INT’L UNABRIDGED DICTIONARY 131 (1993); or “[a] group of persons organized and united for some common purpose.” BLACK’S LAW DICTIONARY 111 (7th ed. 1999). An institution is “an established society or corporation: an establishment or foundation esp. of a public character,” WEBSTER’S 3D NEW INT’L UNABRIDGED DICTIONARY 1171 (1993); or “an established organization, esp. one of a public character . . . .” BLACK’S LAW DICTIONARY 801 (7th ed. 1999).

The plaintiff failed to make the required showing that he was a religious assembly or institution in Dixon v. Town of Coats, 2010 U.S. Dist. LEXIS 56740 at 18, 2010 WL 2347506 at 6 (E.D. N.C. 2010). In support of his claim, the plaintiff contended only that he was “a religious benefactor with a specific religious vision and the willingness to use his resources and property to spread his Christian vision and advance his religious message.”

34-310 A religious assembly or institution is not required to show that the locality’s unequal treatment substantially burdens religious exercise

A claimant bringing a challenge under the equal terms provision does not need to show that a regulation imposes a substantial burden on its religion. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 616, 1172 (9th Cir. 2011).

The equal terms provision is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses. Digruilliers v. Consolidated City of Indianapolis, 506 F.3d 612, 616 (7th Cir. 2007), citing Vision Church v. Village of Long Grove, 468 F.3d 975, 1002-1003 (7th Cir. 2006); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1308 (11th Cir. 2006); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228-1231 (11th Cir. 2004) (“where a zoning regulation treats religious assemblies differently than secular assemblies [such as private clubs and lodges] by excluding religious assemblies from the business district, a factor that is enough to constitute a violation of § (b) of RLUIPA . . . With respect to neutrality, the purpose and operation of the ordinance reveal an impermissible attempt to target religious assemblies”).
34-320 A locality likely cannot raise a compelling governmental interest as a defense against a claim of its unequal treatment of religious assemblies or institutions

The federal appellate courts disagree as to whether a compelling governmental interest is a defense to a violation of the equal terms provision. Compare Covenant Christian Ministries, Inc. v. City of Marietta, 654 F.3d 1231 (11th Cir. 2011) (once the religious assembly or institution produces prima facie evidence that these elements are satisfied, the locality bears of burden of showing that the land use regulation employs a narrowly tailored means of achieving a compelling governmental interest) with Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011) (rejecting the notion that a “compelling governmental interest” is an exception to the equal terms provision). See sections 34-240 and 34-250 for a discussion of compelling governmental interests and the least restrictive means test.

34-330 Determining what uses are equal to religious assemblies and institutions

Whether uses are equal must be analyzed in their proper context. “Equality is always with respect to a characteristic that may or may not be material.” Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011). Except when used in the context of mathematical or scientific relations, equality “signifies not equivalence or identity, but proper relation to relevant concerns.” River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010); Tree of Life Christian School v. City of Upper Arlington, 905 F.3d 357 (6th Cir. 2018) (prima facie case not adequately pleaded where day cares were the only potentially valid comparator). The equal terms provision does not require that all religious assemblies and institutions be treated similarly to one another, but instead requires that they be treated equally to nonreligious assemblies and institutions. Church of Scientology of Georgia, Inc. v. City of Sandy Springs, 843 F. Supp. 2d 1328, 1359 (N.D. Ga. 2011). The claimant may only have to show that the regulation at issue leads to religious assemblies or institutions being treated “less well” than secular assemblies or institutions that are similarly situated regarding the regulatory purpose. Layman Lessons, Inc. v. City of Millersville, 636 F. Supp. 2d 620 (M.D. Tenn. 2008); see also Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3rd Cir. 2007).

The federal appellate courts are not in complete agreement as to how to determine whether a nonreligious assembly or institution is comparable to a religious assembly or institution. Although the Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, has not considered the issue, several other circuits have.

<table>
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<tr>
<th>Federal Appellee Circuit</th>
<th>Standard</th>
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<td>Second</td>
<td>The religious assembly or institution must identify a comparator that is similarly situated for all functional intents and purposes of the regulation. Third Church of Christ, Scientist, of New York City v. City of New York, 626 F.3d 667 (2d Cir. 2010).</td>
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<td>Third</td>
<td>The religious assembly or institution must identify a similarly situated secular assembly or institution with respect to the goal of regulation, and compare the religious assembly’s treatment to that of the similarly situated secular comparator. Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3rd Cir. 2007).</td>
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<td>Fifth</td>
<td>The religious assembly or institution must show more than simply that its religious use is forbidden and that some other nonreligious use is permitted because the equal terms provision “must be measured by the ordinance itself and the criteria by which it treats institutions differently.” Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419, 424 (5th Cir. 2011).</td>
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<td>Seventh</td>
<td>The religious assembly or institution must identify a similarly situated secular comparator with respect to accepted regulatory criteria such as the nature of the zoning district, i.e., commercial district or residential district. River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367 (7th Cir. 2010) (this standard is described as a slight variation from the Third Circuit’s standard).</td>
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<tr>
<td>Ninth</td>
<td>The religious assembly or institution must identify a similarly situated secular comparator with respect to accepted regulatory criteria such as the nature of the zoning district, i.e., commercial district or residential district. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011) (this standard is described as the Third Circuit’s standard, incorporating the Seventh Circuit’s “further refinement”).</td>
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The Various Standards for Determining Whether a Use is Equal

<table>
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<tr>
<th>Federal Appellate Circuit</th>
<th>Standard</th>
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| Eleventh                  | The religious assembly or institution must show that the zoning regulation facially differentiates between religious and nonreligious assemblies or institutions. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).  
  - Facial challenge: When alleging facial neutrality, claims are classified as either: (1) those that challenge ordinances of general applicability but that nevertheless target religion through a religious gerrymander; or (2) those that challenge discriminatory application. When alleging a religious gerrymander, the religious assembly or institution must show that the challenged zoning regulation separates permissible from impermissible assemblies or institutions in a way that burdens almost only religious uses – thus assessing the treatment of the religious assembly or institution relative to all other nonreligious occupants. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308-1311 (11th Cir. 2006)  
  - As applied challenge: When alleging discriminatory application, the religious assembly or institution must show that “a similarly situated nonreligious comparator received differential treatment under the challenged regulation.” *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308-1311 (11th Cir. 2006) |

The following table provides a sampling of the RLUIPA cases that have considered whether a particular use is equal to a religious assembly or institution:

<table>
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<tr>
<th>Uses That May Be Equal to Religious Assemblies and Institutions</th>
<th>Equal</th>
<th>Not equal</th>
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<tr>
<td>Private parks, playgrounds, and neighborhood recreation centers are equal to religious assemblies or institutions “because they are places where ‘groups or individuals dedicated to similar purposes – whether social, education, recreational, or otherwise – can meet together to pursue their interests’. . . . That some individuals have different purposes for meeting in a particular place does not mean the place fails to qualify as an ‘assembly’.” <em>Covenant Christian Ministries, Inc. v. City of Marietta</em>, 654 F.3d 1231, 1245 (11th Cir. 2011) (rejecting the city’s argument that parks, playgrounds and recreation centers were different because those who attend those places are not assembling for a common purpose).</td>
<td>Private clubs, allowed by special use permit, are equal to religious assemblies or institutions. <em>Elijah Group, Inc. v. City of Leon Valley</em>, 643 F.3d 419, 424 (5th Cir. 2011) (city violated the equal terms provision because it prohibited religious assemblies and institutions in the same zoning district where private clubs were allowed by permit).</td>
<td>A 10-member book club is equal only to a 10-member religious assembly or institution. <em>Lighthouse Institute for Evangelism, Inc. v. City of Long Branch</em>, 510 F.3d 253 (3rd Cir. 2007) (given as an example).</td>
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<td>Social organizations are equal to religious assemblies or institutions. <em>Konikov v. Orange County</em>, 410 F.3d 1317, 1329 (11th Cir. 2005) (under the county’s zoning ordinance, groups that met with similar frequency were in violation of the regulations only if the purpose of their assembly was religious).</td>
<td>A hotel operating a catering service is equal to a religious assembly or institution that wanted to operate a catering service. <em>Third Church of Christ, Scientist, of New York City v. City of New York</em>, 626 F.3d 667 (2d Cir. 2010).</td>
<td>A public high school, which was not located by the county but by the school board under its exclusive authority, is not equal to a religious assembly or institution. <em>Grace Church of Roaring Fork Valley v. Board of County Commissioners of Pitkin County</em>, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010).</td>
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<td>A single-parcel district imposed on church property because of its historic value did not violate the equal terms provision. <em>Roman Catholic Bishop v. City of Springfield</em>, 760 F. Supp. 2d 172 (D. Mass. 2011).</td>
<td>Small one room historic school building used as a meeting room and community gathering place is not equal to a religious assembly or institution. <em>Grace Church of Roaring Fork Valley v. Board of County Commissioners of Pitkin County</em>, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010) (“It is beyond dispute that any assembly use that was or could be made of a one-room building is not comparable” to the church’s proposed use).</td>
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<tr>
<td>Uses That May Be Equal to Religious Assemblies and Institutions</td>
<td>Equal</td>
<td>Not equal</td>
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<td>---------------------------------------------------------------</td>
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<td>Membership organizations are equal to religious assemblies or institutions.</td>
<td>Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011) (where the regulation allowed membership organizations by right in the district, but allowed religious organizations only by conditional use permit).</td>
<td>Golf club located on property annexed by the town and approved by the town is not equal to a religious assembly or institution in the county, since there was no evidence that the county was involved in the golf club’s approval. Grace Church of Roaring Fork Valley v. Board of County Commissioners of Pitkin County, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010).</td>
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<td>Community centers, meeting halls and libraries, which along with religious assemblies and institutions were excluded from a commercial district, were equal to religious assemblies or institutions because they did not generate significant taxable revenue or offer shopping opportunities, which were two of the key purposes of the zoning district near a train station.</td>
<td>River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (not finding a violation of the equal terms provision).</td>
<td>Gymnasiums are not equal to religious assemblies and institutions, where all other places of assembly are prohibited in the zoning district, because to allow religious assemblies and institutions in such a case would favor them over secular assemblies and institutions. River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (given as an example; rejecting the Eleventh Circuit’s approach).</td>
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<td>Libraries may be equal to religious assemblies or institutions.</td>
<td>Immanuel Baptist Church v. City of Chicago, 344 F. Supp. 3d 978 (N.D. Ill. 2018).</td>
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<td>Assisted-living facilities, auditoriums, assembly halls, community centers, senior citizens’ centers, day-care centers, nursing homes, funeral homes, radio and television studios, art galleries, civic clubs, libraries, museums, junior colleges, correspondence schools, schools that teach data processing, and nurseries, together with accessory uses and structures, subordinate, appropriate and incidental to the above permitted primary uses, including supportive services directly related to and in the same building with the primary use, plus various accessory retail and service commercial uses, including a cafeteria or other restaurants serving only employees and guests, drugstores, florists, office-supply services, and newsstands, are equal to religious assemblies and institutions.</td>
<td>Digringuilbers v. Consolidated City of Indianapolis, 506 F.3d 612, 616 (7th Cir. 2007) (these uses were allowed by right in C-1 zoning district, where a use variance was required for religious institutions).</td>
<td>A private clubhouse in a residential community used for weddings, lectures and other events is not equal to a religious assembly or institution, since there was no evidence that the county was involved in regulating the uses or that the county knew of the events. Grace Church of Roaring Fork Valley v. Board of County Commissioners of Pitkin County, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010).</td>
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<tr>
<td>Gatherings by organizations such as Boy Scouts and Girls Scouts in residences in residential neighborhoods may be equal to religious assemblies.</td>
<td>Yetto v. City of Jackson, 2019 U.S. Dist. LEXIS 18285 (M.D. Tenn. 2019) (pleadings sufficient to allege a prima facie equal terms violations).</td>
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In order to be considered to be similarly situated, it appears that the comparable uses must be within the same zoning district as the religious assembly or institution, the locality must have played some role in allowing or approving the comparable uses, there must be some relation to relevant concerns and, where the religious assembly or institution has been denied a zoning-related approval, the relevant comparators must have needed the same type of approval (e.g., comparing rezonings, but not comparing a rezoning to a variance). See Centro Familiar Cristiano Buenas Nuevas, supra; Grace Church of Roaring Fork Valley, supra; Church of Scientology of Georgia, Inc. v. City of Sandy Springs, 843 F. Supp. 2d 1328 (N.D. Ga. 2011).

34-400 RLUIPA prohibits a locality from discriminating against any assembly or institution on the basis of religion or religious denomination

A key provision of RLUIPA provides:

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
In order to make *prima facie* case of discrimination, the religious assembly or institution must present evidence of intentional or purposeful discrimination by the locality because of its religious denomination. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013) (church failed to show any discrimination where the opposition to the church had nothing to do with the fact it was a religious institution, but instead was based on the proposed institution’s size); *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531 (7th Cir. 2009); *Church of Scientology of Georgia, Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328 (N.D. Ga. 2011).

A religious assembly or institution “may either show intentional discrimination through direct evidence or establish an inference of discrimination through circumstantial evidence.” *Church of Scientology*, 843 F. Supp. 2d at 1371. “Only the most blatant remarks, the intent of which could be nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination.” *Church of Scientology*, 843 F. Supp. 2d at 1372 (discrimination would not be “inferred merely because Plaintiff was treated differently than other churches in terms of calculating its required parking”).

In *World Outreach Conference Center*, the court found no discrimination under RLUIPA where, though there may have been discrimination by an alderman who expressed a desire that the property at issue have been sold to his political supporter rather than to World Outreach, the discrimination was not based on religious grounds. Instead, the discrimination was based on the developer’s financial relationship with the alderman. *World Outreach Conference Center*, 591 F.3d at 535 (“Religion didn’t enter the picture”); see *World Outreach Conference Center v. City of Chicago*, 787 F.3d 839 (7th Cir. 2015) for later proceedings in this case.

**34-500 RLUIPA prohibits a locality from totally excluding religious assemblies or unreasonably limiting religious assemblies, institutions or structures**

A key provision of RLUIPA provides:

> No government shall impose or implement a land use regulation that - (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

**42 U.S.C. § 2000xx(b)(2).** This provision is known as the *nondiscrimination* provision of RLUIPA.


Prohibiting religious assemblies or institutions from particular zoning districts is not an unreasonable limitation if they are allowed in other zoning districts. *Eljab Group v. City of Leon Valley*, 2009 U.S. Dist. LEXIS 92249, 2009 WL 3247996 (W.D. Tx. 2009) reversed on other grounds at 643 F.3d 419, 424 (5th Cir. 2011) (the ordinance violated the equal terms clause of RLUIPA).

Allowing religious institutions only by special use permit within the locality is, generally, neither a total exclusion nor an unreasonable limitation under RLUIPA. *Vision Church*, 468 F.3d at 990-991 (“The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals”).

In *Rocky Mountain Christian Church v. Board of County Commissioners*, 613 F.3d 1229, 1238-1239 (10th Cir. 2010), the court affirmed a jury finding that the county unreasonably limited religious institutions. Although the county’s land use director testified that the county had approved all other special use applications submitted by churches, a former county planner testified that the county’s land use scheme made it “more difficult for churches to operate in Boulder.
County” and that the county had effectively left few sites for church construction, and another witness who inquired about establishing a synagogue was told by a county commissioner that the county would only allow 100 seats because “there will never be another mega church . . . in Boulder County.”
Chapter 35

The Telecommunications Act of 1996 and Wireless Telecommunications

35-100 Introduction

Congress enacted the Telecommunications Act of 1996 (the “Act”) to promote competition and higher quality in American telecommunications services and to “encourage the rapid deployment of new telecommunications technologies.” 110 Stat. 56, cited in City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005), see also H.R. Conf. Rep. No. 104-458, at 113 (1996), explaining that the purpose of the Act is “to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services ... by opening all telecommunications markets to competition.”

“Congress saw a national problem, namely, an ‘inconsistent and, at times, conflicting patchwork’ of state and local siting requirements, which threatened ‘the deployment’ of a national wireless communication system. [citation omitted]. Congress initially considered a single national solution, namely, a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. [citations omitted]. But Congress ultimately rejected the national approach and substituted a system based on cooperative federalism. [citation omitted] State and local authorities would remain free to make siting decisions. They would do so, however, subject to minimum federal standards – both substantive and procedural – as well as federal judicial review.” City of Rancho Palos Verdes, 544 U.S. at 127-128 (Breyer concurring).

In Section 704 of the Act (codified at 47 U.S.C. § 332(c)(7)), Congress “struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions” over the siting of towers and other facilities that provide wireless services. 360 Communications v. Board of Supervisors of Albemarle County, 211 F.3d 79, 86 (4th Cir. 2000).1 While expressly preserving local zoning authority (47 U.S.C. § 332(c)(7)(A)), the Act requires that decisions denying wireless facilities be in writing and supported by substantial evidence (47 U.S.C. § 332(c)(7)(B)(iii)). The Act also prohibits localities from adopting regulations that prohibit or have the effect of prohibiting wireless services, or unreasonably discriminate against functionally equivalent providers. 47 U.S.C. § 332(c)(7)(B)(i). Finally, the Act requires that localities act on applications for approval of wireless facilities within a reasonable period of time. 47 U.S.C. § 332(c)(7)(B)(i).

The only complete preemption contained in 47 U.S.C. § 332(c)(7)(B) is found in subparagraph (iv), which preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions if those facilities comply with the Federal Communications Commission’s regulations concerning emissions.

A locality may not deny a request for a modification to “an existing wireless tower or base station that does not substantially change the physical dimensions of the tower or base station.” Middle Class Tax Relief and Job Creation Act of 2012 (also known as the “Spectrum Act”), § 6409. Section 6409 is discussed in section 35-400.

35-200 The Telecommunications Act of 1996: the local zoning authority preserved

Because 47 U.S.C. § 332(c)(7) does not affect or encroach upon the substantive standards to be applied under established principles of state and local law, Cellular Telephone Company v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999), a locality retains its authority to:

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1 The United States Courts of Appeal have interpreted some provisions of 47 U.S.C. § 332(c)(7) differently from one another. This chapter focuses primarily on the district court and appellate decisions from the Fourth Circuit Court of Appeal, whose jurisdiction includes Virginia.
• Determine the appropriate height, location and bulk of wireless facilities. *Virginia Code § 15.2-2280(2).*

• Allow wireless facilities, by special use permit, subject to suitable regulations and safeguards. *Virginia Code § 15.2-2286(A)(3).*

• Deny applications for special use permits if the requisite findings for the granting of a permit cannot be made. See, e.g., *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990).

• Deny applications for special use permits if the proposed uses are inconsistent with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986).


Of course, the exercise of this authority must otherwise comply with state and local land use laws, and may not violate the limitations set forth in section 332(c)(7)(B). See *T-Mobile Northeast, LLC v. Frederick County Board of Appeals*, 761 F. Supp. 2d 282 (D. Md. 2010) (court didn’t reach Telecommunications Act issues because the county failed to comply with the requirements for a special use exception). Moreover, section 332(c)(7)(A)’s preservation of local zoning authority does “not alter the FCC’s general authority over radio telecommunications granted by earlier communications legislation.” *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1191 (10th Cir. 1999) (rejecting the assertion that preserving local zoning authority allows local regulation of radio frequency interference, and holding that such regulation is preempted by federal law and does not violate the Tenth Amendment).

Finally, note that the protections to the wireless industry found in the Telecommunications Act of 1996 apply to telecommunications services. Some federal courts in other jurisdictions have concluded that 4G service is not a telecommunications service entitled to the limited protections from local zoning authority under the Act, finding that 4G service is a broadband internet information service. See, e.g., *Clear Wireless LLC v. Building Department of Lynbrook*, 2012 U.S. Dist. LEXIS 32126, 2012 WL 826749 (E.D.N.Y. 2012), and cases and Federal Communications Commission rulings cited therein. This distinction is not critical as far as implementation of the Albemarle County Zoning Ordinance is concerned because, as a broadband internet service, 4G service is within the definition of personal wireless service facility in the Zoning Ordinance.

35-300 The Telecommunications Act of 1996: the requirements and limitations in 47 U.S.C. § 332(c)(7)

As noted in section 35-100, 47 U.S.C. § 332(c)(7) expressly preserves local zoning authority on applications for personal wireless service authorities, subject to five limitations: (1) decisions denying wireless facilities must be in writing (47 U.S.C. § 332(c)(7)(B)(iii)); (2) decisions denying wireless facilities must be supported by substantial evidence (47 U.S.C. § 332(c)(7)(B)(iii)); (3) localities may not adopt regulations that prohibit or have the effect of prohibiting wireless services (47 U.S.C. § 332(c)(7)(B)(i)); (4) localities may not adopt regulations that unreasonably discriminate against functionally equivalent providers (47 U.S.C. § 332(c)(7)(B)(i)); and (5) localities must act on applications for approval of wireless facilities within a reasonable period of time (47 U.S.C. § 332(c)(7)(B)(iii)).

47 U.S.C. § 332(c)(7) also preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions if those facilities comply with the Federal Communications Commission’s regulations concerning emissions (47 U.S.C. § 332(c)(7)(B)(iv)).

These requirements and limitations are discussed below.

35-310 The decision must be in writing

The Telecommunications Act of 1996 requires, among other things, that decisions denying wireless facilities must be in writing. 47 U.S.C. § 332(c)(7)(B)(iii). The federal appellate courts had been split as to whether a locality denying a wireless facility must state the reasons for the denial. The Fourth Circuit Court of Appeals, whose
jurisdiction includes Virginia, had held that it is sufficient for the locality to satisfy the written decision requirement by merely stating “Denied.”

In T-Mobile South v. City of Roswell, Georgia, 574 U.S. ___, 135 S. Ct. 808 (2015), T-Mobile challenged the city council’s denial of its application for a 108-foot tall wireless facility. The United States Supreme Court considered whether, and in what form, localities must provide reasons when they deny applications for wireless facilities. The Court resolved the split among the federal circuit courts.

The Court first considered whether a locality must provide reasons for its decision. The Court considered the other relevant provisions of the Telecommunications Act, including the requirements that a locality’s decision be supported by substantial evidence, that the locality not discriminate among functionally equivalent service providers, and that localities not adopt regulations that prohibit or have the effect of prohibiting wireless services. The Court held that these requirements, as well as other concepts, “all point clearly toward the conclusion that localities must provide reasons when they deny” wireless facilities. The Court added, however, that “these reasons need not be elaborate or even sophisticated, but rather . . . simply clear enough to enable judicial review.”

The Court then addressed the timing for providing those reasons. In T-Mobile, the written minutes which may have provided the reasons for city council’s decision were not available until 26 days after the denial, just 4 days before the wireless provider had to seek judicial review. The Court held that the reasons must be provided “essentially contemporaneously” with the written decision, explaining that although the reasons can be stated separately from the decision, they must be provided “essentially contemporaneously” with the written denial. The Court held that the city council’s 26-day delay between its decision and the availability of the written minutes did not satisfy the “essentially contemporaneously” requirement.

As a practical matter, a locality that denies an application should delay issuing its written decision, which triggers the running of the time to seek judicial review, if there is any doubt as to whether the reasons for the decision can be issued “essentially contemporaneously” with the decision. A verbatim transcript accompanied by a cover letter is sufficient to satisfy the writing requirement. Celico Partnership v. Board of Supervisors of Fairfax County, 140 F. Supp. 3d 548 (E.D. Va. 2015).

35-320 The decision must be supported by substantial evidence

The United States Supreme Court has defined “substantial evidence” to mean “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera v. NLRB, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951). It requires more than a mere scintilla but less than a preponderance. 360 Communications v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000). In reviewing the decision of an elected body, the courts will consider the “reasonable mind” to be that of a reasonable legislator. AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998). The courts will not substitute their judgment for the governing body’s but will uphold the decision if it has “substantial support in the record as a whole.” Virginia Beach, 155 F.3d at 430. The court’s inquiry is to ask whether a reasonable legislator would accept the evidence in the record as adequate to support the governing body’s decision. USCOC of Va. RSA # 3, Inc. v. Montgomery County Board of Supervisors, 343 F.3d 262 (4th Cir. 2003).

Following is a list of some of the facts found by the courts in the Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, and the district courts within the Fourth Circuit, to be substantial evidence under the Act:

- Facility’s consistency with the comprehensive plan: The governing body may consider whether the proposed facility is consistent with the comprehensive plan. In Montgomery County, the location and design of the applicant’s 240-foot tower did not conform to the comprehensive plan or the regional approach for wireless facilities. In Albemarle County, the applicant proposed to construct a 100-foot tower on a mountain top, and the county’s comprehensive plan and open space plan discouraged the construction of structures that would modify ridge lines and would contribute to erosion in mountainous areas. See also Crown Castle Atlantic, L.L.C v. The Board of Supervisors of Loudoun County, 2002 U.S. Dist. LEXIS 22000 (E.D. Va. 2002) (documented concerns about the proposed height and design of the tower and the evidence that the tower could be shorter and still achieve similar functional results, as
well as the location of the proposed tower, adequately supported the board’s finding that the application did not substantially conform to the comprehensive plan); *T-Mobile Northeast L.L.C. v. Fairfax County Board of Supervisors*, 672 F.3d 259 (4th Cir. 2012) (substantial evidence supported the board of supervisors’ denial of a special exception for a proposed wireless facility where the county’s relevant policy called for facilities that provided “the least visual impact on residential areas” where the facility: (1) would be located 100 feet from two of the neighboring residences; (2) would extend 38 feet above the closest tree; (3) would rise approximately 48 feet above the average height of the existing trees on the adjacent property; (4) was to be located on a site containing concrete pads, with only a few trees and a small, grassy area with dense brush; and (5) called for supplemental vegetation that, when fully grown, would not reach a sufficient height to minimize the tree monopole’s visual impact).

- **Facility’s compliance with applicable zoning regulations:** The governing body may consider whether the proposed facility complies with applicable zoning regulations. In *Albemarle County*, the proposed tower violated the zoning ordinance’s limitations on a structure’s proximity to neighboring lots. Although the tower’s noncompliance with the zoning regulations was not the only evidence presented to justify the denial of the application, it was a significant factor in the court’s substantial evidence analysis. In *Montgomery County*, the court held that the proposed facility’s noncompliance with the county’s zoning regulations was, in and of itself, substantial evidence. In *T-Mobile Northeast L.L.C. v. Howard County Board of Appeals*, 2013 U.S. App. LEXIS 9079, 2013 WL 1849126 (4th Cir. 2013) (unpublished), the court held that substantial evidence supported the board’s finding that T-Mobile failed to make a diligent effort to site the facility on government property as required by the Howard County regulations where it made only telephone inquiries regarding siting the facility at a high school, the inquiries were poorly documented, and there was no evidence of any specifics of the request or a written proposal.

- **Height of the facility:** The governing body may consider the height of a proposed facility. *Montgomery County*, supra (rejecting the argument that the board’s decision was impermissibly based solely on aesthetic considerations in violation of Virginia law under *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) since Virginia localities are enabled to regulate the size, height and bulk of structures under Virginia Code § 15.2-2280(2)); see *T-Mobile Northeast*, supra (county’s denial of request to increase height of 100-foot pole an additional 10 feet to allow additional antennas was supported by substantial evidence that the additional height would increase the facility’s visibility; substantial evidence included the reasonable concerns of a local residential community and the negative visual impact of the facility on a historic and scenic byway); *New Cingular Wireless PCS v. Fairfax County Board of Supervisors*, 674 F.3d 270 (4th Cir. 2012) (proposed 88-foot treepole/wireless facility in a residential neighborhood, which would extend 38 feet above the closest tree and 48 feet above the average height of the existing trees on the adjacent property was inconsistent with various provisions in the comprehensive plan and its zoning regulations regarding the siting and visibility of wireless facilities).

- **Design of the facility:** The governing body may consider whether the design of a proposed facility is proper, to the extent the design implicates the structure’s size and bulk. *Montgomery County*, supra (the board could properly consider the adverse impacts arising from the applicant’s more visually intrusive lattice design).

- **Location of the facility:** The governing body may consider the location of the facility on the lot, since Virginia law expressly enables a locality to regulate the location of structures under *Virginia Code § 15.2-2280(2)*. See *Montgomery County*, supra.

- **Impacts of the facility on surrounding neighborhood:** The governing body may consider the impacts of the facility on the surrounding neighborhood. *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307 (4th Cir. 1999) (board considered visual impacts of tower on surrounding neighborhood); *Celko Partnership v. Board of Supervisors of Roanoke County*, 2004 U.S. Dist. LEXIS 27348, 2004 WL 3223288 (W.D. Va. 2004) (concerns regarding property values, aesthetics, and fit within the surrounding community are objectively reasonable and constitute substantial evidence supporting the board’s decision); *New Cingular Wireless PCS*, supra (concerns that proposed 88-foot treepole/wireless facility “do not belong in a residential community such as ours” and would “disrupt the neighborhood and country-like setting”).
• Where structures similar in appearance are regulated differently under the locality’s zoning regulations: In T-Mobile Northeast LLC v. Loudoun County Board of Supervisors, 748 F.3d 185 (4th Cir. 2014), the special exception for one of two facilities disapproved by the board of supervisors at issue in the case would have been an 80-foot tall bell tower that would house the antenna. T-Mobile contended that the board’s aesthetic considerations were not legitimate because Loudoun County’s zoning regulations would have allowed the church to construct a bell tower up to 74 feet in height for its own use, by right. The court rejected this argument and concluded that there was substantial support in the record for the board’s action, explaining that: (1) the fact that a church bell tower without a wireless facility was allowed by right did not imply that citizens may not have legitimate objections to the tower; and (2) “any zoning decision reflects a balance between the benefit provided by the facility and the aesthetic harm caused, and thus a local government might be willing to tolerate what is aesthetically displeasing for one type of use but not for another.”

These factors may be presented to the governing body in a number of ways, ranging from the testimony of members of the public, to staff reports, to the decision-makers’ personal knowledge. Widespread public opposition to the construction of a telecommunications tower also may provide substantial evidence to support a local government’s denial of a permit. See Virginia Beach, supra; Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000) (noting that public opposition, if based upon rational concerns, provides substantial evidence to deny a permit); Albemarle County, supra (determining that public opposition was a factor that contributed to a finding of substantial evidence); Winston-Salem, supra (same); New Cingular Wireless PCS, supra (47 nearby residents signed a petition in opposition and 21 attended the public hearing, and the citizen concerns were reasonably-founded concerns were rational upon which the board could rely); Celico Partnership v. Board of Supervisors of Fairfax County, 140 F. Supp. 3d 548 (E.D. Va. 2015) (photographs and photo simulations showing visual impacts). However, public opinion does not mandate a particular local zoning decision under the Act. Montgomery County, supra.

Public opposition, in whatever form it may be, must have at least some relevance and materiality to the decision before the governing body. Thus, in T-Mobile Northeast LLC v. City Council of the City of Newport News, 674 F.3d 380 (4th Cir. 2012), the court concluded that substantial evidence did not support a city council’s denial of a conditional use permit for a wireless facility at a school where the staff report and the planning commission recommended approval of the facility, and at the city council public hearing 6 persons spoke in favor of the application and only 3 spoke in opposition. The court noted that two of the three who spoke in opposition only expressed concerns about their property values; other comments in opposition included only brief passing comments about the tower’s aesthetics, which were not relevant, concern that workers servicing the tower might pose a risk to students, which was speculative, and concern about potential health effects from the facility, which was not relevant under the Telecommunications Act.

The governing body’s known experiences also may be a source of substantial evidence. Nottoway County, supra; Roanoke County, supra (“known experiences” would allow the board to reasonably conclude that the tower would have an adverse impact on residential property values and would not be aesthetically pleasing).

Neither the governing body nor the public is obligated to call, at its expense, experts to opine about the adverse impacts arising from a proposed wireless facility when its effects are reasonably apparent to non-experts. See Virginia Beach, supra (“In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, non-expert citizens . . .”).

35-330 A locality’s regulations or decisions may not prohibit or have the effect of prohibiting wireless service

Section 332(c)(7)(B)(i)(II) forbids regulations that prohibit or have the effect of prohibiting the provision of personal wireless services:

The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
This provision provides protection for wireless providers who are unable to enter a new market, but are unable to show unreasonable discrimination by a locality.

In order to establish a prohibition under section 332(c)(7)(B)(i)(II), a plaintiff must show: (1) that the locality has a general policy that effectively guarantees the rejection of all wireless facility applications; or (2) that the denial of an application for a single site is “tantamount” to a general prohibition of service. T-Mobile Northeast LLC v. Fairfax County Board of Supervisors, 672 F.3d 259 (4th Cir. 2012); 360 Communications Co. v. Board of Supervisors of Albemarle County, 211 F.3d 79, 87-88 (4th Cir. 2000). To make the latter showing, the wireless provider must demonstrate: (1) that there is an effective absence of coverage in the area surrounding the proposed facility; and (2) that there is a lack of reasonable alternative sites to provide coverage or that further reasonable efforts to gain approval for alternative facilities would be fruitless. T-Mobile, 672 F.3d at 266.

In T-Mobile Northeast LLC v. Loudoun County Board of Supervisors, 748 F.3d 185 (4th Cir. 2014), the Court concluded that T-Mobile could not meet its burden of proving that the board’s denial of its application was “tantamount” to a general effective prohibition on services by showing only that the rejected alternative sites would not close the entire deficiency in coverage, or would not provide the same level of service as the proposed facility. The effective absence of coverage does not mean a total absence; it may mean coverage containing significant gaps. However, T-Mobile had failed to show that there was a lack of alternative sites from which to provide coverage or that further efforts to gain approval for alternative facilities would be fruitless. “This cannot, however, be defined metrically by simply looking at the geographic percentage of coverage or the percentage of dropped calls. It is a contextual term that must take into consideration the purposes of the Telecommunications Act itself.” T-Mobile Northeast, 748 F.3d at 198.

To establish that the denial of an application constitutes an effective prohibition, a wireless provider bears a heavy burden of proof to establish that the locality’s regulation or decision has the effect of prohibiting service. T-Mobile, 672 F.3d at 268. Albemarle County, 211 F.3d at 87-88. The simple fact of denial with respect to a particular site is not enough to establish a prohibition of wireless service. Albemarle County, supra. “[T]here must be something more, taken from the circumstances of the particular application or from the procedure for processing that application, that produces the ‘effect’ of prohibiting wireless services.” Albemarle County, supra. The wireless provider might show that the locality has indicated that repeated individual applications will be denied because of a generalized hostility to wireless services. Albemarle County, supra. As noted above, the courts have recognized the “theoretical possibility that the denial of an individual permit could amount to a prohibition of service if the service could only be provided from a particular site,” but noting “that such a scenario ‘seems unlikely in the real world.’” Albemarle County, supra. In T-Mobile Northeast, supra, the court concluded that T-Mobile could not meet its burden of proving that the board’s denial of its application was “tantamount” to a general effective prohibition on services by showing only that the rejected alternative sites would not close the entire deficiency in coverage, or would not provide the same level of service as the proposed facility. Whatever those circumstances may be, the prohibition clause does not divest the locality of its discretion, under its site regulation or decision has the effect of prohibiting service.

To make the latter showing, the wireless provider must demonstrate: (1) that there is an effective absence of coverage in the area surrounding the proposed facility; and (2) that there is a lack of reasonable alternative sites to provide coverage or that further reasonable efforts to gain approval for alternative facilities would be fruitless. “This cannot, however, be defined metrically by simply looking at the geographic percentage of coverage or the percentage of dropped calls. It is a contextual term that must take into consideration the purposes of the Telecommunications Act itself.” T-Mobile Northeast, 748 F.3d at 198.

In Montgomery County, the board denied the 240-foot tower sought by U.S. Cellular, but approved the construction of a 195-foot tower, which would provide wireless capabilities to a significant area of the county currently without quality wireless service. The court found no prohibition because the board’s careful consideration of the application provided no indication that future tower requests would be “fruitless.” The Court concluded that “[f]ar from seeking to prohibit service, Board members indicated a willingness to ensure coverage for the entire target area.”; see also, Cellco Partnership v. Board of Supervisors of Roanoke County, 2004 U.S. Dist. LEXIS 27348, 2004 WL 3223288 (W.D. Va. 2004) (no prohibition where board denied application for 127-foot tower and associated facilities where it had previously approved 12 special use permits for towers, wireless service provider already provided service to a substantial portion of the county, and the proposed facilities would duplicate services already provided); Crown Castle Atlantic, LLC v. The Board of Supervisors of Loudoun County, 2002 U.S. Dist. LEXIS 22000 (E.D. Va. 2002) (no prohibition of service even though denial of 140-tower left significant gap in coverage because there was no evidence that further amendment to the current application or seeking approval for a facility at another location would be fruitless).
A wireless service provider fails to demonstrate that a locality effectively prohibited the provision of wireless service where: (1) the locality has previously approved numerous applications, especially those of the applicant; (2) the wireless service provider already provides coverage throughout the area; and (3) the wireless service provider fails to demonstrate that no reasonable alternative exists. *T-Mobile Northeast*, 672 F.3d at 268-269. Service that is less than optimal is not the prohibition of service.

In *New Cingular Wireless PCS v. Fairfax County Board of Supervisors*, 674 F.3d 270 (4th Cir. 2012), the court rejected the wireless service provider’s assertion that the board’s denial of a proposed 88-foot treepole/wireless facility had the effect of prohibiting service. The only evidence was the service provider’s “mere reference to a competitor’s prior experience in seeking to locate undescribed and unknown facilities in different parks.” *New Cingular Wireless PCS*, 674 F.3d 277. The court noted that the service provider had not even submitted an application to the local federal park. The court also said that where, as here, the service provider claimed that the board’s denial was tantamount to a general prohibition of service, it failed to demonstrate that further reasonable efforts to gain approval for alternative facilities would be fruitless. The service provider merely argued that obtaining approval of an application from park authorities could “take years to process with no certainty of outcome.”

In *T-Mobile Northeast LLC v. Howard County Board of Appeals*, 2013 U.S. App. LEXIS 9079, 2013 WL 1849126 (4th Cir. 2013) (unpublished), the court rejected the wireless service provider’s claim that the board’s denial of a facility had the effect of prohibiting service where there was evidence that there was some level of wireless coverage in the area, the provider failed to show that locating the facility at alternative sites would be fruitless, and the board had a strong record of approving conditional use permits sought by this provider.

An FCC ruling prohibits localities from denying an application where the sole basis for the denial is the presence of other wireless service providers in the area (known as the “one-provider rule” used by some courts). In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review, et al., WT Docket No. 08-165.

**35-340 A locality’s regulations may not unreasonably discriminate among providers of functionally equivalent services**

Section 332(c)(7)(B)(i)(I) prohibits regulations that unreasonably discriminate against functionally equivalent wireless services (i.e., PCS versus cellular or one wireless company versus another):

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not unreasonably discriminate among providers of functionally equivalent services . . .

Congress intended that localities not favor one technology over another, or favor one service provider over another. However, this limitation does not require that all wireless providers be treated identically. The fact that a decision has the effect of favoring one competitor over another, in and of itself, is not a violation of the discrimination clause. The discrimination clause provides a locality with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

The denial of an application for a wireless facility that is based on legitimate, traditional zoning principles is not “unreasonable discrimination.” *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors*, 672 F.3d 259 (4th Cir. 2012). *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). For example, if a city council approves a special use permit for a wireless facility in a commercial district, it is not necessarily required to approve a permit for a competitor’s facility in a residential district. H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

Unreasonable discrimination will not be found when the denial complained of was subject to a different application process than the approvals against which it is compared or when there is a difference in visual impacts or
the aesthetic character of the individual facility. *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors, supra.* (even where a prior application from a carrier for a 10-foot height extension, and an application for additional antennas, were approved on the same tower, the denial of a 10-foot height extension sought by T-Mobile Northeast was denied).

35-350 A locality must act on an application for approval of a wireless facility within a reasonable period of time

Section 332(c)(7)(B)(ii) requires that a locality act on a request for a wireless permit within a reasonable period of time:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

The Act does not define what a “reasonable period of time” is. However, in In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review, et al., WT Docket No. 08-165, the Federal Communications Commission issued a declaratory ruling that a “reasonable period for a wireless permit is 90 days for collocation applications and 150 days for all other applications. The reader should note that the declaratory ruling defines a “collocation” to include changes to the height of a facility not exceeding 10%, regardless of the procedure for approving such a change under the locality’s zoning regulations. See City of Arlington, Texas v. Federal Communications Commission, 569 U.S. 290, 133 S. Ct. 1863 (2013) (upholding authority of the FCC to issue the declaratory ruling).

35-360 A locality may not regulate radio frequency emissions and interference or base a decision on those grounds

One clear area of federal preemption under the Telecommunications Act is the regulation of radio frequency emissions and interference. With respect to radio frequency emissions, 47 U.S.C. § 332(c)(7)(B)(iv) provides:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

In *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*, 748 F.3d 185 (4th Cir. 2014), the board of supervisors denied a special exception and a “commission permit” for the construction of a wireless facility. Its decision on the special exception included a number of legitimate grounds to disapprove the application, but it also included the possible negative effects of radio frequency emissions as a basis. The district court ordered that the facility be approved, and the board appealed. The Fourth Circuit affirmed, holding that the board’s basis for its decision violated the prohibition against regulating on the basis of radio frequency emissions. In so holding, the court concluded: (1) the fact that the board gave valid reasons for its decision, which by themselves would have been sufficient to uphold the disapproval of the special exception, did not immunize the board from its violation of the statutory prohibition of using radio frequency emissions as a basis for disapproval; and (2) the fact that only the board’s decision on the special exception, but not the commission permit, referred to radio frequency emissions as a basis for its decision did not validate the board’s ultimate decision to disapprove the project because the two decisions were a single regulatory action.

Attempts by state or local governments to regulate in the field of radio frequency interference have been found to be preempted by federal law. Freeman v. Burlington Broadcasters Inc., 204 F.3d 311 (2d Cir. 2000); Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners, 199 F.3d 1185 (10th Cir. 1999). In Freeman, the court struck down a permit condition requiring users of a communications tower to remedy any interference with reception in homes in the area. In *Southwestern Bell*, the court voided a zoning regulation that prohibited wireless
telecommunications towers and antennas from operating in a manner that interfered with public safety communications.

In In the Matter of Petition of Cingular Wireless, et al., WT Docket No. 02-100, the Federal Communications Commission issued a memorandum opinion and order in an administrative proceeding pertaining to Anne Arundel County, Maryland. At issue was a county ordinance requiring that, prior to county issuance of a zoning certificate, owners and users of telecommunications facilities had to show that their facilities would not degrade or interfere with the county’s public safety communications systems. The FCC found that the county ordinance regulating radio frequency interference was preempted by federal law.

35-400 Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012: a locality is required to approve certain modifications to existing wireless towers and base stations

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 is found in Title VI of that law. Title VI is commonly known as the “Spectrum Act.” As explained by the FCC in its Report and Order (FCC 14-153), adopted on October 17, 2014 (the “FCC Report and Order”), the Spectrum Act, among other things, required the FCC “to allocate specific additional bands of spectrum for commercial use” and established a governmental authority to “oversee the construction and operation of a nationwide public safety wireless broadband network.” FCC Report and Order, ¶ 136.

Section 6409(a) (codified at 47 U.S.C. § 1455(a)) provides that localities must approve any application to collocate, remove, or replace (collectively, “modify” or “modification”) transmission equipment on an existing wireless tower or base station if the modification does not substantially change the physical dimensions of the tower or base station. The FCC explained that Section 6409 contributes to the “twin goals of commercial and public safety wireless broadband deployment through several measures that promote the deployment of the network facilities needed to provide broadband wireless services.” FCC Report and Order, ¶ 137.

35-410 Implementing Section 6409: the FCC’s 2013 Guidance

Implementing Section 6409 posed some difficulties because the statute failed to define “substantial change” and “transmission equipment,” which were the two fundamental terms of the law. The FCC and the wireless industry encouraged localities to define “substantial change” as it was defined in an earlier federal document identified as the “Collocation Programmatic Agreement” (“Programmatic Agreement”), an agreement between the FCC, the National Conference of State Historic Preservation Officers, and the Advisory Council on Historic Preservation. Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, DA 12-2047, FCC (01/25/13) (“Guidance on Interpretation of Section 6409(a)”).

The Programmatic Agreement states that it was intended to better manage the consultation process under Section 106 of the National Historic Preservation Act (which requires federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment) and to streamline reviews for collocating antennas on historic properties. The two most controversial elements of the Programmatic Agreement’s definition were that modifications could result in towers and their equipment increasing in height or width by up to 20 feet without being deemed to be a substantial change.

35-420 Implementing Section 6409: the FCC’s Rules

On October 17, 2014, the FCC adopted new Rules contained in a Report and Order (FCC 14-153). The Report and Order was released on October 21, 2014, and the Rules were published in the Federal Register on January 8, 2015 (Federal Register, Vol. 80, No. 5, p. 1238, et seq. (“Federal Register”). The portions of the new Rules that apply to local zoning decisions became effective April 8, 2015. The Rules implement and address some of the shortcomings of Section 6409(a). The Rules were upheld by the Fourth Circuit Court of Appeals in Montgomery County, Maryland v. Federal Communications Commission, 811 F.3d 121 (4th Cir. 2015) (rejecting challenge based on the Tenth Amendment and other grounds).
The Rules provide that any modification of an existing tower or base station resulting from the collocation, replacement, or removal of transmission equipment that does not result in the substantial change in the physical dimensions of the structure must be approved by the locality within 60 days. If the locality fails to approve the modification within the 60-day period, the application is deemed approved.

The Rules define the transmission equipment that will be eligible for collocation and replacement. The definition expands the term to not only include equipment used for personal wireless service communications, but also transmission equipment used for all FCC-licensed or authorized wireless transmissions. The FCC concluded that the expansion of the term fulfilled Congress’ intent in Section 6409 to advance the deployment of commercial and public safety broadband services. Federal Register, ¶¶ 64-66.

The Rules also define substantial change. Whether a modification results in a substantial change to the physical dimensions of an existing tower or base station goes to the heart of the Rules. If an applicant demonstrates that a modification does not result in a substantial change, a locality must approve the application. If the application would result in a substantial change, the locality may process the application under its applicable procedures. Although the definition in the Rules incorporates many of the thresholds for a substantial change in the Programmatic Agreement, it also includes two new key elements – a change is also substantial if: (1) “it would defeat the existing concealment elements of the tower or base station” (italics added); or (2) if it “does not comply with conditions associated with the siting approval of the construction or modification” of the tower or base station equipment, provided that this element does not apply to a condition that applies to the height or width of the existing tower or base station.

The Rules do not define concealment elements, which is a task that has been left to the localities to reasonably define. See, e.g., FCC Report and Order, ¶ 3: “[T]he rules we adopt today will allow local jurisdictions to retain their ability to protect aesthetic and safety interests”; Statement of Chairman Tom Wheeler, FCC Report and Order, p. 147: the new Rules “preserve[] local governments’ authority to adopt and apply the zoning, safety, and concealment requirements that are appropriate for their communities” (italics added).

35-500 State procedure for small cell facilities and micro-cell facilities

Virginia Code §§ 15.2-2316.3 and 15.2-2316.4 establish a uniform procedure and standards for localities to act on small cell facilities on existing structures, and establish a procedure for wireless service providers to obtain approval of, and install, small cell facilities in public rights of way. Small cell facilities are wireless facilities where: (1) each antenna is located inside an enclosure of no more than six cubic feet; and (2) all other wireless equipment associated with the facility has a cumulative volume of no more than 28 cubic feet, or a higher limit established by the FCC. Virginia Code § 15.2-2316.3. An existing structure is any structure that is installed or approved for installation at the time a wireless services provider or wireless infrastructure provider provides notice to a locality or the Department of Transportation of an agreement with the owner of the structure to co-locate equipment on that structure. Existing structure includes any structure that is currently supporting, designed to support, or capable of supporting the attachment of wireless facilities, including towers, buildings, utility poles, light poles, flag poles, signs, and water towers. Virginia Code § 15.2-2316.3.

A locality must review and act on applications for small cell facilities within 60 days and may not require a special use permit, special exception, or variance. Virginia Code § 15.2-2316.4(A). An application may be disapproved only for specific reasons. Virginia Code § 15.2-2316.4(B)(4).

An applicant may seek approval of up to 35 small cell facilities in a single application. Virginia Code § 15.2-2316.4(B)(1). Localities may not charge more than $100 each for up to 5 small cell facilities on an application, and $50 for each additional small cell facility on the application. Virginia Code § 15.2-2316.4(B)(2).

The installation, placement, maintenance, or replacement of micro-wireless facilities that are suspended on cables or lines that are strung between existing utility poles in compliance with national safety codes are exempt from locality permitting requirements and fees. Virginia Code § 15.2-2316.4(C). Micro-cell facilities are small cell facilities that are not larger in dimension than 24 inches in length, 15 inches in width, and 12 inches in height and that have an exterior antenna, if any, not longer than 11 inches. Virginia Code § 15.2-2316.3.
Virginia Code §§ 15.2-2316.4.1 through 15.2-2316.4.3 establish procedures and standards for localities to act on applications for administrative review-eligible projects. 

Administrative review-eligible projects are projects that provide for:

1. The installation or construction of a new structure that is not more than 50 feet above ground level, provided that the structure with attached wireless facilities is (i) not more than 10 feet above the tallest existing utility pole located within 500 feet of the new structure within the same public right-of-way or within the existing line of utility poles; (ii) not located within the boundaries of a local, state, or federal historic district; (iii) not located inside the jurisdictional boundaries of a locality having expended a total amount equal to or greater than 35 percent of its general fund operating revenue, as shown in the most recent comprehensive annual financial report, on undergrounding projects since 1980; and (iv) designed to support small cell facilities; or

2. The co-location on any existing structure of a wireless facility that is not a small cell facility.

Virginia Code § 15.2-2316.3.

Virginia Code § 15.2-2316.4:1(A) prohibits localities from requiring a special exception, special use permit, or variance in order to install an administrative review-eligible project. At most, localities may require an administrative review prior to issuing a zoning permit. Virginia Code § 15.2-2316.4:1(A). Localities may charge a fee not to exceed $500. Virginia Code § 15.2-2316.4:1(B). Virginia Code § 15.2-2316.4:1 also establishes the period by which localities must act on applications, the requirements if the locality disapproves an application, and an appeal procedure.

Virginia Code § 15.2-2316.4:2 prohibits localities from disapproving an application on specified grounds, prohibits localities from requiring an application to provide proprietary, confidential, or other business information to justify the need for the project, and prohibits localities from imposing a number of specified requirements or limitations on an approval.

Virginia Code § 15.2-2316.4:3(A) prohibits localities from requiring zoning approval for routine maintenance or the replacement of wireless facilities or wireless support structures within a six-foot perimeter with wireless facilities or wireless support structures that are substantially similar or the same size or smaller. However, Virginia Code § 15.2-2316.4:3(B) clarifies that nothing in the laws pertaining to small cell facilities and administrative review-eligible projects prohibits localities from limiting the number of new structures or the number of wireless facilities that can be installed in a specific location.
Appendix A

Authorized Signatories for Land Use Applications

1. Introduction

This appendix delineates those persons authorized to sign land use applications and proffers on behalf of corporations, partnerships, religious organizations, trusts, and other unincorporated bodies, societies, benevolent associations, and organizations. This appendix focuses on the most common entities and relationships county departments will encounter. Contact the county attorney’s office if you are faced with an entity that is not addressed here.

This appendix also identifies the supporting documentation an applicant should submit to demonstrate the authority of the person signing an application or proffer.

2. Stock corporations

Authorized signatories: The authorized signatories are: (1) the board of directors; (2) any person in the corporation expressly authorized by the board of directors to complete prescribed acts on behalf of the corporation (Virginia Code § 13.1-673); (3) a committee of the board of directors (Virginia Code § 13.1-689); or (4) a corporate officer as provided in the by-laws or in a resolution of the board of directors (Virginia Code § 13.1-694).

Supporting documentation: The supporting documentation is: (1) for a board of directors, the articles of incorporation or a shareholders agreement may limit the board’s statutory authority (Virginia Code § 13.1-673); (2) for a person expressly authorized by the board of directors, written evidence of that authorization, such as a board resolution or board minutes; (3) for a committee, an action of the board of directors authorizing the committee to act; the articles of incorporation or the by-laws may limit the statutory authority (Virginia Code § 13.1-689); (4) for a corporate officer, the by-laws or the delegating resolution of the board of directors (Virginia Code § 13.1-694).

3. Nonstock corporations

Authorized signatories: The authorized signatories are: (1) the board of directors; (2) any person in the corporation expressly authorized by the board of directors to complete prescribed acts on behalf of the corporation (Virginia Code § 13.1-853); (3) a committee of the board of directors (Virginia Code § 13.1-869); or (4) a corporate officer as provided in the by-laws or in a resolution of the board of directors (Virginia Code § 13.1-872).

Supporting documentation: The supporting documentation is: (1) for a board of directors, the articles of incorporation and the by-laws, the latter of which may include a member or director agreement, may limit the board’s statutory authority (Virginia Code §§ 13.1-852.1, 13.1-853); (2) for a person expressly authorized by the board of directors, written evidence of that authorization such as a board resolution or board minutes; (3) for a committee, an action of the board of directors authorizing the committee to act; the articles of incorporation or the by-laws may limit the statutory authority (Virginia Code § 13.1-869); (4) for a corporate officer, the by-laws or the delegating resolution of the board of directors (Virginia Code § 13.1-872).

4. Limited liability companies (“LLCs”)

Authorized signatories: The authorized signatories are: (1) if the LLC is not a manager-managed LLC, any member; (2) if the LLC is a manager-managed LLC, the manager or any member unless the articles of organization limit the members’ authority (Virginia Code § 13.1-1021.1(A)); or (3) unless otherwise provided in the articles of organization or an operating agreement, the members have the power and authority to delegate to one or more other persons, including agents, officers and employees of a member or manager of the LLC, members’ rights and powers to manage and control the business affairs of the LLC, and to delegate by a management agreement or other agreement with, or otherwise to, other persons (Virginia Code § 13.1-1022(D)).
Supporting documentation: The supporting documentation is the articles of organization (Virginia Code § 13.1-1021.1(A)) and when the power is delegated to someone other than a manager or a member, also the operating agreement and, if applicable, any other agreement (Virginia Code § 13.1-1022(D)).

5. Partnerships

Authorized signatories: The authorized signatories are: (1) if the land is held in the name of the partnership, by any partner; (2) if the land is held in the name of a partner, but the instrument transferring to the partner indicates the partner’s capacity as a partner or the existence of a partnership, but without identifying the partnership, by the partner in whose name the property is held; (3) if the land is held in the name of a person, who is a partner, but the instrument transferring to the person does not indicate the person’s capacity as a partner or the existence of a partnership, by the person in whose name the property is held (Virginia Code § 50-73.92).

Supporting documentation: The supporting documentation is the statement of partnership authority, which may limit the authority of one or more partners (Virginia Code § 50-73.93).

6. Limited partnerships

Authorized signatories: The authorized signatories are any general partner (Virginia Code § 50-73.29).

Supporting documentation: The supporting documentation is the partnership agreement, or amendments thereto, which may limit the authority of one or more general partners (Virginia Code § 50-73.29).

7. Unincorporated churches and other religious bodies

Authorized signatories: The authorized signatories are: (1) all trustees who hold title to the property (Virginia Code §§ 57-8 and 57-15(A)); (2) the authorized signatory of a corporation created pursuant to Virginia Code § 57-16.1 to hold, administer and manage its real or personal property (Virginia Code § 57-15(B)(ii)); or (3) a bishop, minister or ecclesiastical officer (Virginia Code § 57-16).

Supporting documentation: The supporting documentation is: (1) for trustees, an authorizing court order (Virginia Code § 57-15(A)); (2) for the corporation holding title, the appropriate corporate documents (see, e.g., section 3, above) or; (3) for a bishop, minister or ecclesiastical officer, the laws, rules or ecclesiastical polity of the entity that authorizes the person to hold, improve, mortgage, sell and convey the property (Virginia Code § 57-16).

Comment: The terms describing the various types of entities (churches, religious congregations, and religious societies) are not defined by statute. The Virginia Supreme Court has said that Virginia Code §§ 57-7.1 through 57-17 encompass property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body. Norfolk Presbyterian v. Bollinger, 214 Va. 500 (1974).

8. Incorporated churches and other religious bodies

Authorized signatories: See section 7, paragraph 1, above.

Supporting documentation: See section 7, paragraph 2, above.

Comment: In 2005, Virginia Code § 57-15 was amended to allow religious organizations to incorporate. Virginia Code § 57-15(B)(i) authorizes trustees, as an alternative to holding, administering and managing property in the name of the trustees, to incorporate the church or religious body and to transfer the title of the real and personal property held by them to the incorporated church or religious body.
9. **Land trusts**

*Authorized signatory:* The authorized signatories are all trustees who hold title to the property (*Virginia Code § 55-17.1*); provided (1) if a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust (*Virginia Code § 64.2-756(D)*); and (2) a trustee may delegate to a co-trustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly (*Virginia Code § 64.2-756(E)*)).

*Supporting documentation:* The supporting documentation is the deed of conveyance to the trustees and the trust instrument (*Virginia Code § 55-17.1*).

10. **Land held under the Virginia Uniform Transfers to Minors Act**

*Authorized signatory:* The authorized signatory is the custodian (*Virginia Code § 64.2-1912*).

*Supporting documentation:* The supporting documentation is the instrument evidencing the transfer to the custodian under the Virginia Uniform Transfers to Minors Act (*Virginia Code § 64.2-1909*).

11. **Unincorporated bodies or societies who acquire land for charitable purposes**

*Authorized signatories:* The authorized signatories are all trustees who hold title to the property (*Virginia Code § 57-18*, which incorporates Virginia Code §§ 57-8 and 57-15 by reference).

*Supporting documentation:* The supporting documentation is the authorizing court order (*Virginia Code § 57-18*).

12. **Benevolent associations (such as armed forces veterans associations, Freemasons, Odd Fellows, and other fraternal organizations)**

*Authorized signatories:* The authorized signatories are all trustees who hold title to the property (*Virginia Code § 57-19*, which incorporates Virginia Code §§ 57-8 and 57-15 by reference).

*Supporting documentation:* The supporting documentation is the authorizing court order (*Virginia Code § 57-19*).
Appendix B

The Freedom of Information Act: Responding to a Request for Records

This appendix lists ten things a public body’s officers and employees should know about responding to requests for public records.

1. All records in the possession of the public body are presumed to be public records.

All public records are presumed to be open for inspection during regular business hours, unless an exemption is properly invoked. Virginia Code § 2.2-3700. Ultimately, it is the subject of the record that determines whether it is a public record, not where the record is kept. Burton v. Mann, 74 Va. Cir. 471 (2008) (“Central to the issue of production is whether the record can be tied to the ‘transaction of public business.’ Whether a record is found in a public databank, or one privately contracted for by the officer, agent, or employee of a public body is not determinative of the outcome”). Only records that are “prepared or used in the transaction of public business” are “public records.” Virginia Code § 2.2-3701. For example, emails between members of a public body that are not related to the transaction of public business are not “public records” under FOIA. A0-1-00. As stated by the court in Burton, “while it may be of interest what our public officials are eating, personal diet in most cases has nothing to do with the public business of the official. Thus, ‘[p]ublic business encompasses those matters over which the public governmental body has supervision, control, jurisdiction, or advisory power.’ [citation omitted].”

In addition, if a public body transfers possession of its public records for storage, maintenance or archiving, it remains the custodian of the records. Virginia Code § 2.2-3704.

2. Many types of records are public records.

Any record pertaining to the transaction of public business and which is prepared, owned or in the possession of the public body or its officers or employees is a public record, and public records include:

A. Draft documents, such as draft staff reports, which are retained.

B. Previously unreleased documents, such as final staff reports that will be provided to the planning commission and the governing body.


E. Electronic communications such as e-mail if their content otherwise makes them public records.

The intersection of federal copyright law and the Virginia Freedom of Information Act

Subdivision plats, site plans and other engineered drawings submitted by applicants for review and approval by a public body are copyrighted. Making those records available to the public for copying in response to a request under FOIA likely falls under the “fair use” rules (17 U.S.C. § 107) that allow copyrighted documents to be used in a fair and reasonable manner. In Lindberg v. County of Kitsap, 133 Wn.2d 729 (1997), two citizens requested copies of engineering drawings to be used by them in preparation for their comments and criticism on the residential development proposals in public hearings and appeals. The county refused to release the drawings because they were copyrighted. The Washington Supreme Court held that the use of the documents by the citizens as proposed was a reasonable fair use and, therefore, the county improperly failed to release the records under Washington’s freedom of information laws.
### The intersection of federal copyright law and the Virginia Freedom of Information Act

Under FOIA, a public body may not ask the requestor the purpose for the request. When these types of records are copied or made available to the requestor for copying, the Virginia Attorney General has suggested that the response letter include a notice that the documents may be protected from use by copyright: “These documents are being provided because they are public records under the Virginia Freedom of Information Act and their disclosure is required. These documents may be protected from use by copyright laws and permission should be obtained from the copyright owner before making any further copies, public distribution or other copyright-protected use of the work.”

3. **Public records must be in existence in order to be subject to the Freedom of Information Act.**

Public records subject to disclosure under the Freedom of Information Act are only those that exist at the time of the request. *Virginia Code § 2.2-3704(D).* The public body is not required to create a public record; however, it may abstract or summarize information under terms and conditions agreed to between the requester and the public body.

4. **Some public records are exempt from mandatory disclosure.**

There are few records that may be in the possession of a public body’s planning, zoning and similar departments that may be exempt from mandatory disclosure. Public records exempt from mandatory disclosure include:

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<tr>
<th>Code Section</th>
<th>Description</th>
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<tr>
<td>3705.1(1)</td>
<td>Personnel records. <em>Virginia Code § 2.2-3705.1(1).</em> An employment contract between a public body and an officer or employee is not a personnel record that is exempt from disclosure. The Act expressly makes employment contracts subject to public disclosure. <em>Virginia Code § 2.2-3705.1(1).</em></td>
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<tr>
<td>3705.1(13)</td>
<td>Those portions of public records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body, except when requested by the subject of the records. <em>Virginia Code § 2.2-3705.1(13).</em></td>
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<td>3705.1(2)</td>
<td>Written advice of the public body’s attorney; legal advice protected by the attorney-client privilege. <em>Virginia Code § 2.2-3705.1(2).</em> Billing records may fall within the attorney-client exceptions to disclosure if they reveal confidential information, including the motive of the client in seeking representation, or if they reveal litigation strategy. <em>Bergano v. City of Virginia Beach,</em> 296 Va. 403, 410, 821 S.E.2d 319 (2018) (holding that the exemption did not apply to, and that it was improper for the City to withhold, billing information that was broad such as “trial preparation and document review” and “attend trial.” Records indicating the specific nature of the services provided, such as researching particular areas of law, may also fall within these exceptions when the disclosure would compromise legal strategy. <em>Bergano,</em> supra. Disclosures that would reveal analytical work product or legal advice are also exempt from disclosure under FOIA. <em>Bergano,</em> supra.</td>
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<td>3705.1(3)</td>
<td>Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting. <em>Virginia Code § 2.2-3705.1(3); see the discussion of Bergano v. City of Virginia Beach in section 4(D).</em></td>
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| 3705.1(5)    | Records recorded in or compiled exclusively for use in closed meetings. *Virginia Code § 2.2-3705.1(5).* If minutes are prepared for a closed meeting, the minutes are exempt from mandatory disclosure. *Virginia Code § 2.2-3712(H).* “[M]inutes of closed meetings (if any are taken), records recorded in closed meetings (such as individual members' notes), and records prepared exclusively for use in closed meetings (which may include
records prepared solely for distribution and use by members during a closed meeting) are all exempt from mandatory disclosure under FOIA.” AO-03-10.

G. Portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the building code or for obtaining a building permit that would identify specific trade secrets, and those that reveal certain information that would jeopardize the safety and security of the occupants of any building other than a single-family dwelling in the event of terrorism. Virginia Code § 2.2-3705.2(2).

H. Working papers of the mayor or chief executive officer of any public body; provided that no information, which is otherwise open to inspection under the Freedom of Information Act, is exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence. Virginia Code § 2.2-3705.7(2). In addition, information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision is not deemed to be working papers. Virginia Code § 2.2-3705.7(2). “Working papers” are records prepared by or for the mayor’s or chief executive officer’s personal or deliberative use. Virginia Code § 2.2-3705.7(2).

5. Public records are open to inspection and copying during regular office hours.

Unless an exemption applies, all public records are open to inspection and copying during the regular office hours of the custodian of records. Virginia Code § 2.2-3704.

A. Who is eligible to request. Access to these records may not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. Virginia Code § 2.2-3704. The denial of access to public records to non-citizens of the Commonwealth and others not violate the privileges and immunities and the commerce clauses of the United States Constitution. McBurney v. Young, 569 U.S. 221, 133 S. Ct. 1709 (2013).

B. Who may receive request. The request may be given to any officer or employee, and it needs to be immediately forwarded to the custodian.

C. Form of the request. A request for public records must identify the requested records with reasonable specificity. Virginia Code § 2.2-3704. However, the request need not be made in writing. 1990 Va. Op. Atty. Gen. 9. The request also need not refer to the Freedom of Information Act in order to invoke the provisions of the Act or to impose the time limits for a response by the public body. Virginia Code § 2.2-3704.

D. Production. Although the methods and extent of records searches may vary, any searches for records requested under FOIA must be carried out in good faith. AO-02-12; AO-04-10. A public body producing copies of records, or making them available for inspection and copying, is not required to sort or categorize the records into the categories of records identified by the requestor. AO-02-12 (noting that public bodies retain their records in different ways, and that there is no express requirement in FOIA for a public body to provide numbered responses, or their equivalent, to a request). All that is required is that the public body make the records available in good faith and that it produce the records in a manner that would not obfuscate the information or otherwise make it more difficult for the requestor. AO-02-12.

6. Public body response required in 5 working days.

The public body must respond to a records request within 5 working days after its receipt. Virginia Code § 2.2-3704(B). The failure to make any response to a request for records is a violation of the Act and is deemed a denial of the request. Virginia Code § 2.2-3704(E); Fenter v. Norfolk Airport Authority, 274 Va. 524, 649 S.E.2d 704 (2007) (responses to citizen’s requests for information concerning the airport’s authority to subject any vehicles to search violated FOIA where the airport’s response to his second request was that it had contacted the Transportation Security Administration and would respond upon receipt of advice from that agency, and its
response to his third request was that it had referred the matter to its legal counsel. If the requested records are not provided within 5 working days, one of the following four responses must be provided within 5 working days:

A. **Records entirely withheld.** The records are being entirely withheld. *Virginia Code § 2.2-3704(B)(1).* The response must identify, which reasonable particularity the volume and subject matter of the withheld records, and cite, as to each category of withheld records, the specific code section that authorizes withholding the records. *Virginia Code § 2.2-3704(B)(1).*

B. **Records partially provided, partially withheld.** The requested records are being provided in part and are being withheld in part. *Virginia Code § 2.2-3704(B)(2).* The response must identify, which reasonable particularity the volume and subject matter of the withheld records, and cite, as to each category of withheld records, the specific code section that authorizes withholding the records. *Virginia Code § 2.2-3704(B)(2).*

C. **Records not found or do not exist.** The requested records could not be found or do not exist. *Virginia Code § 2.2-3704(B)(3).* However, if the public body knows that another public body has the requested records, the response must include contact information for the other public body. *Virginia Code § 2.2-3704(B)(3).*

D. **Time extension to respond required.** It is not practically possible to provide the requested records or to determine whether they are available within the 5 working day period. *Virginia Code § 2.2-3704(B)(4).* The response must specify the conditions that make a response within the 5-day period impossible. *Virginia Code § 2.2-3704(B)(4).* If the response is made within 5 working days, up to an additional 7 working days is allowed. *Virginia Code § 2.2-3704(B)(4).* It is recommended that for voluminous requests, the custodian should contact the requester to reach an agreement for a reasonable time to make the records available.

7. **Situations arising from records kept in certain form.**

Certain forms of records may impose additional obligations, and certain requests may create unusual problems:

A. **Public records maintained in an electronic data processing system, computer database, or any other structured collection of data not exempt from disclosure must be made available to a requester at a reasonable cost.** *Virginia Code § 2.2-3704(G).* When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but must provide access to the nonexempt records as provided by FOIA. *Virginia Code § 2.2-3704(G).*

B. **The public body must produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester.** *Virginia Code § 2.2-3704(G).*

8. **Reasonable charges for costs.**

The public body may make reasonable charges for its actual costs incurred in accessing, duplicating, supplying, or searching for the requested records. *Virginia Code § 2.2-3704(F).* Factors to be taken into account in determining reasonable charges include, but are not limited to: (1) the number of hours reasonably necessary to compile, copy and assemble the records; (2) the cost of computer time used; and (3) the cost of reproducing the records. *1983-84 Va. Op. Atty. Gen. 436.* Following are some additional considerations:

A. **Duplicating a record.** For duplicating a record, the public body may not charge more than the actual cost of duplication. *Virginia Code § 2.2-3704(F).* The Virginia Freedom of Information Advisory Council has long advised that a public body may not charge the same rates for providing electronic records as it does for providing paper records because the actual costs are not the same. *AO-05-13* (opining that it was not clear how $1.00 per page charge for a 53-page electronic document reflected the actual costs because the number of pages in an electronic document does not affect the actual cost or time spent).
B. **GIS records.** For supplying records produced from a geographic information system, the public body may not charge more than the actual cost of supplying the records. No charge may be imposed upon the owner of the land that is the subject of the request. *Virginia Code § 2.2-3704(F).*

C. **Reviewing records.** A public body may charge the time spent to review records to confirm that the records are responsive to the request, whether they are exempt from disclosure under FOIA, and whether they are prohibited from disclosure under other law. *American Tradition Institute v. Rector and Visitors of the University of Virginia,* 287 Va. 330, 756 S.E.2d 435 (2014); see also *AO-02-07* ("a public body may charge for staff time spent redacting portions or records as part of the actual cost of supplying the records").

D. **Employee or official time.** An officer or employee’s time may not be charged at a rate that exceeds his or her rate of pay. *AO-03-12.* A public body may not charge the salary of an employee whose sole function for the time charged is to watch a requester as he reviews public records. *1989 Va. Op. Atty. Gen. 12.* A public body also may not charge to have an attorney review or double-check responses to a FOIA request when the review is part of the general business of the public body and is not a necessary part of accessing, duplicating, supplying, or searching for the requested records. *AO-02-07.*

9. **Advance deposit of costs may be required for large requests.**

If the public body determines in advance that the charges for producing the requested records are likely to exceed $200, it may require that the requester agree to pay a deposit not to exceed the amount of the advance determination, and the period within which the public body must respond to a request is tolled for the amount of time that elapses between the notice of the advance determination to the requester and the response of the requester. *Virginia Code § 2.2-3704(H).* Where there is significant disparity between a public body’s estimate for a deposit, and the greater actual costs, a court may hold the public body to the estimate. *Batterson v. Voorhees and the County of Powhatan,* 2017 Va. Cir. LEXIS 384 (2017) ("the County should be held" to its $200 estimate where the County’s final cost amount was $1,356.33).

10. **Duties of the designated custodian of records.**

The designated custodian of records must:

A. Be familiar with the requirements for complying with the Freedom of Information Act.

B. Respond to all requests for public records. The following is a response schedule based on a schedule used by the Albemarle County Schools Division:

- **Day request is received:** Recipient forwards copy of request to the custodian. Custodian determines sources of public records and makes a preliminary determination as to the scope of the request, whether a time extension to respond may be required, whether the request needs to be clarified by the requestor, whether the request will require an advance deposit, and whether negotiating a narrowing of the scope of the request will be required.

- **Working day 1:** Custodian, working with department staff and the public body’s attorney, determines whether to provide full response, whether to inform requestor that time extension will be required, whether the request needs to be clarified, whether an advance deposit may be required, and whether to negotiate narrowing the scope of the request.

- **Working day 2:** Custodian gathers records, estimates cost of production and copying, if requested, and contacts the requestor to negotiate narrowing the scope of the request, if necessary.

- **Working day 3:** Custodian provides any records that may be subject to mandatory or discretionary withholding under FOIA or other laws to the public body’s attorney to determine whether exemption from disclosure applies.
• **Working day 4:** Custodian reviews the records for compliance with request and compliance with FOIA, consults with the public body’s attorney if necessary, and prepares written response to requestor.

• **Working day 5:** Custodian sends a written response to the requestor (see sections 6 and 9 above).

C. Consult the public body’s attorney to determine whether an exemption from mandatory disclosure applies, if there is any doubt.

D. Take all necessary precautions for preserving and safekeeping public records. *Virginia Code § 2.2-3704(A)*.

E. Be familiar with the Virginia Public Records Act (also sometimes referred to as the “Records Retention Act”) (Virginia Code § 42.1-76 et seq.) and the Library of Virginia’s schedules pertaining to the retention and destruction of public records.
Appendix C

The Freedom of Information Act: Meetings

Introduction

The Virginia Freedom of Information Act (“FOIA”):

[E]nsures the people of the Commonwealth . . . free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.

Virginia Code § 2.2-3700(B). FOIA requires that the meetings of a locality’s boards, commissions, and committees appointed by the governing body be open to the public. Virginia Code § 2.2-3700 et seq. Open government is the overriding policy of FOIA. Taylor v. Worrell Enterprises, Inc., 242 Va. 219, 409 S.E.2d 136 (1991). FOIA also requires that records of a public body are public records available for public inspection and copying, unless an exception prohibits their disclosure or allows the public body to not disclose some or all of a particular record.

Meetings

1. A meeting may exist when three or more members of a public body are physically assembled for the purpose of discussing or transacting business; if a quorum of the public body is less than three, then a meeting exists whenever a quorum is established.

2. A meeting does not exist when three or more members of a public body are physically assembled, but not for the purpose of discussing or transacting business of the public body, and the gathering or attendance was not called or prearranged with any purpose of discussing or transacting business of the public body (e.g., at a dinner or a VDOT informational meeting).

3. Electronic communications such as e-mail communications between three or more members of a public body may be an unlawful meeting if the communications are conducted in real time; e-mail communications where there are periods of time between each correspondence are unlikely to constitute a meeting.

4. If three or more members of a public body continue discussions of public business after a public meeting has adjourned, the gathering is a meeting under FOIA, even if the members are discussing the business with staff.

5. Public meetings are the rule; closed meetings are the exception; a closed meeting is permitted only when an express statutory exemption from the public meeting requirement applies. For example, the following discussions may be conducted in a closed meeting under Virginia Code § 2.2-3711(A):

   a. Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

   b. Discussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.

6. A meeting may be established under FOIA even though a quorum is not established (e.g., 3 members of a 7-member public body may establish a meeting under FOIA, even though 4 members are required to be present to establish a quorum).
7. If a quorum is not established, the only action the public body may take at a meeting is to adjourn the meeting.

8. The date, time, and location of a public meeting must be posted 3 working days prior to the meeting.

Closed Meeting Motions and Certification

Each motion to go into a closed meeting must state the subject, the purpose, and the specific statutory reference authorizing the exemption from the public meeting requirement.

**Closed Meeting Motion**

(Consultation with legal counsel – actual or probable litigation)

I move that the [Council/Board/Commission] go into a closed meeting pursuant Virginia Code § 2.2-3711(A)(7) to consult with legal counsel and briefings by staff members regarding specific legal matters pertaining to actual [or probable] litigation relating to [describe the matter with particularity, e.g., the disapproval of a subdivision plat; the denial of a rezoning.

**Closed Meeting Motion**

(Consultation with legal counsel – specific legal matters)

I move that the [Council/Board/Commission] go into a closed meeting pursuant to Virginia Code § 2.2-3711(A)(8) to consult with legal counsel [retained by the Council/Board/Commission] regarding specific legal matters pertaining to [describe the matter with particularity] requiring the provision of legal advice by legal counsel.

**Closed Meeting Certification**

I move that the [Council/Board/Commission] certify by a recorded vote that, to the best of each [Council/Board/Commission] member’s knowledge, only public business matters lawfully exempted from the open meeting requirements of the Virginia Freedom of Information Act and identified in the motion authorizing the closed meeting were heard, discussed, or considered in the closed meeting.
Appendix D

Understanding the Citations of Judicial Opinions for the Non-Lawyer

1. Introduction

Public officers, planners and zoning officials will, from time to time, read materials (such as this handbook) in which court cases are cited. Case law may often be cited in contested matters before the BZA or even hotly challenged rezoning or special use permit applications. This appendix is a basic guide to understanding the references to these cases.

2. The courts issuing decisions that will be cited

In the United States, both the federal and state judicial systems may consider land use issues, although the overwhelming majority of the cases are decided in the state courts.

In the federal court system, the trial courts are called “district courts,” the intermediate appellate courts are called “courts of appeals,” which are separated into multi-state territories called “circuits” and, of course, the United States Supreme Court. Virginia has two “districts” – an eastern and a western district, and is one of several mid-Atlantic states that make up the Fourth Appellate Circuit of the Court of Appeals. Federal courts typically consider land use cases when the United States Constitution (such as an equal protection claim) or a federal law (such as the Religious Land Use and Institutionalized Persons Act of 2000 or the Telecommunications Act of 1996) is in issue.

In the Virginia state court system, the trial courts are called the “general district court” and the “circuit court.” With limited exceptions where multiple localities may share a district or circuit court, each locality has its own general district and circuit courts. The land use issues considered by a general district court are generally limited to zoning enforcement cases. The circuit court is the trial court for most other land use issues, such as challenges to rezonings, special use permits, disapproved subdivision plats and site plans, appeals of BZA decisions, and enforcement actions seeking injunctive relief. The Virginia Court of Appeals is the intermediate appellate court, and its involvement in land use issues is generally limited to appeals of criminal convictions in zoning enforcement cases. Finally, the Virginia Supreme Court considers appeals from decisions of the circuit court and the Court of Appeals.

3. The format of the case citations

The case citations inform the reader of the court that issued a decision and when that decision was issued. A case citation identifies the names of the parties, followed by the volume of the official reporter service, identification of the reporter service, followed by the page number at which the case begins, and ending with the year in which the decision was issued.

A citation will list the parties’ names (where there are multiple plaintiffs or defendants, the common practice is to refer to just the first party on each side), followed by references to the volume of the reporter service, the page number on which the opinion begins, ending with the year the opinion was issued. For example, a citation to Cook v. Board of Zoning Appeals of City of Falls Church, 244 Va. 107 (1992) informs the reader that the two parties were a person named Cook and the Falls Church BZA, that the case can be found on page 107 of volume 244 of the Virginia Reports (“Va.”), and that the decision was issued in 1992.

Virginia cases are cited as follows:

- Virginia Supreme Court: Cook v. Board of Zoning Appeals of City of Falls Church, 244 Va. 107 (1992). The “Va.” refers to Virginia Reports, which contains only opinions from the Virginia Supreme Court. A citation from the unofficial reporter – South Eastern Reporter – also may be included (“___ S.E.2d ___”).
• Virginia Court of Appeals: Lawless v. County of Chesterfield, 21 Va. App. 495 (1995). The “Va. App.” refers to the Virginia Court of Appeals Reports, which contains only opinions of the Virginia Court of Appeals. A citation from the unofficial reporter – South Eastern Reporter – also may be included (“___ S.E.2d ___”).

• Virginia Circuit Court: Edenton v. Board of Zoning Appeals of Spotsylvania County, 37 Va. Cir. 176 (1995). Virginia Circuit Court decisions are not reported in an official reporting service. A Virginia circuit court decision may be cited at least three different ways, depending on which service is reporting the case. The volume number, reporting service and page numbers may appear as either “___ Va. Cir. ____,” if the case is reported in a published hardbound series, “___ Va. Cir. LEXIS ____,” if the case is reported by LEXIS, or “___ WL ____” with a reference to the circuit court that immediately precedes the date, if the case is reported by Westlaw.

Federal cases are cited as follows:

• United States Supreme Court: Smith v. Jones, 555 U.S. 777, 854 S.Ct. 123, 940 L.Ed. 333 (2004). The published opinions of the United States Supreme Court appear in the United States Reports (“___U.S. ___”) and in two unofficial reporter services as well. All three reporter services have only United States Supreme Court decisions.

• United States Court of Appeals: 360 Communications v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000). Published opinions from the United States Court of Appeals appear in the Federal Reporter. “F.3d” refers to the Federal Reporter (Third Series), which contains only opinions from the United States Courts of Appeals. “(4th Cir. 2000)” informs the reader that the decision is from the Court of Appeals, Fourth Appellate Circuit (i.e., the “Fourth Circuit”), and was issued in 2000. Unpublished opinions do not appear in the Federal Reporter, but may appear in a service such as LEXIS. Unpublished opinions appearing in LEXIS are cited as, for example, Living Water Church of God v. Charter Township of Meridian, 2007 U.S. App. LEXIS 28825 (6th Cir. 2007) (unpublished).

• United States District Court: Pathways Psychological v. Town of Leonardtown, 133 F. Supp. 2d 772 (D.Md. 2001). “F. Supp. 2d” refers to the Federal Supplement (Second Series), which contains only decisions of the United States District Courts (trial courts). “(W.D. Va. 1999)” informs the reader that the decision is from the United States District Court for the Western District of Virginia, and was issued in 1999. Not all opinions from the United States District Courts are published in the Federal Supplement and, instead, may appear only in a service such as LEXIS. Opinions appearing in LEXIS are cited as, for example, as United States v. Town of Garner, 2010 U.S. Dist. LEXIS 62097 (E.D.N.C. 2010).

Decisions reported from other State courts include the citations from the official reporter and the unofficial reporter.

4. The precedential value of the cases cited, i.e., how much weight should be given to a decision

In the federal court system, United States Supreme Court decisions are controlling throughout the United States on the legal issues decided. Descending the federal court hierarchy, the decisions of the United States Court of Appeals, Fourth Appellate Circuit (the “Fourth Circuit”) are controlling in Virginia on the issues decided, and trump any decisions of the lower United States District Courts. As between decisions of the Fourth Circuit and other federal Courts of Appeal, the decisions of the Fourth Circuit are controlling in Virginia. As between decisions of the United States District Courts, the decisions of the District Courts of the Eastern and Western Districts of Virginia are controlling over District Court decisions from other states. Of course, decisions from other Courts of Appeals and District Court are instructive on those issues not directly decided by the Fourth Circuit Court of Appeals or a federal District Court in Virginia.

In the Virginia state court system, Virginia Supreme Court decisions are controlling throughout Virginia on the legal issues decided by that court. A circuit court is a state trial court, and a decision of a circuit court is instructive and may be controlling within the locality served by the court (but not necessarily) on an issue not decided by the Virginia Supreme Court. Circuit court decisions may be considered to be instructive and, in certain cases, persuasive,
to another circuit court, particularly where the Virginia Supreme Court has not addressed the topic at issue. See, e.g., Johnson v. Niemela, 58 Va. Cir. 199 (2002).

However, the decisions of circuit court judges are not binding on other circuit court judges, Jay-Ton Construction Co. v. Bowen Construction Services, 62 Va. Cir. 414 (2003); 7600 Limited Partnership v. QuesTech, Inc., 41 Va. Cir. 60 (1996), even assuming complete similarity of the facts. Laws v. Coleman-Bullington, Inc., 5 Va. Cir. 251 (1985). Indeed, a circuit court decision is not even binding on the same circuit court or on the same circuit court judge. Johnson, supra (“Counsel for the Plaintiff correctly points out that I held to the contrary in Leasecomm Corp. v. Product Group, et al., 46 Va. Cir. 135 (Fairfax 1998). But consistency is an overrated virtue, and Judge Johnson’s reasoning is more persuasive”). This principle is particularly true if the circuit court judge determines that the prior decision was erroneous. As one Circuit Court has said, the balanced application of legal principles and the cause of equal justice under the law “cannot be advanced if a judge makes an erroneous decision solely to maintain consistency with the judge’s own equally-erroneous past decision. In the words of then-Chief Justice Harry L. Carrico, ‘the law does not follow the thesis that two wrongs make a right.” Robertson v. Western Virginia Water Authority, letter opinion dated July 25, 2011.

The circuit courts throughout the Commonwealth, as well as the Attorney General and state agencies, may rely upon decisions of the circuit courts.

5. Whether a cited case is relevant to the pending matter

When a case is cited, it should be relied upon only if the purpose for which it is cited is relevant to the pending matter. In order to understand a case’s relevance, the reader must know whether the cited case includes similar legally significant facts as the pending matter, and/or whether the cited case’s holding, or ruling, has application to the pending matter.

A strategy often employed by a party in the hopes of avoiding a damaging case is to claim that it has no application to the pending matter because the facts in the cited case are different. In reality, it is highly unlikely that a cited case will ever have a fact pattern that is identical to the pending matter. Look for similarities in the legally significant facts and/or the relevance of the cited court’s ruling. Understand that the party citing the case will focus on the cited case’s similarities to the pending matter, and that another party will highlight the cited case’s differences. The cases cited in section 18-610 in the bulleted text are examples of cases that might be cited in a matter pending before a BZA where it will be important to consider factual similarities and the legal reasoning employed. The case examples pertain to nonconforming uses where the issue was whether the character of a particular use had changed. The cited cases would be compared to the pending matter to decide whether those cases should guide the BZA to a particular result.

Of course, there are a number of holdings, or rulings, of the Virginia Supreme Court that apply to all similar cases, regardless of the underlying facts. For example, the court’s holding in Knowlton v. Browning-Ferris Industries of Virginia, Inc., 220 Va. 571, 260 S.E.2d 232 (1979) that an accessory use cannot become a primary nonconforming use would apply to any nonconforming use issue pending before the BZA, regardless of whether the primary and accessory uses considered in Knowlton were present in the pending matter.
Appendix E

Laws and Guidelines:
Their Legal Standing in Land Use Decision-Making

1. Introduction

Planners and zoning officials (collectively, “planners”) regularly work with state statutes, local ordinances, and regulations, and may touch on issues that relate to the United States or Virginia Constitutions (collectively, “laws”) in their duties. Planners also work with various types of guidelines that have been established by state agencies or by the locality. This appendix identifies and compares laws to guidelines and the general qualities of each.

2. Laws

Laws and guidelines differ from one another in their legal standing and in their force and effect. A planner must first understand what a law is. The “law” is the aggregate of legislation, judicial precedents, and accepted legal principles. Virginia Department of State Police v. Barton, 39 Va. App. 439 (2002). At the state level, the law is comprised of what is known as the “common law” as well as the Virginia Constitution, statutes adopted by the General Assembly, regulations adopted by State agencies, and ordinances adopted by a locality. At the federal level, the United States Constitution and federal statutes and regulations come into play as well. This appendix focuses on state laws.

A. The common law

The common law “comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts.” Weaver v. Commonwealth, 25 Va. App. 486 (1997). Generally, when one refers to the common law, he or she is referring to laws derived from judicial opinions, and the common law may extend back to the English common law that existed before the United States was established.

An example of a common law principle related to planning and zoning is the principle that a landowner may use his property as he wishes. Since the 1920’s in Virginia, this common law principle has been superseded, at least in part, by zoning laws. These zoning laws are said to be in derogation of the common law and operate to deprive an owner of a use thereof which otherwise would be lawful. Therefore, zoning laws are strictly construed in favor of the landowner. 83 Am. Jur. 2d, Zoning and Planning, § 699; see, e.g., Schwartz v. Brownlee, 253 Va. 159, 482 S.E.2d 827 (1997).

B. Constitutional law

The Virginia Constitution is the supreme and fundamental law of the Commonwealth; it is the charter by which the people have consented to be governed. Terry v. Mazur, 234 Va. 442, 362 S.E.2d 904 (1987). Any law or practice that is contrary to the Constitution is inoperative and void. Kamper v. Hawkins, 3 Va. 20 (1793). The Constitution takes precedence over statutes in conflict with the Constitution. If the Constitution says something is not a proper governmental function, no amount of legislative language can make it so. Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968).

A locality’s exercise of its land use powers, particularly the zoning power, may invoke numerous constitutional principles such as due process, equal protection, free speech and expression, just compensation for the physical or regulatory taking of private property for public use, the prohibition against governmental “establishment” of religion, and the free exercise of religion.

Following are a couple of specific examples. 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 . . .” This provision
establishes the right of the people to have fair zoning processes, the right to notice and to be heard regarding certain types of proceedings, and the right to have zoning regulations that are reasonable and fairly applied. Article I, Section 11 of the Virginia Constitution contains another prohibition: “The General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation.” This provision prevents a locality from adopting land use regulations that prohibit, or effectively prohibit, a landowner from making any reasonable use of his or her land without compensating the landowner.

*See chapter 6 for an in-depth review of the constitutional principles that may be affected during the land use process.*

C. Statutes


The laws of the General Assembly that have been codified are contained in the Code of Virginia (the “Virginia Code”) and most of the land use-related laws are found in Title 10.1 (e.g., the Virginia Stormwater Management Act, the Chesapeake Bay Preservation Act, conservation easement laws, Open-Space Land Act) and Title 15.2 (e.g., planning, subdivision of land, and zoning laws).

D. State regulations

In the strict sense of the word, a “regulation” is a statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an administrative agency in accordance with the authority conferred on it by applicable constitutional provisions or state statutes. *Virginia Code § 2.2-4001* (definition of “rule” and “regulation”); *Jackson v. W’*, 14 Va. App. 391, 419 S.E.2d 391 (1992).

Like statutes, regulations are laws but they are promulgated by administrative agencies rather than the General Assembly. So how does an administrative agency, which is part of the executive branch of government, establish laws, which are inherently the responsibility of the legislative branch of government? The Virginia Constitution directs that the government function through three equal but separate branches with specific responsibilities and powers assigned to each. *Virginia Constitution, Article I, Section 5.* The Constitution also provides that no one branch may exercise the functions or powers of another except as specifically authorized by the Constitution. *Virginia Constitution, Article III, Section 1.* Nonetheless, the Virginia Supreme Court has acknowledged that the degree of separation demanded by the Virginia Constitution is not absolute and necessarily operates within some practical limitations and exceptions. *Taylor v. Worrell Enterprises, Inc.,* 242 Va. 219, 409 S.E.2d 136 (1991). In particular, the Court has held that the legislative branch may delegate some of its powers to agencies in the executive branch if the delegation is accompanied by appropriate standards for the exercise of that authority. *Ames v. Town of Painter,* 239 Va. 343, 389 S.E.2d 702 (1990). An analogy at the local government level is the state enabling authority for governing bodies to delegate the review and approval of special use permits – a legislative act – to the BZA. There also are instances where the line between the powers of two branches may be less than clear and incidental encroachment is necessary and permitted. *Worrell,* supra.

State regulations are promulgated under the Administrative Process Act (Virginia Code § 2.2-4000 et seq.) which, for most administrative agencies, requires that before regulations are promulgated, the agency provide notice of the intended regulations, that they be published, and that the public have an opportunity to comment on them before they become final. When regulations become final, they are codified in the Virginia Administrative Code.

One may wonder why administrative agencies are authorized to create laws. The brief explanation is that administrative agencies were given this power out of necessity and because of their evolving experience and expertise. The role of government grew significantly in the first half of the 20th Century and as it grew in size, its many roles became much more complex and specialized. New statutes needed to be implemented, and administrative agencies were created for that purpose. However, regulations also were needed to implement the statutes which, in and of themselves, were lacking the necessary details and procedures to be implemented.
Examples of regulations promulgated by State agencies relevant to planning and zoning law are numerous, but below are two current regulations and the enabling statutes that authorize their promulgation:

<table>
<thead>
<tr>
<th>Regulations</th>
<th>Enabling Authority</th>
</tr>
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<tbody>
<tr>
<td><strong>9 VAC 25-20-10 et seq.</strong>&lt;br&gt;Biosolids regulations</td>
<td><strong>Virginia Code § 62.1-44.19:3(B):</strong> The State Water Control Board, with the assistance of the Department of Conservation and Recreation and the Department of Health, shall adopt regulations to ensure that (i) sewage sludge permitted for land application, marketing, or distribution is properly treated or stabilized; (ii) land application, marketing, and distribution of sewage sludge is performed in a manner that will protect public health and the environment; and (iii) the escape, flow or discharge of sewage sludge into state waters, in a manner that would cause pollution of state waters, as those terms are defined in § 62.1-443, shall be prevented. <em>See also Virginia Code § 62.1-44.19:3(C).</em></td>
</tr>
<tr>
<td><strong>24 VAC 30-155-10 et seq.</strong>&lt;br&gt;VDOT traffic impact analysis regulations</td>
<td><strong>Virginia Code § 15.2-2222.1:</strong> This statute requires localities to submit comprehensive plans and amendments to comprehensive plans that will substantially affect transportation on state-controlled highways to VDOT in order for VDOT to review and provide comments on the impact of the item submitted. Virginia Code § 15.2-2222.1 also requires localities to submit traffic impact statements along with proposed rezonings. Section 15.2-2222.1 directs VDOT to promulgate regulations for the implementation of these requirements.</td>
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### E. Ordinances

The powers of localities must be granted by the General Assembly. *Virginia Constitution, Article VII, Section 3.* The General Assembly has granted authority to the governing bodies of counties, cities and towns to adopt ordinances. *Virginia Code § 15.2-1425.* An “ordinance” is an act of a locality’s governing body – either its board of supervisors, city council or town council – declaring, commanding or prohibiting something. In other words, ordinances are laws adopted by the locality.

The Dillon Rule (also sometimes referred to as “Dillon’s Rule”) limits Virginia’s governing bodies to exercising only those zoning and other powers expressly granted by the General Assembly, powers necessarily or fairly implied from the express powers, and powers that are essential and indispensable. *Logan v. City Council of the City of Roanoke,* 275 Va. 483 (2008); *Norton v. City of Danville,* 268 Va. 402, 602 S.E.2d 126 (2004). As a result of the Dillon Rule, a governing body does not have broad general authority to adopt whatever ordinance it deems appropriate or desirable. *Lawless v. County of Chesterfield,* 21 Va. App. 495 (1995). The Dillon Rule limits a locality’s ability to address local issues using local strategies exercised under its police power. Consequently, a locality’s ability to address local issues is at the mercy of the General Assembly unless a means to address the issue has already been enabled. On the other hand, the Dillon Rule has the effect of assuring, at least to some extent, a certain amount of consistency for those who deal with Virginia’s many localities.

The express grant of authority to adopt zoning ordinances is found in Virginia Code § 15.2-2280 et seq. *(see, in particular, Virginia Code § 15.2-2286).* The express grant of authority to adopt a subdivision ordinance is found in Virginia Code § 15.2-2241 et seq. Other sources of authority exist in Title 15.2 and other titles of the Virginia Code.

*See chapter 5 for an examination of the Dillon Rule.*

### 3. Guidelines

This section identifies the key characteristics of guidelines and explains how they differ from laws. Guidelines come in several different forms, accompanied by varying degrees of formality. The overarching purpose of a guideline is to provide direction or guidance to a decision-maker in the exercise of discretion.
A. What is a guideline?

In a general non-legal sense, guidelines have been described as being “aspirational, in that they suggest or recommend specific actions or behavior for general consideration. They differ from ‘standards,’ which are usually seen as mandatory and may be accompanied by an enforcement mechanism.” Excerpt from The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, September 2004 Public Comment Draft.

Following are several key qualities and characteristics of guidelines identified by the courts in cases ranging from federal sentencing guidelines to Virginia environmental laws. Note that many of these qualities and characteristics overlap one another:


- **Cannot become a law:** Guidelines do not become laws merely because they are almost always followed. *Faruq*, supra, 831 F. Supp. 1262 (D.Md. 1993) (the frequency with which federal parole guidelines are followed does not convert them into laws).


- **State guidelines do not pre-empt lawful ordinances:** Ordinances that are inconsistent with state guidelines are not pre-empted because only laws have pre-emptive effect. *Dail*, supra (county ordinance establishing buffer zones were not invalid because they were inconsistent with the buffer zones recommended in the State Forester’s best management practices because the best management practices were guidelines, not regulations).


- **Express enabling authority not required:** Express statutory authority to develop guidelines is not required; it is sufficient if the agency or office is authorized to administer a particular statutory scheme. *Jackson v. W.*, 14 Va. App. 391, 419 S.E.2d 391 (1992) (Department of Social Services Protective Service Manual was a lawful guideline because the relevant state statute authorized the Commissioner to “supervise the administration of the provisions” of the social services laws and to “see that all laws pertaining to the [DSS] are carried out to their true intent and spirit”).

- **Guide discretion:** Guidelines guide the discretion exercised by the decision-maker. *United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000) (federal sentencing guidelines are a “mechanism for channeling the discretion that a sentencing court would otherwise enjoy”); *Jackson*, supra (Department of Social Services Protective Services Manual was a set of guidelines “intended to be used as tools for the worker in investigating situations of abuse or neglect. In other words, the guidelines merely assist the case worker in interpreting the statute”).

- **Policies as to how discretion will be exercised:** Guidelines establish policies as to how an agency is likely to exercise discretion, but do not impose standards of conduct on the public. *Woodley v. Department of Corrections*, 74 F. Supp. 2d 623 (E.D. Va. 1999) (parole guidelines are “merely policies that show how . . . discretion is likely to be
exercised”); *Faruq, supra* (federal parole guidelines are “stated policy rules that show how agency discretion is likely to be exercised”).

- **Interpretive:** Guidelines are interpretive rather than legislative. *Barrow, supra* (“guidelines operate within a statutory framework to guide judgment. By their nature, they are interpretive, rather than legislative”).

- **Flexible:** Guidelines are not fixed and rigid, but are flexible. *Faruq, supra*.

- **May be disregarded:** Guidelines may be disregarded when circumstances warrant. *Woodley, supra* (where parole board issued policy statement to explain why it was exercising its discretion in a manner different from past practices); *Barrow, supra* (“guidelines . . . may be discarded where circumstances require”); *Faruq, supra* (federal parole commission “remains free to make parole decisions outside of these guidelines”).


- **Various factors determine weight to be given to guidelines:** The weight given to a guideline in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Skidmore, supra*.

**B. Examples of guidelines in planning and zoning law**

This subsection reviews several types of guidelines commonly found in Virginia planning and zoning law – the comprehensive plan, the guidelines of an architectural review board, and internal departmental guidelines that provide guidance to planning staff when reviewing a particular type of application.

1. **The comprehensive plan**

Since 1980, each Virginia locality has been required to have a comprehensive plan. A comprehensive plan is a plan for the physical development of the territory within the locality’s jurisdiction. *Virginia Code § 15.2-2223*. The purpose of the comprehensive plan is to guide and accomplish a coordinated, adjusted, and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity, and general welfare of the inhabitants, including the elderly and persons with disabilities. *Virginia Code § 15.2-2223*.


As a guide, the comprehensive plan does not supersede the existing zoning designation and its associated regulations for a particular parcel. For example, a subdivision plat cannot be disapproved on the ground that the future development that may result from the subdivision is inconsistent with the comprehensive plan. *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). Moreover,
there is no requirement that the existing zoning designation for a particular parcel be consistent with the use called for in the comprehensive plan. See chapter 9 for an in-depth review of comprehensive plans.

2. Design guidelines

Architectural review boards (“ARB”) established under Virginia Code § 15.2-2306 are charged with determining whether a proposed structure is architecturally compatible with the historic landmarks, buildings or structures within a historic district. See Worley v. Town of Washington, 65 Va. Cir. 14 (2004). These determinations are usually made by the ARB by applying appropriate design guidelines.

The following shows how a locality (in this example, Albemarle County) gets from the state enabling authority to the application of design guidelines:

- Virginia Code § 15.2-2306: “The ordinance may include a provision that no building or structure, including signs, shall be erected, reconstructed, altered or restored within any such district unless approved by the review board or, on appeal, by the governing body of the locality as being architecturally compatible with the historic landmarks, buildings or structures therein.”

- Albemarle County Architectural Design Guidelines (excerpt): “Compatibility with significant historic sites: New structures and substantial additions to existing structures should respect the traditions of the architecture of historically significant buildings in the Charlottesville and Albemarle area. Photographs of historic buildings in the area, as well as drawings of architectural features, which provide important examples of this tradition are contained in Appendix B. . . The Guidelines’ standard of compatibility can be met through building scale, materials, and forms which may be embodied in architecture which is contemporary as well as traditional. The Guidelines allow individuality in design to accommodate varying tastes as well as special functional requirements.”

There is little Virginia case law considering Virginia Code § 15.2-2306 or whether an ARB has properly applied its guidelines. In Rogers v. Loudoun County Board of Supervisors, 38 Va. Cir. 235 (1995), the neighbors of landowners who obtained a certificate of appropriateness for a house and barn challenged the board’s approval of the certificate, claiming that the house and barn were not appropriately concealed from their manor house under the design guidelines. The court upheld the board’s decision, noting that the landowners had moved their proposed house 200 yards from its originally proposed location and that the plaintiff’s attorney had conceded that the location was “real close but not yet there.” The court concluded that if the location of the house and barn was real close to being properly located as the plaintiffs conceded, the board’s decision could not be arbitrary or capricious.

3. Internal departmental guidelines

A planning or zoning department can create a number of guidelines to implement the locality’s ordinances in a consistent and reasonable manner. The example below is an excerpt of a checklist that was developed by the Planning Division of the Albemarle County Department of Community Development to assist planners and to inform applicants about the relevant issues in applications for rezonings and special use permits.

<table>
<thead>
<tr>
<th>Example of an Internal Departmental Guideline</th>
</tr>
</thead>
<tbody>
<tr>
<td>The information below is provided at this location to help applicants understand the level of review which takes place with each request. It is also available to inform the public on the nature of the review. Finally, it is placed at the County’s website as a reference tool for reviewers.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Questions for Review Coordinator/Planner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Using the above information and information from the Comprehensive Plan, the reviewing planner is to answer the following questions:</td>
</tr>
<tr>
<td>1. What does the Comprehensive Plan recommend for this property? Is the proposal generally in keeping with the land use recommendations from the Comprehensive Plan?</td>
</tr>
<tr>
<td>2. If the project is in the Development Areas, how well does the project meet the principles of the Neighborhood Model? What changes are needed in order for the proposal to conform with the Comprehensive Plan?</td>
</tr>
</tbody>
</table>
### Example of an Internal Departmental Guideline

3. If the project is in the Rural Areas, how well does it meet specific Comprehensive Plan goals for the Rural Areas? Does the application conflict with or support Rural Areas character? Could changes be made to the project to more closely conform with the Comprehensive Plan?

4. For special use permits, how does the proposal relate to the zoning district's purpose? How will the public health, safety, and general welfare be protected if the use is approved?

5. For rezonings, what is the by-right use of the property? What level of change is being requested?

6. How well does the proposal meet the purpose and intent of the proposed zoning district? Is the zoning district requested the appropriate district for the area?

7. What impacts are expected to nearby or adjoining properties, water and sewer service, schools, streets and roads, fire, police, and rescue service? Would this application create a need for additional services? Are impacts appropriately mitigated?

### C. How to tell if something is a regulation, or law, or a guideline

The following table is a side-by-side comparison of laws and guidelines summarizing several attributes of both to help the planner determine whether he or she is considering a law or a guideline.

<table>
<thead>
<tr>
<th>Attribute</th>
<th>Law</th>
<th>Guideline</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did a state statute expressly authorize the law or guideline?</td>
<td>State regulations and local ordinances will be based on express statutory authority.</td>
<td>Guidelines need not be based on express statutory authority (the comprehensive plan is an exception). Developing guidelines that are based on experience, expertise and reasoned judgment are generally an inherent power.</td>
</tr>
<tr>
<td>What body or office established the law or guideline?</td>
<td>State regulations may be promulgated only by state agencies under authority established by a state statute. Local ordinances may be adopted only by the locality’s governing body.</td>
<td>Any officer charged with the administration of a law may develop guidelines.</td>
</tr>
<tr>
<td>What procedure was used to establish the law or guideline?</td>
<td>State regulations and local ordinances may be established only by complying with specific legal requirements, including public notice and a right of the public to comment.</td>
<td>Generally, there are no required procedures to establish guidelines.</td>
</tr>
<tr>
<td>Who uses the law or guideline?</td>
<td>Laws have general applicability throughout the jurisdiction to which they pertain, i.e., the state or the locality.</td>
<td>Guidelines are typically used only by the decision-makers, i.e., they are for internal use, to assist them in the exercise of discretion.</td>
</tr>
<tr>
<td>How is the law or guideline used?</td>
<td>If it is imposing standards, it is likely a regulation.</td>
<td>If it is merely interpreting standards contained in statutes or ordinances to facilitate their implementation, it is likely a guideline.</td>
</tr>
<tr>
<td>What does the law or guideline require, and what are the consequences for noncompliance?</td>
<td>Laws require particular action or impose a standard of conduct. The consequences for noncompliance may be punishment, invalidation of the action or some other substantive result.</td>
<td>There are no consequences since guidelines need not be followed in all cases, though it is helpful to identify why the guidelines were not followed in a particular case.</td>
</tr>
<tr>
<td>What language does the law or guideline use?</td>
<td>The word “shall” is generally used in an imperative or mandatory sense. <em>Schmidt v. City of Richmond</em>, 206 Va. 211, 142 S.E.2d 573 (1965). Statutes and regulations commonly use the term “shall.”</td>
<td>The term “should” is typically found in a guideline and it is not used in an imperative or mandatory sense, but merely indicates a course of action that ought to be taken or considered. Even the term “shall” when used in guidelines, would not be mandatory.</td>
</tr>
<tr>
<td>How does the law or guideline refer to itself?</td>
<td>Though a self-reference may serve as a starting point, this may be the least reliable attribute to determine whether something is a law or a guideline. There are so-called guidelines that are regulations, and regulations that are, at least in their effect, guidelines.</td>
<td></td>
</tr>
</tbody>
</table>
Appendix F

Principles of Deed Construction

This appendix lays out the primary principles of interpreting the language in deeds.

1. If a deed is unambiguous, the intent of the grantor is determined from the language of the deed


The grantor’s intention, as expressed in the instrument, must prevail unless it is contrary to some principle of law or rule of property. *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 782 S.E.2d 131 (2016); *Auerbach v. County of Hanover*, 252 Va. 410, 478 S.E.2d 100 (1996) (in ascertaining the intent of the grantor, the deed is examined as a whole and effect given to all of its terms and provisions not inconsistent with some principle of law or rule of property); *Austin v. Dobbs*, 219 Va. 930, 252 S.E.2d 588 (1979); *Fitzgerald v. Fitzgerald*, 194 Va. 925, 76 S.E.2d 204 (1953).

If a deed is clear and unambiguous, the focus is upon the language of the deed and from that source alone, its meaning is determined. *Wetlands America Trust, supra; Trailsend Land Co. v. Virginia Holding Corp.*, 228 Va. 319, 321 S.E.2d 667 (1984); *Irby v. Roberts*, 256 Va. 324, 504 S.E.2d 841 (1998) (in such a case, one should look no further than the four corners of the deed itself). Put another way, if the language of a deed is clear, unambiguous and explicit, and the intention is thereby free from doubt, that intention is controlling, if not contrary to law or to public policy, and auxiliary rules of construction should not be used. *Shirley v. Shirley*, 259 Va. 513, 525 S.E.2d 274 (2000).

The terms of every deed are to be understood in their plain, ordinary, and proper sense (*Wetlands America Trust, supra*), and where words have a primary meaning they must always be understood in that sense, unless the context shows that they were otherwise intended. *Lindsey v. Eckels*, 99 Va. 668, 40 S.E. 23 (1901). Words deliberately put into a deed, and put there for a purpose, are not to be lightly considered nor arbitrarily put aside. *Halsey v. Fulton*, 119 Va. 571, 89 S.E. 912 (1916). Where there is no conflict in any of the provisions of the deed and no repugnancy results, all parts thereof should be given effect. *Fitzgerald, supra*.

Oral evidence of the circumstances at the time of the deed’s creation is not to be considered in giving effect to the clear, unambiguous, and explicit language of the deed. *Irby v. Roberts*, 256 Va. 324, 504 S.E.2d 841 (1998).

2. If a deed is ambiguous, extrinsic evidence may be considered and rules of construction may be applied

If the language of a deed is “obscure and doubtful, it is frequently helpful to consider the surrounding circumstances and probable motives of the parties.” *Swords Creek Land Partnership v. Dollie Belcher*, Va. ___, 762 S.E.2d 570, 572 (2014) (concluding that the severance deed in that case was not ambiguous); *CNX Gas Company, LLC v. Rasnake*, 287 Va. 163, 752 S.E.2d 865 (2014).

Extrinsic evidence and parol evidence are admissible to resolve an ambiguity. *See, e.g., Renner Plumbing v. Renner*, 225 Va. 508, 303 S.E.2d 894 (1983). An ambiguity exists when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two or more things at the same time. *Allen v. Green*, 229 Va. 588, 331 S.E.2d 472 (1985); *CNX Gas, supra; Renner Plumbing, supra*. 

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If a deed is uncertain and ambiguous, oral evidence may be received to show all the attendant circumstances existing at the time the deed was executed, including the situation of the parties and their relationship. Camp v. Camp, 220 Va. 595, 260 S.E.2d 243 (1979). The Virginia Supreme Court has stated when the language in a deed is “obscure and doubtful,” it is “helpful to consider the surrounding circumstances and probable motives of the parties.” CNX Gas, supra. However, oral contemporaneous evidence is, in general, inadmissible to contradict or vary the terms of a valid deed because the deed is the only outward and visible expression of the meaning of the parties. Camp, supra (to allow a deed to be varied or contradicted by verbal testimony of what passed at or before the deeds making would be to favor less trustworthy evidence to trump more certain and reliable evidence – the deed itself).

Rules of construction may be applied if the deed is ambiguous. See Shirley v. Shirley, 259 Va. 513, 525 S.E.2d 274 (2000).

3. General rules of construction when a deed is ambiguous

Following are some general rules for construing an ambiguous deed:

- **Construed against the grantor.** The language in an ambiguous deed must be construed against the grantor and in favor of the grantee. CNX Gas Company, LLC v. Rasnake, 287 Va. 163, 752 S.E.2d 865 (2014); Ellis v. Commissioner, 206 Va. 194, 202, 142 S.E.2d 531, 536 (1965). The Virginia Supreme Court has called this rule “one of the most just and sound principles of the law because the grantor selects his own language.” CNX Gas, supra (noting that the presumption of construing a deed in favor of the grantee is so strong that, in a prior case, the court held that where there was doubt as to whether one or two parcels were intended to be conveyed, the deed will be construed to pass title to both).

- **Grantor intended to convey all the language capable of conveying.** A grantor must be considered to have intended to convey all that the language he has employed is capable of passing to the grantee. CNX Gas, supra; Hamlin v. Pandapas, 197 Va. 659, 664, 90 S.E.2d 829, 833 (1956).

- **Entire deed considered together.** The whole of a deed and all its parts should be considered together, and effect should be given to every part of the instrument, if possible. CNX Gas, supra; Auerbach v. County of Hanover, 252 Va. 410, 414, 478 S.E.2d 100, 102 (1996). No part should be discarded as superfluous or meaningless. CNX Gas, supra; Foster v. Foster, 153 Va. 636, 645, 151 S.E. 157, 160 (1930).

- **Harmonize terms.** Where the meaning of the language is not clear, or the deed is not artfully drawn, the terms should be harmonized, if possible, so as to give effect to the intent of the parties. CNX Gas, supra; Foster v. Foster, 153 Va. at 646, 151 S.E. at 160.

- **Granting clauses and conflicting language: the common law rule and the modern rule.** At common law, the granting clause always prevailed over language repugnant to it; under the modern rule, the intent of the parties, if it is clearly and unequivocally expressed, will prevail. CNX Gas, supra. If it is impossible to ascertain, with reasonable certainty, the parties’ intent from the language of the deed, the common law rule still applies and the granting clause prevails. CNX Gas, supra; Goodson v. Capehart, 232 Va. 232, 326, 349 S.E.2d 130, 133 (1986). That rule applies “with particular force to exceptions in a deed that are repugnant to the granting clause.” CNX Gas, supra.

- **Exceptions.** Exceptions in a deed are always to be “taken most favorably for the grantee, and if it be not set down and described with certainty, the grantee shall have the benefit of the defect.” CNX Gas, supra, quoting Bradley v. Virginia Railway & Power Co., 118 Va. 233, 238, 87 S.E. 721, 723 (1916).

4. The effect of a deed referencing a plat

Where a deed incorporates a plat by reference, that plat must be considered part of the deed itself. Faison v. Union Camp Corporation, 224 Va. 54, 294 S.E.2d 821 (1982). Even though a plat is incorporated by reference into a deed for descriptive purposes, its effect is limited to being a descriptive tool; the plat itself does not convey. Burdette
v. Brush Mountain Estates, L.L.C., 278 Va. 286, 682 S.E.2d 549 (2009) (cases cited therein; holding that a plat, incorporated into two deeds for descriptive purposes, could not serve as an instrument of conveyance of an easement, even though the plat had a note stating that a private easement was conveyed). Where a plat is referred to in a deed for the purpose of fixing the parcels’ boundaries, the effect is the same as if it were copied into the deed. Poindexter v. Melton, 237 Va. 448, 377 S.E.2d 450 (1989).

In Marble Technologies, Inc. v. Mallon, 290 Va. 27, 773 S.E.2d 155 (2015), the issue was whether the location of an easement had moved with the changing mean high water line along the Chesapeake Bay. The 1936 deed stated that the property recipients took their property “subject to an easement on a twenty foot road as designated on the map recorded with this deed.” The map depicted “S 20–00 W” as the southern end of the easement and it denoted a point where the easement made a slight bend as “980.0’ S29.55W,” and designated the easement as running “Along Present Mean High Water.” The map noted the location of a “Stake” at the northern end of the designated “Twenty Foot Road,” and depicted the easement as existing “Along Present Mean High Water.” The Virginia Supreme Court concluded that the reference to the “present mean high water” line meant the line as it existed in 1936 when the map was created, and that this conclusion was confirmed by the fact that the map used metes and bounds and a stationary marker to show the easement’s location. Thus, the Court held “that the map is unambiguous regarding the location of the easement. The metes and bounds descriptions and the stationary markers dispel any claim of ambiguity. Nothing on the map or in the deed indicates that the easement was to move with the changing coastline.” Marble Technologies, 290 Va. at 34, 773 S.E.2d at 158.

5. The effect of a plat referencing a deed

References on a plat to deeds recorded incorporate the legal descriptions of those deeds into the plat and, thus, into any subsequent deeds referencing the plat. Auerbach v. County of Hanover, 252 Va. 410, 478 S.E.2d 100 (1996).

6. Descriptions of land conveyed

A deed conveying land must give such a description of the property intended to be conveyed as will be sufficient to identify it with reasonable certainty. Chesapeake Corp. of Virginia v. McCreery, 216 Va. 33, 216 S.E.2d 22 (1975).

Land conveyed by a single metes and bounds description means that the land is held out as a single parcel, even though the deed may refer to prior deeds that showed the land to be comprised of multiple parcels. Diversified Development Co. v. Sendi, 34 Va. Cir. 390 (1994).

If there is an irrevocable conflict between multiple descriptions of the property conveyed, the description that is less certain yields to the one that is more certain. See Smith v. Chapman, 51 Va. 445 (1853). In the absence of a contrary intent, the following order of preference rule applies where deed descriptions are inconsistent:

1. Natural monuments or landmarks.
2. Artificial monuments and established lines, marked or surveyed.
3. Adjacent boundaries or lines of adjoining tracts.
4. Calls for courses and distances.
5. Designation of quantity.

Providence Properties, Inc. v. United Virginia Bank/Seaboard, 219 Va. 735, 251 S.E.2d 474 (1979); Spradlin v. Andrews, 1999 Va. Cir. LEXIS 553 (1999). The rule, however, is not inflexible and will not be applied if to do so would frustrate the intent of the parties to the deed. Providence Properties, supra. Indeed, the rule is designed to effectuate the presumed intent of the parties. Providence Properties, supra.

In Ettinger v. Oyster Bay II Community Property Owners’ Association, 296 Va. 280, 819 S.E.2d 432 (2018), the issue was whether Parcel E’s northeast boundary extended only to the edge of Hibiscus Drive, or to its centerline. The relevant part of the deed described Parcel E as “bounded on the Northeast, by Hibiscus Drive.” The Virginia Supreme Court held that, under longstanding Virginia case law, the deed established Parcel E’s northeastern boundary...
boundary at the centerline of the road. The Court gives as good summary of the law that applies not only to roads, but to streams and other objects having width:

“It is an established rule in Virginia that a conveyance of land bounded by or along a way carries title to the center of the way, unless a contrary intent is shown.” Martin v. Garner, 286 Va. 76, 80-81, 745 S.E.2d 419 (2013); Cogito v. Dart, 183 Va. 882, 889, 33 S.E.2d 759 (1945) (“[T]he boundary on a way, public or private, includes the soil to the center of the way if owned by the grantor and there are no words or specific descriptions to show a contrary intention.”). Although the grantor may reserve the narrow strip to the center of the road from a conveyance, he or she must do so expressly – “[n]o such reservation will arise by implication.” Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass’n, 240 Va. 221, 228, 396 S.E.2d 661 (1990). “This doctrine has uniformly received the sanction of this court,’ Durbin v. Roanoke Bldg. Co., 107 Va. 753, 756, 60 S.E. 86 (1908), since we first recognized it in the context of lands bounded by streams, Hayes v. Bowman, 22 Va. 417, 420 (1823) (“If it be the wish of the grantor not to convey the bed of the stream or of any part thereof, it is easy for him to exclude it, by the use of words, proper for that purpose. In the absence of such words, the moiey of the bed of the stream, passes by the conveyance.”); see also, e.g., Schwalm v. Beardsley, 106 Va. 407, 409-10, 56 S.E. 135 (1907) (applying Hayes and noting the general principle that ‘when the boundary line is simply an object . . . which has width, in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the thing so running over or standing on the land is the boundary of the lot granted.”

Ettinger, 296 Va. at 284-285 (also holding that the deed’s reference to a recorded subdivision plat, which depicted survey lines, did not show the grantor’s intent to convey only to the road’s edge).

As reflected in the list above, quantity is the least reliable method of describing land. Ettinger, 296 Va. at 286. Therefore, a description by square footage or acreage is inferior to all other deed descriptions. Ettinger, supra (deed’s reference to 196,670 square feet being conveyed did not show the necessary intent to not convey land to the centerline of the road described as a boundary of the parcel being conveyed); Providence Properties, supra; see also Brunswick Land Corporation v. Perkinson, 146 Va. 695, 132 S.E. 853 (1926) (where there is a conflict between the acreage and the boundary lines called for in a deed, it is well settled that the acreage is the less reliable indicator).

Where a map, plan, survey or deed is referred to for a description of land, it is not to be regarded as extrinsic evidence, but part of the instrument itself. Richardson v. J. S. Hoskins Lumber Co., 111 Va. 755, 69 S.E. 935 (1911).

In construing an ambiguous deed that contains descriptions of two parcels, but also refers to a plat that showed the land to be a single parcel, the descriptive clauses would be considered as well as the plat. Faison v. Union Camp Corp., 224 Va. 54, 294 S.E.2d 821 (1982) (under circumstances, the descriptive clauses controlled).

7. Description of easement dimensions

A deed may expressly create an easement but fail to define specifically its dimensions. When this situation occurs and the deed language does not state the object or purpose of the easement, the determination of the easement’s scope is made by reference to the intention of the parties to the grant, ascertained from the circumstances pertaining to the parties and the land at the time of the grant. Anderson v. Delore, 278 Va. 251, 683 S.E.2d 307 (2009); Waiskey v. Lewis, 224 Va. 206, 294 S.E.2d 879 (1982). If the deed language states the object or purpose of the easement, the dimensions of the easement may be inferred to be what are reasonably sufficient to accomplish the object or purpose of the easement. Anderson, supra; Hamlin v. Pandapas, 197 Va. 659, 90 S.E.2d 829 (1956).

8. Deeds of correction

Two deeds, the latter of which corrects a mistake or supplies an omission, may be construed together provided that they embrace the same subject matter, are between the same parties, and are related only to the same transaction. King v. Norfolk & W. R. Co., 90 Va. 210, 17 S.E. 868 (1893).
9. Deeds that establish restrictive covenants imposing encumbrances on land

Valid covenants restricting the free use of land, although widely used, are not favored and are strictly construed. Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P., 291 Va. 153, 163, 782 S.E.2d 131, 137. Therefore, deeds that establish restrictive covenants imposing encumbrances on land are strictly construed against the party seeking to enforce them if the restrictions suffer from any substantial doubt or ambiguity. Wetlands America Trust, Inc., 291 Va. at 162, 782 S.E.2d at 136; Friedberg v. Riverpoint Bldg. Comm., 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977). The party seeking to enforce the restrictions has the burden to prove that they have been violated. Wetlands America Trust, supra; Mid-State Equip. Co. v. Bell, 217 Va. 133, 140, 225 S.E.2d 877, 884 (1976).

When a court has resolved the meaning of the disputed restrictive covenants, the restrictions will be enforced when applicable. Wetlands America Trust, Inc., 291 Va. at 162, 782 S.E.2d at 136; Mid-State Equip. Co., supra. However, substantial doubt or ambiguity will be resolved against the restrictions and in favor of the free use of property. Wetlands America Trust, Inc., 291 Va. at 163, 782 S.E.2d at 137; Traylor v. Holloway, 206 Va. 257, 259, 142 S.E.2d 521, 522-523 (1965).
Appendix G

Strategies for Making a Decision

A decision-maker must analyze facts, identify the issues, and apply the relevant facts to the applicable standards and make a decision. This appendix provides some general strategies for making a decision – hopefully the correct decision.

1. Put the application in its proper context

By identifying the nature of the application under review, you can begin to organize your thoughts in ways that will identify the relevant and irrelevant issues. For example, if a planning commission is considering a rezoning, you know that the policies in your locality’s comprehensive plan will play a big role, you may suggest some modifications to the application that would allow a policy to be achieved, that you have a lot of discretion in how those policies are applied, and that your decision will be a recommendation to the governing body. On the other hand, if the planning commission is considering a subdivision plat, the sole issue is whether the plat satisfies the minimum requirements of the subdivision ordinance, the comprehensive plan is irrelevant, there are no policy considerations, and the planning commission has no discretion to deny the plat if it satisfies the minimum requirements.

2. Identify the relevant policies, standards and facts

The staff report should identify the relevant policies and standards that apply to a particular decision. The policies and standards not only guide your decision, but also determine what facts will be relevant or irrelevant. Discarding the irrelevant from the relevant is essential. Be aware, however, that what may be considered to be relevant to a legislative decision on a rezoning or a special use permit application, is significantly broader than what is relevant to a ministerial decision on a subdivision plat or site plan.

3. Rank the policies, if applicable

When considering legislative or discretionary matters to which the policies in the comprehensive plan may apply, you may need to decide which policies should prevail over other policies if there are conflicts between them. Hopefully, the policies in your comprehensive plan are not internally inconsistent. Even if they are not, you may decide to give one policy greater weight in your decision than another.

4. Organize the facts

Facts must be organized in two ways. First, the relevant facts must be separated from the irrelevant facts. Facts are relevant if they tend to support or not support a conclusion. Second, the facts need to be organized within the framework of the policies or standards applicable to the decision. A well-written staff report should present the relevant facts within the framework of the policies or standards to allow the public body to easily identify which facts support or do not support each applicable policy or standard.

5. Consider and discuss the options

The range of options available in making a decision will depend on the nature of the application, the facts that have been presented, and whether the facts support or do not support the applicable policies and standards.

6. Select an option

By the time the discussion comes to a close, a conclusion should have been reached as to whether the facts support or do not support the applicable policies or standards. Again, the available options will depend on the nature of the application. However, the option selected must be supported by the relevant facts as they are applied to the applicable policies and standards. Otherwise, the decision may be subject to challenge as being arbitrary and capricious.
Appendix H

Digest of Key Matters Considered by the Board of Supervisors, the Planning Commission, the Architectural Review Board, and by County Staff

This appendix reviews 15 land use matters pertaining to the comprehensive plan, zoning, subdivision, water protection, and other matters regularly considered by the board of supervisors, the planning commission, the architectural review board, and by county staff.

1. Amendments to the Comprehensive Plan

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

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

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

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

**Nature of the Act:** Legislative.¹

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

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

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

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

¹ A legislative act has been explained by the Virginia Supreme Court to involve balancing the consequences of private conduct against the interests of public welfare, health, and safety. In general, a legislative body exercises a legislative power when it prescribes a course of conduct. Legislative acts are presumed to be reasonable, correct, and constitutionally valid. In the land use arena, actions on comprehensive plan amendments, ordinance text amendments, special use permits, special exceptions, and certificates of appropriateness are legislative acts.
Board Role: The board receives the commission’s report of its decision and may decide whether to take further action.

Nature of the Act: Legislative.

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

3. Zoning Map Amendments

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

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

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

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

Nature of the Act: Legislative.

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

- The existing use and character of property.
- The comprehensive plan.
- The suitability of property for various uses.
- The trends of growth or change.
- The current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies.
- The transportation requirements of the community.
- The requirements for airports, housing, schools, parks, playgrounds, recreation areas, and other public services.
- The conservation of natural resources.
- The preservation of flood plains.
- The protection of life and property from impounding structure failures.
- The preservation of agricultural and forestal land.
- The conservation of properties and their values.
- The encouragement of the most appropriate use of land throughout the county.
Additional considerations for zoning map amendments establishing a planned development zoning district in Albemarle County: (1) whether the proposed planned development satisfies the purpose and intent of the planned development district; (2) whether the area proposed to be rezoned is appropriate for a planned development under the comprehensive plan; and (3) the relation of the proposed planned development to major roads, utilities, public facilities, and services.

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

4. Zoning Text Amendments

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

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

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

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

Nature of the Act: Legislative.

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

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

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

5. Special Use Permits

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

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

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

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

Nature of the Act: Legislative.

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

6. Special Exceptions

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

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

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

Nature of the Act: Legislative.

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

7. Certificates of Appropriateness

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

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

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

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

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

Nature of the Act: Legislative.

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

8. Subdivision Text Amendments

Nature of the Matter: Amend the subdivision regulations.
**Commission Role:** The commission holds a public hearing and makes a recommendation to the board on the proposed amendment.

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

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

**Nature of the Act:** Legislative.

**Considerations:** Whether the proposed regulation is enabled by Virginia Code §§ 15.2-2241 through 15.2-2245.1.

9. **Subdivision Plats**

**Nature of the Matter:** Subdivision plats are schematic drawings that show how land will be divided into 2 or more lots, and show the location and nature of required improvements.

**Commission Role:** The commission considers only appeals by the subdivider from the disapproval of a subdivision plat by the county’s subdivision agent, or the approval of a preliminary subdivision plat with conditions to which the subdivider objects. The commission’s sole role is to determine whether the plat satisfies the minimum requirements of the subdivision ordinance. The commission may approve or disapprove the plat, and it may approve a preliminary plat with the conditions to which the subdivider objects if they are required to satisfy an express requirement.

**Board Role:** The board considers only appeals by the subdivider from the commission’s disapproval of the subdivision plat or its approval of a preliminary plat with conditions to which the subdivider objects. The board’s sole role is to determine whether the plat satisfies the minimum requirements of the subdivision ordinance.

**Board Act:** Action to approve or disapprove the plat, and it may approve a preliminary plat with the conditions to which the subdivider objects if they are required to satisfy an express requirement.

**Nature of the Act:** Ministerial.

**Considerations:** The Subdivision Ordinance, and any other regulations that must be satisfied under the Subdivision Ordinance.

10. **Site Plans**

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

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2 A ministerial act is one performed under a given set of facts and in a prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, one’s own judgment upon the propriety of the act being done. An act is ministerial even though an officer has to determine the existence of the facts that make it necessary for him to act. Once an applicant has complied with all requirements, the function of approval becomes ministerial, and the application must be approved. Unlike legislative acts, ministerial acts have no presumptions of reasonableness or correctness. Actions on subdivision plats and site plan are ministerial acts.
Commission Role: The commission considers only appeals by the developer from the disapproval of a site plan by the county’s site plan agent, or the approval of an initial site plan with conditions to which the developer objects. The commission’s sole role is to determine whether the site plan satisfies the minimum requirements of the site plan regulations in the zoning ordinance. The commission may approve or disapprove the site plan, and it may approve the initial site plan with the conditions to which the developer objects if they are required to satisfy a requirement.

Board Role: The board considers only appeals by the developer from the commission’s disapproval of the site plan or its approval of the initial site plan with conditions to which the developer objects. The board’s sole role is to determine whether the site plan satisfies the minimum requirements of the site plan regulations in the zoning ordinance.

Board Act: Action to approve or disapprove the site plan, and it may approve an initial site plan with the conditions to which the developer objects if they are required to satisfy a requirement.

Nature of the Act: Ministerial.

Considerations: The site plan regulations in the zoning ordinance, and any other regulations that must be satisfied under the site plan regulations.

11. Variations from and Exceptions to Subdivision or Site Plan Requirements

Nature of the Matter: The general regulations of the subdivision ordinance or the site plan regulations in the zoning ordinance may be varied or waived.

Commission Role: Certain variations and exceptions pertaining to requirements for improvements are considered by the commission in the first instance while others are considered by the county’s subdivision agent or the site plan agent (the “agent”); those variations or exceptions considered by the agent may be considered by the commission on appeal by the subdivider or developer (the “applicant”) from the agent’s disapproval of a variation or exception or the approval of a variation or exception with conditions to which the applicant objects.

Board Role: The board considers only appeals by the applicant from the commission’s disapproval of the variation or exception or its approval of the variation or exception with conditions to which the applicant objects. On appeal, the board determines whether the applicant should be permitted to vary or to be excepted from one or more of the otherwise applicable minimum requirements.

Board Act: Approval, with or without reasonable conditions, or disapproval.

Nature of the Act: Administrative.

Considerations: Whether there are unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship.

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

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

**Commission Role:** None.

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

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

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

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

13. Capital Improvement Program

**Nature of the Matter:** The capital improvement program (“CIP”) identifies all of the public facilities, including any road or transportation improvement to be undertaken in the ensuing 5 years. The CIP includes estimates of the costs of the facilities and life cycle costs, and identifies the means for financing them. The CIP breaks the projects into two categories – those to be undertaken in the ensuing fiscal year (Year 1) and those to be undertaken in a period not to exceed the next four years (Years 2-5).

**Commission Role:** Conduct a public hearing and provide its recommendations on the CIP to the governing body.

**Commission Act:** Recommendation to the governing body.

**Board Role:** Consider as part of its consideration of the budget.

**Board Act:** Legislative.

**Considerations:** The comprehensive plan, which serves as the source for the public facilities to be undertaken. In addition, Virginia Code § 15.2-2239 provides that the planning commission shall consult with the chief administrative officer (i.e., in Albemarle County, the county executive) and the “heads of departments and interested citizens and organizations.”

**Source:** Virginia Code § 15.2-2239.
14. Six-Year Secondary Road Plan

**Nature of the Matter:** The six-year secondary road plan is the plan for improvements to the secondary system of highways in a county. The plan lists the proposed improvements and the cost estimate of each project listed. The plan is based upon the best estimate of funds to be available to the county for expenditure in the six-year period.

**Commission Role:** Discuss the entire plan with the citizens of the county and consider their views on the plan.

**Commission Act:** Recommendation to the board of supervisors.

**Board Role:** Jointly with representatives of the Virginia Department of Transportation, the board of supervisors prepares a six-year secondary road plan. After conducting a public hearing which is held jointly with the representatives of the Virginia Department of Transportation, finalizes and adopts the plan.

**Board Act:** Legislative.

**Considerations:** The best estimate of funds to be available to the county for expenditure in the six-year period, which is provided by the Virginia Department of Transportation.

**Source:** Virginia Code § 33.2-331.

15. Agricultural and Forestal Districts

**Nature of the Matter:** The purposes of agricultural and forestal districts are two-fold: (i) conserve and protect agricultural and forestal lands for food production, environmental and aesthetic reasons; and (ii) encourage the development and improvement of agricultural and forestal lands for producing food and other agricultural and forestal products. Land within a district is prohibited from being developed to a more intensive use, other than a use resulting in more intensive agricultural or forestal production, without prior approval of the governing body.

**Commission Role:** The planning commission conducts public hearings on requests to establish a district and to add land to an existing district, and on periodic reviews of existing districts (generally, once every 10 years).

**Commission Act:** Recommendation to the governing body including, but not limited to, the potential effect of the district and proposed modifications upon the locality’s planning policies and objectives. As part of its periodic review of a district, the commission must recommend whether to terminate, modify, or continue the district.

**Board Role:** Action to establish or add land or, for district reviews, action to terminate, modify, or continue the district. If the board decides to establish, add to, continue, or modify a district, it adopts an ordinance.

**Board Act:** Legislative.

**Considerations:** Establishing and adding land to a district: Virginia Code § 15.2-4306 lists the following considerations for establishing and adding land to a district: (i) the agricultural and forestal significance of land within the district or addition and in areas adjacent thereto; (ii) the presence of any significant agricultural lands or significant forestal lands within the district and in areas adjacent thereto that are not now in active agricultural or forestal production; (iii) the nature and extent of land uses
other than active farming or forestry within the district and in areas adjacent thereto; (iv) local developmental patterns and needs; (v) the comprehensive plan and, if applicable, the zoning regulations; (vi) the environmental benefits of retaining the lands in the district for agricultural and forestal uses; and (vii) any other matter which may be relevant. Also must consider the recommendation of the locality’s agricultural and forestal district advisory committee.

Reviewing a district: Virginia Code § 15.2-4307 provides that the planning commission must include in its recommendation the potential effect of the district and proposed modifications upon the locality’s planning policies and objectives.

Sources: Virginia Code § 15.2-4300 et seq.
Appendix I

A Comprehensive Approach to Planning:
Key Policies in the Comprehensive Plan That Guide Development

1. Introduction

A comprehensive plan is adopted or amended only after careful and comprehensive surveys and studies of the existing conditions, trends of growth, and the probable future requirements of the area. *Virginia Code § 15.2-2223* (italics added). The subject of these surveys and studies may include the use of land, the preservation of agricultural and forestal land, characteristics and conditions of existing development, natural resources, dam break inundation zones, and other matters. *Virginia Code § 15.2-2224(A)(1); see Huber v. Loudoun County Board of Supervisors*, 55 Va. Cir. 318 (2001) (planning commission not required to survey and study all of the matters set forth in Virginia Code § 15.2-2224; only required to study “such matters as” those listed in the statute).

This appendix examines the key policies in the Comprehensive Plan that guide decisions regarding development, including the decision as to whether to expand the Development Areas to accommodate new development.

2. The County’s Growth Management Policy

The County’s Growth Management Policy has been part of the Comprehensive Plan since 1971. Comprehensive Plan, page 3.4. The Policy states:

Promote the efficient use of County resources through a combination of:

A. Protecting the elements that define the Rural Area:
   - Agricultural resources
   - Forestry resources
   - Land preservation
   - Land conservation
   - Water supply resources
   - Natural resources
   - Scenic resources
   - Historical, archaeological, and cultural resources

and

B. Promoting the Development Areas as the place where a variety of land uses, facilities, and services exist and are planned to support the County’s future growth, with emphasis placed on density and high quality design in new and infill development.

Comprehensive Plan, page 3.3.

2-1 The Growth Management Policy Directs Development into the Development Areas and Preserves the Rural Area for Rural Uses

The Growth Management Policy “directs development into specific, identified areas while conserving the remainder of the County for rural uses, such as agriculture, forestry, resource protection, and others that rely on these uses.” Comprehensive Plan, page 3.3. The Policy “is the basis for most of the recommendations in [the Comprehensive]
Plan and is the primary means to achieve the County’s vision for the future.” Comprehensive Plan, page 3.4. The stated goal of the Policy is as follows:

Albemarle County’s Development Areas will be attractive, vibrant areas for residents and businesses, supported by services, facilities, and infrastructure. Growth will be directed to the Development Areas and the County’s Rural Area, with its agricultural, forestal, historic, scenic, and natural resources will be preserved for future generations.

Comprehensive Plan, page 3.1.

2-2 The Growth Management Policy Has Been Consistently Applied

The first objective of the Growth Management Policy is to consistently use the Policy as the basis on which to guide decisions on land use, capital expenditures, and providing services. Comprehensive Plan, page 3.7. Strategy 1a states:

Continue to encourage approval of new development proposals in the Development Areas as the designated location for new residential, commercial, industrial, and mixed-use development. Only approve new development proposals in the Rural Area that are supported by Rural Area goals, objectives, and strategies.

Comprehensive Plan, page 3.7. This strategy has been consistently applied. “The County has a long history of making land use decisions that support growth in the Development Areas but not in the Rural Area. Existing zoning provides for by-right use of private property; however, occasionally requests are made to rezone Rural Area property for more intensive development. Such requests are rarely, if ever, approved because to do so would undermine the Growth Management Policy.” Comprehensive Plan, page 3.7.

The Growth Management Policy “has been strengthened over time by consistent application and has given Albemarle County a distinctive character when compared to the surrounding counties and most other non-urban counties in Virginia.” Comprehensive Plan, page 3.4. This distinctive character is, in part, managed growth and the constraint of sprawl. The County’s distinctive character is a valuable asset that distinguishes it from the competition for business and tourism, as further discussed in Section 6.

2-3 If a Development Areas Boundary is Expanded into the Rural Area, is the Growth Management Policy Still Being Consistently Applied?

The correct answer is “it depends,” based on analysis and consideration of all Comprehensive Plan policies relevant to a particular boundary change. When the boundaries of the Development Areas are discussed in the context of the Growth Management Policy, the boundaries being referred to are the current boundaries. Although the Growth Management Policy does not expressly address the appropriate triggers for expanding the Development Areas, the Growth Management Policy becomes insignificant if the Development Areas’ boundaries are easily changed. Therefore, any changes to the Development Areas boundaries are inconsistent with the Growth Management Policy unless other policies discussed in the following sections are considered and satisfied.

3. The County’s Economic Development Policy

The goal for economic development in the County is: “Albemarle’s economy will be diverse, strong, and sustainable, and retain and benefit County citizens, existing businesses, and new local ventures.” Comprehensive Plan, page 6.1.
3-1 Economic Development is to be Pursued in Harmony with Other Policies in the Comprehensive Plan

The Comprehensive Plan is clear that the County’s goal for economic development is to be pursued in a manner that is in harmony with other key policies in the Comprehensive Plan, in particular the Growth Management Policy:

New business, residential, and industrial growth is directed to the Development Areas where investment in infrastructure has been made, and mixed-use communities help promote healthy lifestyles. *Comprehensive Plan, page 6.3 (“Relationship to the Vision” text box).*

and:

Albemarle’s commitment to economic development is accomplished along with and within the framework of the rest of the goals and objectives of the Comprehensive Plan. *Comprehensive Plan, page 6.3.*

The Comprehensive Plan also states that the County is able to improve its economy by, among other things, “retaining the distinctive character of both the Rural Area and the Development Areas.” *Comprehensive Plan, page 6.3 (“Relationship to the Vision” text box).*

3-2 Economic Activity in the Development Areas is Different from Economic Activity in the Rural Areas

Objective 1 of the Economic Development Policy is to “[p]romote economic development activities that help build on the County’s assets while recognizing distinctions between expectations for the Development Areas and the Rural Area.” *Comprehensive Plan, page 6.5.*

The strategies for implementing this objective include promoting “new employment activities in the Development Areas and encourag[ing] developers of commercial and industrial projects to incorporate the Neighborhood Model principles” (*Comprehensive Plan, page 6.5*) and promoting “agriculture, forestry, and agribusiness enterprises in the Rural Area that help support the Rural Area goals for a strong agricultural and forestal economy.” *Comprehensive Plan, page 6.6.*

Neither of these strategies, nor the others for this objective, address the issue of expanding the Development Areas to accommodate economic development.

3-3 Strategies to Accommodate Future Business and Industrial Development in the Development Areas

Objective 4 of the Economic Development Policy recommends that the County “[e]nsure that there is sufficient land to accommodate future business and industrial growth, and plan for infrastructure to serve employment areas where these businesses are located.” *Comprehensive Plan, page 6.10.*

One strategy to implement Objective 4 is to “[p]rovide a strategic assessment of properties available for existing business expansion, start-up industries, and desirable locations for target industries. Continue to assess the quality of the areas designated for business and industry to ensure that there is land for business and industrial growth with parcels of suitable size, topography, location, and infrastructure.” *Comprehensive Plan, page 6.11 (italics added).*

A second strategy is to “[e]ncourage development of business and industrial uses in the Development Areas on appropriately zoned land and consider proactively rezoning land to allow for light industrial uses that have been identified on master plans.” *Comprehensive Plan, page 6.11.*

A third strategy is to “[e]xplore opportunities to assist with redevelopment of underutilized commercial and industrial zoned properties.” *Comprehensive Plan, page 6.11.* Although neither of these strategies address the issue of expanding the Development Areas to accommodate economic development, they do recognize the need and value of
a comprehensive study that looks at the availability of land for economic development from a strategic, rather than reactive, position. A land area analysis conducted prior to the Comprehensive Plan’s June 10, 2015 adoption concluded:

. . . that overall acreage is sufficient for future needs, but much of the available land is in small parcels and lacks the needed roads and utilities to be marketable to new and expanding target industries. Additional work is needed to develop a list of available properties and to ensure that parcels are large enough for targeted businesses and are in advantageous locations.

*Comprehensive Plan, page 6.11.* The Director of Economic Development is currently studying the availability of land suitable for economic development in the Development Areas.

4. The County’s Development Areas Policy

The goal for the County’s Development Areas is for them to be “vibrant active places with attractive neighborhoods, high quality, mixed-use areas, thriving business and industry, all supported by services, infrastructure, and multimodal transportation networks.” *Comprehensive Plan, page 8.1.* The Development Areas are “the place for residential and business growth,” and they serve as a complement to the Rural Area. *Comprehensive Plan, page 8.3.*

### 4-1 The Development Areas Can Accommodate Projected Growth if Planned Density is Achieved and Quality Development Occurs


Objective 4 states that Development Area land should be used “efficiently to prevent premature expansion of the Development Areas.” *Comprehensive Plan, page 8.27.* The discussion that follows Objective 4 states:

Albemarle County’s Development Area boundaries have generally been the same for the last sixteen years. Although there is no policy that the boundaries should remain unchanged, the County has acknowledged that premature expansion of the Development Areas will frustrate the goals of the County’s Growth Management Policy, the Rural Areas [sic] Plan, and the Neighborhood Model in achieving compact urban places. The ability of the Development Areas to accommodate projected growth depends on the density and quality of new development.

*Comprehensive Plan, page 8.27 (italics added).* This excerpt may leave one with the impression that the greater perceived threat to expanding the boundaries of the Development Areas will come from residential development if the density and form of development sought in the Comprehensive Plan is not achieved. Accommodating future business development in the Development Areas is addressed below.

### 4-2 Expanding the Development Areas Should be Considered Only if it is Determined They Cannot Accommodate Development After Conducting a Capacity Analysis

The strategies to avoid premature expansion of the Development Areas under Objective 4 focus primarily on residential development. However, a study conducted during the Comprehensive Plan review process is summarized in the Economic Development chapter of the Comprehensive Plan as follows:

As part of the background work for this Comprehensive Plan update, an analysis of land area available for industrial and office/R&D/flex/light industrial uses was completed . . . The analysis showed that overall acreage is sufficient for future needs, but much of the available land is in small parcels and lacks the needed roads and utilities to be marketable to new and expanding target industries. Additional work is needed to
develop a list of available properties and to ensure that parcels are large enough for targeted businesses and are in advantageous locations.

*Comprehensive Plan, page 6.11.*

Strategy 4b calls for the County to update the capacity analysis every two years to ensure adequate residential land exists to meet new housing needs. *Comprehensive Plan, page 8.28.* However, the discussion that follows this strategy is broader in scope:

... [S]ufficient land exists for residential growth and commercially zoned but unbuilt land can accommodate future commercial needs through 2030. Until it is established that the Development Areas cannot accommodate expected future residential and nonresidential growth, the boundaries should remain intact, with the exception of minor adjustments that result in no substantial gain in acreage. In order to know when or if the boundaries should be expanded, it is important to monitor building activity and regularly update the capacity analysis.

*Comprehensive Plan, page 8.28 (italics added).* Thus, the results of a capacity analysis, which is comprehensive in nature, is the essential study that guides the decision as to whether to expand the Development Areas.

With respect to the land needed for employment or industrial uses, the Comprehensive Plan states that, at present, capacity analysis “showed that overall acreage exists for future needs, but much of the available land is in small parcels and lacks the needed roads and utilities to be marketable to new and expanding target industries.” *Comprehensive Plan, page 8.33.* Objective 7 states: “Create thriving, active employment and commercial areas.” *Comprehensive Plan, page 8.32.* The discussion that immediately follows continues this theme: “This Objective speaks to two important land use aspects needed for thriving commerce and industry – ensuring that sufficient land is available for future non-residential uses and helping to protect that land for future business and employment needs.” *Comprehensive Plan, page 8.32.* Strategy 7a states: “Continue to ensure that sufficient developable land is available for future commercial and industrial development needs.” *Comprehensive Plan, page 8.33.*

**4-3 Extending Development to the Development Areas Boundary is a Strategy to Avoid Premature Expansion of the Development Areas:**

In the context of a discussion about protecting the visual boundary between the Rural Area and the Development Areas, the Comprehensive Plan states: “In most circumstances, development in the Development Areas should extend to the Rural Area boundary in order to use the full potential of the Development Areas and not have to expand into the Rural Area.” *Comprehensive Plan, page 8.25.*

**4-4 Redevelopment in the Development Areas is a Strategy to Avoid Premature Expansion of the Development Areas**

Redevelopment is a strategy that can: (1) “improve and take advantage of existing investment in the Development Areas” (Comprehensive Plan, page 8.23, Strategy 2o); and (2) promote “the re-use of buildings or areas to improve the functionality and appearance of underutilized sites.” (Comprehensive Plan, page 8.23) These strategies “avoid the need to expand into the Rural Area.” *Comprehensive Plan, page 8.23.*

In acknowledging the existing capacity in the Development Areas for commercial and industrial development, the Comprehensive Plan states that “[t]here is even more capacity if opportunities for redevelopment of land with existing buildings are factored in. The larger issue lies with land needed for employment uses.” *Comprehensive Plan, page 8.32.*

**5. Jurisdictional Areas**

The areas that are eligible to receive public water or sewer service, or both, are known as the jurisdictional areas. Jurisdictional areas are established and expanded by the Board of Supervisors. These are policy decisions to allow
public water and sewer services to be provided in a manner that can be supported by the utility’s physical and financial capabilities. Comprehensive Plan, page 12.29. The extent of the jurisdictional areas generally follow the Development Areas boundaries. Comprehensive Plan, page 12.29.

The single largest growth management tool for the County is the provision of utilities. Comprehensive Plan, page 13.5. The Comprehensive Plan observes:

[The County] has a longstanding commitment to provide public water and sewer service in the Development Areas while not expanding service outside of those areas. Delineation and application of jurisdictional area boundaries is significant in the encouragement, discouragement, and direction of growth to Development Areas. Strict adherence to the County’s utility extension policy is a very strong Comprehensive Plan implementation measure.

Comprehensive Plan, page 13.5. “The boundaries of the Development Areas are to be followed in delineating jurisdictional areas. Change to these boundaries outside of the Development Areas should only be allowed when: (1) the area to be included is adjacent to existing lines; and (2) public health and/or safety is in danger.” Comprehensive Plan, page 12.30.

6. The Comprehensive Plan is a Tool to Promote Economic Development and Tourism

Creating and maintaining a healthy, attractive, and livable community not only benefits the County’s residents. It also promotes economic development and tourism.

6-1 The Link Between Good Land Use Planning and Economic Development

The link between good land use planning and a community’s economic strength and success is evident in recurring themes from both the economic development and the land use planning perspectives. From the economic development perspective, these three themes arise:

- Communities must have a vision for the future.
- Communities must develop a sense of place.
- Businesses want a place, not just a site.


From the land use planning perspective, the three themes identified above are discussed in Edward T. McMahon’s article The Secrets of Successful Communities (PlannersWeb.com, July 29, 2013), which summarizes the key elements of successful communities, including:

- Successful communities capitalize on their distinctive assets – their architecture, history, natural surroundings, and home-grown businesses, rather than adopting a new or a generic identity.
- Successful communities pick and choose among development projects because some projects will make a community a better place to live, work, and visit; other projects will not. They reject generic designs from developers and insist on designs that are sensitive to local character. McMahon cites a development consultant who stated that “when a chain store developer comes to town they generally have three designs ranging from Anywhere USA to Unique.” The unique design is sensitive to local character.
- Successful communities pay attention to aesthetics by controlling signs, planting street trees, protecting scenic views and historic buildings, and encouraging new construction that fits in with the existing community.
McMahon explains why aesthetics are important: “The image of a community is fundamentally important to its economic well-being. Every single day in America people make decisions about where to live, where to invest, where to vacation and where to retire based on what communities look like.”

The following excerpts from various commentaries and studies sum up a range of reasons why good land use planning should matter to a locality interested in economic development:

- In a study on the effect of zoning on economic development in rural areas, the authors concluded that planning and zoning facilitated economic development rather than impeded it. The authors summarized the benefits of zoning to include: “(1) business and citizen preference for land use predictability; (2) assurance for business prospects and residents that their investment will be protected; (3) the ability to guide future development and prevent haphazard (e.g., patchwork), harmful, or unwanted development; and (4) the minimization of potential conflict between industry and residents.” Does Rural Land-use Planning and Zoning Enhance Local Economic Development? Economic Development Journal, Fall 2006, Joy Wilkins, B. William Riall, Ph.D., Arthur C. Nelson, Ph.D., with Paul Counts and Benjamin Sussman.

- “Having a distinctive identity will help communities create a quality of life that is attractive for business retention and future residents and private investment. Community economic development efforts should help to create and preserve each community’s sense of uniqueness, attractiveness, history, and cultural and social diversity, and include public gathering places and a strong local sense of place.” Local Government Commission (California), Principle 14.

- “Quality urban development . . . wants no part of an unstable, unplanned, uncontrolled environment as they know this is not a place to make a long-term investment.” Planning America's Communities: Paradise Found? Paradise Lost? Herbert Smith (1991)

- “The states that do the most to protect their natural resources also wind up with the strongest economies and the best jobs.” Institute for Southern States Study (1994).

6-2 The Link Between Good Land Use Planning and Tourism

Tourism is also a beneficiary of good land use planning. The Virginia Tourism Corporation reports that in 2014, domestic tourism in Virginia generated $22.4 billion in visitor spending, supported 216,900 jobs, and provided approximately $1.504 billion in state and local taxes to Virginia’s communities. In Albemarle County and the City of Charlottesville, the Virginia Tourism Corporation reports that tourism generated almost $553 million in direct visitor spending, supported over 5,400 jobs and generated $18 million in local tax revenue for the city and the county in 2014. Needless to say, tourism is a significant part of economic development.

In discussing the role that a community’s image plays in tourism, Edward T. McMahon, in his article The Secrets of Successful Communities (PlannersWeb.com, July 29, 2013), writes: “The more any community in America comes to look just like every other community the less reason there is to visit. On the other hand, the more a community does to protect and enhance its uniqueness whether natural or architectural, the more people will want to visit. Tourism is about visiting places that are different, unusual, and unique. If everyplace was just like everyplace else, there would be no reason to go anyplace.” “This is the reason why local land use planning and urban design standards are so important.” Edward T. McMahon, Responsible Tourism: How to Preserve the Goose that Lays the Golden Egg, Virginia Town & City, May 2015.

Other writers have expressed a similar sentiment, which all go back to why good land use planning should matter to a community:

- “Tourism simply doesn’t go to a city that has lost its soul.” Arthur Frommer, Travel Writer.
“The most central feature that needs protection is the natural beauty and setting of a place. Once lost, it can seldom be restored.” Leisure Travel: Making it a Growth Market . . . Again, Stanley Plog.

In summary, these excerpts advocate managed development and growth. They also caution localities to avoid losing their unique identity. Creating and maintaining a healthy, attractive, and livable community not only benefits a locality’s residents. It also promotes economic development and tourism.

7. Conclusion

Good land use planning promotes economic development and tourism, and the Board of Supervisors’ consistent application of the policies pertaining to Growth Management, Economic Development, and the Development Areas, and the Board’s establishment of jurisdictional areas are the long-term drivers of good land use planning in Albemarle County. The result of the consistent application of these policies is that Albemarle County has a distinctive character that sets it apart from its peer counties.

The decision to vary from these policies to, for example, expand the Development Areas, should be approached cautiously. The Comprehensive Plan provides strategies to avoid prematurely expanding the Development Areas by, for example, pursuing redevelopment. The Plan carves out an exception for “minor adjustments that result in no substantial gain in acreage.” The Plan also recognizes that, at some point, expansion may be required. Before that step is taken, the Plan calls for “monitoring building activity” and engaging in a strategic and comprehensive assessment of the adequacy and capacity of land, structures, or both, to accommodate the uses proposed for further development.
Appendix J

Sample Rules of Parliamentary Procedure
(Source: Albemarle County Board of Supervisors Rules of Procedure)

1. Purpose

   A. **General.** The purpose of these Rules of Procedure (the Rules) is to facilitate the timely, efficient, and orderly conduct of public meetings and decision-making, and they are designed and adopted for the benefit and convenience of the Albemarle County Board of Supervisors (the Board).

   B. **Rules Do Not Create Substantive Rights in Others.** The Rules do not create substantive rights in third parties or participants in matters before the Board.

   C. **Compliance with These Rules.** The Rules that are parliamentary in nature are procedural, and not jurisdictional, and the failure of the Board to strictly comply with the procedural rules shall not invalidate any action of the Board. The Rules that implement the requirements of State law are jurisdictional only to the extent that Virginia law makes them so.

2. Board Members

   A. **Equal Status.** Except for the additional responsibilities of the Chair provided in Rule 3(A), all Board members have equal rights, responsibilities, and authority.

   B. **Decorum.** Members will act in a collegial manner and will cooperate and assist in preserving the decorum and order of the meetings.

3. Officers and Their Terms of Office

   A. **Chair.** When present, the Chair shall preside at all Board meetings during the year for which elected. The Chair shall have a vote but no veto. (Virginia Code §§ 15.2-1422 and 15.2-1423) The Chair shall also be the head official for all of the Board’s official functions and for ceremonial purposes.

   B. **Vice-Chair.** If the Chair is absent from a Board meeting, the Vice-Chair, if present, shall preside at the meeting. The Vice-Chair shall also discharge the duties of the Chair during the Chair’s absence or disability. (Virginia Code § 15.2-1422)

   C. **Acting Chair in Absence of Chair and Vice-Chair.** If the Chair and Vice Chair are absent from any meeting, a present Board member shall be chosen to act as Chair.

   D. **Term of Office.** The Chair and Vice-Chair shall be elected for one-year terms, but either or both may be re-elected for one or more additional terms. (Virginia Code § 15.2-1422)

   E. **References to the Chair.** All references in these Rules to the Chair include the Vice-Chair or any other Board member when the Vice-Chair or the other member is acting as the Chair.

4. Meetings

   A. **Annual Meeting.** The Annual Meeting is the first meeting in January held after the newly elected members of the Board qualify for the office by taking the oath and meeting any other requirements of State law, and the first meeting held in January of each succeeding year. At the Annual Meeting, the Board shall:

      1. **Elect Officers.** Elect a Chair and a Vice-Chair.
2. **Designate Clerks.** Appoint a Clerk who shall serve at the pleasure of the Board and have the duties stated in Virginia Code § 15.2-1539 and any additional duties set forth in resolutions of the Board as adopted from time to time. (Virginia Code § 15.2-1538)

3. **Establish Schedule for Regular Meetings.** Establish the days, times, and places for regular meetings of the Board for that year. (Virginia Code § 15.2-1416)

4. **Establish Dates for Hearings on Zoning Text Amendments.** Establish the days on which public hearings may be held on citizen-initiated zoning text amendments.

5. **Adopt Rules and Policies.** Adopt Rules of Procedure and Board Policies that will apply in the calendar year, subject to amendment under Rule 12.

**B. Regular Meetings.** Regular Meetings are those established at the Annual Meeting to occur at specified days, times, and places.

1. **Regular Meeting Falling on a Holiday.** If any day established as a Regular Meeting day falls on a legal holiday, the meeting scheduled for that day shall be held on the next regular business day without action of any kind by the Board. (Virginia Code § 15.2-1416)

2. **Adjourning a Regular Meeting.** A regular meeting, without further public notice, may be adjourned from day to day or from time to time or from place to place, not beyond the time fixed for the next regular meeting, until the business of the Board is complete. (Virginia Code § 15.2-1416) If a quorum was not established or was lost during the meeting, the Board members present may only adjourn the meeting (See also Rules 7(B), (C), and (D)).

3. **Continuing a Regular Meeting When Weather and Other Conditions Create Hazard.** If the Chair finds and declares that weather or other conditions are hazardous for Board members to attend a regular meeting, the meeting shall be continued to the next regular meeting date. The Chair’s finding shall be communicated to the other Board members and to the general news media as promptly as possible. All hearings and other matters previously advertised shall be conducted at the continued meeting and no further advertisement shall be required. (Virginia Code § 15.2-1416)

4. **Establishing Different Day, Time, and Place of Regular Meeting.** After the Annual Meeting, the Board may establish different days, times, or places for Regular Meetings by passing a resolution to that effect in accord with Virginia Code § 15.2-1416.

**C. Special Meetings.** The Board may hold special meetings as it deems necessary at times and places that it deems convenient.

1. **Calling and Requesting a Special Meeting.** A special meeting shall be held when called by the Chair or requested by two or more Board members. The call or request shall be made to the Clerk and shall specify the matters to be considered at the meeting.

2. **Duty of Clerk to Provide Notice.** Upon receipt of a call or request, the Clerk, after consultation with the Chair, shall immediately notify each Board member, the County Executive, and the County Attorney. The notice shall be in writing and delivered to the person or to his place of residence or business, or if requested by a Board member, by email or facsimile. The notice shall state the time and place of the meeting and shall specify the matters to be considered. The notice may be waived if all members are present at the special meeting or if all members sign a waiver for the notice. (Virginia Code § 15.2-1418) The Clerk shall also notify the general news media of the time and place of the special meeting and the matters to be considered.
3. **Matters That May Be Considered.** Only those matters specified in the notice shall be considered at a special meeting unless all Board members are present.

4. **Adjourning a Special Meeting.** A special meeting may be adjourned from time to time as the Board finds necessary and convenient. (Virginia Code § 15.2-1417) If a quorum was not established or was lost during the meeting, the Board members present may only adjourn the meeting (See also Rules 7(B), (C), and (D)).

5. **Order of Business for Regular Meetings**

   A. **Establishing the Agenda.** The Clerk of the Board shall establish the agenda for all meetings in consultation with the County Executive and the Chair. The County Executive and Clerk shall review the agenda with the Chair and Vice Chair prior to the meeting. The Clerk shall set the order of business as provided in Rule 6(B), provided that the Clerk may modify the order of business to facilitate the business of the Board. The draft agenda shall be provided to the Board 6 days prior to the regular meeting date.

   1. **Resolutions Proposed by Board Members.** Resolutions may be proposed by a Board member requesting the Board to take a position on an issue of importance to the Board. A Board member requesting the Board to adopt a resolution should give notice of the intent to request action on the resolution on a specified meeting date and submit a draft of the proposed resolution. The Clerk will distribute the draft resolution with background information, if available, to all Board members. Board members may submit proposed changes to the proposed resolution to the Clerk in a redline format. The Clerk shall forward all comments received from Board members to the Board. The Board member requesting the resolution will then coordinate with the Clerk to prepare a resolution for consideration by the Board. The Clerk shall poll the Board members to determine if a majority of the Board members support adding the resolution to the agenda for consideration. If a majority of the Board members indicate support for considering the resolution, the resolution will be added to the proposed final agenda. If all Board members indicate support for the resolution, the resolution may be placed on the proposed consent agenda unless any member requests otherwise.

   2. **Other Items Proposed To Be Added to the Clerk’s Draft Agenda by Board Members.** Any Board member may propose to add items, other than Resolutions subject to Rule 5(A)(1), to the Clerk’s draft agenda for action if notice of that item has been given in writing or by email to all Board members, the Clerk, and the County Executive by 5:00 p.m. 2 days before the date of the meeting or upon the unanimous consent of all Board members present. Any item that has been timely proposed and properly noticed shall be added to the end of the agenda for discussion or action unless a majority of the Board members present agree to consider the item earlier on the agenda.

   3. **Proclamations and Recognitions Proposed by Citizens.** A request by a citizen to place a proclamation or recognition on the agenda must be made at least 4 weeks in advance of the meeting date. The request to advance a proclamation or recognition shall be submitted to the Clerk. If the request is made to a Board member, the person making the request will be directed to make the request to the Clerk. The Clerk will advise the person making the request of the process and submittal requirements. Upon submittal of the request, the Clerk will review the submittal for completeness and forward it to Board members for review. The Clerk shall poll Board members to determine if a majority of the Board supports adding the proclamation or recognition to the agenda. The Clerk will advise the person requesting the proclamation or recognition whether the proclamation or recognition will be considered by the Board.

   4. **Public Hearings for Zoning Map Amendments; Prerequisites.** Public hearings for zoning map amendments are subject to the following rules in order for the item to be placed on the agenda and heard by the Board:
a. **Public Hearing Should Not Be Advertised Until Final Documents Received.** The Board’s preference is that a public hearing for a zoning map amendment should not be advertised until all of the final documents for a zoning application have been received by the County and are available for public review. To satisfy this preference, applicants should provide final plans, final codes of development, final proffers, and any other documents deemed necessary by the Director of Community Development, to the County no later than 2 business days prior to the County’s deadline for submitting the public hearing advertisement to the newspaper. Staff will advise applicants of this date by including it in annual schedules for applications and by providing each applicant a minimum of two weeks’ advance notice of the deadline.

b. **Effect of Failure to Timely Receive Final Documents.** If the County does not timely receive the required final documents, the public hearing shall not be advertised and the matter shall not be placed on the agenda unless the applicant demonstrates to the satisfaction of the Director of Community Development that good cause exists for the public hearing to be advertised. If the matter is not advertised, a new public hearing date will be scheduled.

c. **Receipt of Final Signed Proffers.** Final signed proffers shall be submitted to the County no later than 9 calendar days prior to the date of the advertised public hearing. This policy is not intended to prevent changes from being made to proffers resulting from comments received from the public or from Board members at the public hearing.

5. **Public Hearings; Zoning Map Amendments; Deferral at Applicant’s Request.** Zoning map amendments advertised for public hearing shall be on the agenda for public hearing on the advertised date, provided that an applicant may request a deferral as follows:

a. **First Request Received Prior to Noon on the Wednesday of the Week Before the Public Hearing; Approval by Clerk; Matter Removed from Agenda.** If an applicant submits its first signed written deferral request and it is received by the Clerk no later than noon on the Wednesday of the week prior to the scheduled public hearing, the Clerk will administratively grant the request and remove the matter from the Agenda. The Board will be notified of the deferral in the next Board package and the deferral will be announced at the earliest possible Board meeting to alert the public of the deferral. The staff also will make every effort to alert the public when a deferral is granted.

b. **Subsequent Request or Request Received Later Than Noon on the Wednesday of the Week Before the Public Hearing; Matter Remains on Agenda.** Any subsequent request for deferral for the same application previously deferred, or any request received by the Clerk later than noon on the Wednesday of the week prior to the scheduled public hearing, will be granted only at the discretion of the Board by a majority vote of those Board members present and voting. In considering whether to grant the deferral, the Board shall consider whether the reason for the deferral justifies the likely inconvenience to the public caused by the deferral. The staff also will make every effort to alert the public when a deferral is granted.

B. **Order of Business at Regular Meetings.** At regular meetings of the Board, the order of business shall generally be as follows:

1. Call to Order.
2. Pledge of Allegiance.
4. Adoption of the Final Agenda.
5. Brief Announcements by Board Members.
6. Proclamations and Recognitions.
7. From the Public: Matters Not Listed for Public Hearing on the Agenda.
8. Consent Agenda.
10. From the Board: Committee Reports and Matters Not Listed on the Agenda.
11. From the County Executive: Report on Matters Not Listed on the Agenda.
12. Adjourn.

C. Closed Meetings. A closed meeting may be held at any point on the agenda, as necessary. Generally, a closed meeting will be scheduled either at the midpoint of the agenda or at the end of the agenda prior to adjournment.

6. Rules Applicable to the Items of Business on the Agenda

A. Adoption of the Final Agenda. Adoption of the Final Agenda is the first order of business for a regular meeting of the Board. The Board may modify the order of business as part of its adoption of the final agenda. The final agenda shall be adopted by a majority vote of the Board members present and voting. No matter for action not included on the final agenda shall be considered at that meeting.

B. Brief Announcements by Board Members. Brief Announcements by Board Members are announcements of special events or other items of interest that are not considered committee reports and are not otherwise on the meeting agenda.

C. Proclamations and Recognitions. Proclamations are ceremonial documents or recognitions adopted by the Board to draw public awareness to a day, week, or month to recognize events, arts and cultural celebrations, or special occasions. Recognitions are ceremonial acknowledgements by the Board of a person for service or achievement.

D. From the Public: Matters Not Listed for Public Hearing on the Agenda. From the Public: Matters Not Listed for Public Hearing on the Agenda allows any member of the public to speak on any topic of public interest that is not on the agenda for a public hearing at that meeting. The following rules apply:

1. Time. Each speaker may speak for up to 3 minutes, provided that if the anticipated number of speakers may exceed 10, or for other reasons related to the Board efficiently conducting its business, the Chair may reduce the amount of time allowed for each speaker to speak to 2 minutes.

2. Place. Each speaker shall speak from the podium.

3. Manner. In order to allow the Board to efficiently and effectively conduct its business, each speaker shall comply with Rules 6(D)(1) and 6(D)(2), shall address the Board and not the audience, and shall not engage in speech or other behavior that actually disrupts the meeting. The speaker may include a visual or audio presentation.

E. Consent Agenda. The Consent Agenda shall be used for matters that do not require discussion or comment and are anticipated to have the unanimous approval of the Board.

1. Questions to Staff. Board members should ask the County Executive or the staff member identified in the executive summary any questions regarding a Consent Agenda item prior to the Board meeting.

2. Discussion and Comment. There shall be no discussion or comment on Consent Agenda items at the Board meeting.

3. Removing Item from Consent Agenda. Any Board member may remove an item from the Consent Agenda. Any item removed from the Consent Agenda shall be moved to a specific time or to the end of the meeting agenda for further discussion or action. An item requiring only brief comment or discussion may be considered immediately after the approval of the Consent Agenda.
4. **Effect of Approval of Consent Agenda.** A motion to approve the Consent Agenda shall approve Consent Agenda items identified for action and accept Consent Agenda items identified for information.

F. **General Business.** *General Business* includes public hearings, work sessions, appointments, and other actions, discussions, and presentations.

1. **Public Hearings.** The Board shall not decide any matter before the Board requiring a public hearing until the public hearing has been held. The Board may, however, at its discretion, defer or continue the holding of a public hearing or consideration of the matter. The procedures for receiving a presentation from the applicant and comments from members of the public shall be at the discretion of the Board. However, unless otherwise decided, the following rules apply:

   a. **Time.** The applicant shall be permitted up to 10 minutes to present its application. Following the applicant’s presentation, any member of the public shall be permitted to make 1 appearance for that public hearing and speak for up to 3 minutes on the matter, provided that if the anticipated number of speakers may exceed 10, the Chair may reduce the amount of time allowed for each speaker to speak to 2 minutes. Following comments by members of the public, the applicant shall be permitted up to 5 minutes for a rebuttal presentation.

   b. **Place.** The applicant and each member of the public presenting and speaking shall do so from the podium.

   c. **Manner.** In order to allow the Board to efficiently and effectively conduct its business, each speaker shall comply with Rules 6(F)(1)(a) and 6(F)(1)(b), shall address the Board, speak to issues that are relevant to the matter for which the public hearing is being held, and shall not engage in speech or other behavior that actually disrupts the meeting. The speaker may include a visual or audio presentation.

2. **Public Hearings; Zoning Map Amendments; Applicant’s Documents Not Available During Advertisement Period.** If the public hearing is held without the applicant's final documents being available for review throughout the advertisement period due to the late submittal of documents, or because substantial revisions or amendments are made to the submitted documents after the public hearing has been advertised, it is the policy of the Board to either defer action and schedule a second public hearing that provides this opportunity to the public or to deny the application. In deciding whether to defer action or to deny the application, the Board shall consider whether deferral or denial would be in the public interest or would forward the purposes of this policy.

G. **From the Board: Committee Reports and Matters Not Listed on the Agenda.** From the Board: Committee Reports and Matters Not Listed on the Agenda shall be limited to matters that are not substantial enough to be considered as agenda items to be added to the final agenda. Reports include routine committee reports and information updates by Board members. Any matters discussed are not matters to be acted upon by the Board at that meeting.

H. **Report from the County Executive.** The Report from the County Executive is a report on matters that the County Executive deems should be brought to the Board’s attention and provide updates, if necessary, to the monthly County Executive’s Report.

7. **Quorum**

   A. **Establishing a Quorum.** A majority of all of the members of the Board that is physically assembled shall constitute a quorum for any meeting of the Board, except as provided in Rule 8(B)(2). *(Virginia Code § 15.2-1415)*
B. Quorum Required to Act; Exceptions. The Board may take valid actions only if a quorum is present. (Virginia Code § 15.2-1415) There are 2 exceptions:

1. Quorum Not Established; Adjournment. If a quorum is not established, the only action the Board members present may take is to adjourn the meeting.

2. Quorum Not Established or Lost Because of Conflict of Interest. If a quorum cannot be established or is lost because one or more Board members are disqualified because of a conflict of interest under the State and Local Government Conflict of Interests Act (Virginia Code § 2.2-3700 et seq.), the remaining members constitute a quorum for the conduct of business and have the authority to act for the Board.

C. Loss of Quorum During Meeting. If a quorum was established but during a meeting the quorum is lost, the only action the Board members present may take is to adjourn the meeting. If prior to adjournment the quorum is again established, the meeting shall continue. (Virginia Code § 15.2-1415)

D. Quorum Required to Adjourn Meeting to Future Day and Time. A majority of the Board members present at the time and place established for any regular or special meeting shall constitute a quorum for the purpose of adjourning the meeting from day to day or from time to time, but not beyond the time fixed for the next regular meeting.

8. Remote Electronic Participation

The Board will permit a Board member to participate in a Board meeting electronically from a remote location, provided that:

A. Notification to Clerk of Inability to Attend Because of Emergency, Personal Matter, Disability, or Medical Condition. On or before the day of the meeting, the Board member shall notify the Chair that the member is unable to attend the meeting due to an emergency or a personal matter or that the member is unable to attend the meeting due to a temporary or permanent disability or other medical condition that prevents the member's physical attendance. The member must identify with specificity the nature of the emergency or personal matter.

B. Quorum Physically Assembled; Approval of Remote Electronic Participation. A quorum of the Board must be physically assembled at the primary or central meeting location. The Board members present must approve the participation; however, the decision shall be based solely on the criteria in Rule 8(A), without regard to the identity of the member or matters that will be considered or voted on during the meeting.

C. Duty of Clerk to Record Action. The Clerk shall record in the Board’s minutes the specific nature of the emergency, personal matter, disability, or medical condition, and the remote location from which the absent Board member participated. If the absent member's remote participation is disapproved because participation would violate this policy, the disapproval shall be recorded in the Board's minutes.

D. Audibility of Absent Member. The Clerk shall make arrangements for the voice of the absent Board member to be heard by all persons in attendance at the meeting location. If, for any reason, the voice of the absent member cannot reasonably be heard, the meeting may continue without the participation of the absent member.

E. Limitation on Remote Electronic Participation in Calendar Year. Electronic participation by the absent member as provided in this Rule shall not exceed 2 Board meetings in each calendar year.

(Virginia Code § 2.2-3708.1)
9. Conducting the Business of the Board

A. Enable Efficient and Effective Conduct of Business. Meetings shall be conducted in a manner that allows the Board to efficiently and effectively conduct its business, without actual disruptions.

B. Minimizing Disruptions. To minimize actual disruptions at meetings:

1. Speakers. Members of the public who are speaking to the Board shall comply with Rules 6(D) and 6(F)(1), as applicable. Members of the public invited to speak to the Board during any agenda item other than From the Public: Matters Not Listed for Public Hearing on the Agenda or during a public hearing shall comply with Rule 6(D).

2. Persons Attending the Meeting. Any person attending a Board meeting shall comply with the following:
   
   a. Sounds. Persons may not clap or make sounds in support of or in opposition to any matter during the meeting, except to applaud during the Proclamations and Recognitions portion of the meeting. Instead of making sounds, persons who are not speaking at the podium are encouraged to raise their hands to indicate their support or opposition to any item during the meeting. Cell phones and other electronic devices shall be muted.

   b. Other Behavior. Persons may not act, make sounds, or both, that actually disrupt the Board meeting.

   c. Signs. Signs are permitted in the meeting room so long as they are not attached to any stick or pole and do not obstruct the view of persons attending the meeting.

C. Chair May Maintain Order. The Chair may ask any person whose behavior is so disruptive as to prevent the orderly conduct of the meeting to cease the conduct. If the conduct continues, the Chair may order the removal of that person from the meeting.

10. Voting Procedures

A. Action by Motion. Unless otherwise provided (See Rule 12(D)), any action by the Board shall be initiated by a motion properly made by a Board member and followed by a vote, as provided below:

1. Motion Must Be Seconded; Exception. Each action by the Board shall be initiated by a motion that is seconded; provided that a second shall not be required if debate immediately follows the motion. Any motion that is neither seconded nor immediately followed by debate shall not be further considered.

2. Voting and Recording the Vote. The vote on any motion shall be by a voice vote. The Clerk shall record the name of each Board member voting and how he voted on the motion.

3. Required Vote, Generally Required Vote for Specific Matters. Each action by the Board shall be made by the affirmative vote of a majority of the members present and voting on the motion; provided that an affirmative vote of a majority of all elected members of the Board shall be required to approve an ordinance or resolution: (1) appropriating money exceeding the sum of $500; (2) imposing taxes; or (3) authorizing the borrowing of money. (Article VII, § 7, Virginia Constitution; Virginia Code §§ 15.2-1420, 15.2-1427, 15.2-1428)

4. Tie Vote. A tie vote shall defeat the motion voted upon. A tie vote on a motion to approve shall be deemed a denial of the matter being proposed for approval. A tie vote on a motion to deny shall not be deemed an approval of the matter being proposed for denial.
5. **Abstention.** If any Board member abstains from voting on any motion, he shall state his abstention. The abstention will be announced by the Chair and recorded by the Clerk.

B. **Motion to Amend.** A *motion to amend* a motion properly pending before the Board may be made by any Board member. Upon a proper second, the motion to amend shall be discussed and voted on by the Board before any vote is taken on the original motion unless the motion to amend is accepted by both Board members making and seconding the original motion. If the motion to amend is approved, the amended motion is then before the Board for its consideration. If the motion to amend is not approved, the original motion is again before the Board for its consideration.

C. **Motion to Call the Question.** The discussion of any motion may be terminated by any Board member making a *motion to call the question*. Upon a proper second, the Chair shall call for a vote on the motion to call the question without debate on the motion itself, and the motion shall take precedence over any other matter. If the motion is approved, the Chair shall immediately call for a vote on the original motion under consideration.

D. **Motion to Reconsider.** Any decision made by the Board may be reconsidered if a motion to reconsider is made at the same meeting or an adjourned meeting held on the same day at which the item was decided. The motion to reconsider may be made by any member of the Board. Upon a proper second, the motion may be discussed and voted. The effect of the motion to reconsider, if approved, shall be to place the item for discussion in the exact position it occupied before it was voted upon.

E. **Motion to Rescind.** Any decision made by the Board, except for decisions on zoning map amendments, special use permits, special exceptions, and ordinances, may be rescinded by a majority vote of all elected members of the Board. The motion to rescind may be made by any Board member. Upon a proper second, the motion may be discussed and voted on. The effect of the motion to rescind, if approved, is to nullify the previous decision of the Board. Decisions on zoning map amendments, special use permits, special exceptions, and ordinances may be rescinded or repealed only upon meeting all the legal requirements necessary for taking action on the items as if it was a new item before the Board for consideration; otherwise, decisions on zoning map amendments, special use permits, special exceptions, and ordinances shall only be eligible for reconsideration as provided in Rule 10(D).


Procedural rules that are not addressed by these Rules shall be governed by Robert's Rules of Order Procedure in Small Boards, which provide:

A. **Not Required to Obtain the Floor.** Board members are not required to obtain the floor before making motions or speaking, which they can do while seated.

B. **No Limitation on Number of Times a Member May Speak.** There is no limitation on the number of times a Board member may speak to a question, and motions to call the question or to limit debate generally should not be entertained.

C. **Informal Discussion.** Informal discussion of a subject is permitted while no motion is pending.

D. **When Vote Without Motion Not Required.** Sometimes, when a matter is perfectly clear to all present and if agreed to by unanimous consent of all Board members present and voting, a vote can be taken without a motion having been introduced. Unless agreed to by unanimous consent, however, all proposed actions of the Board must be approved by vote under the same rules as in other assemblies, except that a vote can be taken initially by a show of hands, which is often a better method.

E. **Chair; Putting Question to Vote.** The Chair need not rise while putting questions to vote.
F. **Chair, Speaking During Discussion.** The Chair can speak in discussion without rising or leaving the chair, and, subject to rule or custom within the particular board (which should be uniformly followed regardless of how many members are present), the Chair usually can make motions and usually votes on all questions.

12. **Amendment of Rules of Procedure**

These Rules of Procedure may be amended only as follows:

A. **Rules Eligible for Amendment.** Any Rule may be amended.

B. **Procedure to Amend.** Any Rule eligible for amendment may be amended only by a majority vote of the Board members present and voting at the next regular meeting following a regular meeting at which notice of the motion to amend is given. Notice of the motion to amend a rule may be made by any Board member. The motion to amend a rule may be made by any Board member. Upon a proper second, the motion shall be discussed and voted on. In deciding whether and how to amend a Rule, the Board shall consider that Rules 3, 4, 6(D), 6(F)(1)(a) through (c), 7, 8, 9(B), and 10(A)(3) address statutory or constitutional requirements.

C. **Limitation on Effect of Amendment.** The Board’s approval of a motion to amend one or more Rules shall not permit the Board to act in violation of a requirement mandated by the Code of Virginia, the Constitution of Virginia, or any other applicable law.

13. **Suspension of Rules of Procedure**

These Rules of Procedure may be suspended only as follows:

A. **Rules Eligible for Suspension.** Rules 1, 2, 5, 6, 9(A), 10 (except for Rule 10(A)(3)), 11, and 12 may be suspended.

B. **Procedure to Suspend, Generally.** Any Rule eligible for suspension may be suspended by a majority plus 1 vote of the Board members present and voting. The motion to suspend a rule may be made by any Board member. Upon a proper second, the motion may be discussed and voted on. The effect of the motion to suspend a rule, if approved, is to make that rule inapplicable to the matter before the Board.

C. **Suspension of Rules Pertaining to Motions When Uncertainty as to Status or Effect.** If one or more motions have been made on a matter, and there is uncertainty as to the status or effect of any pending motions or how the Board is to proceed at that point, the Board may, by a majority vote of the Board members present and voting, suspend the rules in Rule 6 for the sole purpose of canceling any pending motions and to permit a new motion to be made. The motion to suspend a rule pertaining to any pending motions may be made by any Board member. Upon a proper second, the motion may be discussed and voted on.

D. **Limitation on Effect of Suspension.** The Board’s approval of a motion to suspend one or more Rules shall not permit the Board to act in violation of a requirement mandated by the Code of Virginia, the Constitution of Virginia, or any other applicable law.