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 Since the 1920's in Virginia, this common law principle has been superseded, at least in part, by zoning laws.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 legislative power of the Commonwealth is vested in the General Assembly. *Virginia Constitution, Article VI, Section 1*. A "statute" is an act of the state legislature declaring, commanding or prohibiting something. *Weaver v. Commonwealth*, 25 Va. App. 95 (1997). The General Assembly is Virginia's state legislature.

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:

State Regulations and their Enabling Authority	
Regulations	**Enabling Authority**
9 VAC 25-20-10 *et seq.*: Biosolids regulations	**Virginia Code § 62.1-44.19:3(B):** 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. *See also Virginia Code § 62.1-44.19:3(C).*
24 VAC 30-155-10 *et seq.*: VDOT traffic impact analysis regulations	**Virginia Code § 15.2-2222.1**: 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.

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:

- *Not laws*: Guidelines are not laws. *Faruq v. Herndon*, 831 F. Supp. 1262 (D.Md. 1993) (federal parole guidelines are not laws).

- *Do not have force and effect of law*: Guidelines do not have the force and effect of law. *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995); *Dail v. York County*, 259 Va. 577, 528 S.E.2d 447 (2000); *Zamzam v. United States*, 1997 U.S. Dist. LEXIS 2800 (W.D. Va. 1997) (Internal Revenue Manual governs the internal affairs of the Internal Revenue Service and it does not have the force and effect of law).

- *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).

- *Subordinate to laws*: Guidelines do not take precedence over or supersede statutes or regulations. *Bader v. Norfolk Redevelopment & Housing Authority*, 10 Va. App. 697, 396 S.E.2d 141 (1990).

- *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).

- *Operate within statutory framework*: Guidelines operate within the statutory framework under which they are created. *United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000) (federal sentencing guidelines "merely guide the discretion of district courts in determining sentences within a legislatively determined range . . ."); *United States v. Barrow*, 913 F. Supp. 458 (E.D. Va. 1996).

- *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").

- *Reflect experience and judgment*: Guidelines may represent a body of experience and informed judgment. *Skidmore v. Swift & Co.*, 323 U.S. 134, 34 S. Ct. 283, 89 L. Ed. 124 (1944) (interpretive guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance), cited in *Bailey ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Lamb v. Qualex, Inc.*, 2002 U.S.App. LEXIS 5982 (4th Cir. 2002) (unpublished).

- *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*.

A comprehensive plan 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 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). 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).

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.

Example of an Internal Departmental Guideline
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.
Questions for Review Coordinator/Planner Using the above information and information from the Comprehensive Plan, the reviewing planner is to answer the following questions: 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? 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?

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.

Summary of Attributes of Laws and Guidelines		
Attribute	**Law**	**Guideline**
Did a state statute expressly authorize the law or guideline?	State regulations and local ordinances will be based on express statutory authority.	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.
What body or office established the law or guideline?	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.	Any officer charged with the administration of a law may develop guidelines.
What procedure was used to establish the law or guideline?	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.	Generally, there are no required procedures to establish guidelines.
Who uses the law or guideline?	Laws have general applicability throughout the jurisdiction to which they pertain, *i.e.*, the state or the locality.	Guidelines are typically used only by the decision-makers, *i.e.*, they are for internal use, to assist them in the exercise of discretion.
How is the law or guideline used?	If it is imposing standards, it is likely a regulation.	If it is merely interpreting standards contained in statutes or ordinances to facilitate their implementation, it is likely a guideline.
What does the law or guideline require, and what are the consequences for non-compliance?	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.	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.
What language does the law or guideline use?	The word "shall" is generally used in an imperative or mandatory sense. *Schmidt v. City of Richmond*, 206 Va. 211, 142 S.E.2d 573 (1965). Statutes and regulations commonly use the term "shall."	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.
How does the law or guideline refer to itself?	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.	