

## 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:

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

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

Procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991). Procedural due process does not apply to legislative matters.

To establish a violation of procedural due process, plaintiffs must show: (1) they had property or a property interest; (2) of which the defendant deprived them; (3) without due process of law. *Sunrise Corp. v. City of Myrtle Beach*, 420 F.3d 322 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 not 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.

<b>The Due Process Clause: Procedural Due Process</b>	
<b>Rights Protected</b>	<b>How to Ensure Compliance</b>
The right to notice and the right to be heard	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
The locality’s adherence to statutory time requirements	Adhere to the statutory time requirements in, <i>e.g.</i> , Virginia Code §§ 15.2-2286(A)(7) (rezonings), 15.2-2259 (final subdivision plats and site plans), 15.2-2312 (variances and appeals to the BZA)
Regulation may not be uncertain or vague; a person of ordinary intelligence must have a reasonable opportunity to know what is prohibited	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

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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 *Ihnken 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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. *Lingle v. Chevron USA, 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 (4<sup>th</sup> 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”).

<b>The Due Process Clause: Substantive Due Process</b>	
<b>Right Protected</b>	<b>How to Ensure Compliance</b>
Regulation or decision may not be arbitrary or irrational, so unjustified by any circumstance, governmental interest, or facts	<p>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</p> <p>Ensure that specific zoning actions are based on evidence in the record and are not arbitrary and capricious</p>

Substantive due process does not forbid reasonable regulation of the use of private property. *Alford v. City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979). However, a legitimate exercise of the zoning power requires that “the means employed [must be] reasonably suited to the achievement of [the] goal.” *Alford*, 220 Va. at 586, 260 S.E.2d at 243. The boundaries of permissible action by localities are set by the law. *First Virginia Bank - Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983).

Substantive due process requires that a zoning action *not arbitrarily or capriciously deprive a person of the legitimate use of his or her property*. The mere power to enact an ordinance does not carry with it the right to arbitrarily or capriciously deprive a person of the legitimate use of his property. *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653, 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1995); *Gum Springs, LC 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. *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4<sup>th</sup> Cir. 1992).

- *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. *Gum Springs, 59 Va. Cir. at 515.*
- *The third element – governmental action beyond the outer limits of legitimacy that no process can cure:* “[I]n 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; Gum 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 *Siena Corporation v. Mayor and City Council of Rockville, Maryland, 874 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 (4<sup>th</sup> 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. DeGross 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.”

*Boggs v. Board of Supervisors of Fairfax County*, 211 Va. 488, 178 S.E.2d 508 (1971) deserves some discussion because it would likely be analyzed as a substantive due process case under current case law (assuming no state court remedy was available). The Virginia Supreme Court found that the R-10 zoning classification attached to plaintiff’s land rendered the land economically unfeasible for development, and not saleable at any price. The Court held that the board’s refusal to rezone the land from the single-family classification to another classification was clearly unreasonable and arbitrary. In holding that the plaintiff’s property should be rezoned to a reasonable use, the Court stated that “[a] zoning of land for single family residences is unreasonable and confiscatory and therefore illegal where it would be practically impossible to use the land in question for single family residences.” *Boggs*, 211 Va. at 491, 178 S.E.2d at 510.

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. *Huggins v. Prince George's County*, 683 F.3d 525 (4<sup>th</sup> Cir. 2012). The court found that the county had good cause to take the action it took, which was within the scope of the broad rights the county reserved in consent orders the parties had entered into to resolve the enforcement litigation, was reasonable given that the site adjoined a superfund site and there was evidence that hazardous substances were migrating across the salvage company's site toward a county-owned right-of-way, and the salvage company had been grading its site without a permit. Under these facts, the court found no substantive due process violation because the county's actions did not "shock the conscience," which was what the salvage company had to allege and show.

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. *Sundowner Association v. Wood County Commission*, 2014 WL 3962495, at 18 (S.D. W.Va. 2014). 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.

*Quinn v. The Board of County Commissioners of Queen Anne's County, Maryland*, 862 F.3d 433 (4<sup>th</sup> Cir. 2017) encompasses planning, zoning, and subdivision issues. 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 both the sewer extension plan and the merger provision violated his substantive due process rights. The Fourth Circuit Court of Appeals held that his substantive due process challenge to the sewer extension plan failed because "Quinn never had an entitlement to receive sewer service. He bought his land knowing it lacked sewer service, and Maryland law does not recognize a property interest in access to sewer service."

The court also rejected Quinn's substantive due process challenge to the merger provision, holding that the merger provision was a patently legitimate governmental action and explaining:

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 (4<sup>th</sup> 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 (4<sup>th</sup> 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. Pomhatan County*, 2009 WL 3359204 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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, safety, morals, or general welfare.* 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.

*Board of Supervisors of Fairfax County v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959), quoted in *Schefer, supra*.

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. Kobler*, 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).

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

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 (4<sup>th</sup> 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 test 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.

### **6-320 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 geographical 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 *Rome, supra*; but see *Kobler, supra* (under the facts, there was no rational basis to draw district boundary line along road).

### 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 (4<sup>th</sup> 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.

Although not couched as an equal protection case, the Virginia Supreme Court in *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), overturned the board’s denial of the applicant’s request to rezone its property to a higher density which was consistent with the density recommended for the property in the comprehensive plan. The Virginia Supreme Court held that the denial of the rezoning was unreasonable. The unwritten policy of the county was to promote Reston for development first, followed by the properties on the periphery, such as the applicants’. At the time the board was denying Allman’s rezoning application, it was approving other similar rezonings in the area. The Court noted that the board had denied the zoning application “primarily because of its timing, rather than because of its impact on public facilities.”

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 (4<sup>th</sup> 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 (4<sup>th</sup> 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*, 239 Va. at 230, 391 S.E.2d at 372.

In *Dawson, LC v. Loudoun County Board of Supervisors*, 59 Va. Cir. 517 (2001), the court denied the landowners’ claim that it was denied equal protection when the board of supervisors denied its request to upzone its land. 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 Fourteenth, provides that private property shall not “be taken for public use, without just compensation.” As its text makes plain, the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” In other words, it “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” (emphasis in original). While scholars have offered various justifications for this regime, we have emphasized its role in “barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

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

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.

Takings		
Type	Key Elements	Circumstances When Takings Claim Typically Raised (Not Necessarily Successful)
<b>Taking by physical invasion</b>	Government requires an owner to submit to a permanent physical invasion	Law requiring landowners to allow cable companies to install cable facilities; waters behind government dam that flood private property
<b>Regulatory taking</b>	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%	Regulations or decisions that thwart landowners plans to develop or use their property or significantly reduce the value of the property, <i>e.g.</i> , denied upzonings
<b>Temporary taking</b>	Regulation or decision temporarily deprives an owner of all or substantially all economically beneficial use of the property	Moratoria that prohibit development; lengthy delays to obtain approvals
<b>Categorical taking</b>	Regulation or decision completely deprives an owner of “all economically beneficial use” of the property	Environmental regulations such as sand dune protection laws that prohibit all development and use of the property
<b>Exaction</b>	Locality requires dedication of land or fees as a condition of approval; the condition lacks a nexus and rough proportionality to the impacts	Conditions (proffers) associated with a rezoning or a condition to a special use permit, variance, site plan or subdivision plat

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).

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

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, LLC v. Baltimore County*, 2010 U.S. App. LEXIS 19582, 2010 WL 3736258 (4<sup>th</sup> 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 (4<sup>th</sup> 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 *Taboe-Sierra Preservation Council v. Taboe 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (9<sup>th</sup> Cir. 2007) (economic impact of height and use restrictions on portion of owners' property near airport was minimal because the property in the RPZ accounted for only 5% of the owners' property, and that small portion could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot).

"Disparity in values between residential and commercial uses will always exist, yet the government is not required to maintain zoning so that a landowner may enjoy the most beneficial use of her property." *Reagan v. County of St. Louis*, 211 S.W.3d 104 (2006) (rezoning from industrial to residential zoning district imposed an insufficient economic impact to constitute a taking where the reduction in value of owner's land was \$65,300, or 30%) citing *Dorman v. Township of Clinton*, 269 Mich. App. 638 (2006); *K & K Const. v. Department of Environmental Quality*, 267 Mich. App. 523 (2005) (diminution in value of approximately 24 to 33 percent, though significant, "certainly does not weigh in favor of a finding" that the state's denial of a permit to fill in the wetland was a compensable regulatory taking); *FIC Homes of Blackstone, Inc. v. Conservation Commission*, 41 Mass. App. Ct. 681 (1996) ("A reduction in the number of houses that an owner may build is a diminution in value and not a taking"); *Carolin's 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 prevented it from being developed with house, was not severe enough to constitute a taking where it could still be used for forestry, agriculture, and conservation use, as well as for cluster development with contiguous lots).

Even where the only residual economic uses of land are recreational, such as camping or picnicking, economic value may still remain. See *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4<sup>th</sup> Cir. 1998) citing *Lucas* (dissenting opinions) but also discussing the *Penn Central* factors; *Bettendorf v. St. Croix County*, 631 F.3d 421, 425 (7<sup>th</sup> 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, in order for other uses to be considered, they must be more than just a possibility. For example, in *Matter of Friedenburt 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.

## **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 *Rith Energy v. United States*, 270 F.3d 1347 (Fed. Cir. 2001) (91% diminution in value; noting that even with 91% diminution, the revocation of a mining permit did not deprive the mining company of its opportunity to make a profit, it simply reduced the margin of profit); *Pompa Construction Corporation v. City of Saratoga Springs*, 706 F.2d 418(2<sup>d</sup> Cir. 1983) (approximately 90%, though unspecified); *Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9<sup>th</sup> 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 (9<sup>th</sup> 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 Friedenborg v. New York State Department of Environmental Conservation*, 2003 NY Slip Op 18838 (N.Y. App. Div. 11/24/2003), where there was a diminution in value of 92 to 95%, almost the entire parcel was designated as tidal wetlands, and it was likely that a number of recreational uses would be denied.

In *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997), Omni alleged that Prince William County's purchase of property adjoining its proposed subdivision constituted an uncompensated taking. In order for Omni to develop its property as it desired, its development plan included providing road, sewer and water access through and in conjunction with the adjoining property. Omni and the prior owner of the adjoining property had 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.

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

The degree of interference with *reasonable investment-backed expectations* is the second factor considered in determining whether a governmental regulation "goes too far." *Palazzolo v. Rhode Island*, 533 U.S. 606, 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 (4<sup>th</sup> 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 *Murr v. Wisconsin*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1933 (2017), the 4 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587 (2007), the appellate court affirmed a jury verdict in favor of the city, holding that the city’s denial of the owner’s application to rezone property to more than double the permitted density did not frustrate the owner’s reasonable investment-backed expectations where the land had been zoned for 1-acre minimum lots for more than 30 years before the owner purchased the property. In *Martin v. Board of Supervisors of Hanover County*, 57 Va. Cir. 546 (2001), the board of supervisors’ denial of a rezoning of a portion of a 31.3 acre tract from A-1 to AR-1 to allow an approximately 8.248 acre portion to be divided into 6 lots was not a taking where, under its present zoning, the 31.3 acre tract could be developed into three 10-acre lots. The court said

that “The Defendant Board’s actions did not deprive Plaintiffs of the value of their property; Plaintiffs bought the property on the speculation that they could enhance its value by rezoning and selling it. They could not enhance their ‘bet’ by obtaining a rezoning contingency when they purchased the property.” In *Patrick v. McHale*, 54 Va. Cir. 67 (2000), the denial of a rezoning from Agricultural to Residential did not frustrate the owner’s investment-backed expectations where the property was zoned Agricultural when it was acquired, and the owner did not buy the property in reliance on a state of affairs that did not include the challenged regulatory regime. The court also noted that the evidence established that the property was suitable for farming or cultivating timber, and that the property had significant value as an investment 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) (rezoning of owner’s property from industrial to residential did not unreasonably frustrate the owner’s expectations where the abutting lands were zoned residential and developed with dwellings; proposed office building allowed in an industrial district would have been inconsistent with the existing development); *Dorman v. Township of Clinton*, 269 Mich.App. 638 (2006) (“[a] simple visual inspection of the area would have placed [landowner] on notice that his proposed development was inconsistent with the character of the neighborhood”).

Owners are charged with knowledge of those existing regulations and conditions. *Hannon v. Metropolitan Development Commission of Marion County*, 685 N.E.2d 1075 (1997); *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217 (2000) (town’s refusal to install municipal utility services for a particular parcel was not a taking because plaintiff had no reasonable investment-backed expectations, adding that property owners are charged with knowledge of ordinances that affect their property). In addition, the owner’s knowledge and experience must be taken into account when determining 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.

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).

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 *Mebaffy 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. *Holiday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (4<sup>th</sup> 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 (4<sup>th</sup> 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); *McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124 (2007) (considering the lengthy history of zoning restrictions on adult entertainment establishments in North Dakota and other states, the owner's investment-backed expectations to offer exotic dancing in a bar were neither legitimate nor reasonable); *Town of Georgetown v. Sewell*, 786 N.E.2d 1132 (2003) (waste dumps are heavily regulated for the protection of human health and the environment).

Similarly, the importance of the public policy justifying the regulation affects one's reasonable investment-backed expectations. *Vacation Village, Inc. v. Clark County, Nevada*, 497 F.3d 902 (9<sup>th</sup> 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 (4<sup>th</sup> 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 Invs. 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*, 533 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”).

“[G]arden-variety zoning based on the need to control growth, preserve small-town atmosphere, and maintain a low tax rate” is a legitimate use of the zoning power. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776 (1995), cited in *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621, 2007 WL 4322321 (4<sup>th</sup> Cir. 2007) (unpublished) (affirming summary judgment for village).

An amendment to a comprehensive plan does not significantly diminish an owner’s investment-backed expectations where the owner was able to develop its property under the existing zoning, which was unchanged. *AEL Realty Holdings, Inc. v. Board of Representatives of the City of Stamford*, 82 Conn. App. 613 (2004). Similarly, an announcement by a state agency that the owner’s property was one of three sites for a proposed use was not a taking because the announcement was not a physical invasion of the property; it was merely a first step towards what might eventually result in a physical taking of the property, and the announcement was quickly withdrawn. *Santini v. Connecticut Hazardous Waste*, 342 F.3d 118 (2<sup>d</sup> 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 (4<sup>th</sup> 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 constrict 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 (4<sup>th</sup> 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). *Taboe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002). In *Taboe-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. *Taboe-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, 5<sup>th</sup> 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 of time 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, 5<sup>th</sup> 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, 5<sup>th</sup> 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 (4<sup>th</sup> Cir. 2005) (nearly seven year delay from date of city’s decision (held to be lawful) on its application until resolution by appellate court was not extraordinary where application made it through the city review in three to four months, and there was no evidence that the city could control or attempted to delay the judicial process); *Philric Associates v. South Portland*, 595 A.2d 1061 (Me. 1991) (two years to consider subdivision application); *1902 Atlantic Limited v. United States*, 26 Cl. Ct. 575 (1992) (five year delay held to be cost of doing business in regulated society). In most cases, prolonged governmental decision-making that temporarily deprives a landowner of the use of its property has been held not to be an extraordinary delay. Mandelker, *Land Use Law, 5<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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, 1015, 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 as 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<sup>1</sup>**

Justice Roberts, writing for the majority in *Koontz v. St. Johns River Water Management District*, 570 U.S. \_\_\_\_, 133 S. Ct. 2586, 2595 (2013) stated:

[I]nsisting 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 \_\_\_\_, 133 S. Ct. at 2595.

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 <i>reasonable conditions</i> that are in addition to the applicable zoning regulations	Conditions must be <i>constitutional conditions</i> 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 <i>give rise to the need</i> for the proffers	A condition must have an <i>essential nexus</i> to the impact it seeks to address
Proffers must have a <i>reasonable relation</i> to the rezoning	A condition must have <i>rough proportionality</i> 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

<sup>1</sup> 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.

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.

Comparison of the Invalid Condition in <i>Nollan</i> to Appropriate Conditions Having an Essential Nexus to the Impact Sought to be Addressed		
Impacts Identified by the Commission Resulting from the New, Larger House	Condition Imposed by the Commission, Lacking a Nexus to the Identified Impacts	Conditions that would have Protected the Public's Ability to see the Beach
<p>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.</p> <p>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.</p>	<p>Dedicate a public easement laterally across the beachfront of their property.</p>	<ul style="list-style-type: none"> <li>• A height limitation on the house.</li> <li>• A width restriction on the house.</li> <li>• A ban on fences on the property.</li> <li>• Provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.</li> </ul>

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. Dedications 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 (4<sup>th</sup> 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.<sup>2</sup>

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.<sup>3</sup> The

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<sup>2</sup> *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 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.

<sup>3</sup> 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."

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 \_\_\_, 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 \_\_\_, 133 S. Ct. at 2599, 2603.<sup>4</sup>
- *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’s] forfeiture of his constitutional rights.” *Koontz*, 570 U.S. at \_\_\_, 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 *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.” *Koontz*, 570 U.S. at \_\_\_, 133 S. Ct. at 2595. There is no constitutional significance between the condition precedent – *approved if* – and the condition subsequent – *denied until*.
- *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 \_\_\_, 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 \_\_\_, 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 \_\_\_, 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 –

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<sup>4</sup> 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).

whether state or federal – on which the landowner relies.” *Koontz*, 570 U.S. at \_\_\_\_, 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.

<b>Can Cash Proffer Policies Satisfy <i>Nollan</i>, <i>Dolan</i> and <i>Koontz</i>?</b>	
•	<i>Nexus</i> . Cash proffer policies may satisfy the essential nexus test in <i>Nollan</i> if the policy is part of the comprehensive plan, the need for capital improvements are part of the capital improvement program, and the impacts resulting from new development are based on fiscal impact reports, studies and analyses.
•	<i>Rough proportionality</i> . Cash proffer policies may satisfy the rough proportionality test in <i>Dolan</i> if, for example, the policy has established the fiscal impact that each new dwelling unit has on public facilities, provided that the policy provides for an <i>individualized assessment</i> by, for example, allowing for different per unit cash proffer amounts depending on the type of dwelling unit (single family detached, townhouse, multi-family, senior) and by allowing credits and offsets for specific reasons.

**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 (4<sup>th</sup> 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.

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

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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 Babalu 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 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 (4<sup>th</sup> 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		
Constitutional 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>i.e.</i> , 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 ( <i>e.g.</i> , hours of operation), place ( <i>e.g.</i> , certain zoning districts; spatial requirements) and manner ( <i>e.g.</i> , licensing requirements)

### 6-610 Signs

Signs take up space, obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. *Reed v. Town of Gilbert*, 576 U.S. \_\_\_\_, 135 S. Ct. 2218, 2231 (2015), quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994). Localities may regulate signs to improve traffic safety and to improve their aesthetics. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981) (traffic safety); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118 (1984) (aesthetics).

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.

### 6-611 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 concept 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 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 2013).

As explained by the Fourth Circuit Court of Appeals in *Cahaly v. Larosa*, 796 F.3d 399, 405 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 “communicat[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), cited in *Reed*, 135 S. Ct. at 2235 (Breyer concurring).

The Fourth Circuit Court of Appeals applied *Reed* in *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4<sup>th</sup> 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.

The following table summarizes the state of the law after *Reed v. Town of Gilbert*, 576 U.S. \_\_\_, 135 S. Ct. 2218 (2015):

Governmental Regulation of Signs After <i>Reed</i>				
Type of speech	Regulation type	Examples	When justified	Justifications
Commercial (e.g., advertising)	Content based <sup>1</sup>	“ . . . a sign that advertises the sale, lease, rental, or development of the lot on which the sign is located . . . ”  “ . . . a sign that advertises an upcoming auction . . . ”	Substantial governmental interest	Preserve aesthetics; promote traffic safety; protect property values
	Content neutral	“ . . . a sign located on a lot that is for sale, lease, rental, or development . . . ”  “ . . . a permanent sign that is supported from the ground and not attached to another structure . . . ”  “ . . . the sign area shall not exceed 32 square feet . . . ”  “ . . . the sign height shall not exceed 16 feet above the ground . . . ”  “ . . . a sign with flashing lights or moving parts is prohibited . . . ”		
Noncommercial (e.g., protest signs, political signs, ideological signs)	Content based	“ . . . a sign that advocates for a candidate for elected office or for an issue to be voted on in an upcoming election . . . ”  “ . . . a sign that protests the action of the county government or any elected official . . . ”	Compelling governmental interest	Protect public safety by guiding vehicular and pedestrian traffic; identifying hazards
	Content neutral	“ . . . a sign containing copy this is exclusively noncommercial speech . . . ”  “ . . . a permanent sign that is supported from the ground and not attached to another structure . . . ”  “ . . . the sign area shall not exceed 32 square feet . . . ”  “ . . . the sign height shall not exceed 16 feet above the ground . . . ”  “ . . . a sign with flashing lights or moving parts is prohibited . . . ”	Substantial governmental interest	Preserve aesthetics; promote traffic safety; protect property values

<sup>1</sup>Unlike 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 (4<sup>th</sup> Cir. 2013); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4<sup>th</sup> 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 (4<sup>th</sup> 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 unprotected. *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 (4<sup>th</sup> Cir. 2013); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4<sup>th</sup> 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 regulations, contending that the decibel levels set in the regulations were chosen “to silence the ability of bar and restaurant owners within the Town of Boone to play live and recorded music during their peak hours.”

The issue for the district court was whether the town’s noise regulations, which imposed limits on the permissible decibel levels produced by live and recorded music in various zoning districts depending on the day of the week and the time of day, violated the First Amendment. Because the noise regulations applied to particular zoning districts within the town, including those parts of the town that were considered traditional public forums and where the plaintiffs were located, the court analyzed the ordinance as though it applied in a traditional public forum, which imposes the most exacting standard on the analysis of the ordinance.

The court first concluded that the ordinance was a content neutral “time, place or manner” regulation because it can be justified without reference to the content of, in this case, the music. The court rejected the plaintiffs’ argument that the noise regulations were content based because they provided exemptions for certain sporting events and non-recurring community events. The court also rejected the plaintiffs’ argument that by singling out music, the town’s regulations were content based because the town was not restricting any particular viewpoint. The court concluded that the regulations furthered a substantial governmental interest because controlling noise levels in order to retain the character of a particular area and its more sedate activities, and to avoid the undue intrusion of noise into residential areas, was a legitimate justification or governmental interest. The court next concluded that the regulations were narrowly tailored to further the town’s interest because the permissible decibel levels were

established in hourly increments, more relaxed standards applied on Friday and Saturday nights and on weekends, than other days of the week, and higher decibel levels were allowed in commercial districts as compared to residential districts. Lastly, the court concluded that the noise regulations left open ample alternative channels of communication because neither live nor recorded music was prohibited. Instead, the plaintiffs and other businesses could have live or recorded music within the decibel levels allowed by the noise regulations.

In *Hassay v. Mayor and City Council of Ocean City, Maryland*, 955 F. Supp. 2d 505 (D. Md. 2013), the plaintiff was a violinist who played his violin, with an accompanying sound device, on the Ocean City boardwalk, and had done so from 1995 until 2012. In 2012, the city amended its noise regulations to prohibit sound from musical instruments or sound devices if the sound was audible from 30 feet. The expert testimony in court was that virtually every sound is audible at a distance of 30 feet. In order for music to be audible to the plaintiff's audience 15 feet away from him, it would need to be at least 10 decibels above the boardwalk's background noise and would, therefore, be easily audible from 30 feet, even though the expert would not consider it to be excessively loud. The evidence also revealed that much of the noise was generated by the boardwalk shops themselves, which played music to attract customers. The key issue in the case was whether the city's noise regulations, which prohibited sound from musical instruments or sound devices if the sound was audible from 30 feet, were narrowly tailored and left ample alternative channels for communication as required by the First Amendment.

<b>Key Considerations When Regulating Noise</b>
<ul style="list-style-type: none"> <li>• 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.</li> <li>• Preambles or statements of purpose in particular areas of regulation are important. In <i>Hellbender, Inc. v. Town of Boone</i>, 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."</li> <li>• 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.</li> <li>• 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.</li> </ul>

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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 city 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.