

## Chapter 8

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

#### 8-100 Introduction

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

<b>The Different Nature of Various Land Use Decisions</b>				
<b>Act</b>	<b>Types of Land Use Decisions</b>	<b>Key Qualities</b>	<b>Effect of Being Classified As Such</b>	<b>Presumptions</b>
<b>Legislative</b>	CPAs ZTA ZMAs Special exceptions Special use permits Certificates of appropriateness Exceptions under subdivision laws	Made only by the governing body (exception for SUPs delegated to the BZA)  Prescribes a course of conduct by establishing policy or law  Balances private conduct against the public health, safety and welfare	Broad discretion  Broad range of immunities attach to decision makers  Exempt from due process challenges (though statutory procedures must be complied with)	Presumed to be reasonable and valid (constitutional)
<b>Administrative, which does not include the exercise of discretion, i.e., ministerial</b>	Site plans Subdivision plats Certificates of occupancy	Implement policy or law by applying the facts in the particular circumstances to the law or policy	When the requirements of the law or policy have been satisfied, approval is required; there is no discretion to deny	No presumption that decision-maker acted correctly  Failure to act correctly will be found to be arbitrary and capricious
<b>Administrative, which includes the exercise of discretion</b>	Variances Decisions determining whether performance standards are satisfied	Limited discretion delegated by governing body to lower body or officer to apply specific standards to a set of facts  Standards must be as reasonably precise as the subject matter requires or permits	Decision must be based only on the standards specified by the governing body  Exercise of discretion must be reasonable	No presumptions  Exercise of discretion must be reasonable or it will be found to be arbitrary and capricious
<b>Quasi-judicial</b>	Official determinations Appeals	Grants or denies a privilege or benefit	Factual determinations are critical, and findings of fact must be made to allow judicial review	Factual determinations presumed correct; no presumption of correctness for legal conclusions

## 8-200 Legislative acts

“The power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people.” *County of Fairfax v. Fleet Industrial Park Ltd. Partnership*, 242 Va. 426, 432, 410 S.E.2d 669, 672 (1991); see *Mumpower v. Housing Authority*, 176 Va. 426, 454, 11 S.E.2d 732, 743 (1940); *Laird v. City of Danville*, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983). Generally, a legislative function can be exercised only by a locality’s governing body. *Fleet Industrial Park*, *supra*. There are limited exceptions where State law allows certain functions of the zoning power to be delegated under specific circumstances. An example is the authority in Virginia Code § 15.2-2309(6) for the governing body to delegate the review of special exceptions or special use permits to the locality’s board of zoning appeals. Even when this authority is delegated, the exercise of the power continues to be considered a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997).

The Virginia Supreme Court has recognized that it is not always easy to determine when a legislative body is acting in a legislative or some other capacity. *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948). The exercise of legislative power involves the “balancing of the consequences of private conduct against the interests of public welfare, health, and safety.” *Helmick*, 254 Va. at 229, 492 S.E.2d at 114. In general, a legislative body exercises a legislative power when it prescribes a course of conduct. *Blankenship*, 188 Va. at 103, 49 S.E.2d at 323 (distinguishing legislative acts from quasi-judicial acts). In other words, legislative acts create new laws; ministerial acts generally implement existing laws. *Helmick*, 254 Va. at 228-229, 492 S.E.2d at 114.

### 8-210 Acts that are legislative

Generally, zoning is a legislative power that has been delegated from the state to Virginia’s localities by express enabling authority. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637, 107 S.E.2d 445 (1959). Within the context of land use decisions, there are a number of acts that the courts have found to be legislative in nature:

- *Comprehensive plan adoption and amendments*: Amendments to the comprehensive plan are legislative acts. See *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 487 S.E.2d 207 (1997).
- *Zoning text and zoning map adoption and amendments*: Ordinances that regulate or restrict conduct with respect to property are purely legislative and, therefore, zoning text and zoning map amendments are legislative acts. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006) (rezoning); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997); *City Council of Virginia Beach v. Harrell*, 236 Va. 99, 372 S.E.2d 139 (1988); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). Thus, when two reasonable zoning classifications apply to a property (the existing and proposed zoning classifications), the governing body has the legislative prerogative to choose between those reasonable zoning classifications. *Board of Supervisors of Fairfax County v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991). Moreover, when the governing body considers the many factors when taking zoning actions, the weighing of those factors is a legislative function. *Miller & Smith*, *supra*.
- *Special exceptions and special use permits*: Acting on a request for a special exception or a special use permit is a legislative act. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013); *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 581, 727 S.E.2d 40, 47 (2012); *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Bollinger v. Board of Supervisors*, 217 Va. 185, 227 S.E.2d 682 (1976). This rule applies even when the special exception or special use permit is essentially a waiver of a regulation by the governing body permitted under the zoning regulations. *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2004) (special exception allowed by zoning regulations to allow a “deviation” from setback regulations).
- *Certificates of appropriateness*: Action by a governing body on a certificate of appropriateness under the locality’s historic resources regulations (*Virginia Code* § 15.2-2306) is a legislative act. *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004) (treating the decision on the certificate of appropriateness as similar to a special exception; holding that the city council’s denial of the certificate was unreasonable).

- *Setting rates and fees for certain services*: Setting rates and fees for sewer or water services is a legislative function. *Eagle Harbor, LLC v. Isle of Wight County*, 271 Va. 603, 628 S.E.2d 298 (2006); *City of South Boston v. Halifax County*, 247 Va. 277, 441 S.E.2d 11 (1994).
- *Vacation of subdivision plat*: Action by a governing body on a request to vacate a subdivision plat is a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997). The determination of whether to vacate a subdivision plat, like the decision regarding the grant or denial of a special use permit, is a decision which regulates or restricts the use of property. *Helmick, supra*.
- *Variations or exceptions under subdivision regulations*: Variations or exceptions by a governing body under the authority of Virginia Code § 15.2-2242(1) are legislative acts. *GIBC Golf, LLC v. Board of Supervisors of Loudoun County*, 77 Va. Cir. 287 (2006) (exception to requirement that lots front on public street; in acting on the exception, the board of supervisors was responding to the request by a private property owner seeking to maximize its expectations as to development densities permitted by existing zoning; these expectations were weighed against the public's interest in how those private developmental requirements related to the overall transportation needs of the community).

A planning commission does not act in a lawmaking capacity when it considers matters for recommendation to the governing body that are legislative in nature. However, in making its recommendation, the commission considers the same factors and matters of public policy as the governing body.

### 8-220 Effect of an act being classified as legislative

There are two key presumptions that attach to legislative acts:

- *Presumption of reasonableness*: A legislative act is presumed to be reasonable. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006); *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003); *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997).
- *Presumption of validity*: A legislative act is also presumed to be constitutionally valid. *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). If challenged in court by probative evidence that the decision was unreasonable, the governing body need only produce sufficient evidence of reasonableness to make the issue fairly debatable; if the issue is fairly debatable, the legislative decision must be sustained. *Renkey, supra*; *Robertson, supra*; *Richardson, supra*.

Because a legislative act requires the exercise of discretion, members of the governing body are immune from liability under Virginia law from any suit arising out of the exercise or failure to exercise their discretionary or governmental authority. *See, for example, Virginia Code § 15.2-1405 (official immunity for members of board of supervisors)*. Members of the governing body are also immune from suit and liability in actions brought under 42 U.S.C. § 1983 arising from their legislative decisions. *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998) (in the land use context, absolute immunity exists when local legislative officials are acting in their legislative, as opposed to administrative or executive, capacities).

Finally, legislative actions are not subject to procedural due process claims arising from alleged deficiencies in the notice or hearings. A locality is only required to satisfy statutory notice and hearing requirements. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991) (procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings, not legislative proceedings).

### 8-300 Administrative acts that do not include the exercise of discretion, *i.e.*, ministerial acts

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

ministerial act is one performed under a given set of facts and in a prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, one's own judgment upon the propriety of the act being done. *Richlands Medical Association v. Commonwealth ex rel. State Health Commissioner*, 230 Va. 384, 337 S.E.2d 737 (1985). A duty is ministerial even though an officer has to determine the existence of the facts that make it necessary for him to act. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976).

An ordinance may authorize conditions to be imposed in carrying out a mandate. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319, 1987 WL 488696 (1987).

### **8-310 Acts that are ministerial**

The approval of site plans and subdivision plats are ministerial acts. At an early point in the site plan process, a locality may have the discretion to deny a site plan or a subdivision plat, but once the applicant has complied with all existing ordinances the function of approval becomes ministerial, and the plan or plat must be approved. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976); *Planning Commission of City of Falls Church v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971); compare *Umstatted v. Centex Homes*, 274 Va. 541, 650 S.E.2d 527 (2007) (determination of whether a subdivision application was complete was not ministerial such that a subdivider was entitled to mandamus; the determination of completeness involved an investigation of submitted plans, the conditions existing on the land and the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist). The ministerial nature of site plans and subdivision plats is best reflected in the requirement that if a plan or plat is disapproved, a locality is required to identify for the applicant the particular requirement that is unsatisfied, and explain what the applicant must do to satisfy that requirement. *Virginia Code* §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary).

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

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

### **8-320 Effect of an act being classified as ministerial**

In contrast to a legislative act that establishes a policy or law, a ministerial act implements that policy or law by applying the facts in the particular circumstances to the established standards that govern the decision. When all of the requirements of a statute or ordinance are satisfied, an action that was once discretionary becomes ministerial and mandatory, and the application must be approved. *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 487 S.E.2d 207 (1997) (once zoning requirements were satisfied, and building permit application otherwise satisfied USBC requirements, issuance of building permit was ministerial and mandatory).

Site plan and subdivision plat regulations should not inject the process with discretionary or policy considerations. For example, in *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999), the county denied a subdivision master plan, relying on a provision of its subdivision ordinance that allowed the board to deny a plat if, in its opinion, the land was unsuitable for subdivision. The ordinance also provided that land was deemed unsuitable for subdivision if it would not preserve a "rural environment." As another example, site plan review should not include a determination of consistency with the comprehensive plan because at the site plan or subdivision plat stage, the comprehensive plan is irrelevant. See, e.g., *Rackham v. Vanguard*

*Limited Partnership*, 34 Va. Cir. 478 (1994) (the comprehensive plan may not be a basis for denying a subdivision plat which is otherwise in conformity with duly adopted standards, ordinances, and statutes). The ultimate question for the decision-maker should be whether the site plan or subdivision plat will be approved or denied upon a determination that it satisfies the applicable regulations, not whether the plan should be approved or denied as a policy matter.

Unlike legislative and quasi-judicial actions, the presumptions of reasonableness and correctness do not attach to the performance of ministerial duties. *But see West v. Mills*, 238 Va. 162, 168, 380 S.E.2d 917, 921 (1989) (“[w]e keep in mind that the members of the planning commission are presumed to have acted correctly”). If a ministerial duty is not performed as required by law, a court would likely find the decision to be arbitrary and capricious and issue a writ of mandamus compelling the ministerial duty to be performed. *Phillips v. TELUS, Inc.*, 223 Va. 585, 292 S.E.2d 311 (1982). An arbitrary and capricious act is one that is “‘willful and unreasonable’ and taken ‘without consideration or in disregard of facts or without determining principle,’” or when the deciding body departs from the appropriate standard when making its decision. *James v. City of Falls Church*, 280 Va. 31, 42, 694 S.E.2d 568, 574 (2010). For example, the denial of a certificate of occupancy because the zoning administrator had fire and safety concerns was arbitrary and capricious because the petitioners had satisfied all of the requirements of the town code. *DeCarlo v. Board of Zoning Appeals of the Town of Vienna*, 78 Va. Cir. 88 (2009).

The official immunity afforded to a locality’s officers and employees under Virginia law does not exist for the performance of a ministerial duty. *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190 (1991). In civil rights actions under 42 U.S.C. § 1983, the absolute immunity that attaches to legislative acts does not attach to ministerial acts. *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998). Likewise, the qualified immunity that may be readily available for legislative acts does not exist for the improper performance of a ministerial duty if the law governing the rights that have been violated is so clear, at the time of their conduct, that a reasonably competent person, in their position, would not have believed the conduct to be lawful. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987).

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

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

There are many situations where the exercise of discretion may be required in conjunction with a site plan or subdivision plat. A site plan or subdivision ordinance may allow an applicant to request variations or exceptions of their respective requirements, and the regulations may confer some discretion on the decision-maker when acting on the request, as explained in section 8-400. The approval of these requests may be a prerequisite to the action on the site plan or subdivision plat and are separate and distinct from the ministerial nature of the review of the site plan or subdivision plat itself.

One question that occasionally arises is whether a site plan or subdivision plat may be denied on health, safety or nuisance grounds, even though the plan or plat meets all of the express requirements of the applicable regulations. General statements in land use regulations setting forth their general purposes of protecting the public health, safety, and welfare, or preventing nuisances, do not themselves provide a basis to deny a site plan or a subdivision plat. *See Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999) (Virginia Code § 15.2-2200 is merely a statement of purpose and intent, and is not a source of power). Within the scope of the enabling authority, the applicable land use regulations are supposed to address health, safety, and nuisance issues through specific and comprehensive regulations.

### **8-400 Administrative acts that include the exercise of discretion**

An officer is engaged in a discretionary act “[w]here the official duty involves the necessity on the part of the

officer to make some investigation, to examine evidence and form his judgment thereon.” *Umstattd v. Centex Homes*, 274 Va. 541, 546, 650 S.E.2d 527, 530 (2007) (mandamus denied because determining whether an application is complete is a discretionary act).

Although zoning is a generally legislative power that has been delegated from the state to Virginia’s localities by express enabling authority that must be exercised by the governing body, certain functions of the zoning power may be delegated under specific standards. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637, 107 S.E.2d 445 (1959). The nature of the power delegated has been described as “more essentially ministerial than legislative.” *Ours Properties, Inc. v. Ley*, 198 Va. 848, 852, 96 S.E.2d 754, 757 (1957); *Thompson v. Smith*, 155 Va. 367, 381, 154 S.E.2d 579, 584 (1930).

The delegation of authority to a subordinate officer or body is long-recognized in Virginia and has been described as “essential to carry out the legitimate functions of government.” *Bell v. Dorey*, 248 Va. 378, 379, 448 S.E.2d 622, 623 (1994). “Under the changing circumstances and conditions of life, it is frequently necessary that power be delegated to an agent to determine some fact or state of things upon which the legislative body may make laws operative.” *Gavis v. Board of Zoning Appeals of City of Winchester*, 1985 WL 306753 (Va. Cir. Ct. 1985).

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

The modern tendency of the courts is liberal in upholding ordinances of this character, in order to facilitate their proper administration. Considerable freedom to exercise discretion and judgment must, of necessity, be accorded to officials in charge of administering such ordinances. A legislative body, such as a city council, must work through some instrumentality or agency to perform its duties, since it does not sit continuously. Under the changing circumstances and conditions of life, it is frequently necessary that power be delegated to an agent to determine some fact or state of things upon which the legislative body may make laws operative. Otherwise, the wheels of government would cease to operate. Of course, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits.

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

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

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

*Compare Sinclair v. New Cingular Wireless*, 283 Va. 198, 720 S.E.2d 543 (2012) (characterizing the approval by the planning commission of the disturbance of critical slopes under prescribed criteria and standards as a non-delegable legislative act).

Administrative acts that may require the exercise of discretion include variances and a broad range of decisions where the decision-maker must determine whether performance standards stated in the ordinance have been satisfied.

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

The ability of a governing body to delegate discretionary authority is limited. The governing body must provide, by ordinance, “uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards.” *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637, 639, 107 S.E.2d 445, 447 (1959); *see also National Maritime Union v. City of Norfolk*, 202 Va. 672, 680, 119 S.E.2d 307, 313 (1961) (“The courts, in passing on zoning ordinances, have firmly established the rule that where such ordinances grant discretionary power for their administration, there must be provided standards for the guidance of the administering authority”). In other words, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits. *Andrews, supra* (standard of “whether [a] proposed use would be desirable or advantageous to the neighborhood or the community or the county at large [required to comply] to the minimum requirement for the promotion of the public health, safety, convenience and general welfare” found “too general and wholly vague”).

The governing body may delegate to a subordinate officer or board the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by the general terms of a law exist. *Ours Properties, Inc. v. Ley*, 198 Va. 848, 96 S.E.2d 754 (1957). In *Ours Properties*, the Virginia Supreme Court upheld an ordinance vesting discretion in zoning officials to grant an application for an industrial establishment if “satisfactory evidence is presented that such establishment will not adversely affect any contiguous district through the dissemination of smoke, fumes, dust, odor, or noise or by reason of vibration and that such establishment will not result in any unusual danger of fire or explosion.” A delegation of the power to exercise discretion based upon a finding of facts was not of itself an arbitrary or capricious delegation. *Ours Properties*, 198 Va. at 852, 96 S.E.2d at 758.

When a discretionary approval includes the authority to impose conditions, the purpose of a particular regulation may imbue the decision making body with the discretion to impose particular conditions that address the purposes of the regulation. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319, 1987 WL 488696 (1987).

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

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

The determination of whether an application is complete may also be discretionary. *See Umstatted v. Centex Homes*, 274 Va. 541, 650 S.E.2d 527 (2007) (the determination of completeness involved an investigation of submitted plans, the conditions existing on the land and the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist).

Waivers from, and modifications to, otherwise applicable regulations are not delegable administrative acts but are, instead, legislative acts that are more appropriately address through the special exception process. *Sinclair v. New Cingular Wireless*, 283 Va. 198, 720 S.E.2d 543 (2012).

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

In taking an administrative action involving the exercise of discretion, the decision-maker is allowed to exercise a certain amount of judgment regarding the propriety of the request so long as it is within the scope of the authority granted. However, when the decision-maker exercises its discretion, it may not exercise that discretion in an arbitrary or capricious manner. *Glass v. Board of Supervisors of Frederick County*, 30 Va. Cir. 504 (1981). Actions are defined as arbitrary and capricious when they are “willful and unreasonable” and taken “without consideration or in disregard of facts or law or without determining principle.” *School Board of City of Norfolk v. Wescott*, 254 Va. 218, 224, 492 S.E.2d 146, 150 (1997).

One situation where the decision-maker may run afoul of its delegated authority is if it fails to adhere to the standards applicable to the delegation and bases its decision on a standard created *ad hoc*. For example, in *Recycle America, LLC v. Loudoun County*, 59 Va. Cir. 504 (2001), the board of supervisors denied a waiver from a setback requirement under the county’s solid waste ordinances. The waiver regulations imposed express standards to be considered in evaluating such a request, and these standards pertained to whether a reduced setback would create a nuisance. However, the board denied the waiver because such a setback had not been granted for other similarly situated facilities. In finding the board’s decision to be arbitrary and capricious, the court said: “This decision sets forth a benchmark, absent from the ordinance, that weighs the outcomes of a request predicated upon a comparison with others rather than adherence to a self imposed merits-based standard.” *Recycle America*, 59 Va. Cir. at 507.

Another situation where the decision-maker may get itself into trouble is if it believes that the delegation of the authority itself – *e.g.*, “the zoning administrator *may* determine the performance standards are satisfied if . . .” – confers broad discretion that trumps the delegated standards. This issue also arose in *Recycle America*, and the court said:

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

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

If the decision-maker has not abused its discretion by acting arbitrarily or capriciously, and it has acted within the ambit of its legislatively delegated authority, then its actions should be sustained. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319, 1987 WL 488696 (1987).

### **8-440 Legislative acts may not be delegated**

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

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

## 8-500 Quasi-judicial acts

It is not always easy to determine just when a public body is acting in a quasi-judicial capacity, or in a wholly legislative capacity. In general, it may be said that a public body acts in a quasi-judicial capacity when it grants or denies a privilege or benefit, and in a legislative capacity when it prescribes a course of conduct. *Blankenship v. City of Richmond*, 188 Va. 97, 49 S. E. 2d 321 (1948).

### 8-510 Acts that are quasi-judicial

A zoning administrator acts in a quasi-judicial capacity when making official determinations. *Lynch v. Spotsylvania County Board of Zoning Appeals*, 42 Va. Cir. 164 (1997). It would appear, therefore, that a BZA acts in a similar quasi-judicial capacity when it considers an appeal of such a determination. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 72 Va. Cir. 342 (2006) *reversed on other grounds at* 275 Va. 452, 657 S.E.2d 147 (2008).

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

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

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

The party challenging the BZA’s decision has the burden of proof. *Foster, supra*. Although the trial is not *de novo* and is generally held on the record of the proceedings before the BZA, any party may introduce evidence in court. *Virginia Code § 15.2-2314*. See *chapter 15*.