

Chapter 16

Interpreting Statutes and Ordinances

16-100 Introduction

This chapter provides general guidance regarding the interpretation of statutes and ordinances, which is a common task of the zoning administrator and, on an appeal, of the BZA. It is by no means an exhaustive review of the rules of statutory interpretation. It does, however, provide a general framework for interpreting statutes and ordinances and addresses many misconceptions about this sometimes difficult task.

The rules of interpretation are the same for statutes and ordinances, and for simplicity, they are collectively referred to in this chapter as *ordinances*.

A legislative body (for a locality, its governing body) is “the author of public policy.” *In re Woodley*, 290 Va. 482, 490, 777 S.E.2d 560, 565 (2015). The best indications of public policy are to be found in the enactments of the legislative body. *Woodley, supra*.

16-200 Responsibility for interpreting the land use ordinances and the comprehensive plan

At the staff level, the task of interpreting the zoning ordinance is assigned to the zoning administrator. *Virginia Code* § 15.2-2286. A BZA is authorized to interpret the zoning ordinance. *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999). The task of interpreting the subdivision ordinance is assigned to the subdivision agent. *Virginia Code* § 15-2241(9).

A locality’s public bodies also have the authority to interpret an ordinance if it is necessary to do so to exercise its powers. *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010) (planning commission had the authority to interpret the zoning ordinance as part of its consideration of a subdivision plat; also holding that the planning commission was not obligated to adopt the zoning administrator’s interpretation of the zoning ordinance). In addition, a governing body is authorized to interpret the comprehensive plan. *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980); *Gasner v. Board of Supervisors of Fairfax County*, 1993 WL 945908 (Va. Cir. Ct. 1993). On appeal from decisions of the zoning administrator, a governing body is authorized to interpret proffers. *Virginia Code* § 15.2-2299 *et seq.*

In the end, the courts “shoulder the duty of interpreting statutes because ‘pure statutory interpretation is the prerogative of the judiciary.’” *Fitzgerald v. Loudoun County Sheriff’s Office*, 289 Va. 499, 505, 771 S.E.2d 858, 860 (2015). “This axiom stems from basic principles of separation of powers,” *Fitzgerald, supra*, because “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

16-300 Two rules specifically applicable to zoning ordinances

With respect to zoning ordinances in particular, the Virginia Supreme Court has said that they “should be given a fair and reasonable construction in the light of the manifest intent of the legislative body enacting them, the object sought to be attained, the natural import of the words used in common and accepted usage, the setting in which such words are employed, and the general structure of the ordinance as a whole.” *Patton v. City of Galax*, 269 Va. 219, 229-230, 609 S.E.2d 41, 46 (2005), quoting *Mooreland v. Young*, 197 Va. 771, 91 S.E.2d 438 (1956).

However, zoning regulations also are in derogation of the common law and operate to deprive an owner of a use thereof which otherwise would be lawful; therefore, they should be strictly construed in favor of the property owner. *83 Am. Jur. 2d, Zoning and Planning*, § 699; *see, e.g., Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (“Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.”); *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999) (an ordinance should not be extended by interpretation beyond its intended purpose). A rule of strict construction only

means that the regulations are not to be enlarged in their operation beyond their express terms. As a rule of statutory construction, this rule applies only when an ordinance is ambiguous. *See section 16-500 for a summary of the rules that apply to the construction of ambiguous ordinances.*

16-400 Give an ordinance its plain and natural meaning

The first step in interpreting an ordinance is to employ the plain and natural meaning of the words used. *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 618 S.E.2d 311 (2005); *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005); *Fritts v. Carolinas Cement Company*, 262 Va. 401, 551 S.E.2d 336 (2001); *McClung v. County of Henrico*, 200 Va. 870, 108 S.E.2d 513 (1959). This approach is possible when the language of the ordinance is unambiguous.

Often, those charged with interpreting an ordinance mistakenly jump to a *perceived intent* of the ordinance and construe it accordingly, and ignore the language of the ordinance itself. However, when employing the plain and natural meaning to language that is unambiguous, the key question is not what the governing body intended to enact, but the meaning of the words of the ordinance enacted. *Carter v. Nelms*, 204 Va. 338, 131 S.E.2d 401 (1963). When an ordinance is unambiguous, the governing body's *intent* is determined only from what the ordinance says, and not from what anyone thinks it should have said. *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) (“We determine the General Assembly’s intent from the words employed in the statutes”).

It must be assumed that the governing body chose, with deliberation and care, the words it used when it adopted the ordinance at issue. *Miller v. Highland County*, 274 Va. 355, 650 S.E.2d 532 (2007) (as employed in the relevant statutes, the terms “locality” and “board of supervisors” are not synonymous or interchangeable). The words used are binding when the ordinance is interpreted, *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 396 S.E.2d 672 (1990), unless such a literal interpretation would involve a manifest absurdity. *Dominion Trust Co. v. Kenbridge Construction Co.*, 248 Va. 393, 448 S.E.2d 659 (1994). If the rule was otherwise, the legislative power of the governing body would be usurped by those not holding that power. *Barr, supra*. For example, in *Land & Learning Development, LLC v. Board of Supervisors of Shenandoah County*, 55 Va. Cir. 226 (2001), the court agreed with the board of supervisors that cluster developments in a certain zoning district were limited to 25 acres, even though the court agreed with the developer’s argument that “limiting the maximum size of a cluster housing development undermines the stated goal of preserving open spaces.” The court recognized that there were countervailing policy goals that led the board to impose the size limitation, and it would not substitute its judgment for that of the board.

When ascertaining the plain meaning of an ordinance, each word’s meaning must be considered in the context of the entire phrase from which it is taken. *Bell v. Commonwealth*, 22 Va. App. 93 (1996). An undefined term must be given its ordinary meaning, given the context in which it is used. *Sansom v. Board of Supervisors of Madison County*, 257 Va. 589, 514 S.E.2d 345 (1999). The context may be examined by considering the other language used in the ordinance. *Sansom, supra*.

A word that is non-technical is presumed to have been used in its ordinary sense. *Frere v. Commonwealth*, 19 Va. App. 460 (1995). Dictionaries may be used as aids in obtaining the plain and natural meaning of a word. *Fritts, supra*; *Brown-Forman Corp. v. Sims Wholesale Co.*, 20 Va. App. 423 (1995). Other resources also may be relied on. For example, in order to determine whether a flag qualifies as an official flag of the United States, it may be appropriate to rely on Executive Order 10834 if the term is not otherwise defined in the zoning ordinance. *Hanover County v. Dunn*, 82 Va. Cir. 225 (2011) (upholding determination that the defendant’s flag was not a flag of the United States allowed by the zoning ordinance because it did not comply with Executive Order 10834; therefore, the defendant’s banners were mere representations of the flag and were prohibited under the zoning ordinance).

Suggested Approach to Determine the Plain and Natural Meaning of an Ordinance

- Read the entire phrase to understand its context generally, and its context with other provisions of the ordinance.
- Review the ordinance’s definitions to determine the meaning of words used in the phrase.
- Review dictionaries to determine the meaning of words not defined in the ordinance and apply a meaning that is relevant to the context in which the term is used. When it resorts to a dictionary, the Virginia Supreme Court often cites *Webster’s Third New International Dictionary*.

Zoning regulations, as with all other laws, must be interpreted to achieve a sensible meaning, and interpretations that produce absurd or unreasonable results must be avoided. *McFadden v. McNorton*, 193 Va. 455, 69 S.E.2d 445 (1952); *Hoover v. Saunders*, 104 Va. 783 (1906). An absurd result describes “situations in which the law would be internally inconsistent or otherwise incapable of operation.” *Boynnton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006).

Curious, narrow, or strained interpretations also should be avoided. *Crews v. Commonwealth*, 3 Va. App. 531 (1987). Certainly, an ordinance should not be extended by interpretation beyond its intended purpose. *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999). It is perfectly reasonable to conclude that if the governing body had intended to include a provision in an ordinance, it could, and would, have done so. *Board of Zoning Appeals ex rel. County of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999).

When current and prior versions of an ordinance are at issue, there is a presumption that the governing body, in amending the ordinance, intended to make a substantive change in the law. *West Levinsville Heights, supra*. Further, it is assumed that the amendments to an ordinance are purposeful, rather than unnecessary. *West Levinsville Heights, supra*.

Section 16-410 examines a case where the zoning administrator and the BZA correctly interpreted the zoning ordinance. The case shows that when done correctly, the exercise can be relatively simple. However, zoning administrators and BZAs can go seriously astray when they ignore the fundamental principles discussed in this chapter and instead strain to reach a particular result. The cases in sections 16-420 and 16-430 provide classic situations in the land use context where the public bodies failed to adhere to some of these fundamental principles.

16-410 Follow the basic rules to reach a sound result

In *The Lamar Company, LLC v. Board of Zoning Appeals, City of Lynchburg*, 270 Va. 540, 620 S.E.2d 753 (2005), Lamar sought approval to remove two billboards and re-erect billboards approximately 10 yards from their current location. The relevant zoning regulations prohibited a billboard from being erected in the district unless the billboard replaced a then-existing billboard in the district. Because the zoning ordinance did not define “replaces,” the zoning administrator resorted to the dictionary and applied the following definition – “to place again: restore to a former place, position, or condition.” Based on this definition, the zoning administrator determined that the new billboards would satisfy the zoning ordinance only if they were placed in the exact same location (*i.e.*, the footprint of) as the existing billboards. Because the new billboards would not be in the exact same location as the existing billboards, the zoning administrator denied Lamar’s request to move the billboards, and the BZA affirmed that decision.

The Virginia Supreme Court found no error in the BZA’s decision. The Court’s opinion is instructive as to how ordinances should be interpreted: (1) the zoning administrator chose from among several possible definitions of “replaces,” but chose the one that he determined best reflected the meaning of the word *within the context of the ordinance*; (2) although the “footprint” requirement may not have been the only possible interpretation, it clearly fell within the reasonable scope of the dictionary definition; and (3) both the zoning administrator and the BZA were familiar with the use of the word “replaces” and other relevant terms used in the zoning ordinance.

In *Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007), the issue was whether two parcels separated by a public street were *adjacent* within the meaning of the zoning ordinance so as to allow them to be considered a single lot for zoning purposes. The zoning administrator and the BZA concluded that they were not adjacent and the Virginia Supreme Court affirmed. The Court stated that “deciding when two objects are not widely separated, but are close enough to be adjacent requires a judgment call.”

16-420 Don’t ignore the plain meaning of a law, even with the best intentions

In *Board of Zoning Appeals ex rel. County of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999), the zoning administrator and the BZA went astray when, in an effort to reach a conclusion they believed would be equitable to

a landowner and the county, they ignored the plain meaning of a regulation and construed it in a manner they thought was fair, though contrary to the regulation.

The issue in *852 L.L.C.* was the proper interpretation of a regulation in the York County zoning ordinance pertaining to computing developable land area. The regulation provided density credits for certain bodies of water that could be included in calculating net developable density. Specifically, the regulation allowed: (1) a 0% density credit for existing ponds, lakes or other impounded water bodies; (2) a 50% density credit for certain nontidal wetlands; and (3) a 100% density credit for stormwater management ponds or basins. The owner sought a determination of the density credit for an 11-acre body of water on a 30-acre parcel.

The zoning administrator initially determined that the body of water was an existing lake and entitled to no density credit. When the owner complained, the zoning administrator agreed to consider a portion of the body of water to be a stormwater management facility, but only that portion that would be required to meet the stormwater management requirements of the drainage area. The zoning administrator arrived at a density credit of 18.6%, and the BZA affirmed the decision on appeal. The trial court reversed the decision of the BZA.

On appeal to the Virginia Supreme Court, the BZA argued that the density credit regulation was ambiguous where a body of water served multiple purposes (lake, wetland, stormwater management facility), and that its decision offered “a fair interpretation of the ordinance which recognizes legitimate development expectations, while protecting the county from overdevelopment.”

The Virginia Supreme Court concluded that, however equitable the BZA’s solution might be, it “extended beyond permissible ordinance interpretation and became prohibited legislative action taken by an administrator.” First, the Court concluded that the ordinance was unambiguous because it provided that the computation of the density credit “shall” be determined by one of the three percentages set forth in the ordinance. Because it was undisputed that the body of water was used for stormwater management (though it may have had excess capacity for that purpose), the plain meaning of the regulation required that it be given a 100% density credit. The Court concluded: “Nowhere does the ordinance permit the administrator to allocate a reduced density credit based on what the administrator and his staff determine is the appropriate percentage ‘necessary for a development site such as the subject property’ . . . Had the County Board of Supervisors intended the administrator to have such latitude, it would have so provided in the ordinance; such latitude may not properly be created by administrative interpretation.” *852 L.L.C.*, 257 Va. at 490, 514 S.E.2d at 770.

In *Renkey v. County Board of Arlington County*, 272 Va. 369, 375, 634 S.E.2d 352, 356 (2006), the board rezoned land from the R-5 to the C-R zoning district, even though the first paragraph of the C-R district regulations stated that in order to be eligible for the C-R classification, “a site shall be located within an area designated ‘medium density mixed use’ and zoned ‘C-3’.” The Virginia Supreme Court rejected the board’s claim that this provision was nothing more than part of the district regulation’s preamble, which began with the stated purposes of the C-R zoning district. The Court said that the language at issue set out mandatory eligibility criteria for the district.

16-430 Don’t read language into a law that isn’t there

In *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000), the plaintiffs owned land in the vicinity of a proposed radio station and tower and sought to challenge a decision by the zoning administrator that a radio tower was a use allowed by right. In fact, the Lillys had been present at all four public hearings before the board of supervisors at which the question arose. At the fourth public hearing, the zoning administrator announced his determination that the construction of a radio tower was a by-right use, and told the audience that his ruling could be appealed to the BZA. No one, including the Lillys, appealed the zoning administrator’s determination to the BZA.

The Lillys filed a declaratory relief action challenging the board of supervisors’ decisions approving a radio station and tower. The circuit court ruled that their action was barred because they failed to exhaust their administrative remedies by timely appealing the zoning administrator’s verbal determination to the BZA. On appeal, the Lillys claimed, among other things, that they had not received notice of the zoning administrator’s

determination. In its analysis of Virginia Code § 15.2-2311(A), the Virginia Supreme Court noted that nothing in section 15.2-2311(A) required that the zoning administrator's decision be in writing. Indeed, Virginia Code § 15.2-2311(A) only requires that "any *written notice of a zoning violation* or a *written order* of the zoning administrator" must inform the aggrieved person of his or her right to appeal. The zoning administrator's decision in *Lilly* was neither a notice of zoning violation nor an order. Although the practice among zoning administrators may be to put all of their determinations and decisions in writing in order to start the clock running on the time to file an appeal, there is no requirement in Virginia Code § 15.2-2311(A) that a zoning administrator's determination or decision, or the notice of the right to appeal, be in writing.

The Virginia Supreme Court concluded that the Lillys had actual notice of the decision because they were present at the public hearing, the zoning administrator made clear the basis for his decision, and the zoning administrator intended his determination to be final – based on his statement that it could be appealed to the BZA.

The following four cases illustrate errors made by zoning administrators and BZAs who read language into zoning ordinances that did not exist.

In *Donovan v. Board of Zoning Appeals of Rockingham County*, 251 Va. 271, 467 S.E.2d 808 (1996), the Virginia Supreme Court held that the BZA erred when it determined that an automobile graveyard lost its nonconforming status because it was not screened within three years after the adoption of the zoning ordinance. The Court concluded that "[n]othing in the ordinance provides that the failure to screen an automobile graveyard terminates a valid nonconforming use." *Donovan*, 251 Va. at 276, 467 S.E.2d at 811.

In *Cook v. Board of Zoning Appeals of City of Falls Church*, 244 Va. 107, 418 S.E.2d 879 (1992), the Virginia Supreme Court held that the BZA erred when it determined that all structures built before 1910 were deemed to be on the city's official register of protected property. The Court found that the BZA's interpretation was contrary to the regulation's express requirement that each structure successfully complete a certification procedure before being placed on the official register.

In *Shri Ganesb, LLC v. City Council for the City of Hampton*, 2014 Va. LEXIS 19 (2014) (unpublished), the owner of an unimproved parcel sought to install posts to prevent trespassers from driving golf carts across the parcel to the beach. The relevant zoning regulation at the time allowed as a permitted use "an accessory building or structure, . . . provided that no accessory *building* shall be constructed on a lot until the construction of the main building has been actually commenced . . ." The zoning administrator determined that the posts were not allowed because he determined that an accessory building or *structure* could not be constructed prior to commencement of construction of the the main building. By definition at the time, the posts did not meet the definition of a "building." The Virginia Supreme Court concluded that the zoning administrator's determination was plainly wrong because the restriction in the ordinance that prohibited accessory *buildings* from being constructed until construction of the main building had commenced did not apply to accessory *structures*.

In *Ramsey v. Board of Zoning Appeals of the Town of Front Royal*, 68 Va. Cir. 135 (2005), a landowner appealed the BZA's decision that a special use permit was required to construct a garage on a lot, a portion of which was in the floodplain, even though the garage would not be constructed on the portion of the lot that was in the floodplain. The relevant zoning regulation stated that a special use permit was required "for all uses, activities and development occurring within any floodplain district . . ." The zoning administrator and the BZA erred because they misread the regulation to mean that a special use permit was required for uses, activities and development occurring *anywhere on any lot, any portion of which lay within any floodplain district*. The zoning regulations did not impose such a requirement.

16-440 Be mindful of the context in which a word or phrase is used

In *Board of Supervisors of James City County v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014), the issue was whether Virginia Code § 15.2-2303.1:1 applied retroactively. Section 15.2-2303.1:1 was adopted in 2010, and it delays the collection of cash proffers for residential construction that are on a per dwelling unit or per home basis until completion of the final inspection and prior to the issuance of a certificate of occupancy for the subject

property. The question was whether Virginia Code § 15.2-2303.1:1(A), and its reference to “any cash proffer,” meant that it applied to proffers accepted before July 1, 2010, when the statute became effective.

The county relied on the Virginia Supreme Court’s statement in *Berner v. Mills*, 265 Va. 408, 413, 579 S.E.2d 159, 161 (2003) that it is a “fundamental principle[] of statutory construction that retroactive laws are not favored, and that a statute is always construed to operate prospectively unless a contrary legislative intent is manifest.” The county argued that retroactive application was not manifest in Virginia Code § 15.2-2303.1:1.

The Virginia Supreme Court disagreed, first noting that it has never required that the General Assembly use any specific form of words to indicate that a new statute or amendment to an existing statute is intended to be applied retroactively. Rather, the Court said that it looks “to the context of the language used by the legislature to determine if it shows it was intended to apply retroactively and prospectively.” *Windmill Meadows*, 287 Va. at 180, 752 S.E.2d at 843. The Court concluded:

[I]t is clear that in the overall context of the statute the legislature intended to limit the time for payment of cash proffers to the period following a final inspection and before the issuance of a certificate of occupancy “[n]otwithstanding the provisions of any cash proffer requested, offered, or accepted.” (Emphasis added.) The plain meaning of this language clearly indicates that even if an existing cash proffer already agreed to, but not yet due on the effective date of the statute, requires a payment to a locality before the completion of a final inspection, the new statute would apply, “[n]otwithstanding” that requirement, to delay the authority of the locality to demand or accept payment until after the final inspection of a subject unit is completed.

Windmill Meadows, 287 Va. at 181, 752 S.E.2d at 843. The Court also relied on *Sussex Community Services Association v. Virginia Society for Mentally Retarded Children, Inc.*, 251 Va. 240, 467 S.E.2d 468 (1996), in which it had held that the term “any restrictive covenant” in Virginia Code § 36-96.6, added to the statute in 1991, applied retroactively to restrictive covenants recorded before the effective date of the amendment.

16-450 The court does not defer to the locality’s or the BZA’s interpretation

In both *The Lamar Company, LLC v. Board of Zoning Appeals, City of Lynchburg*, 270 Va. 540, 620 S.E.2d 753 (2005) and *Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007), the Virginia Supreme Court stated that it was deferring to the interpretations of the zoning ordinance by the zoning administrator and the BZA because those officials and bodies had experience and expertise with their respective zoning ordinances. The reader should note that the Virginia Supreme Court’s deference to the local interpretations of zoning ordinances in *Lamar* and *St. Luke’s* were made under a different standard of review that changed on July 1, 2006.

Whatever judicial deference to an administrative interpretation previously existed has also been clarified. In *The Nielsen Company, LLC v. County Board of Arlington County*, 289 Va. 79, 767 S.E.2d 1 (2015), a tax case, the Virginia Supreme Court acknowledged that its prior decisions about giving “deference” or “weight” to administrative decisions “have been less than clear,” and then it explained:

“Deference” refers to a court’s acquiescence to an agency’s position without stringent, independent evaluation of the issue. [citation omitted]. “Weight” refers to the degree of consideration a court will give an agency’s position in the course of the court’s wholly independent assessment of an issue. [citation omitted]

We have consistently held that courts do not defer to an agency’s construction of a statute because the interpretation of statutory language always falls within a court’s judicial expertise. [citation omitted] Though a court never defers to an administrative interpretation, in certain situations a court may afford greater weight than normal to an agency’s position. When “the statute is obscure or its meaning doubtful, [a court] will give great weight to and sometimes follow the interpretation which those whose duty it has been to administer it have placed upon it.” *Superior Steel Corp. v.*

Commonwealth, 147 Va. 202, 206, 136 S.E. 666, 667 (1927). But even when great weight is afforded to an administrative interpretation of a statute, such an interpretation does not bind a court in deciding the statutory issue. [citation omitted] In any event, absent ambiguity, the plain language controls and the agency’s interpretation is afforded no weight beyond that of a typical litigant. [citation omitted]

In *Board of Supervisors of Culpeper County v. State Building Code Technical Review Board*, 52 Va.App. 460, 663 S.E.2d 571 (2008), the issue was whether the Culpeper County board of supervisors could establish minimum qualifications for persons acting as third-party inspectors under the county’s building official. USBC § 109.3 authorizes localities to impose “any limitation” it chooses on the delegation by the building official of his duties to third-party inspectors. Acting on this authority, the board of supervisors required that third-party inspectors be either engineers or architects. A former building official who lacked those qualifications challenged the board’s authority to the State Building Code Technical Review Board, which interpreted USBC § 109.3 in a way that denied the board of supervisors the ability to impose limitations. The court of appeals reversed the decision of the circuit court, which had deferred to the interpretation of the Technical Review Board. The court of appeals held that the Technical Review Board incorrectly interpreted USBC § 109.3 in a manner that usurped a locality’s authority to establish criteria for who may act as a delegate of the building official’s authority.

Addressing the issue of deference that should be afforded an interpretation of a regulation by the body charged with its enforcement, the court said:

Even so, “deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.” *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260, 111 S. Ct. 1227, 1237, 113 L. Ed. 2d 274, 290 (1991) (Scalia, J., concurring). No matter how one calibrates judicial deference, the administrative power to interpret a regulation does not include the power to rewrite it. When a regulation is “not ambiguous,” judicial deference “to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621, 632 (2000).

Culpeper County, 52 Va.App. at 466-467, 663 S.E.2d at 574.

For any person charged with interpreting an ordinance, one of the key lessons to be learned from *Culpeper County* is that *the authority to interpret an ordinance does not confer the power to administratively change the meaning of an ordinance through interpretation. See section 16-520 for the rules pertaining to the weight the courts may give to a consistent administrative interpretation of an ambiguous ordinance.*

16-460 Three useful rules: the “Latin Classics”

The following rules of construction should, ordinarily, be resorted to only when attempting to determine the meaning of an ambiguous ordinance (see section 16-500). However, these rules can be helpful even when an ordinance is unambiguous:

- *Ejusdem generis*: General words are to be taken as referring only to those things of the same class as the special words.
Example: A statute that refers to “. . . animals such as cats and dogs.”
Effect of the rule: The general word “animals” does not include wild animals.
- *Noscitur a sociis*: The meaning of a term can be understood from the words around it.
Example: In a statute pertaining to money and interest earned, the term “interest” means “annual interest.”
Effect of the rule: Because of the words around it, “interest” could not mean daily, weekly or monthly interest.
- *Expressio unius est exclusio alterius*: Reference to one or more things in a particular class excludes all other things in that class.

Example: The reference to “locality” excludes “homeowners’ association.”

Effect of the rule: Among the various types of entities, the fact that the statute refers to “locality” means that other entities such as “homeowners’ associations” are excluded.

16-470 The meanings given by the courts to certain commonly used words and phrases that are modifiers

Certain words and phrases that act as modifiers recur throughout the Virginia Code and local ordinances, and it is helpful to understand how the courts have interpreted these terms:

- *All:* The word *all* suggests an expansive meaning because *all* is a term of great breadth. *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012).
- *An and any:* The words *an* and *any*, are unrestrictive modifiers and are generally considered to apply without limitation. *Sussex Community Services Association v. Virginia Society for Mentally Retarded Children, Inc.*, 251 Va. 240, 243, 467 S.E.2d 468, 469 (1996); see *Board of Supervisors of James City County v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014), where the Virginia Supreme Court concluded that Virginia Code § 15.2-2303.1:1(A), and its reference to *any cash proffer*, applied retroactively, as discussed in section 16-440.
- *Shall include:* The term *shall include* is not exhaustive, and merely indicates that the listed items, among others, are covered by the relevant provision. *Shall include* is not equivalent to *limited to*. *Project Vote/Voting for America, Inc.*, 682 F.3d at 337.

16-500 If an ordinance is ambiguous, apply rules of construction to give meaning

If the language of an ordinance is clear and unambiguous, there is no need to construe it. *Taylor v. Shaw and Cannon Co.*, 236 Va. 15, 372 S.E.2d 128 (1988). The plain and natural meaning is applied, as discussed in section 16-400. Resort to rules of construction, legislative history and extrinsic facts are not permitted because the words of the ordinance itself must be taken as written to determine their meaning. *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999); *Taylor, supra*.

An ambiguous ordinance is subject to rules of construction to give it meaning. Language is ambiguous if it can be understood in more than one way. *Virginia-Am. Water Co. v. Prince William Service Authority*, 246 Va. 509, 436 S.E.2d 618 (1993). An ambiguity also exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness. *Brown v. Lukbard*, 229 Va. 316, 330 S.E.2d 84 (1985). The fact that parties may disagree as to the meaning of an ordinance does not necessarily mean that an ordinance is ambiguous. *Michie’s Jurisprudence, Statutes*, p. 310.

When an ordinance is determined to be ambiguous, the language must be construed to promote the end for which it was enacted, if such an interpretation can reasonably be made from the language used. *VEPCO v. Board of County Supervisors of Prince William County*, 226 Va. 382, 309 S.E.2d 308 (1983). An ordinance should be read to give reasonable effect to the words used and to promote the ability of the enactment to remedy the mischief at which it is directed. *Jones v. Connell*, 227 Va. 176, 314 S.E.2d 61 (1984).

Surprisingly, there do not appear to be many published opinions where a court has found a law to be ambiguous. A good example of an ambiguous law applying the “consistent administrative construction” rule is found in *Anglin v. Joyner*, 181 Va. 660, 26 S.E.2d 58 (1943), where the statute at issue provided for the forfeiture of a chauffeur’ license upon “conviction or forfeiture of bail upon two charges of reckless driving all within the preceding twelve months.” A chauffeur was convicted in August 1941 and February 1942. The chauffeur contended that the statute required that he be charged two times within a 12-month period in order for the forfeiture statute to apply. The Virginia Supreme Court found the statute to be ambiguous, but found that the Department of Motor Vehicles’ longstanding consistent interpretation was to apply the 12-month period to the dates of the convictions, not the dates of the charges, and upheld the forfeiture of the chauffeur’s license. See section 16-520 for further discussion of this rule of construction.

The reader should be aware that the rules of statutory construction are numerous, some are contradictory to one another, and they can be selectively invoked to support a desired result. “Canons of construction need not be conclusive and are often countered, of course, by some pointing in a different direction.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115, 121 S.Ct. 1302 (2001). Sections 16-510 through 16-540 provide brief discussions of some of the key rules.

16-510 Ascertain the intent of the governing body

If an ordinance is ambiguous, the intent of the governing body must be ascertained. This determination involves the appraisal of the subject matter, purposes, objects and effects of the ordinance, in addition to its express terms. *Vollin v. Arlington Co. Electoral Board*, 216 Va. 674, 222 S.E.2d 793 (1976). One source for determining the intent of the governing body is the ordinance’s preamble, which is the introductory statement explaining the document’s basis and objective. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006). In a typical zoning ordinance, each district’s regulations begin with a preamble stating the governing body’s purpose and intent for that district.

The views of the meaning and application of an ordinance indicated by both the legislative and administrative departments of the locality also are material in determining the purpose and intent of the ordinance. *Belle-Haven Citizens Association v. Schumann*, 201 Va. 36, 109 S.E.2d 139 (1959). For example, in *Gasner v. Board of Supervisors of Fairfax County*, 1993 WL 945908 (Va. Cir. Ct. 1993), the circuit court found that a provision of Fairfax County’s comprehensive plan calling for “environmentally responsible” development was ambiguous. As such, the court concluded that the board of supervisors could interpret the term in a manner that, in its discretion, best implemented the objectives of the plan, provided that its construction was reasonable.

16-520 Weight may be given to a consistent construction by officials charged with enforcement

When an ordinance is ambiguous, the Virginia Supreme Court has often said that the consistent construction of an ordinance by officials charged with its enforcement, such as the zoning administrator, is given great weight. *Cook v. Board of Zoning Appeals of City of Falls Church*, 244 Va. 107, 418 S.E.2d 879 (1992). In *The Nielsen Company, LLC v. County Board of Arlington County*, 289 Va. 79, 767 S.E.2d 1 (2015), a tax case, the Court said that “[w]hen ‘the statute is obscure or its meaning doubtful, [a court] will give great weight to and sometimes follow the interpretation which those whose duty it has been to administer it have placed upon it.’” “Weight,” the *Nielsen* Court said, “refers to the degree of consideration a court will give an agency’s position in the course of the court’s wholly independent assessment of an issue.” It should be noted that the courts have often cited this rule even in cases where the court found the ordinance to be unambiguous.

With the foregoing statements of the Virginia Supreme Court in mind, it remains vital that each interpretation must be supportable on its own merits. When viewed from that perspective, the following principles from prior case law make sense:

- *Courts will reject plainly wrong consistent administrative interpretations:* If the consistent administrative interpretation is so at odds with the plain language used in the ordinance as a whole, the interpretation is plainly wrong and will be reversed. *Board of Zoning Appeals ex rel. County of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999).
- *Locality may change consistent administrative interpretation that is wrong:* A locality will not be estopped from changing a longstanding consistent administrative interpretation where it is wrong. In *Land & Learning Development, LLC v. Board of Supervisors of Shenandoah County*, 55 Va. Cir. 226 (2001), the court agreed with the board of supervisors that cluster developments in a certain zoning district was limited to 25 acres, thereby disqualifying the landowner’s 29.069 acre parcel from such a development. The landowner claimed that county officials had not adhered to the 25-acre size limitation and had not interpreted the zoning district regulations as imposing such a size limitation. Citing *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968) and other cases, the court granted the board’s demurrer on this issue, stating that the board was not estopped from advancing its present (and correct) interpretation.

- *A single administrative interpretation may be “consistent”*: How many prior interpretations are required in order to establish a consistent administrative interpretation of an ordinance? The evidentiary burden to establish a consistent construction does not appear to be high. In *Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007), the BZA was able to establish a consistent construction of the regulation at issue by a letter from the assistant city attorney to the trustee’s attorney explaining that “[t]his interpretation has been applied uniformly throughout the city” and then explaining the rationale for that interpretation.

16-530 Construe the ordinance as a whole

An ordinance should not be construed by singling out a particular phrase. *VEPCO v. Board of County Supervisors of Prince William County*, 226 Va. 382, 309 S.E.2d 308 (1983). Various provisions of an ordinance must be read as a consistent and harmonious whole, with effect given to each word. *Jones v. Connell*, 227 Va. 176, 314 S.E.2d 61 (1984). All relative provisions and sections of an ordinance must be considered and read together in construing a single provision or section. *National Maritime Union of America, AFL-CIO v. City of Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961).

Ordinance provisions that relate to the same subject are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete ordinance arrangement. *Lillard v. Fairfax County Airport Authority*, 208 Va. 81, 155 S.E.2d 338 (1962) (regulations that deal with the same or connected subjects may be considered *in pari materia* and should be read and construed together so as to harmonize and give effect to all the provisions of each); *Prillaman v. Commonwealth*, 199 Va. 401, 100 S.E.2d 4 (1957).

When a term is used in different sections of an ordinance, the courts will give it the same meaning in each instance unless there is a clear indication that the legislative body intended a different meaning. *REVI, LLC v. Chicago Title Insurance Co.*, 290 Va. 203, 211, 776 S.E.2d 808, 812 (2015).

16-540 Other rules of construction

Following are other common rules of construction applied to determine the meaning of an ambiguous ordinance:

- *The “Latin” classics*: The rules of *ejusdem generis*, *noscitur a sociis*, and *expressio unius est exclusio alterius*, as explained in section 16-460. Although they should be applied only to assist in determining the meaning of an ambiguous ordinance, are helpful when giving meaning to an unambiguous ordinance.
- *General and specific regulations*: If conflicts between regulations cannot be resolved, the more specific regulation will be deemed controlling. *Virginia Department of Health v. Kapa, Inc.*, 289 Va. 131, 142, 766 S.E.2d 884, 890 (2015) (“[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.” [citation omitted]). A specific regulation may not be nullified by one of general application unless the legislative intent is plain. *Commonwealth ex rel. Virginia Department of Corrections v. Brown*, 259 Va. 697, 529 S.E.2d 96 (2000).
- *General and specific words*: When general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words. *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996).
- *Subsequent legislation*: A presumption normally arises that a change in law is intended when new provisions are added to prior legislation by an amendment. *Boyd v. Commonwealth of Virginia*, 216 Va. 16, 215 S.E.2d 915 (1975). However, when amendments are enacted soon after controversies arise over the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act – a formal change – rebutting the presumption of substantial change. *Boyd, supra*.

- *Meaning given to every word:* No part of a statute or ordinance may be treated as meaningless unless absolutely necessary. *Garrison v. First Federal Savings and Loan of South Carolina*, 241 Va. 335, 402 S.E.2d 25 (1991); *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation*, 277 Va. 198, 671 S.E.2d 160 (2009) (holding that the BZA correctly affirmed the determination by the zoning administrator that a site plan showing multi-family structures violated the zoning district regulations because, although “condominium-type ownership” was allowed by special use permit in the district, multi-family structures were not allowed; since “condominium-type ownership” applies to the legal form of land tenure to be adopted, not to the physical structure of the buildings to be erected and the ownership aspect of the term could not be ignored). An exception to this rule applies when a word appears to have been inserted through inadvertence or mistake and is incapable of any sensible meaning or is otherwise repugnant to the rest of the statute or ordinance. *Burnette v. Commonwealth*, 194 Va. 785, 75 S.E.2d 482 (1953).
- *Different terms:* When an ordinance uses different terms in the same section, the terms are presumed to have a different meaning from one another. *Klarfeld v. Salisbury*, 233 Va. 277, 355 S.E.2d 319 (1987).
- *Punctuation:* The punctuation used in an ordinance is said to be the most fallible of all means to interpret an ordinance, and it should not be used as an aid of interpretation except as a last resort. *See, e.g., Harris v. Commonwealth*, 142 Va. 620, 128 S.E. 578 (1925).
- *Exceptions:* Exceptions to a general ordinance provision are given a strict construction. *Commonwealth v. Edwards*, 235 Va. 499, 370 S.E.2d 296 (1988). This means that the entitlement to the exception must appear clearly from the language relied upon. *Westminster Canterbury of Hampton Roads, Inc. v. City of Virginia Beach*, 238 Va. 493, 385 S.E.2d 561 (1989).
- *Preambles:* Preambles explain the governing body’s purpose and intent for a zoning ordinance or district regulation, but cannot enlarge or confer powers to control the words of the act unless they are doubtful or ambiguous. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006) (holding that mandatory eligibility criteria for the zoning classification at issue was not part of the preamble; see case discussion in section 16-420). In a typical zoning ordinance, each district’s regulations begin with a preamble stating the governing body’s purpose and intent for that district.