

Chapter 17

Classifying Primary Uses and Determining Whether a Use is an Accessory Use

17-100 Introduction

The zoning administrator and, on appeals, the BZA often must determine whether a particular use is permitted in a zoning district, either as a *primary* (also referred to by some localities as a *principal* or *main*) use or as an *accessory* use. This chapter examines some of the key rules that apply to these determinations.

There are two types of zoning ordinances: (1) the inclusive or permissive type (hereinafter, collectively, “inclusive”), which permits only those primary uses specifically named; and (2) the exclusive type, which prohibits specified uses and permits all others. *Wiley v. Hanover County*, 209 Va. 153, 163 S.E.2d 160 (1968); *see also Board of Supervisors of Madison County v. Gaffney*, 244 Va. 545, 422 S.E.2d 760 (1992) (nudist club not allowed in conservation zoning district because not specifically permitted in district regulations). A zoning ordinance also may use both forms. *Wiley, supra*.

With an inclusive ordinance, the burden is on the landowner to show that a proposed primary use is permitted. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006); *Fairfax County v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947). With an exclusive ordinance, the burden is on the locality to show that a use is not permitted, or that it falls within a classification that is excluded. *Parker, supra*.

The inclusive ordinance appears to be the more modern approach to zoning and is the more common type of zoning ordinance in Virginia.

17-200 Rules for classifying uses

Classifying a use means determining whether a particular use or activity fits within one of the uses specifically permitted by right or by special use permit in an inclusive zoning ordinance, or as one of those prohibited in an exclusive zoning ordinance. The classification of a use requires the exercise of discretion. *Ancient Art Tattoo Studio v. City of Virginia Beach*, 263 Va. 593, 561 S.E.2d 690 (2002).

Ten Rules for Classifying a Use

- When the use regulations are ambiguous, use classifications will likely be strictly construed in favor of the landowner.
- Refer to and rely on the definitions in the zoning ordinance.
- When classifying a use, all possible uses within the district should be considered.
- Use classifications should not be based on the proposed use’s proximity to other uses.
- The activity itself, not the activity’s accoutrements, determine the type of use.
- Whether a use is appropriate in the district may not be considered.
- Use classifications must be based on legitimate land use considerations, and not on illegitimate or personal reasons.
- For uses of structures, look to their function rather than their form.
- The use itself, not the owner or the nature of the owner, should determine the classification.
- When the use regulations are ambiguous, the purpose and intent of the district should be considered.

To classify a use, in addition to applying the rules for interpreting statutes and ordinances (see chapter 16), the following rules should be considered as well:

- *Use classifications will likely be strictly construed in favor of the landowner:* The rule that prevails in most jurisdictions, at least in the absence of any statute to the contrary, is that because zoning ordinances are in derogation of the

common law and operate to deprive an owner of a use thereof which otherwise would be lawful, they should be strictly construed in favor of the property owner. *83 Am. Jur. 2d, Zoning and Planning*, § 699; see, e.g., *Young v. Town of Vienna*, 203 Va. 265, 123 S.E.2d 388 (1962) (revenue ordinance must be strictly construed); *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000). In the context of classifying uses, this rule means that the zoning administrator and the BZA should not read an implied prohibition of a particular use into a use classification.

- *Refer to and rely on the definitions in the zoning ordinance:* Most zoning ordinances include definitions of many, if not all, use classifications. If a use is defined in the zoning ordinance, that definition must be applied. In *Coston v. Norfolk Board of Zoning Appeals*, 81 Va. Cir. 152 (2010), the petitioner challenged the BZA’s decision that a moped was an automobile under the definition of “automobile” in the zoning ordinance, and therefore his moped sales use was not allowed in the C-1 zoning district. The circuit court upheld the BZA’s interpretation because the definition included “any vehicle propelled by its own motor and operating on ordinary roads” and the definition included “motor scooters, motorized bicycles and the like.” The court also concluded that the zoning ordinance definition was not in conflict with any State definition of the term.
- *When classifying a use, all possible uses within the district should be considered:* Although it may seem obvious, determining that a use is not allowed in a district because it does not fit within one use classification does not mean that it may not be allowed under another classification. In *Buckley v. Zoning Appeals Board*, 59 Va. Cir. 150 (2002), the circuit court held that the zoning administrator and the BZA erred when it determined that the landowner’s proposed use was not allowed in the zoning district because it was a *distribution facility* (defined to mean “the intake of goods and merchandise, the short term storage of such goods or merchandise, and/or the breaking up into lots or parcels and the shipment off-site of such goods and merchandise”), a use that was not allowed in the A-3 zoning district. The landowner sorted and hauled unprocessed felled trees. The court concluded that even if the logs were goods as used in the definition of *distribution facility*, the use also was a *log yard* (defined to mean “a location where unprocessed felled trees are taken, sorted by grade and species, and hauled to prospective purchasers”), which was an agricultural, forestry and silvicultural use allowed by right in the A-3 zoning district. In *CL 11-93 & CL 11-41*, opinion letter dated November 28, 2011, the circuit court concluded that the BZA erred when it found that the landowner’s proposed taxi detailing use was a by right use in the C-3 zoning district, thereby reversing the decision of the zoning administrator that the proposed use required a permit. The BZA had concluded that the proposed use fell within the by-right “similar to other by-right uses” catch-all classification. Instead, the court concluded that the zoning administrator had correctly determined that the use fell within the “vehicle service establishment” use classification, which required a permit.
- *Use classifications should not be based on the proposed use’s proximity to other uses:* In *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. (former) 1981), plaintiff sought to establish a medical facility providing abortion services. The city determined that the proposed facility was not allowed in the zoning district and justified its decision because of the proposed use’s proximity to single family residences, churches and schools. The court found that the city’s reliance on the proposed facility’s proximity to these other uses to classify the use was impermissible.
- *The activity itself, not the activity’s equipment and materials, determine the type of use:* General use classifications such as *agricultural* or *commercial* can sometimes be problematic because those terms, even if defined, are broad in scope and likely come with a number of assumptions. For example, in determining whether a landscaping business is an agricultural or a commercial use, the zoning administrator would err if he simply followed this analysis:

Landscaping business → Plant stock and small tractors → Agricultural use

The equipment and materials of the landscaping business – plant stock and small tractors – do not in and of themselves, determine whether the use is agricultural or commercial. In fact, continuing with the landscaping business example, the courts have uniformly concluded that a landscaping business is not an agricultural use where the business had a number of employees who worked off-site, the plant stock was stored on the property to be used in landscaping jobs, and equipment stored on the property was used in the landscaping jobs. See, e.g., *Town of Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95 (1953); *Petitti v. Plain Township Board of Zoning Appeals*, 2003 Ohio 8449 (2003) (unpublished); *Winnebago County v. Wilson*, 98-3114 (Wis. Ct. App. 1999) (unpublished).

- *Whether a use is appropriate in the district may not be considered:* The determination of what uses are appropriate within a particular zoning district is a legislative function reserved to the locality’s governing body. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). Thus, the role of the zoning administrator and the BZA is not to determine what types of uses they feel are appropriate in the zoning district, but only to give meaning to the use classifications the governing body has decided to allow in the district.
- *Use classifications must be based on legitimate land use considerations, and not on illegitimate or personal reasons:* A use classification should not be based or swayed by illegitimate or personal reasons. *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989). *Marks* is instructional even though it is not a use classification case. In *Marks*, a palmist sought a conditional use permit and the city initially supported granting the permit. However, after certain local citizens displayed overt religious hostility to the presence of the palmist, the city council denied the permit. The federal court of appeals concluded that the city council had improperly denied the permit. The court said that the public’s negative attitudes, or fears, unsubstantiated by factors which are properly cognizable in a zoning proceeding, were not permissible bases for a land use decision. In *P.L.S. Partners, Women’s Medical Center of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788 (D.R.I. 1988), the center obtained a building permit for a “health care facility,” a use allowed by right in the underlying zoning district. When residents complained that the center would be providing abortions, the zoning inspector changed the use classification to “hospital,” a use that required a special use permit. The center brought a civil rights action. The court held that singling out abortion services for special treatment under the zoning ordinance by classifying the use as a hospital rather than as a health care facility violated equal protection. The city had classified emergency centers, out-patient clinics, and physician’s offices that performed other minor surgical procedures as health care facilities.
- *For uses of structures, look to their function rather than their form:* Generally, the function, rather than the form, of a structure is relevant to defining the use under the zoning ordinance. *Fritts v. Carolinas Cement Company*, 262 Va. 401, 551 S.E.2d 336 (2001) (“silos” used as warehouses were properly classified as a warehouse use).
- *The use itself, not the owner or the nature of the owner, should determine the classification:* Ownership does not determine how a use is classified. *Maxeey v. Board of Zoning Appeals*, 480 N.E.3d 589 (Ind. App. 1985); *Gallagher v. Zoning Board of Adjustment*, 32 Pa D&C 669 (1963) (proposal to use single-family dwelling for religious broadcasting is not a church).
- *Consider the purpose and intent of the district:* When the use regulations are ambiguous, the purpose and intent of the zoning district and the nature of the uses allowed by-right and by special use permit should be considered to understand the zoning district.
- *Consider the legislative history:* The legislative history may provide evidence as to whether a particular use is allowed in the district or allowed by a special use permit. In *Virginia Psychiatric Co. v. Zoning Appeals Board of Fairfax County*, 47 Va. Cir. 36 (1998), the circuit court considered the record of the BZA hearing when it granted a special use permit for a nursing home in affirming a later decision by the BZA that a residential treatment facility was not within the scope of the original permit.

One Way to Reduce the Need to Classify Uses

- The traditional way in which uses have been classified in a particular zoning district has been to list in the district regulations the uses that are allowed by right and by special use permit. For example, a commercial zoning district’s regulations might list dozens of retail sales shops with great specificity – gifts shops, clothing shops, shoe shops, department stores, drug stores, stores selling musical instruments, stores selling photography equipment, and so on. If someone proposes to sell something not included in the list, the zoning administrator must determine whether it is allowed.
- Consider replacing the traditional list with broad, defined, categories such as “retail sales.”

This list of rules is not exhaustive. The first task for the zoning administrator and the BZA when classifying a use is to read the language in the zoning ordinance and apply a reasonable interpretation using the plain and natural meaning of the terms used, within the context they are used.

The classification of some uses is self-evident and simple. Other uses may not easily fit into a classification or may be difficult to classify, such as when the use is conducted indoors or in a difficult-to-observe location, the use is conducted in a manner in which its impacts are outside of the normal hours when the zoning official can observe the activities (*e.g.*, overnight storage of equipment), or when the landowner or occupant is conducting the use in a manner that prevents it from being easily classified.

The zoning official must collect information that will allow her to make an informed decision as to how a use should be classified. In order to collect the necessary information, it is suggested that she look to the following sources:

Collecting Information to Classify a Use

- Ask the owner to describe the nature of its activities in writing.
- Ask the owner for permission to enter the property or buildings to observe the activities; if permission is denied, seek an administrative search warrant to conduct an inspection to determine whether the use is permitted in the zoning district.
- Interview neighbors.
- Observe the use at various times of the day and week to understand its dimensions.
- For commercial and industrial uses, collect descriptions of the use from telephone book and newspaper advertisements or the business's website.
- For suspected commercial and industrial uses that you question whether they are being forthright in their descriptions of their use, conduct an internet search of the business.
- For certain uses, search State records for state-issued permits (*e.g.*, permit issued for a trash hauler) and licenses (*e.g.*, a Class A contractor's license).
- Search court records and published court decisions involving the person or business for descriptions of the nature of the activities.

17-300 Accessory uses

Each primary use allowed is accompanied by a range of accessory uses. The issue of whether a use is an accessory use arises in various situations. For example, a landowner may claim that a use not otherwise allowed in the zoning district as a primary use is, in fact, accessory use to a permitted primary use.

Because a limited number of Virginia cases have considered the issue of accessory uses, this section relies heavily on cases from other states. A short survey of uses that have been found or not been found to be accessory follows section 17-324.

17-310 The nature of accessory uses

An *accessory use* is commonly defined to be a use that is subordinate and customarily incidental to the primary use. See *Wiley v. County of Hanover*, 209 Va. 153, 157, 163 S.E.2d 160, 163 (1968). For example, Albemarle County defines an "accessory use, building or structure" to mean "[a] subordinate use, building or structure customarily incidental to and located upon the same lot occupied by the primary use, building, or structure, and located upon land zoned to allow the primary use, building or structure provided that a subordinate use, building or structure customarily incidental to a primary farm use, building or structure need not be located upon the same lot occupied by the primary farm use, building, or structure." *Albemarle County Code* § 18-3.1. In addition, a locality may expressly delineate those uses that it deems to be accessory. See, *e.g.*, *Carter v. Bavuso*, 2014 WL 3510293 (2014) (Virginia Supreme Court, unpublished).

"The rule of accessory use is a response to the impossibility of providing expressly by zoning ordinance for every possible lawful use. Even though a given use of land is not explicitly allowed, it is nonetheless permissible if it may be said to be accessory to a use that is expressly permitted." *Town of Salem v. Durrett*, 125 N.H. 29, 32, 480 A.2d 9, 10 (1984). An accessory use "must be one 'so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it.'" *Whaley v. Dorchester County Zoning Board of Appeals*, 337 S.C. 568, 579,

524 S.E.2d 404, 410 (1994) (parking 18-wheel truck overnight and on weekends at owner’s home was not an accessory use on a residentially-zoned parcel). The Alaska Supreme Court has observed that the accessory use cases throughout the United States “uniformly give accessory use a fairly narrow meaning.” *Dykstra v. Municipality of Anchorage*, 83 P.3d 7, 10 (2004).

17-320 The key criteria for determining whether a use is accessory

The two key criteria for determining whether a use is accessory are whether the use is *subordinate* to a lawful primary use and whether it is *customarily incidental* to a primary use. These key requirements are commonly used terms to define *accessory use* in zoning ordinances throughout the United States, and are discussed at length in the following sections. Whether a use is accessory is a matter to be determined from the evidence. *Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968).

17-321 The use must be subordinate to the primary use

A landowner claiming that a use is accessory must first demonstrate that the use is *subordinate* to an identified primary use. The term *subordinate* is defined by *Webster’s Dictionary* to mean “placed in or occupying a lower class or rank: inferior.” A *subordinate* use incorporates the requirement that the accessory use be minor in relation to the permitted primary use. *Dykstra v. Municipality of Anchorage*, 83 P.3d 7 (2004); *Becker v. Town of Hampton Falls*, 117 N.H. 437, 374 A.2d 653 (1977).

Common Factors to Consider in Determining Whether a Use is Subordinate
<ul style="list-style-type: none"> • Area devoted to the use. • Frequency of the use. • Active versus passive activities. • Number of employees and work hours. • Whether the use is truly subordinate to the primary use or whether it is a different, alternative, additional use.

The relevant factors in determining whether a particular use is subordinate to a primary use will depend on the circumstances. Following are some of the factors that should be considered:

- *Area devoted to the use:* The area devoted to the use in relation to the primary use should be considered. However, the fact that a use occupies less area than the primary use does not necessarily make it subordinate, and the fact that a use occupies more area than the primary use does not necessarily preclude it from being subordinate. For example, on a 1-acre lot with a primary residential use, gardening would nonetheless be subordinate to the primary use even though the gardened portion of the lot may consume more than 90% of the lot’s area. In *McLane v. Wiseman*, 84 Va. Cir. 10 (2011), the fact that inoperable or junk vehicles occupied a large portion of the landowner’s residentially-zoned parcel was a key factor in the court concluding that the vehicles were not accessory to the primary residential use. In *Gavis v. Board of Zoning Appeals of the City of Winchester*, 1985 WL 306753 (1985), the circuit court found that proposed garage and storage facilities that would be 41% the floor space of the four apartments the facilities would purportedly serve were not accessory where the average in the city for storage space was less than 10% of the floor space and, therefore, the proposed garage and storage facilities were not a customary or incidental use.
- *Frequency of the use:* The time devoted to the use in relation to the primary use may be a relevant consideration. *Orion Sporting Group, LLC v. Board of Supervisors of Nelson County*, 68 Va. Cir. 195 (2005) (sporting clays facility was a year-around activity; hunting preserve limited to eight months per year). A seasonal activity, in relation to a year-around primary use, would likely be considered to be subordinate to the primary use. Conversely, a purported year-around accessory use would not be subordinate to a seasonal primary use.
- *Active versus passive activities:* The relative intensity of the use, and the resulting impacts on the land and the neighboring properties, should be considered. For example, as between a landscaping business and a nursery,

the landscaping business is often the more intense use because it may have a business office, employees and landscaping vehicles and equipment coming and going, as well as a storage yard where landscaping equipment and materials are stored and equipment is maintained. A nursery, on the other hand, may be limited to an area where plants are stored and watered until they can be used in the landscaping work.

- *Number of employees and work hours:* The number of employees assigned to a use may be a relevant consideration. Although in most cases one may expect that the accessory use will have fewer employees than the primary use, that is not always the case. For example, a primary equipment storage yard use may have a single employee assigned to work on storage-related activities. However, the maintenance of the stored equipment could be considered to be a permitted subordinate use, even though there are more employees performing equipment maintenance work.
- *Whether the use is truly subordinate to the primary use or whether it is a different, alternative, additional use:* The use must truly be subordinate to the primary use and not simply be a different, alternative or additional use. For example, in *Orion Sporting Group, LLC, supra*, the circuit court found that a proposed sporting clays facility was not subordinate to a hunting preserve because the evidence showed that the sporting clays facility was a different and alternative use for those who did not wish to participate in hunting. The court found that the sporting clays facility was a separate primary use of the property. In *McLane v. Wiseman*, 84 Va. Cir. 10 (2011), the court affirmed the decision of the BZA that the storage and maintenance of inoperable or junk vehicles on a residentially-zoned parcel was an alternative use to the residence, not a subordinate use, because of the landowner's purpose in having the vehicles and the area occupied or extent of the vehicles.

As part of this analysis, recognize that multiple uses on a parcel may each be classified as primary uses – some of which may be permitted in the zoning district, some of which may not be.

17-322 The use must be customarily incidental to the primary use

A landowner claiming that a use is accessory must next demonstrate that the use is *customarily incidental* to the primary use. Although the Virginia courts have not examined the meaning of this commonly used term, the courts from other states have considered it on numerous occasions. In general, a use that is *customarily incidental* to a primary use implies that the use flows from, naturally derives or follows as a logical consequence of, or is a normal and expected offshoot from the primary use. *Town of Alta v. Ben Hame Corporation*, 836 P.2d 797 (Utah Ct. App. 1992) (boarding houses, lodging houses, hotels are not accessory to permitted primary use in agricultural-residential zoning district). Some courts have said that the terms *customarily* and *incidental*, though often linked in definitions of *accessory use*, impose distinct requirements that warrant separate analysis.

17-323 The meaning of the word *customarily*

A *customarily incidental* use is one that has “commonly, habitually, and by long practice been established as reasonably associated with the primary . . . use.” *Becker v. Town of Hampton Falls*, 117 N.H. 437, 441, 374 A.2d 653, 655 (1977) (holding that a barn constructed to house heavy construction equipment on residentially zoned land was not accessory to primary residential use); *Lawrence v. Zoning Board of Appeals of the Town of North Branford*, 158 Conn. 509, 264 A.2d 552 (1969); *Carmel v. City of Old Town*, 2001 Me. Super. LEXIS 24, 2001 WL 1719191 (2001); *McKinney v. Kent County Board of Adjustment*, 1995 Del. Super. LEXIS 83, 1995 WL 109032 (1995).

Although a rare association of uses cannot qualify as customary, the uses need not be joined in a majority of the instances of the primary use. *Town of Salem v. Durrett*, 125 N.H. 29, 480 A.2d 9 (1984); *Southco, Inc. v. Concord Township*, 552 Pa. 66, 713 A.2d 607 (1998) (a use may be customarily incidental to a primary use even where there is no evidence that a majority, or even a substantial number, of similar properties are engaged in a similar accessory use). However, the lawful occurrence of the use must be more than unique or rare. *Lawrence, supra*. The use must be “common enough so that it can be said to be a known and accepted incidental use.” *County of Lake v. La Salle National Bank*, 76 Ill. App. 3d 179, 182, 395 N.E.2d 392, 394 (1979) (determining whether a trailer for a groundskeeper's sleeping quarters was accessory to the operation of a golf course). In other words, a use is *customarily incidental* “when it is so necessary or so commonly to be expected in connection with the main use that it cannot be

supposed that the ordinance was intended to prevent it.” *Grandview Baptist Church v. Zoning Board of Adjustment*, 301 N.W.2d 704, 708-709 (1981) (holding that 32 by 42 foot steel storage building was not accessory to a church in a residential zoning district; of 50 churches examined, it was the only one with a steel storage building).

Common Factors to Consider in Determining Whether a Use is Customary
<ul style="list-style-type: none"> • The size of the parcel. • The nature of the primary use of the parcel. • The use made of the adjacent parcels. • The economic structure of the area. • Whether the proposed use is customary within the locality and the region.

Some of the factors that are relevant to determining *custom* are the size of the parcel in question, the nature of the primary use of the parcel, the use made of the adjacent parcels and the economic structure of the area. *Lawrence, supra*. The zoning administrator and the BZA need to determine whether the proposed use is customary within the locality and the region. For example, the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with a residential use include garages, swimming pools, decks, gazebos, small sheds and small-scale gardening; the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with an agricultural use include barns, sheds, silos, the storage of farm equipment and machinery, and the raising of crops and livestock.

17-324 The meaning of the word *incidental*

The term *incidental* incorporates “the concept of [a] reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of ‘incidental’ would be to permit any use which is not primary, no matter how unrelated it is to the primary use.” *Lawrence v. Zoning Board of Appeals of the Town of North Branford*, 158 Conn. 509, 512, 264 A.2d 552, 554 (1969); *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 641 N.E.2d 1334 (1994) (gravel removal for commercial purposes was not accessory to a permitted agricultural use, even though the removal of the gravel would allow creation of a Christmas tree farm).

Survey of Uses Found to be and not to be Customarily Incidental	
Customarily Incidental	Not Customarily Incidental
<p>Pigeon house customarily incidental to a family dwelling. <i>Wiley v. County of Hanover</i>, 209 Va. 153, 163 S.E.2d 160 (1968).</p> <p>Storage of decommissioned trucks as sources of parts customarily incidental to a milk trucking. <i>County Commissioners of Carroll County v. Zent</i>, 86 Md. App. 745, 587 A.2d 1205 (1991).</p> <p>Crematorium customarily incidental to a cemetery. <i>McCormick v. City of Alexandria Bd. of Zoning Appeals</i>, 5 Va. Cir. 313 (1986); <i>Laurel Lawn Cemetery Association v. Zoning Board of Adjustment of Township of Upper Deerfield</i>, 226 N.J. Super. 649, 545 A.2d 253 (1988).</p> <p>Stone crushing customarily incidental to a quarry. <i>James H. Maloy, Inc. v. Town Board of Guilderland</i>, 92 A.D. 2d 1056, 461 N.Y.S.2d 529 (1983).</p>	<p>Sporting clays facility not customarily incidental to a hunting preserve. <i>Orion Sporting Group, LLC v. Board of Supervisors of Nelson County</i>, 68 Va. Cir. 195 (2005).</p> <p>Storage and maintenance of inoperable or junk vehicles on a residentially-zoned parcel not customarily incidental to residential use given the purpose for the vehicles and the area occupied by the vehicles. <i>McLane v. Wiseman</i>, 84 Va. Cir. 10 (2011).</p> <p>Outside storage of goods, materials, and equipment composed of appliances, pieces of wood, pipes, and other miscellaneous items, on property zoned Retail Commercial was not customarily incidental to a primary use because it was not stock or inventory of the business. <i>Vaughn v. City of Newport News</i>, 20 Va. App. 530, 531-532, 458 S.E.2d 591, 591-592 (1995)</p> <p>Proposed garage and storage facilities that would be 41% the floor spaces of the four apartments they would purportedly serve were not accessory where the average in the city for storage space was less than 10% of the floor space and, therefore, the proposed garage and storage facilities were not a customary or incidental use. <i>Gavis v. Board of Zoning Appeals of the City of Winchester</i>, 1985 WL 306753 (1985).</p> <p>Parking 18-wheel truck overnight and on weekends at owner’s home on residentially-zoned land not customarily incidental to a residential use. <i>Whaley v.</i></p>

Survey of Uses Found to be and not to be Customarily Incidental	
Customarily Incidental	Not Customarily Incidental
<p>Heliport customarily incidental to a construction business. <i>State v. P.T. & L. Construction Co., Inc.</i>, 77 N.J. 20, 389 A.2d 448 (1978).</p> <p>Toilet customarily incidental to a campground. <i>Hardy v. Zoning Board of Review of Town of Coventry</i>, 119 R.I. 533, 382 A.2d 520 (1977).</p> <p>Restaurant customarily incidental to a bowling alley. <i>Gross v. Zoning Board of Adjustment of City of Philadelphia</i>, 424 Pa. 603, 227 A.2d 824 (1967).</p> <p>Day care center operated “for the instruction and education of the children who attend,” and which was “viewed by the pastor, by the employees, and presumably by those who have chosen for their children to attend, as in fact an extension of the ministry” of the church, was customarily incidental to the church use. <i>Harvest Christian Center v. King George County Board of Zoning Appeals</i>, 55 Va. Cir. 279 (2001).</p>	<p><i>Dorchester County Zoning Board of Appeals</i>, 337 S.C. 568, 524 S.E.2d 404 (1994).</p> <p>Boarding houses, lodging houses, hotels not customarily incidental to a permitted primary use in agricultural-residential zoning district. <i>Town of Alta v. Ben Hame Corporation</i>, 836 P.2d 797 (Utah Ct. App. 1992).</p> <p>Barn constructed to house heavy construction equipment on residentially zoned land not customarily incidental to a residential use. <i>Becker v. Town of Hampton Falls</i>, 117 N.H. 437, 441, 374 A.2d 653, 655 (1977).</p> <p>32 by 42 foot steel storage building not customarily incidental to a church in a residential zoning district. <i>Grandview Baptist Church v. Zoning Board of Adjustment</i>, 301 N.W.2d 704 (1981).</p> <p>Sleeping quarters for employees not customarily incidental to a restaurant. <i>Charlie Brown of Chatham, Inc. v. Board of Adjustment for Chatham Township</i>, 202 N.J. Super. 312, 495 A.2d 119 (App. Div. 1985).</p> <p>Shredding and storage of aluminum not customarily incidental to a beer business. <i>Wegner Auto Co., Inc. v. Ballard</i>, 353 N.W.2d 57 (S.D. 1984).</p> <p>Used car lot not customarily incidental to an auto repair shop. <i>Fleury v. Town of Essex Zoning Board of Adjustment</i>, 141 Vt. 411, 449 A.2d 958 (1982).</p> <p>Pharmacy not customarily incidental to a doctor’s office. <i>In re Porter Medical Associates Use Change Permit</i>, 139 Vt. 132, 423 A.2d 491 (1980).</p> <p>Restaurant serving alcohol not customarily incidental to an office use. <i>Tollway North Office Center Central National Bank in Chicago v. Streicher</i>, 83 Ill. App. 3d 239, 403 N.E.2d 1246 (2d Dist. 1980).</p> <p>Tire storage not customarily incidental to a retail tire store. <i>Hopewell Township v. Wilson</i>, 46 Pa. Commw. 442, 406 A.2d 612 (1979).</p>

17-330 An accessory use may not become a lawful nonconforming primary use

An accessory use may not become a lawful nonconforming primary use. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979). See chapter 18 for a discussion of nonconforming uses.

In *Knowlton*, the owners had operated a hog farm, and garbage was hauled onto the property to feed the hogs. In 1959, Fairfax County enacted a zoning ordinance that permitted hog farming, but did not permit the general trucking business, which therefore became a nonconforming use. Eventually, the hog farm use terminated, but a waste hauling operation continued and expanded over the years. One of the questions the Virginia Supreme Court considered was whether the waste hauling operation was a nonconforming primary use, since it had begun as an accessory function of the hog farm. The Court stated: “It is true that trash collection . . . was related to the hog raising operation permitted by the ordinance. But a use accessory or incidental to a permitted use ‘cannot be made the basis for a nonconforming principal use.’” *Knowlton*, 220 Va. at 575-576, 260 S.E.2d at 236.

In *Bull Run Civic Association v. Board of Zoning Appeals of Loudoun County*, 7 Va. Cir. 201 (1983), the circuit court concluded that a crusher that was accessory to a nonconforming quarry operation under a 1955 permit was limited to processing stone extracted in accordance with the 1955 permit and to extend its use beyond that which was permitted under the prior permit would elevate the crusher to a nonconforming primary use.

In *Gwinn v. Lester*, 1991 WL 835353 (1991), the circuit court found that the landowners could not continue to park a dump truck on their residentially-zoned parcel where a prior regulation merely required that each parcel have one vehicle space per family unit and at that time parking the dump truck on the parcel had begun, the parcel had been used for a farm and a residence. The current regulations prohibited parking dump trucks of a certain size in residential zoning districts. Assuming that the parking space requirement under the former regulations was a “use,” the court held that parking the dump truck was only accessory to the farm and residence use and when the property ceased to be used for that primary use, parking the dump truck – an accessory use – could not become a nonconforming primary use.

17-340 The character of the primary use determines the character of the accessory use, and the accessory use must be allowed in the zoning district

The very nature of an *incidental* use (see section 17-324) requires that the accessory use be of the same use classification (*i.e.*, commercial, residential, agricultural or industrial) as the primary use. *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005) (because the mining operation was not allowed in the residential zoning district, the mining access road, which was accessory to the primary mining use, was likewise not allowed in the residential zoning district); *Carolinus Cement Co. v. Zoning Appeals Board of Warren County*, 49 Va. Cir. 463 (1999) (the character of the primary use determines the character of the accessory use: “the focus of the analysis is on the character of the activity on the property rather than the physical characteristics of the structures housing the use”).

17-350 Primary and accessory uses on a split-zoned parcel

Occasionally, a single parcel may have multiple zoning designations, such as when a single 10-acre parcel abutting a highway has 2 acres of commercially zoned land abutting the highway and the remaining 8 acres are zoned residential or agriculture. The issue that typically arises in a split-zoned parcel situation is whether the access or some other accessory use is permitted on the portion of the parcel within one zoning district to serve the primary use which is on the portion of the parcel within another zoning district. Whether an accessory use may be located on a portion of the parcel subject to different zoning regulations will depend on the applicable zoning regulations.

In *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005), the Virginia Supreme Court considered whether a mining operation allowed by special use permit on the agriculturally zoned portion of a 139-acre parcel could construct an access road across the residentially zoned portion of the parcel to serve the mining operation. The residentially zoned portion of the parcel was situated between the agricultural use portion and a public highway. Although the special use permit request applied only to the part of the parcel located in the agricultural zoning district, the “operation plan narrative” that the mining operator submitted with its special use permit application included a proposal to construct an access road across the portion of the parcel zoned for limited residential use to transport raw materials from the mining site to the public highway.

The Orange County zoning ordinance at issue in *Capelle* defined *accessory use* as “a secondary and subordinate use or structure customarily incidental to, and located upon the same lot occupied by, the main use or structure.” In holding that the mining road could not be used on the portion of the parcel zoned for limited residential use, the Court relied on the regulations for the portion of the parcel zoned for limited residential use, which further limited accessory uses to those customarily incidental to the listed permitted uses in the limited residential zoning districts. The Court also relied on another provision in the zoning ordinance that provided that “any use not expressly permitted or permitted by special use permit in a specific district is prohibited.” Because the mining operation was a use neither allowed by right nor by special use permit in a limited residential zoning district, the access road to the mining operation was prohibited in the limited residential zoning district.

In *Gilbert’s Corner Limited Partnership v. Loudoun County Board of Zoning Appeals*, 1990 Va. Cir. LEXIS 472, 1990 WL 751280 (1990), the two tracts at issue were zoned commercial on one side and agricultural on the other. The landowners proposed to develop the commercially zoned land for retail, office and personal service uses and to use portions of the agriculturally zoned lands for drainfields for the waste generated from the commercial uses and for road access to the commercial uses. The zoning administrator and the BZA determined that the drainfields and

private roads that would serve the commercial uses were not allowed in the agricultural zoning district, and the landowners appealed. The circuit court affirmed the BZA's decision on these issues, holding:

Thus, "to the extent such uses are accessory uses, the principal use to which they are incidental or subordinate must be a permissible use." In the instant cases, the commercial development planned for the portion of the properties zoned C-1 is not a use specifically permitted by right or by special exception in the "A-3" district.

Gilbert's Corner, 1990 Va. Cir. LEXIS at 8-9, 1990 WL 751280 at 3.

The following cases from other jurisdictions pertain to split-zoned parcels: *Dupont v. Town of Dracut*, 41 Mass. App. Ct. 293, 670 N.E.2d 183 (1996) (split-zoned parcel; access and parking on commercially zoned portion of parcel, which prohibited residential uses, could not serve multi-family dwelling in residentially zoned portion of parcel); *Wolf v. Zoning Board of Adjustment*, 79 N.J. Super. 546, 192 A.2d 305 (1963) (split-zoned parcel; parking lot on residentially zoned portion could not serve restaurant in commercially zoned portion); *Park Construction Co. v. Planning & Zoning Board of Appeals*, 142 Conn. 30, 110 A.2d 614 (1954) (split-zoned parcel; residentially (R-6) zoned portion could not serve as access to multi-family residentially zoned portion).

The rule distilled from the split-zoned parcel cases is that, where a parcel is located in two different zoning districts, an accessory use may not be established in one zoning district to serve a primary use in the other zoning district if the primary use is not allowed in the zoning district in which the accessory use is located. See, e.g., *Dupont, supra*. Another rule obtained from these cases is that an accessory use takes on the use characteristics of the primary use it serves. For example, a parking lot on commercially zoned land serving dwellings on residentially zoned land is a residential use; a parking lot on residentially zoned land serving a restaurant on commercially zoned land is a commercial use. See section 17-340.

17-360 Accessory uses on differently zoned and separate parcels

Whether an accessory use serving a primary use may be located on a separate parcel within a separate zoning district will depend on the applicable zoning regulations.

In *Carolinas Cement Co. v. Zoning Appeals Board of Warren County*, 49 Va. Cir. 463 (1999), the circuit court concluded that a private road on an agriculturally zoned parcel would not be accessory to a proposed cement and fly ash distribution facility on an industrially zoned parcel.

A number of cases from other jurisdictions have concluded that an accessory use could not be located on a separate parcel that was subject to different zoning regulations: *Teachers Insurance & Annuity Association v. Furlotti*, 70 Cal. App. 4th 1487, 83 Cal. Rptr. 2d 455 (1999) (commercial building's use of portion of alley in residential zone was commercial in nature and violated residential zoning district regulations); *Atria, Inc. v. Board of Adjustment*, 438 Pa. 317, 264 A.2d 609 (1969) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel); *Williams v. Bloomington*, 108 Ill. App. 2d 307, 247 N.E.2d 446 (1969) (residentially zoned parcel could not be used to provide access to serve an adjoining commercially zoned parcel); *Sprague-Covington Co. v. Zoning Board of Review*, 102 R.I. 317, 230 A.2d 419 (1967) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel); *San Francisco v. Safeway Stores, Inc.*, 150 Cal. App. 2d 327, 310 P.2d 68 (1957) (residentially zoned easement may not be used to provide access to commercial use on adjoining parcel); *Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 109 N.E.2d 597 (1952) (residentially zoned parcel may not be used to provide access to commercial use on adjoining parcel).

17-370 Specific accessory uses may be excluded from a zoning district

A locality may exclude specific accessory uses from a district by regulation. *Wiley v. County of Hanover*, 209 Va. 153, 157, 163 S.E.2d 160, 163 (1968) ("Had it been the purpose of the ordinance to prohibit the raising, sheltering or harboring of pigeons or other fowl in a residential district, as the county claims, this could easily have been accomplished by a simple and direct provision to that effect").