

Chapter 22

Subdivisions

22-100 Introduction

A *subdivision*, unless otherwise defined by local ordinance, means the division of a parcel of land into three or more lots of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in the division, any division of a parcel of land. *Virginia Code* § 15.2-2201. In Albemarle County, a *subdivision* means “any division of land, and includes resubdivisions, rural subdivisions, family subdivisions, and the establishment of a condominium regime.” *Albemarle County Code* § 14-106. The agent designated in the locality’s subdivision ordinance for its administration may be authorized to determine whether a proposed division is a subdivision within the meaning of the subdivision ordinance. *See 1987-88 Va. Op. Atty. Gen. 208.*

Purposes of Subdivision Regulations

- Establish the procedures for dividing land.
- Establish the requirements for the subdivider to provide public infrastructure and other improvements when the land is developed, rather than placing the burden on the public at large.
- Do not regulate land uses, and are not a substitute for zoning regulations.

While zoning regulations delineate the uses and the permissible ways in which land may be developed, subdivision regulations identify the procedures for dividing land and impose requirements for providing public infrastructure and other improvements when the land is developed. Thus, subdivision regulations are different from zoning regulations, and are not substitutes for zoning regulations. *1985-86 Va. Op. Atty. Gen. 90.*

Subdivision regulations exist to assure the orderly subdivision and development of land and to promote the public health, safety, convenience and welfare of the locality’s citizens. *Virginia Code* §§ 15.2-2200, 15.2-2240; *1989 Va. Op. Atty. Gen. 100.* Among the key concerns addressed by subdivision ordinances are the coordination of existing and planned streets, the provision of adequate water, sewerage and drainage systems, the extent and manner in which streets are to be improved, the dedication of rights-of-way for public use of rights-of-way, and the dedication of other site-related improvements. *1989 Va. Op. Atty. Gen. 100.* One of the main purposes of the subdivision enabling legislation is to require a subdivider to lay out and construct streets and other improvements in accordance with state and local standards before the maintenance is taken over by VDOT or the city and to relieve the public to this extent of the burden that would otherwise exist. *Board of Supervisors of Fairfax County v. Ecology One, Inc.*, 219 Va. 29, 245 S.E.2d 425 (1978).

22-200 A summary of the evolution of subdivision regulation

In *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 66-67 (4th Cir. 1992), the court summarized the evolution of subdivision regulations as follows:

“Land use controls over subdivisions . . . date from the late nineteenth century. The original statutes took the form of land platting legislation and were intended to provide a more efficient method of conveying property. See D. Hagman & J. Juergensmeyer, *Urban Planning and Land Development Control Law* § 7.2, at 191 (2d ed. 1986). Before subdivision control, land was sold by reference to metes and bounds, an unreliable system that often resulted in confusion and overlapping titles. *See id.* Subdivision regulations avoided these problems by requiring land developers to record in the local records office a ‘plat,’ or map, of the property. The plat, which contained precise dimensions, subdivided the land into blocks and lots and indicated the location of roads and parks. Once the plat was recorded, individual lots could then be conveyed by reference to the lot, block, and plat name, thereby avoiding the confusion inherent in the metes and bounds system. *See id.*

Beginning in the 1920s, subdivision control became not only a mechanism to simplify the conveyance of individual lots, but also a means through which localities could regulate urban and suburban development through

comprehensive planning. *See id. at 191-92.* Localities began to use subdivision regulations to prevent the construction of new streets that were not well aligned with existing roads. *See D. Mandelker, Land Use Law*, § 9.02, at 362 (2d ed. 1988). Subdivision control also functioned to ensure that development did not result in platted lots of unusable sizes that remained vacant, *see D. Hagman & J. Juergensmeyer, supra*, § 7.2, at 192, or in the splitting of large holdings suited for industrial or agricultural uses into numerous parcels that a private person could not reassemble, *see Note, Land Subdivision Control*, 65 Harv.L.Rev. 1226 (1952).

Following [World War II], localities used subdivision control to implement more extensive substantive regulation. With the expansion of suburban areas, subdivision regulation turned to ensuring the provision of adequate local governmental facilities and services. Thus, such regulation mandated the construction of parks and other recreational facilities as well as schools for area residents. *See D. Hagman & J. Juergensmeyer, supra*, § 7.2, at 193. Comprehensive planning also became concerned with structuring development to avoid serious off-site drainage problems and to avert the negative impact of development on the local environment. *See id.* Subdivision regulation also became a mechanism to ensure that streets were properly constructed and were sufficiently wide for anticipated traffic. *See R. Platt, Land Use Control: Geography, Law, and Public Policy* 222 (1991). Finally, localities required each lot to have adequate access to public services and utilities, such as water, sewage, gas, electricity, telephone, and cable television. *See id. at 223.*”

22-300 The scope of the authority to regulate the division of land

A locality’s authority to regulate the division of land is limited. *County of Chesterfield v. Tetra Associates, LLC*, 279 Va. 500, 506, 689 S.E.2d 647, 649 (2010); *see Board of Supervisors of Loudoun County v. Georgetown Land Company*, 204 Va. 380, 131 S.E.2d 290 (1963) (subdivision-enabling statutes authorize locality to reasonably define the term “subdivision”). The exercise of powers under a subdivision ordinance must be authorized by the subdivision-enabling statutes in Virginia Code § 15.2-2240 *et seq.* *See National Realty Corp. v. Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968).

The scope of a locality’s subdivision regulations is delineated in Virginia Code § 15.2-2241, which prescribes the mandatory provisions that *must* be included in a subdivision ordinance, and Virginia Code §§ 15.2-2242 through 15.2-2244.1, which prescribe the optional provisions that *may* be included in a subdivision ordinance.

A locality does not have the power to enact a subdivision ordinance that is more expansive than the enumerated requisites contained in Virginia Code §§ 15.2-2241 through 15.2-2244.1. *See Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999). Finally, a locality is entitled to exercise discretion only to the extent permitted by Virginia Code §§ 15.2-2241 through 15.2-2244.1. *See Countryside Investment, supra; Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997). *See section 22-330 for an analysis of attempts by localities to exercise implied powers.*

22-310 Mandatory provisions

Virginia Code § 15.2-2241 sets forth several provisions that *must* be included in a subdivision ordinance:

- *Plat details:* Plat details which meet the standard for plats as adopted under Virginia Code § 42.1-82, which is part of the Virginia Public Records Act. *Virginia Code § 15.2-2241(1)*. *See also* Virginia Code § 15.2-2258, which requires, among other things, that if any portion of the land lies in a drainage district or a mapped dam break inundation zone, those facts must be set forth on the plat. In addition, if any grave, object, or structure marking a place of burial exists on the lands, they must be identified on the plat.
- *Coordination of streets:* The coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage, including, for ordinances and amendments thereto adopted on or after January 1, 1990, for the coordination of those streets with existing or planned streets. *Virginia Code § 15.2-2241(2)*.

- *Drainage, flood control and other public purposes:* Adequate provisions for drainage and flood control, for adequate provisions related to the failure of impounding structures and impacts within dam break inundation zones, and other public purposes, for light and air, and for identifying soil characteristics. *Virginia Code § 15.2-2241(3)*. Note that Virginia Code § 15.2-2243.1 requires a subdivider to pay 50% of the contract ready costs for necessary upgrades to an impounding structure attributable to the project.
- *Design for streets, public utilities and community facilities:* The extent and manner in which streets will be graded, graveled or otherwise improved, and water and storm and sanitary sewer and other public utilities or other community facilities will be installed. *Virginia Code § 15.2-2241(4)*. In contrast to Virginia Code § 15.2-2241(2) pertaining to the coordination of streets, the language in subsection (4) does not require that existing or planned streets be present in existing or future subdivisions on adjacent properties in order for a locality to implement regulations providing for the extent to which subdivision streets will be improved. The plain and ordinary meaning of the term *extent* means the “amount of space which [the street] occupies or the distance over which it extends” and the term includes the *length* and *width* of the street. *Webster’s Third New International Dictionary (1993)*. The term *extend* means “to cause to stretch out or reach” or to “push to a farther point.” *Webster’s Third New International Dictionary (1993)*.
- *Dedication of right-of-way and certain public improvements for public use:* Accepting the dedication for public use of any right-of-way located within a subdivision where a street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system, or other improvement dedicated for public use has been constructed or will be constructed and be publicly maintained. *Virginia Code § 15.2-2241(5)*. Recordation of the plat operates to transfer to the locality, in fee simple, the portion of the subdivision set apart for streets, alleys or other public use. *Virginia Code § 15.2-2265*. Recordation of the plat also operates to transfer to the locality any easement on the plat to create a public right of passage and such easements shown on the plat for the conveyance of stormwater, domestic water and sewage, including the installation and maintenance of any facilities used for such purposes as the locality may require. *Virginia Code § 15.2-2265*.
- *Vehicular ingress and egress:* Site-related improvements required by the locality’s ordinance for vehicular ingress and egress, including traffic signalization and control, for public access streets. *Virginia Code § 15.2-2241(5)*.
- *Critical slope stabilization:* Site-related improvements required by the locality’s ordinance for structures necessary to ensure the stability of critical slopes. *Virginia Code § 15.2-2241(5)*.
- *Stormwater management facilities:* Site-related improvements required by the locality’s ordinance for stormwater management facilities. *Virginia Code § 15.2-2241(5)*.
- *Phased subdivisions:* The phasing of sections of a subdivision, with certain rights protected, provided the requirements of Virginia Code § 15.2-2241(5) are satisfied. *Virginia Code § 15.2-2241(5)*.
- *Security to guarantee construction of required improvements:* In lieu of constructing the required improvements prior to final subdivision plat approval, the developer may provide security to guarantee their construction or installation. *Virginia Code § 15.2-2241(5)*. A locality may not require a security to guarantee the construction of a facility or improvement if it is not shown or described on the approved subdivision plat or site plan. *Virginia Code § 15.2-2241(B)*. The primary purpose of a performance security requirement is to guarantee the completion of the improvements covered by the security. *See Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985). The security primarily protects the locality from assuming undesired financial burdens, but also indirectly protects residents of a new subdivision by ensuring that there will be adequate access and that public facilities will be constructed. *1987-88 Va. Op. Atty. Gen. 204*. A locality may require an acceptable form of surety for the completion of public improvements, such as a bond, letter of credit, escrow or another performance guarantee as provided in the statute.
- *Security to provide for maintenance of a dedicated street until acceptance into state-maintained system:* If the locality accepts the dedication of a road for public use and the street, due to factors other than its quality of construction, is not acceptable into the secondary system of state highways, then the locality may require the developer to provide

security to pay for the maintenance of the street until it is accepted into the state system. *Virginia Code § 15.2-2241(5)*.

- *Conveyance of easements for cable television and certain utilities:* The required conveyance, in appropriate cases, of common or shared easements to franchised cable television operators furnishing cable television, and public service corporations furnishing cable television, gas, telephone and electric service to the proposed subdivision. *Virginia Code § 15.2-2241(6)*.
- *Monuments:* Monuments of specific types to be installed establishing street and property lines. *Virginia Code § 15.2-2241(7)*.
- *Period of validity of approved final plat:* Unless a plat is filed for recordation within six months after final approval thereof or a longer period provided by the locality, the approval must be withdrawn and the plat marked void and returned to the agent. If the facilities to be dedicated to public use are under construction or the developer has furnished security to the locality, the time for recording the final plat is one year or the period provided in the security agreement, whichever period is longer. *Virginia Code § 15.2-2241(8)*.
- *Administration and enforcement:* The administration and enforcement of the subdivision ordinance, including the imposition of reasonable fees and charges for the review of subdivision plats and site plans, and for the inspection of facilities required to be installed. *Virginia Code § 15.2-2241(9)*.
- *Family divisions:* Reasonable provisions permitting a single division of a parcel for the purpose of sale or gift to a member of the immediate family of the property owner in accordance with the provisions of Virginia Code § 15.2-2244. *Virginia Code § 15.2-2241(10)*.
- *Release of security:* The periodic partial and final complete release of any bond, escrow, letter of credit, or other performance guarantee required by the County for required improvements, in accordance with the provisions of Virginia Code § 15.2-2245. *Virginia Code § 15.2-2241(11)*.

22-320 Optional provisions

Virginia Code §§ 15.2-2242, 15.2-2243 and 15.2-2244.1 set forth several provisions that *may* be included in a subdivision ordinance. This list does not include specific enabling authority in Virginia Code § 15.2-2242 granted to one or a very limited number of localities. Some of these optional provisions have been adopted by Albemarle County, as noted below.

- *Variations or exceptions:* Variations in or exceptions to the general regulations of a subdivision ordinance may be allowed in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship. *Virginia Code § 15.2-2242(1)*; *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008) (upholding subdivision regulations authorizing the subdivision agent to make exceptions to otherwise applicable subdivision regulations if the size or shape of the land, topography, proposed land use or other special conditions made compliance with the subdivision regulations impractical, and to make exceptions to the minimum paved width of streets if the cross slope would not permit a greater width); *GIBC Golf, LLC v. Loudoun County, Board of Supervisors*, 77 Va. Cir. 287 (2008) (variation or exception considered by governing body is a legislative act). See *Albemarle County Code §§ 14-224.1 and 14-225.1*.
- *Health official opinion on subsurface sewage disposal:* The furnishing of a preliminary opinion from the applicable health official regarding the suitability of a subdivision for installation of subsurface sewage disposal systems where that method of sewage disposal will be used in the subdivision. *Virginia Code § 15.2-2242(2)(i)*; *Albemarle County Code §§ 14-309 and 14-310*. Virginia Code § 15.2-2157 provides that when sewers or sewerage disposal facilities are not available, “a locality shall not prohibit the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.” An “alternative onsite sewage system” is defined in Virginia Code §

32.1-163 to be a “treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.”

- *Requirement that buildings will connect to public water or sewer system:* All buildings constructed on lots resulting from the subdivision of a larger tract that abuts or adjoins a public water or sewer system or main shall be connected to that public water or sewer system or main, subject to the provisions of Virginia Code § 15.2-2121. *Virginia Code § 15.2-2242(2)(ii).*
- *Statement that private streets do not meet state standards and will not be publicly maintained:* If the streets in a subdivision will not be constructed to meet state standards, the subdivision plat and all approved deeds of subdivision, or similar instruments, must contain a statement advising that the streets in the subdivision do not meet state standards and will not be maintained by VDOT or the locality. Grantors of any subdivision lots to which such statement applies must include the statement on each deed of conveyance thereof. *Virginia Code § 15.2-2242(3).*
- *Private street standards:* Minimum standards for the construction of streets that will not be built to state standards. *Virginia Code § 15.2-2242(3).*
- *Security to guarantee construction of private streets:* In lieu of constructing required private streets prior to plat approval, the developer may provide security to guarantee their construction or installation. *Virginia Code § 15.2-2242(3).*
- *Voluntary funding of off-site street improvements:* The voluntary funding of off-site street improvements and reimbursement of advances by the governing body. *Virginia Code § 15.2-2242(4).* There is no express authority in the subdivision enabling authority for a locality to require a subdivider to construct off-site improvements or to make improvements to existing public roads. *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979); see *Potomac Greens v. City Council*, 761 F. Supp. 416 (E.D.Va. 1991), *rev'd on other grounds and vacated*, 6 F.3d 173 (4th Cir. 1993) (localities have no authority to exact off-site improvements to public highways, but city could require elimination of part of parking facility under its general police powers). However, a subdivider may voluntarily agree to make improvements to existing access roads. *Board of Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985). See section 25-320 et seq. for a discussion of the authority to require off-site road improvements as a condition of subdivision plat approval.
- *Reimbursement for off-site street improvements, the need for which is substantially generated by the subdivision:* If a developer makes an advance of payments for construction of reasonable and necessary street improvements located off-site, and the need for those improvements is substantially generated and reasonably required by the construction or improvement of the subdivision, the locality may agree to reimburse the subdivider under statutorily prescribed conditions. *Virginia Code § 15.2-2242(4).*
- *Provisions pertaining to solar energy:* Provisions for establishing and maintaining access to solar energy to encourage the use of solar heating and cooling devices in new subdivisions. The provisions apply to a new subdivision only when so requested by the subdivider. *Virginia Code § 15.2-2242(6).*
- *Provisions for clustering single-family dwellings:* Provisions for clustering single-family dwellings and preservation of open space developments that comply with the requirements of Virginia Code § 15.2-2286.1. *Virginia Code § 15.2-2242(8).*
- *Dedication of land and construction of sidewalk on subdivision lot on pre-existing street:* Provisions requiring, where a lot being subdivided or developed fronts on an existing street, and adjacent property on either side has an existing sidewalk, the dedication of land for, and construction of, a sidewalk on the property being subdivided or developed, to connect the existing sidewalk. *Virginia Code § 15.2-2242(9).* This provision does not usurp the authority of localities (*Virginia Code § 15.2-2241(5)*) or VDOT to require sidewalks on a new street or highway. *Virginia Code § 15.2-2242(9).*

- *Phase I environmental site assessments*: Provisions requiring and considering Phase I environmental site assessments based on the anticipated use of the property that meet generally accepted national standards. *Virginia Code* § 15.2-2242(10).
- *Disclosure and remediation of contamination*: Provisions requiring disclosure and remediation of contamination and other adverse environmental conditions of the property prior to approval of the subdivision plat. *Virginia Code* § 15.2-2242(11).
- *Payment by subdivider of pro rata share of certain facilities*: Payment by a subdivider or developer of land of the pro rata share of the cost of providing reasonable and necessary sewerage, water, and drainage facilities, located outside the property limits of the land owned or controlled by the subdivider or developer but necessitated or required, at least in part, by the construction or improvement of the subdivision or development. *Virginia Code* § 15.2-2243.
- *Durational restrictions on a family subdivision; limitation on parcel size*: Provisions allowing a family subdivision only if: (1) the property has been owned for at least 15 consecutive years by the current owner or a member of the immediate family; and (2) the landowner agrees to place a restrictive covenant on the property that prohibits the transfer of the subdivided lot to a nonmember of the immediate family for a period of 15 years, subject to any reduction or exceptions to the 15-year period provided in the covenant when changed circumstances so require. *Virginia Code* § 15.2-2244.1. The restrictive covenant may be modified by such a reduction or exception, and the locality must execute a recordable instrument reflecting the modification. *Virginia Code* § 15.2-2244.1. A locality also may require that the subdivided lot be no more than one acre and otherwise meet the requirements of state and local law. *Virginia Code* § 15.2-2244.1

22-330 The extent of any implied authority, or the lack thereof

The exercise of powers under a subdivision ordinance must be authorized by the subdivision-enabling statutes in *Virginia Code* § 15.2-2240 *et seq.* See *National Realty Corp. v. Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968) (locality lacked the implied authority to impose fees under its subdivision ordinance because the State Subdivision Law, though it enabled localities to administer their subdivision regulations, did not expressly enable localities to impose fees). As noted in section 22-300, a locality does not have the power to enact a subdivision ordinance that is more expansive than the enumerated requisites contained in *Virginia Code* §§ 15.2-2241 through 15.2-2244.1. See *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999).

A subdivision ordinance may not include provisions that effectively allow a locality to make a land use policy decision when considering a subdivision plat. In *Countryside Investment*, the county denied a subdivision master plan, relying on a provision of its subdivision ordinance that allowed the board to deny a plat if, in its opinion, the land was unsuitable for subdivision. The ordinance also provided that land was deemed unsuitable for subdivision if it would not preserve a “rural environment.” In finding that the challenged provisions of the subdivision ordinance went beyond that enabled by *Virginia Code* §§ 15.2-2241 and 15.2-2242, the Virginia Supreme Court said that a locality may not “under the guise of a subdivision ordinance, enact standards which would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property’s zoning classification.” *Countryside Investment*, 258 Va. at 505, 522 S.E.2d at 613-614.

A subdivision ordinance also may not prohibit what is permitted by the zoning ordinance. In *County of Chesterfield v. Tetra Associates, LLC*, 279 Va. 500, 506, 689 S.E.2d 647, 649 (2010), the county’s zoning ordinance allowed one acre minimum lot size within the agricultural zoning district. However, the subdivision ordinance allowed the subdivision of lots in that district only to a five acre minimum lot size. The Virginia Supreme Court affirmed the circuit court’s grant of summary judgment in favor of Tetra, stating:

[T]he County infringes upon the right to subdivide to a minimum one acre parcel of land in the Agricultural District even though a residence on a one acre lot is a permitted use in Tetra’s property’s current Agricultural zoning classification. County Code § 17-36(a), by prohibiting a lot subdivision in the Agricultural District and requiring a residential parcel subdivision with a requisite

five acre minimum lot size, effectively rezones Tetra's property in a manner inconsistent with the uses permitted by Tetra's Agricultural zoning classification. The County is not permitted to use a subdivision ordinance to prohibit a use of Tetra's property that is permitted by the property's zoning classification.

Tetra Associates, 279 Va. at 506-597, 689 S.E.2d at 650.

Also, a subdivision ordinance may not consider the anticipated improvements on a subdivider's proposed lots when considering an application. *Seymour v. City of Alexandria*, 273 Va. 661, 643 S.E.2d 198 (2007) (regulations for resubdivision improperly provided that lots could not be resubdivided "in such a manner as to detract from the value of adjacent property").

A subdivision ordinance also may not limit the timing for subdividing lots. In *Strong v. Orange County Board of Supervisors*, 85 Va. Cir. 396 (2012), the owners were interested in developing 175 acres, proposing to create 65 lots at the 2 acre minimum allowed under the applicable zoning district regulations. Under the county's subdivision ordinance, the owners would be allowed to create 4 lots every 4 years, meaning that it would take over 32 years to complete the subdivision of the parcel into 65 lots. The owners challenged the subdivision regulations that required this "time delay." The circuit court held that there is no authority in Virginia Code §§ 15.2-2241 or 15.2-2242 to include "time delay" provisions in a subdivision ordinance. Therefore, the sections of the Orange County subdivision ordinance that required time delay violated the Dillon Rule.

Over the years, the Attorney General has opined that localities have, or lack, the implied authority to impose additional subdivision regulations, including:

- *No authority to impose requirement not enabled by State law and not set forth in local regulations*: A locality may not impose conditions that require the fulfillment of any requirement unless the requirement is set forth in the zoning or subdivision ordinance. *1990 Va. Op. Atty. Gen. 94* (locality lacked authority to require avigation easements).
- *Requiring assurance of adequate water quantity*: Virginia Code §§ 15.2-2121 and 15.2-2241 through 15.2-2246, as well as the legislative intent expressed in Virginia Code § 15.2-2200, may enable a locality to require assurance of an adequate quantity of water for each lot in a subdivision when water is to be provided by individual wells. *1997 Va. Op. Atty. Gen. 70*. This opinion may be suspect in light of the decision in *Countryside Investment*, discussed above, where the Virginia Supreme Court held that Virginia Code § 15.2-2200 is not a source of power, and a locality does not have the power to enact a subdivision regulation that is more expansive than the enumerated regulations enabled in Virginia Code §§ 15.2-2241 and 15.2-2242.
- *Creation of homeowner's association; ownership and maintenance of private streets*: The express grant of authority to localities to allow privately owned roads implies the power to require a subdivider to create a homeowner's association under the Virginia Property Owners' Association Act and to own and maintain private streets in a subdivision. *1992 Va. Op. Atty. Gen. 53*.
- *No authority to regulate lot sizes under subdivision regulations*: The inclusion of provisions allowing the regulation of lot sizes in the zoning enabling legislation, and the lack of similar provisions in the subdivision enabling legislation, compel the conclusion that a locality may not impose a minimum lot size requirement for mobile homes, mobile home parks or campgrounds under its subdivision regulations. *1985-86 Va. Op. Atty. Gen. 90*. This opinion is consistent with the Virginia Supreme Court's decision in *Tetra Associates*, discussed above.
- *No authority to prohibit buildings on certain lots*: A locality is not authorized to prohibit buildings on subdivision lots abutting private "paper streets" in a subdivision antedating its subdivision ordinance. *1979-80 Va. Op. Atty. Gen. 328*.

22-340 The obligation to comply with the subdivision ordinance in order to subdivide land

Virginia Code § 15.2-2254(A) provides that a developer cannot subdivide land “without fully complying with the provisions of the subdivision ordinance.” *Board of Supervisors of Culpeper County v. Greengael, L.L.C.*, 271 Va. 266, 281, 626 S.E.2d 357, 365 (2006) (an independent investigation regarding the provision of water and sewer service undertaken by the county, regardless of the information acquired, could not substitute for the written assurance that water and sewer would be provided, as required by the subdivision ordinance). Thus, unless land is divided by order of the court in a partition proceeding, it may be divided only by a plat of subdivision. *Virginia Code § 15.2-2254(1)*.

A *plat* or *plat of subdivision* (hereinafter, “plat”) is a schematic representation of land divided or to be divided and information required by law. *Virginia Code § 15.2-2201*. A plat may not be recorded unless and until it has been submitted to and approved by the locality. *Virginia Code § 15.2-2254(2)*. A person may not sell or transfer any land of a subdivision before a plat has been duly approved and recorded, unless the subdivision was lawfully created prior to the adoption of the subdivision ordinance. *Virginia Code § 15.2-2254(3)* (but also providing that this prohibition does not prevent the recordation of the instrument by which the land is transferred or the passage of title as between the parties to the instrument); see 2009 Va. Op. Atty. Gen. LEXIS 16, 2009 WL 57059 (localities are not authorized to require the review and approval of boundary survey plats and physical survey plats as a prerequisite for recordation).

Although recording an approved plat with the clerk of the circuit court is required to lawfully transfer a lot from a subdivision, any alleged failure to comply with the recording requirements does not inhibit the passage of title between the parties. *Virginia Code § 15.2-2254(B)*.

22-350 The conveyance of title, even if the plat does not comply with the subdivision ordinance

One of the quirks of the state subdivision laws is that even though a subdivider fails to comply with a locality’s subdivision regulations, land within the purported subdivision may be lawfully conveyed to third parties. Of course, that comes with certain risks. Virginia Code § 15.2-2254(3) provides:

No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein, unless the subdivision was lawfully created prior to the adoption of a subdivision ordinance applicable thereto. *However, nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument.* (emphasis added)

See, *Matney v. Cedar Land Farms, Inc.*, 216 Va. 932, 224 S.E.2d 162 (1976); *Justus v. Lowell*, 28 Va. Cir. 505, 510 (1992) (“compliance with the terms of the ordinance is not a prerequisite to the rights of the parties to convey, as between themselves, or to make use of the recording statutes”; however, the right to convey title “does not insure that such title is marketable”); *Leighton v. Virginia Department of Health*, 2001 Va. Cir. LEXIS 1, 4, 2001 WL 34118060 (2001) (“a failure to properly subdivide the parcel may impede future plat approval and places significant limitations on the use of the property by the owner”).

In *Nejati v. Stageberg*, 286 Va. 197, 747 S.E.2d 795 (2013), Angstadt purchased a parcel in the City of Fredericksburg and the city’s tax maps showed the parcel as a single lot, but the tax commissioner’s records indicated that in 1942 the parcel had been listed as two separate “tax parcels.” In 2008, Angstadt had the parcel surveyed and the survey depicted boundary lines corresponding to the boundaries of the two old tax parcels. The survey was recorded without the city approving the survey as a subdivision. Both parcels were separately sold to two buyers. Nejati purchased the lot with an apartment building on it. Stageberg purchased the undeveloped lot. When Stageberg sought to build a house on his lot, the zoning administrator concluded that the house could not be built because the lot did not exist as a separate lot. Stageberg sued the buyer of the other lot, Nejati, along with Angstadt and others. As against Nejati, Stageberg contended that they owned the whole undivided parcel as tenants in common and the trial court so held.

The Virginia Supreme Court held that Stageberg and Nejati held the parcel as tenants in severalty because the deeds by which each acquired their land relied on the survey and the survey was determined to be an accurate

description of each of the lots conveyed. The court rejected Stageberg’s argument that the description of each lot was rendered indefinite (and therefore a tenancy in common should be found) because of the seller’s failure to comply with Virginia Code § 15.2-2254. The court said that failure to comply with Virginia Code § 15.2-2254 resulted only in significant limitations on the use of the lots and that future development of the divided property might be restricted, but it did not prevent conveyance of the property and did not affect the property interests transferred by the deed.

22-400 The procedures to review and act on a subdivision plat

Localities variously assign subdivision plat review and approval to the locality’s designated subdivision agent, to the planning commission or to the governing body itself. *1991 Va. Op. Atty. Gen. 68*. If a subdivider has complied with all applicable laws, the approval of a subdivision plat is a ministerial function. *See Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976).

22-410 The preliminary plat

Localities may require that a subdivider submit a preliminary plat for approval if the plat involves more than 50 lots, and may provide for submittal of a preliminary plat at the option of the landowner for plats involving 50 or fewer lots. *Virginia Code § 15.2-2260(A)*. A preliminary plat is a schematic representation of the land proposed to be divided, but is not in a final form for recording. Among other things, a preliminary plat allows the locality to review the proposed subdivision for compliance with the applicable regulations before the subdivider has all of the necessary engineering work performed, which is included in the final plat.

Following is a table summarizing the key steps and events in having a preliminary subdivision plat (hereinafter, *preliminary plat*) approved by Albemarle County. Simpler procedures and different improvement requirements apply to plats for rural subdivisions, family subdivisions and other delineated subdivisions.

Albemarle County: Nine Key Steps to Action on a Preliminary Subdivision Plat
<ol style="list-style-type: none"> 1. Preliminary application conference. 2. Submittal of preliminary plat and determination of completeness. 3. Notice by the agent to abutting landowners and members of the board of supervisors and the planning commission. 4. Review of preliminary plat by site review committee. 5. Site review committee forwards requirements and recommendations to the agent. 6. Subdivider makes revisions to the preliminary plat plan, if necessary. 7. Consideration of preliminary plat by the agent. 8. Action on the preliminary plat by the agent. 9. If the preliminary plat disapproved, subdivider may appeal decision to the circuit court or the planning commission.

Five key steps in the process, and the requirements to assure compliance with State law, are discussed below.

- *Determining completeness*: When the preliminary plat is submitted, the clock begins to run to assure a timely action. The locality is best served by requiring that the plat submittal is complete before it is deemed to be submitted. The determination as to whether a plat submittal is complete may require the exercise of discretion and not be purely ministerial. *Umstatt v. Centex Homes*, 274 Va. 541, 650 S.E.2d 527 (2007) (mandamus is not a proper remedy to compel a locality to accept a preliminary plat as complete because the determination as to whether the submittal was complete required the official to investigate the submitted plat, the conditions existing on the subject land and the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist (such as whether any variations or exceptions would be required)).
- *Time for action*: A preliminary plat must be acted on by the agent within 60 days after it was submitted, provided that if state agency approval is required of a feature (such as the street design), the plat must be acted upon within not more 35 days after receipt of all state-agency approvals (who must act within 45 days after receiving the preliminary plat) and within 90 days after the plat was officially submitted. *Virginia Code § 15.2-2260(C)*. If the agent fails to timely act on the plat, the subdivider may, after giving ten days’ notice to the locality, petition

the circuit court “to enter an order with respect thereto as it deems proper, which may include directing approval of the plat.” *Virginia Code § 15.2-2260(D)*. Localities with a population greater than 90,000 based on the 2000 United States Census must act on a preliminary plat for the development of commercial or industrial uses according to an alternative timeline (not applicable to Albemarle County, whose 2000 population was about 84,000). *Virginia Code § 15.2-2260(C)*.

- *Requirements if the preliminary plat is disapproved:* If the agent does not approve the preliminary plat, he must state in writing the reasons for the disapproval and state what corrections or modifications to the plat will permit its approval. *Virginia Code § 15.2-2260(C)*. The agent should ensure that this writing is prepared with care and that it only identifies the express *requirements* of the applicable regulations as grounds for disapproval. The failure of a preliminary plat to incorporate mere *recommendations*, whether stated in the regulations or suggested by the agent, staff or anyone else, may never be the basis for disapproving a preliminary plat. In lieu of disapproving the preliminary plat, the agent should always consider approving it with conditions requiring that the required corrections be addressed with the final plat. Whether this alternative can be used in a particular situation will depend on the type and extent of the corrections required. *For additional discussion regarding the disapproval of a plat, see section 22-500.*
- *Options available to the subdivider if the preliminary plat is disapproved:* If the agent disapproves a preliminary plat and the subdivider contends that the disapproval was not properly based on the applicable regulations, or was arbitrary or capricious, it may appeal the disapproval to the circuit court. *Virginia Code § 15.2-2260(E)*. The appeal must be filed within 60 days after the written disapproval by the agent. *Virginia Code § 15.2-2260(E)*. Albemarle County provides the subdivider the option to first appeal the disapproval to the planning commission and, thereafter, the board of supervisors. *Albemarle County Code § 14-223*. *For additional discussion regarding judicial challenges to a decision pertaining to a plat, see section 22-600.*

An approved preliminary plat is valid for a period of five years, provided the subdivider: (1) submits a final plat for all or a portion of the property within one year after the approval (or a longer period provided in the subdivision ordinance); and (2) thereafter diligently pursues approval of the final plat. *Virginia Code § 15.2-2260(F)*. After three years have passed since the preliminary plat was approved, and upon 90 days’ written notice to the subdivider, the agent may revoke the approval of the preliminary plat upon a finding that the subdivider has not diligently pursued approval of the final plat. *Virginia Code § 15.2-2260(F)*. Once an approved final plat for all or a portion of the property is recorded, the underlying preliminary plat remains valid for a period of five years from the date of the last recorded plat. *Virginia Code § 15.2-2260(G)*.

As a result of the economic downturn that began in 2008, the General Assembly has extended the validity of qualifying preliminary plats by statute. *Virginia Code § 15.2-2209.1(A)* provides that any valid preliminary plat that was outstanding as of January 1, 2017 shall remain valid under July 1, 2020, or a later date approved or agreed to by the locality. This extension also applies to any other plan or permit associated with the preliminary plat for the same time period.

Vested rights may arise from an approved preliminary plat. *See chapter 19.*

22-420 The final plat

A final plat is a schematic representation of the land proposed to be divided that is in a final form that is suitable for recording. Following is a table summarizing the key steps and events in having a final plat approved by Albemarle County.

Albemarle County: Six Key Steps to Action on a Final Subdivision Plat
<ol style="list-style-type: none"> 1. Final plat submitted within one year of approval of preliminary plat. 2. Review of final plat by the site review committee. 3. Site review committee recommends action on the final plat. 4. Consideration of final plat by the agent. 6. Action on final plat by the agent.

Albemarle County: Six Key Steps to Action on a Final Subdivision Plat

7. If final plat disapproved, the subdivider may appeal the decision to the circuit court or the planning commission.

The key steps in the process, and the requirements to ensure compliance with State law, are discussed below. The reader will note that although these key steps are similar to those pertaining to preliminary plats, Virginia Code § 15.2-2259 (applicable to final plats) and Virginia Code § 15.2-2260 (applicable to preliminary plats) do not use identical language.

- *Determining completeness:* As with preliminary plats, when a final plat is submitted, the clock begins to run to ensure a timely action. The locality is best served by requiring that the plat submittal is complete before it is deemed to be submitted. One difference between preliminary and final plats is that Virginia Code § 15.2-2259(A)(1) expressly refers to a final subdivision plat being *officially submitted*. A plat is *officially submitted* within the meaning of Virginia Code § 15.2-2259 when the subdivider files an application in the appropriate form in the proper office, accompanied by the fee, and submits a plat for the purpose of review which contains all of the data reasonably required by the subdivision regulations and by Virginia Code § 15.2-2262 (requisites of plat). *Fairview Co. v. Board of Supervisors of Spotsylvania County*, 21 Va. Cir. 193 (1990) (once the basic requirements are met, the agent must review the plat and approve or disapprove it; the agent may not refuse to act on a plat, otherwise properly submitted, on the ground that the proposed plat violates certain applicable regulations).
- *Time for action:* A final plat must be acted on by the agent within 60 days after it was officially submitted, provided that if state agency approval is required of a feature (such as the street design), the plat must be acted upon within not more than 35 days after receipt of all state-agency approvals (who must act within 45 days after receiving the final plat). *Virginia Code § 15.2-2259(A)(1)*. The agent is required to “thoroughly review the plat and [] make a good faith effort to identify all deficiencies, if any, with the initial submission.” *Virginia Code § 15.2-2259(A)(1)*. If the final plat was previously disapproved, the agent must act on the modified, corrected and resubmitted plat within 45 days. *Virginia Code § 15.2-2259(A)(1)*. If the agent fails to timely act on the plat, the subdivider may, after giving ten days’ notice to the locality, petition the circuit court “to decide whether the plat should or should not be approved.” *Virginia Code § 15.2-2259(C)*. Localities must act on a final plat for the development of commercial or industrial uses according to an alternative timeline. *Virginia Code § 15.2-2259(A)(2) and (3)*. The period within which an action must be taken does not begin with filing a plat that is in an inappropriate form. *Fairview Co., supra*.
- *Requirements if the final plat is disapproved:* If the agent does not approve the final plat, “specific reasons for disapproval shall be contained either in a separate document or on the plat itself. The reasons for disapproval shall identify deficiencies in the plat that cause the disapproval by reference to specific duly adopted ordinances, regulations or policies and [] identify modifications or corrections as will permit approval of the plat.” *Virginia Code § 15.2-2259(A)(1)*. The failure of a final plat to satisfy the lawful conditions of the preliminary plat approval is, of course, a legitimate basis to disapprove a final plat. *See Roberts v. Board of Zoning Appeals of Madison County*, 64 Va. Cir. 397 (2004) (county properly disapproved subdivision plat because subdivider failed to comply with condition of plat approval that a pre-existing entrance be abandoned as required under the subdivision ordinance because it was less than 600 feet from the proposed subdivision entrance). *For additional discussion regarding the disapproval of a plat, see section 22-500.*
- *Options available to the subdivider if the final plat is disapproved:* If the agent disapproves a final plat and the subdivider “contends that the disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious,” it may appeal the disapproval to the circuit court. *Virginia Code § 15.2-2259(D)*. The appeal must be filed within 60 days after the written disapproval by the agent or the planning commission. *Virginia Code § 15.2-2259(D)*. Albemarle County provides the subdivider the option to first appeal the disapproval to the planning commission and, thereafter, the board of supervisors. *Albemarle County Code § 14-231*. *For additional discussion regarding judicial challenges to a decision pertaining to a plat, see section 22-600.*

An approved final plat *that has been recorded* is valid for a period of not less than five years from the date of approval or for a longer period as the agent or the planning commission may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development. *Virginia Code § 15.2-*

2261(A). However, an approved final plat that has been recorded, from which any part of the property subdivided has been conveyed to third parties (other than to the developer or local jurisdiction), remains valid for an indefinite period of time unless and until any portion of the property is subject to a vacation under Virginia Code § 15.2-2270 *et seq.*

An approved final plat *that has been recorded that may be a section of a subdivision as shown on the approved preliminary plat (i.e., a phased subdivision)* entitles the subdivider to record the remaining sections shown on the preliminary plat for a period of five years after the recordation of any section or for a longer period as the agent or the planning commission may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development. *Virginia Code § 15.2-2241(5)*. This rule applies only if the subdivider furnishes to the governing body a certified check, cash escrow, bond, or letter of credit in the amount of the estimated cost of construction of the facilities to be dedicated within the section for public use and maintained by the locality, the Commonwealth, or other public agency. A subdivider proceeding under this rule is also subject to all of the requirements of Virginia Code § 15.2-2241(5) and the engineering and constructions standards and zoning requirements in effect at the time the plat for each remaining section is recorded. *Virginia Code § 15.2-2241(5)*.

An approved final plat *that has not been recorded* is valid for a period of six months or a longer period as may be approved by the governing body from the date the agent affixes his signature to the plat, or for any other period specified in a surety agreement entered into by and between the subdivider and the locality, whichever is later if: (1) the subdivider has begun construction of facilities to be dedicated to public use pursuant to an approved plan or permit with approved surety; or (2) the subdivider has furnished surety in a form authorized by the subdivision ordinance in the amount of the estimated cost of construction of the facilities. *Virginia Code § 15.2-2241(8)*.

Finally, as with preliminary plats, the General Assembly has extended the validity of qualifying final plats by statute. Virginia Code § 15.2-2209.1(A) provides that any recorded final plat that was outstanding as of January 1, 2017 shall remain valid under July 1, 2020, or a later date approved or agreed to by the locality. This extension also applies to any other plan or permit associated with the final plat for the same time period.

Vested rights may arise from an approved final plat. *See chapter 19.*

22-500 Disapproval of a subdivision plat

If a preliminary or final plat is disapproved, the specific reasons for disapproval must be provided to the subdivider, either in a separate document or on the plat itself. *Virginia Code §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary)*.

The decision-maker must identify the deficiencies in the plat that caused the disapproval by reference to specific ordinances, regulations or policies, and also must generally identify modifications or corrections that will permit approval of the plat. *Virginia Code §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary)*. The decision-maker is required to make a good faith effort to identify all deficiencies, if any, in a final plat. *Virginia Code § 15.2-2259(A)*.

One trial court has said that, in order for the requirement that the reasons for disapproval be stated in writing to have any legitimate meaning and effect, the reasons must: (1) be the reasons expressed by the agent or the collective action of the members of the planning commission; (2) be clearly communicated to the applicant so that he knows exactly why the plat was not approved; and (3) be in writing. *Mountain Venture Partnership Lovettsville II v. Planning Commission of Lovettsville*, 26 Va. Cir. 50 (1991). Neither approval by default nor a declaration that the disapproval is null and void is the judicial remedy if the locality fails to provide the required explanation. *Mountain Venture, supra*.

With respect to preliminary plats, the Virginia Supreme Court has said that when a local governing body's disapproval of a preliminary plat is appealed, the "trial court must sustain the decision unless the local governing body failed to comply with the applicable subdivision ordinances or acted arbitrarily and capriciously in denying the application." *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 277, 626 S.E.2d 357, 363 (2006).

Because Virginia Code §§ 15.2-2259 and 15.2-2260 apply to both subdivision plats and site plans, cases pertaining to site plans are included below.

22-510 Disapproval because the plat fails to comply with an ordinance requirement

The disapproval of a plat because the subdivider failed to show compliance with the law outside of the state and local planning, subdivision and zoning laws (*Virginia Code* § 15.2-2200 *et seq.*) is not arbitrary and capricious. *Dorn v. Board of Supervisors of Fairfax County*, 28 Va. Cir. 133 (1992) (but also holding that a decision based on the determination that the applicant failed to properly withdraw the subject property from a condominium regime – a decision of law rather than a decision of fact – was arbitrary and capricious).

Failure to comply with an ordinance requirement will support the disapproval of a plat. In *VACOM, Inc. v. Fairfax County Board of Supervisors*, 33 Va. Cir. 39 (1993), one of the issues before the court was whether the county's disapproval of VACOM's sixth revision of a site plan for a proposed development near the Route 28/Route 29 intersection in Fairfax County was improperly based on minor deficiencies that served as a mere pretext for the county's real concern – the redesign of the intersection. The court identified a number of minor deficiencies in the site plan related to frontage, drainage, berms, and correct acreage totals. Although noting that these deficiencies were minor and could be corrected in seven to ten days, the court found that these were legitimate grounds to disapprove the site plan. The court rejected VACOM's argument that the disapproval of the site plan based on the above deficiencies served as a mere pretext, finding that "any proper basis for rejecting the sixth site plan is sufficient. The failure of the sixth site plan to meet the frontage requirements was clearly a proper basis for objection. Whether the county had ulterior motives for rejecting the sixth site plan is inconsequential if one of the bases of its rejection was proper." *VACOM*, 33 Va. Cir. at 48.

22-520 Neither the comprehensive plan nor other policy considerations may be a basis for disapproval

A plat may be approved only on the basis of whether it complies with all applicable regulations. The comprehensive plan may not be the basis for denying a plat that is otherwise in conformity with duly adopted standards, ordinances and statutes. *Rackham v. Vanguard Limited Partnership*, 34 Va. Cir. 478, 479 (1994).

A subdivision ordinance may not include provisions that effectively allow a locality to make a land use policy decision when considering a subdivision plat. In *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999), the county denied a subdivision master plan, relying on a provision of its subdivision ordinance that allowed the board to deny a plat if, in its opinion, the land was unsuitable for subdivision. The ordinance also provided that land was deemed unsuitable for subdivision if it would not preserve a "rural environment." In finding that the challenged provisions of the subdivision ordinance went beyond that enabled by Virginia Code §§ 15.2-2241 and 15.2-2242, the Virginia Supreme Court said that a locality may not "under the guise of a subdivision ordinance, enact standards which would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property's zoning classification." *Countryside Investment*, 258 Va. at 504-505, 522 S.E.2d at 613-614.

22-600 Judicial challenges to the approval or disapproval of a preliminary or final plat

There are at least four possible scenarios when a decision to approve or disapprove a preliminary or final plat may be challenged in court. Because Virginia Code §§ 15.2-2259 and 15.2-2260 apply to both subdivision plats and site plans, cases pertaining to site plans are included below.

22-610 Challenge by the subdivider to the disapproval of a plat

A subdivider may appeal the locality's disapproval of a plat to the circuit court within 60 days after the decision. *Virginia Code* §§ 15.2-2259(C) (*final*), 15.2-2260(E) (*preliminary*). The circuit court's review is limited to a determination of whether the locality's disapproval was "not properly based on the ordinance applicable thereto, or was arbitrary or capricious." *Virginia Code* §§ 15.2-2259(C) (*final*), 15.2-2260(E) (*preliminary*); *Sansom v. Board of Supervisors of Madison County*, 257 Va. 589, 514 S.E.2d 345 (1999); *West v. Mills*, 238 Va. 162, 380 S.E.2d 917 (1989). Likewise, the court must sustain the locality's decision unless the locality failed to comply with the applicable ordinances or acted arbitrarily or capriciously. *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006) (applied to final plat).

The courts have said that their authority under Virginia Code §§ 15.2-2259(C) and 15.2-2260(E) is sufficiently broad to permit a trial court to approve a plat if the evidence supports the subdivider's allegations. *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979) (under state enabling authority, the trial court had the authority to approve a plat that met all applicable requirements; limiting the court's role to determining whether the county's disapproval was not properly based upon the applicable ordinance, or was arbitrary or capricious, would be an overly restrictive interpretation of the statute); *Sterling Land Corp. v. Planning Commission of Town of Hamilton*, 51 Va. Cir. 307 (2000).

If an appeal is filed regarding the disapproval of a plat, the locality is not required to consider an alternative plat pending the appeal. *West, supra*.

22-620 Third party challenge against the locality under Virginia Code §§ 15.2-2259 or 15.2-2260

A third party may not judicially challenge the approval of a plat in an action against the locality under Virginia Code §§ 15.2-2259 or 15.2-2260. *See Barton v. Town of Middleburg*, 27 Va. Cir. 20 (1991). Virginia Code § 15.2-2259 confers the right to appeal only upon the applicant. There is no language giving such a right of appeal to a third party or even an aggrieved party as provided in Virginia Code § 15.2-2314 (certiorari to review a decision of a board of zoning appeals) or Virginia Code § 15.2-2311 (appeal to board of zoning appeals of a decision by a zoning administrator or other officer). *Barton*, 27 Va. Cir. at 21-22.

22-630 Third party challenge against the locality in a declaratory judgment action

A third party may not judicially challenge the approval of a plat in a declaratory judgment action brought under Virginia Code § 8.01-184. *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 499, 659 S.E.2d 296, 304-305 (2008). In *Logan*, neighboring landowners brought a declaratory relief action under Virginia Code § 8.01-184, challenging the city's approval of a subdivision, including the approval of various exceptions authorized under the subdivision ordinance. In dismissing the neighboring landowners' right to declaratory judgment, the Virginia Supreme Court said:

. . . Logan has attempted to use the declaratory judgment statutes to create a right of appeal to the circuit courts that does not otherwise exist. Because the declaratory judgment statutes do not create such rights, and in the absence of statutory authority granting her a right of appeal to actions taken under the Subdivision Ordinance, Logan remained a stranger to the subdivision approval process and was not authorized to challenge [the director of planning's] actions under that Ordinance.

See also Miller v. Highland County, 274 Va. 355, 369, 650 S.E.2d 532, 538 (2007), in which the Virginia Supreme Court rejected a third party challenge under Virginia Code § 8.01-184 to the board of supervisors' finding of substantial accord under Virginia Code § 15.2-2232. The court said that "the declaratory judgment statutes may not be used to attempt a third-party challenge to a governmental action when such challenge is not otherwise authorized by statute."

22-640 Third party challenge against the subdivider

A third party may not judicially challenge the approval of a plat in an action against the subdivider. *See, Shilling v. Jimenez*, 268 Va. 202, 597 S.E.2d 206 (2004) (third parties have no right to challenge the approval of a subdivision plat in an action against the developer). The landowners in *Shilling* claimed that Loudoun County's subdivision ordinance had extended to them the right to enforce the requirements of the subdivision ordinance. The Virginia Supreme Court disagreed, noting that the enabling acts reaffirmed the authority of localities to regulate the subdivision and development of land, and that there was a clear legislative intent to vest in the governing body and its agents the sole power to enforce its subdivision ordinances. After noting the applicable 5-year statute of limitations under Virginia Code § 8.01-243(B), the Court said that "[t]hird-party suits challenging subdivisions long after their approval and recordation could have a profound effect on the vested property rights of innocent purchasers and lenders. We will not impute to the General Assembly an intent to create such an effect in the absence of express statutory language." *Shilling*, 268 Va. at 208, 597 S.E.2d at 210.

22-700 Family subdivisions

A *family subdivision* is a division of land under family division regulations resulting in a transfer of land from the property owner to a member of his or her immediate family. Compared to a regular subdivision, the procedure for a family division is greatly simplified, and the required improvements and design requirements are minimal. The principal focus of the family division is to promote the values society places upon the disposition of family estates during the lifetime of the owner with a minimum of government regulation and to promote the cohesiveness of the family. *1989 Va. Op. Atty. Gen. 100*. On the other hand, the family division procedure was not intended to authorize the subdivision of property for short-term investment purposes without complying with otherwise applicable requirements of the subdivision ordinance. *1989 Va. Op. Atty. Gen. 100*.

Although exempt from most of a locality's subdivision regulations, the lots created by family division are nevertheless subject to the locality's zoning regulations. *Crestar Bank v. Martin*, 238 Va. 232, 383 S.E.2d 714 (1989) (subdivision lots created by family division subject to a zoning regulation limiting the placement of mobile homes); *1989 Va. Op. Atty. Gen. 100*.

There are three types of family divisions, two of which are discussed below. *Virginia Code § 15.2-2244*. The third type, which may be established in counties having the urban county executive form of government (the County of Fairfax), is governed by *Virginia Code § 15.2-2244(B)*.

22-710 Standard family divisions

Counties that are not experiencing 10% population growth from the next to latest to the latest decennial census ("high growth localities") are *required* to adopt reasonable provisions permitting the single division of a parcel for the purpose of sale or gift to a member of the immediate family. *Virginia Code §§ 15.2-2241(10) and 15.2-2244(A)*. The reference to a *single division* may include a single lot for each member of the property owner's immediate family. *1989 Va. Op. Atty. Gen. 100*.

Family divisions under *Virginia Code § 15.2-2244(A)* are subject only to the following requirements:

- Any express requirement contained in the Virginia Code.
- Any requirement imposed by the locality that all lots of less than five acres have reasonable right-of-way of not less than ten feet or more than twenty feet providing ingress and egress to a dedicated recorded public street or thoroughfare.
- Only one such division is allowed per family member. A property owner whose property is subdivided pursuant to *Virginia Code § 15.2-2244(A)* in one county is not prohibited from dividing property by family division which he owns in another county. *2000 Va. Op. Atty. Gen. LEXIS 16, 2000 Va. Op. Atty. Gen. WL 425335*.

Under this type of family subdivision, a *member of the immediate family* is defined as any person who is a natural or legally defined offspring, stepchild, spouse, sibling, grandchild, grandparent, or parent of the owner. *Virginia Code § 15.2-2244(A)*. In addition, a locality may include aunts, uncles, nieces and nephews in its definition of immediate family. *Virginia Code § 15.2-2244(A)*. Transfers may be made to beneficiaries of land held in trust, provided that the beneficiaries are members of the immediate family. *Virginia Code § 15.2-2244.2*. The transfer of lots may go in any direction (*e.g.*, not only from parent to offspring, but from offspring to parent). Also, the family division regulations do not concern themselves with how the property was originally acquired. Thus, offsprings can convey their joint interests in a lot to a parent, who may then effect a family division among the offspring. *1989 Va. Op. Atty. Gen. 100*.

22-720 Family subdivisions in high-growth localities such as Albemarle County

Counties that are experiencing 10% population growth from the next to latest to the latest decennial census such as Albemarle County are not required to allow division by family subdivision. *Virginia Code § 15.2-2244(C)*.

A family subdivision in Albemarle County is subject to all requirements of the Virginia Code and county regulations. The county's subdivision ordinance defines *member of the immediate family* more narrowly than state law under Virginia Code § 15.2-2244(A). The term means the "natural or legally defined off-spring, grandchild, grandparent, or parent of the owner of property." *Albemarle County Code § 14-106*. Business entities and trusts are not generally considered members of the immediate family under this definition and may neither create, convey nor receive a lot created by family subdivision. However, Albemarle County has created two exceptions: (1) land owned as part of a trust for estate planning purposes may be considered to be owned by the current owner or a member of his or her immediate family if certain factors are satisfied; and (2) a lot created by family subdivision may be conveyed to the custodian of a qualifying member of the immediate family under the Virginia Uniform Transfers to Minors Act (*Virginia Code § 64.2-1900 et seq.*). *Albemarle County Code § 14-212(A)*. In a trust where the trustee or trustees is a natural person, the factors that will be considered include:

- Title to the real property is in the name of one of the trustees.
- The intended grantee is a qualifying member of the trustee's immediate family and, if there is more than one trustee, the intended grantee is a qualifying member of each trustee's immediate family.
- The trust agreement allows the trustee to convey real property and, if there is more than one trustee, all of the trustees agree in writing to the family subdivision.
- Under the trust agreement, the trustees retain complete control over the trust assets.

Following is another special circumstance where the county attorney concluded that a proposed subdivision could qualify as a family subdivision:

A widow owned a ½ interest in a parcel; the other ½ interest was owned by a trust established by her now-deceased husband, and the widow was the sole beneficiary. The widow wanted to convey a 2-acre parcel to her grandson. The widow would get the ½ interest out of the trust before the 2-acre parcel was conveyed, and was willing to have a condition on the family division plat, stating that the ½ interest in the trust would be transferred to the widow before the parcel could be conveyed to a member of the immediate family. For tax reasons, the widow's attorney claimed that the plat needed to be approved by the county before the ½ trust interest was transferred to the widow. The plat and the deed(s) would be recorded simultaneously. The conclusion of the county attorney was that the conveyance would be between members of the immediate family.

The county's subdivision regulations require minimal improvements and only minimal design requirements for private streets and utilities. *Albemarle County Code § 14-208(D)*. Under Albemarle County Code § 14-211, a family subdivision will be approved only if, in addition to satisfying all other applicable requirements of the subdivision ordinance, the agent is satisfied that:

- Only one lot is created for transfer by sale or gift to the same family member.
- The subdivider has not previously divided any other land within the county by family subdivision for transfer by sale or gift to the same family member.
- Each lot proposed to be created complies with the all applicable requirements of the zoning ordinance.
- If the lot proposed to be created will be transferred to a member of the immediate family owning an abutting lot, the family subdivision lot shall be combined with the abutting lot and shall be so noted on the plat.

Under Albemarle County Code § 14-212, an approved family subdivision will be subject to four conditions of approval: (1) the lot must have been owned by the owner or a member of the owner's immediate family for at least four consecutive years immediately preceding the date the family subdivision plat is submitted; (2) the lot must be

held by the grantee for a minimum period of four years, except for the purposes of securing any purchase money and/or construction loan, including bona fide refinancing, or if the lending institution requires in writing that the grantee's spouse be a co-grantee or co-owner of the lot; a restrictive covenant must also be recorded restricting transfer of the lot to a third person during the four-year period; (3) the entrance of the principal means of access for each lot onto any public street must comply with VDOT standards and be approved by VDOT; and (4) a restrictive covenant must be recorded which prohibits the sale or conveyance of any lot created to anyone other than a member of the immediate family during the four-year period.

22-730 One concern about family subdivisions: circumvention of the standard subdivision procedures and requirements

One of the concerns localities and members of the general public have about family subdivisions is that they may be used as a means to circumvent the procedures and improvement requirements of a conventional subdivision.

Circumvention can result in long-term problems for the locality because family subdivision regulations require only minimal improvements. Thus, purchasers of family subdivision lots may be faced with roads leading to their lots may meet a lower standard than what is otherwise required. To counter potential abuse, a locality is enabled to enact reasonable provisions to protect against the abuse of the family subdivision scheme. *1986-87 Va. Op. Atty. Gen. 121; Virginia Code § 15.2-2244.1*. This authority is greatest for high growth localities operating under Virginia Code § 15.2-2244(C), which allows the locality to define *member of the immediate family* as it chooses and to impose any other requirements it deems to be appropriate. In fact, high growth localities are not required to allow for family subdivisions. *Virginia Code § 15.2-2244(C) ("a subdivision ordinance may include reasonable provisions")*.

The locality may require that the proposed family subdivision be submitted to the locality's subdivision agent for review and approval. *1989 Va. Op. Atty. Gen. 100*. If the underlying circumstances indicate that the proposed family subdivision is for the purpose of circumventing the subdivision ordinance, the agent may deny the family subdivision. *1989 Va. Op. Atty. Gen. 100; Virginia Code § 15.2-2244(A)*. It is reasonable for a locality to require the landowner and the members of the immediate family to execute an affidavit to the effect that the proposed family subdivision is not for the purpose of circumventing the requirements of the subdivision ordinance. *1989 Va. Op. Atty. Gen. 100*.

If implemented by a locality, Virginia Code § 15.2-2244.1 allows a locality to address most of the concerns about circumvention of the subdivision ordinance. Section 15.2-2244.1 allows a locality to require that before land may be divided by family subdivision: (1) the property must have been owned for up to 15 consecutive years by the current landowner or a member of the immediate family; and (2) the landowner must agree to place a restrictive covenant on the subdivided property that would prohibit the transfer of the property to a nonmember of the immediate family for a period of 15 years or a lesser period allowed by the locality under prescribed circumstances. *Virginia Code § 15.2-2244.1*. Finally, a locality may require that the subdivided lot be no more than one acre and otherwise meet any other express requirement imposed by the locality. *Virginia Code § 15.2-2244.1*.

Albemarle County requires that the land that is the subject of a family division be owned by the current owner or a member of his or her immediate family for at least four consecutive years immediately preceding the date the family subdivision plat is submitted for review. *Albemarle County Code § 14-212(A)*. The county also prohibits any lot created by the family subdivision, including the residue, from being transferred to a person other than an eligible member of the immediate family for a period of four years after the date of recordation of the plat, with limited exceptions. *Albemarle County Code § 14-212(B)*.

22-800 Vacation of a subdivision plat

All or part of a subdivision plat may be vacated according to the procedures provided by law. *See Virginia Code § 15.2-2271 et seq.* The term *vacation* implies an abandonment, extinguishment, or a permanent ending of the recorded plat, rather than a modification or alteration of it. *1980-81 Va. Op. Atty. Gen. 335*. Not every change to a subdivision plat requires that the plat be vacated to effect the change. *1979-80 Va. Op. Atty. Gen. 330*. For example, if the

subdivider makes changes affecting lot sizes, or desires to remove a lot from a plat, vacation is necessary. *1979-80 Va. Op. Atty. Gen. 330*. However, the division of one lot of a subdivision into two or more lots constitutes a resubdivision, which is treated and processed as a subdivision. *1979-80 Va. Op. Atty. Gen. 330; Virginia Code § 15.2-2201. See Albemarle County Code § 14-106 (definition of subdivision)*.

A plat may be vacated either before or after a lot created by the plat is sold. *Virginia Code §§ 15.2-2271 (before), 15.2-2272 (after)*. The statutory procedures for vacating all or part of a plat are mandatory in order for the vacation to be effective. *1986-87 Va. Op. Atty. Gen. 128*. The manifest purpose of the statutory procedures is to prevent diminution of public uses and conveniences guaranteed in the original plan of subdivision. *1986-87 Va. Op. Atty. Gen. 128*.

An action by a governing body on a request to vacate a subdivision plat is a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997) (affirming circuit court's grant of town's demurrer in action by landowners challenging the town council's refusal to consent to the landowners' request to vacate subdivision plat; action also held not to be unreasonable).

22-810 Vacation of a plat before a lot is sold

Before a lot is sold, a recorded subdivision plat or part thereof may be vacated either by written instrument or by ordinance, as follows:

- *Written instrument*: A plat may be vacated by a written instrument declaring the plat to be vacated. *Virginia Code § 15.2-2271(1)*. The instrument must be signed by the owners, proprietors and trustees who signed the plat, and must be consented to by the locality. *Virginia Code § 15.2-2271(1)*. Once duly executed and approved by the locality, the instrument is recorded. *Virginia Code § 15.2-2271(1)*.
- *Ordinance*: A plat may be vacated by ordinance, provided that no facilities for which bonding is required by the locality have been constructed on the property and no facilities have been constructed on any related section of the property located in the subdivision within five years of the date on which the plat was first recorded. *Virginia Code § 15.2-2271(2)*. In determining whether to adopt the ordinance, the locality's governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation. *See Virginia Code § 15.2-2271(2)*. A noticed public hearing must be held and any person aggrieved by file an action in circuit court challenging the adoption of the ordinance. *Virginia Code § 15.2-2271(2)*. A certified copy of the ordinance of vacation may be recorded with the clerk of the circuit court. *Virginia Code § 15.2-2271(2)*.

The recording of the written instrument or ordinance operates to destroy the force and effect of the recording of the vacated plat and divests all public rights in, and reinvests the owners, proprietors and trustees, if any, with the title to the streets, alleys, easements for public passage and other public areas laid out or described in the plat. *Virginia Code § 15.2-2271(1) and (2)*.

22-820 Vacation of a plat after a lot is sold

If any lot has been sold, a recorded subdivision plat or part thereof may be vacated either by written instrument or ordinance, as provided below. Obviously, vacation of all or part of a plat after a lot has sold becomes more complicated because more parties (lot owners and the subdivider), sometimes having competing interests.

- *Written instrument*: A plat may be vacated by written instrument stating agreement to the vacation. *Virginia Code § 15.2-2272(1)*. The instrument must be signed by all of the owners (including creditors whose debts are secured by a recorded deed of trust or mortgage) of lots shown on the plat and by a representative of the locality. *Virginia Code § 15.2-2272(1)*. If the instrument has the effect of extinguishing utility easements, the owners of those easements must sign the instrument as well. *1986-87 Va. Op. Atty. Gen. 128; see Virginia Code § 15.2-2275*. If only areas involving drainage easements or street rights-of-way will be vacated, and the vacation does not impede or alter drainage or access for any lot owners other than those lot owners immediately adjoining or contiguous to the vacated area, then only the owners immediately adjoining or contiguous to the vacated area

must sign the instrument. *Virginia Code* § 15.2-2272(1). Conversely, if the vacation would impede or alter the drainage or access for all the owners of lots contained on the plat, then the signatures of all those owners are required. *1996 Va. Op. Atty. Gen. 61*. Once duly executed, the instrument is recorded with the clerk of the circuit court. *Virginia Code* § 15.2-2272(1).

- *Ordinance*: A plat may be vacated by ordinance, initiated on the motion of one of the members of the governing body or on the application of any interested person. *Virginia Code* § 15.2-2272(2). In determining whether to adopt the ordinance, the governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation. *See Virginia Code* § 15.2-2272(2). In addition, the governing body should observe constitutional principles such as due process and understand that, as always, the legislative power must be exercised in good faith. *1984-85 Va. Op. Atty. Gen. 297*. A noticed public hearing must be held and any person aggrieved by filing an action in circuit court challenging the adoption of the ordinance. *Virginia Code* § 15.2-2272(2).

In *Boober v. Board of Supervisors of Botetourt County*, 65 Va. Cir. 53 (2004), the owner of a parcel (the “church parcel”) abutting a subdivision vacated by ordinance under *Virginia Code* § 15.2-2272 alleged that it was irreparably harmed by the plat’s vacation. The vacation of the plat also vacated a public right of way that would provide the only possible access to the church parcel once it was developed. In overruling the board’s demurrer, the circuit court concluded that the complaint did not need to allege “unreasonableness” in the ordinance under *Virginia Code* § 15.2-2272(2), but only “irreparable damage.” The circuit court also overruled the demurrer and special plea of another defendant that was made on the ground that the owner of the church parcel had failed to allege a cause of action and lacked standing. That defendant’s theory was that the owner of the church parcel had no remedy under *Virginia Code* § 15.2-2272(2) because the church parcel was not within the subdivision. The court rejected this theory because *Virginia Code* § 15.2-2272(2) conferred standing on “the owner of any lot shown on the plat” who showed that he will be irreparably damaged. *Boober*, 65 Va. Cir. at 57-58. In this case, the church parcel was shown on the subdivision plat that was vacated. The court concluded that if the General Assembly had intended to confer standing only on the owner of a lot within the subdivision, it “could easily have used more restrictive language.” *Boober*, 65 Va. Cir. at 59.

The recording of the written instrument or ordinance operates to destroy the force and effect of the original recording of the vacated plat and vests fee simple title to the centerline of any streets, alleys or easements for public passage so vacated in the abutting lot owners free and clear of any rights of the public or other owners of lots shown on the plat. *Virginia Code* § 15.2-2274. This vesting of fee simple title is also subject to the rights of the owners of any public utility installations which have been previously erected in the streets, alleys or easements. *Virginia Code* § 15.2-2274. If a street, alley or easement for public passage is located on the periphery of the plat, the title for its entire width vests in the abutting lot owners. *Virginia Code* § 15.2-2274. The fee simple title to any portion of the plat vacated that was set apart for any other public use is revested in the owners, proprietors and trustees, if any, who signed the plat, free and clear of any rights of public use in the same. *Virginia Code* § 15.2-2274. The vesting of title is automatic; a separate deed is not required. *1980-81 Va. Op. Atty. Gen. 332*.

22-830 Relocating or vacating boundary lines by plat

A locality may authorize the boundary lines of any lot to be vacated, relocated or otherwise altered as part of an otherwise valid and properly recorded plat of subdivision or resubdivision. *Virginia Code* § 15.2-2275. No easements or utility rights-of-way may be relocated or altered without the express consent of all persons holding any interest therein. *Virginia Code* § 15.2-2275. This procedure may be used only if it does not involve relocating or altering streets, alleys, easements for public passage, or other public areas. *Virginia Code* § 15.2-2275.

Alternatively, a locality may allow lot lines to be vacated by deed provided that no easements or utility rights-of-way located along any of the lot lines may be extinguished or altered without the express consent of the easement holders. *Virginia Code* § 15.2-2275. The deed must be approved in writing on its face by the locality and must reference the recorded plat by which the lot line was originally created. *Virginia Code* § 15.2-2275. Once approved by the locality, the deed must be recorded. *Virginia Code* § 15.2-2275.

22-840 Lot owners do not necessarily have a vested right to maintain lots in subdivision at a certain size

One purpose for vacating a plat or resubdividing is to change the sizes of some of the lots. In the absence of a general plan for development restricting lots to a certain size, a conveyance of lots by reference to a recorded map or plat does not in itself raise any implied covenant that the lots will remain as shown on the plat or that they may not be later changed in size or further subdivided. *1979-80 Va. Op. Atty. Gen. 327*.

However, when the necessary covenants or other terms and conditions restricting lot sizes are in the deed of conveyance itself, or otherwise in the chain of title, the resubdivision of originally platted lots is prohibited. *Friedberg v. Riverpoint Building Committee*, 218 Va. 659, 239 S.E.2d 106 (1977). The subdivision enabling legislation (*Virginia Code* § 15.2-2240 *et seq.*) does not require that a subdivider set forth restrictions on lot sizes in deeds or on plats. Thus, the recording of deeds and plats under those provisions does not in itself give rise to any implied covenant as to lot sizes. *1979-80 Va. Op. Atty. Gen. 327*. As a result, unless there is a general plan for the development restricting lot sizes in a subdivision, there is no covenant between subdivider and purchasers, or among purchasers, as to the lot sizes, and the purchasers have no vested right in retaining the status quo. *1979-80 Va. Op. Atty. Gen. 327*. Note that today subdividers often record restrictive covenants that prohibit the further subdivision of the lots within the development.

22-900 A note about notes on plats: sometimes they may be binding on the subdivider or its successors

In *City of Chesapeake v. Dominion Security Plus Self Storage, LLC*, 291 Va. 327, 785 S.E.2d 403 (2016), the owners of land being subdivided agreed to a note on a subdivision plat under review by the City of Chesapeake. The note addressed the owners' reservation for future purchase by the city a portion (4,943 square feet) of a 4.5 acre parcel being subdivided, and that the purchase value of the portion would be based on the fair market value as of the date the city decided to exercise its right to purchase the land. The note concluded: "The owners agree that it shall not make or have any claims for damage to the said improvements or damages to the residue [of] the owners' property by reason of the said purchase." The subdivision plat was approved by the City and recorded. The owners sold the parcel to Dominion.

After the city filed its petition for condemnation, Dominion answered that it was not bound by the reservation because it was an unlawful exaction without due process, the reservation was beyond the city's authority, and that the condemnation resulted in a reduction in market value to the remaining property because of loss of reasonable access, visibility, and other causes. The city responded that the note on the subdivision plat was a valid and enforceable contract. The trial court agreed, but allowed Dominion to present evidence of damages to the residue because, when the plat was recorded, the damages were not foreseeable. The trial court awarded Dominion \$2,156,789.18 for the damages to the residue.

The city appealed, and the Virginia Supreme Court held that the note on the plat was a contract that was enforceable by the city, and foreseeability of damages to the residue was not a term of the contract. The award of \$2,156,789.18 for damages to the residue was reversed, leaving \$44,141.00 for the value of the property that was acquired.