

Chapter 27

Enforcing the Zoning Ordinance

27-100 Introduction

This chapter provides guidance to zoning officials for determining whether a zoning violation exists, conducting inspections and collecting evidence, and preparing for court. In enforcing its zoning ordinance, a locality may seek criminal fines (*Virginia Code* § 15.2-2286(A)(5)), a court order requiring the violator to abate the violation through an injunction (*Virginia Code* § 15.2-2208), or civil penalties (*Virginia Code* § 15.2-2209). In conjunction with an enforcement action, the locality may also record a *lis pendens* meeting the requirements of *Virginia Code* § 8.01-268 in the clerk's office of the circuit court. See *Virginia Code* § 15.2-2208(B).

27-200 Rules of evidence for the zoning official

This section provides a brief overview of the law pertaining to the admissibility of evidence in a civil zoning enforcement action. Because this scope is so limited, it is a very brief summary of the rules of evidence in Virginia and the reader is advised to consult with the Part 2 of the Rules of the Supreme Court of Virginia, which may be found online at <http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf>, case law, and Virginia treatises on the subject.

In considering these rules, the readers should understand that many zoning violations are enforced in general district court, where the defendant landowner and/or occupant may not be represented by an attorney, and where evidentiary objections by the defendant are unlikely. Nonetheless, knowledge of these rules of evidence allows the zoning official to better prepare her case for court, to be confident that the evidence that will be presented will be admissible if an objection is raised, and to assure that the evidence presented will be relevant and material.

27-210 The rules of evidence and why they exist

The term *evidence* generally refers to the testimony, documents, and other information presented to the court at a trial to persuade the court that a proposition should be taken as established or proven. The rules of evidence are a system of rules that governs the presentation and admissibility of evidence.

The rules of evidence have evolved over the centuries, and the rules that have developed are designed to keep out any matters that: (1) are likely to be untrue; (2) are likely to mislead the trier of fact; (3) would unduly arouse the emotions of the trier of fact; or (4) violate some public policy of greater social importance. The rules also are designed to keep a trial moving forward without being buried under an avalanche of information having little relevance toward proving or disproving a particular fact.

Today, the rules of evidence reflect the balancing of the value of evidence against the dangers of admitting it.

27-220 Admissibility of evidence

All relevant evidence is admissible, except as otherwise provided by the United States Constitution, the Virginia Constitution, statute, rules of evidence, and other rules prescribed by the Virginia Supreme Court (for purposes here, collectively referred to as the *rules of evidence*).

Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, *i.e.*, it tends to prove or disprove a material issue in the case. It is not necessary for the evidence to directly prove an ultimate issue in the case in order to be relevant; it is admissible as relevant if it constitutes a link in the chain of proof.

The admissibility of relevant evidence is not absolute. The rules of evidence may prevent relevant evidence from being admitted. For example, a zoning official may be prevented from testifying that a neighbor of a zoning violator told her that the violator had 37 junked vehicles on his property. Although evidence about the junked vehicles may be relevant, it would likely not be admissible because it is *hearsay*, discussed in section 27-233.

If the evidence is not relevant; *i.e.*, if it does not tend to prove or disprove any material issue in the case, it is not admissible.

27-230 Rules of evidence every zoning official should know

A zoning official is routinely the key witness in a zoning enforcement action. There are several fundamental rules of evidence that every zoning official should know when preparing a zoning enforcement case for court.

27-231 A witness must have personal knowledge of the matter

A witness may not testify to a matter unless evidence is introduced that is sufficient to support a finding that the witness has personal knowledge of the matter. Personal knowledge is typically established by the witness' own testimony. This requirement is easily satisfied when the testifying zoning inspector has observed the condition of the property and performed other related functions, such as reviewing records to confirm whether a particular permit or approval was granted.

27-232 A witness who forgets while testifying may have his memory refreshed

A witness should testify from memory. However, a witness may forget some or all of the facts about which he is called to testify, either because of nervousness, the passage of time, or the sheer volume of facts he is asked to recall. One way to refresh a witness' memory is to ask him leading questions. Another way is to allow the witness to examine materials, usually writings, which relate to the matter forgotten. The materials relied upon need not be admitted into evidence, and they need not even be otherwise admissible.

After examining the materials, the witness may either: (1) put aside the material and testify from an independent recollection; or (2) although not having actual independent recollection, testify directly from the material placed before him. In the latter situation, if the witness has *some* independent recollection of the matter, he may use the notes to refresh his memory, provided he made a correct record of the details at the time of the event.

27-233 The hearsay rule prohibits the admission of out-of-court statements unless an exception applies

Hearsay is an oral or written statement, other than one made by a declarant while testifying in court, offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception applies. Although there are numerous exceptions to the hearsay rule, the zoning official should be familiar with the following four:

- *Admissions by party-opponents:* An *admission* is an out-of-court statement offered against a party, that is the party's own statement or that of an authorized representative, and it is admissible. The admission may be a statement of fact, an opinion, or a legal conclusion. The admission is not binding or conclusive and may be denied, rebutted, or explained away. As a practice suggestion, the zoning official should pay attention to and document every out-of-court statement made by a zoning violator and his or her representatives.
- *Recorded recollection:* A *recorded recollection* is an original memorandum or record made at or near the time of an event concerning a matter about which a witness once had firsthand knowledge. If the witness does not have a present recollection of the event and vouches for the accuracy of the memorandum or record, it may be read into the record. As a practice suggestion, the zoning official should take contemporaneous notes or prepare a report of each zoning inspection and each conversation with persons pertaining to the zoning violation immediately following the inspection or conversation.

- *Records of documents affecting an interest in property and statements in those records:* The record of a document purporting to establish or affect an interest in property (e.g., a deed), and statements in those documents, are admissible. Recitals of fact in a deed or deed of trust are *prima facie* evidence of those facts. As a practice suggestion, the zoning official should conduct a search of the owner of the property in the circuit court's records, and obtain an authenticated copy of the deed from the clerk of the court.
- *Official records and reports:* Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth the activities of the office or agency, or matters observed within the scope of the office or agency's duties, are admissible. Official records, and the statements contained in those records, are *prima facie* evidence of the facts stated. The official zoning map and written notices of violation are official records. As a practice suggestion, the locality's zoning department should have one person formally designated as the custodian of all records in the department. Prior to going to court, that person should prepare copies of the relevant portions of the official zoning map and all written notices of violation provided to the zoning violator and have them authenticated.

27-234 Illustrative evidence and photographs

The use of illustrative evidence to clarify testimony is both proper and common. Illustrative evidence includes such visual aids as sketches and maps.

Photographs are admissible either to illustrate the testimony of a witness, or as independent evidence of matters revealed by the photograph. In order to assure that the photographs will be admissible in court, the witness should be able to testify that the photograph is a fair and accurate representation of her observations. The witness need not have taken the photograph, and neither the witness nor the photographer is required to testify about the technical details (e.g., shutter speed, film speed and type, lens focal length) of the photograph in order for it to be admissible.

27-235 Judicial notice

The doctrine of judicial notice allows the court to streamline the trial process by eliminating the formalities of the rules of evidence for certain evidentiary matters that are beyond any reasonable dispute. When the doctrine applies, certain facts and laws are accepted as established.

A court *may* take judicial notice of those facts that are either: (1) so generally known within the jurisdiction (e.g., Monticello is in Albemarle County); or (2) so easily ascertainable by reference to reliable sources (e.g., the time the sun set on a particular date), that reasonably informed people in the community would not regard them as reasonably subject to dispute. Facts that have been judicially noticed include those pertaining to the location and boundaries of cities and counties, natural features such as rivers and mountains, man-made features such as railroads and bridges, natural phenomena, times, dates and days, and the effects of weather.

A court *must* take judicial notice of the laws of the United States, the Commonwealth or any subdivision of the Commonwealth. *Virginia Code § 8.01-386(A) (civil cases); Virginia Code § 19.2-265.2(A) (criminal cases)*. This means that a court must take judicial notice of a locality's ordinances, including its zoning ordinance. In taking notice, the court may consult any book, record, register, journal or other official document or publication purporting to contain, state, or explain the law, and may consider any evidence or other information or argument that is offered on the subject. *Virginia Code § 8.01-386(B) (civil cases); Virginia Code § 19.2-265.2(B) (criminal cases)*. To assist the court, staff should prepare authenticated copies of the relevant sections of the zoning ordinance and highlight the relevant provisions or be certain that the court has an always-updated copy of the code.

27-300 Determining whether a zoning violation exists, and proving it

In most cases, zoning officials must establish the condition of the property on a particular date or series of dates as being in violation of one or more zoning regulations. There are three key elements to establish a violation: (1) the ownership and occupancy of the property; (2) the applicable zoning of the property; and (3) the unlawful condition or use of the property. A methodical approach should be taken to determine whether a zoning violation exists.

The principles discussed in this section apply in civil zoning enforcement actions and discuss the sources for various pieces of evidence and how to get them before the court. The reality is that most zoning enforcement cases are fairly simple in nature, and the zoning inspector can testify about all three elements (ownership/occupancy, applicable zoning and regulations, and the condition of the property), without introducing all of the documentary evidence discussed below.

27-310 Establishing ownership and occupancy of the property; other violators

The first element to be established is the ownership and occupancy of the property. Although ownership and occupancy is typically not in issue by the time a zoning enforcement case gets to court, the issue can be raised, particularly in a criminal enforcement action.

27-311 Ownership

Ownership of the property may be established by:

- *Deed*: An authenticated copy of the last recorded deed showing that the zoning violator is the owner of the property.
- *Official records*: An authenticated copy of the locality's public real estate records pertaining to the property.
- *Admissions of the party-opponent*: Testimony that the zoning violator, a party to the zoning enforcement action, admitted that he is the owner of the property.

Establishing ownership by deed alone may be insufficient if the deed was recorded many years prior to the enforcement action and there is no evidence presented of a recent title search. In *Harlow v. City of Richmond*, 1995 Va. App. LEXIS 954, 1995 WL 264311 (1995) (unpublished), the Virginia Court of Appeals held that ownership was not established by deeds recorded 8 and 19 years before the date of the alleged offense. The court said that the deeds were "too remote in time to prove ownership." The court rejected the city's additional evidence that the appellant had applied or offered to apply for a variance on one parcel, and that he obtained a building permit. The problem faced by the city in *Harlow* should be addressed by presenting additional evidence showing current ownership status; e.g., evidence that a search of the land records up to the present did not show that the ownership had since changed, presenting official real estate records, or testifying about admissions by the owner.

27-312 Occupancy

Occupancy of the property may be established by:

- *Leases and similar documents*: A lease, rental agreement or similar document obtained from the owner or the occupant.
- *Admissions of the party-opponent*: Testimony that the zoning violator, a party to the zoning enforcement action, admitted that he is the occupant of the property.
- *Testimony based on observations*: A witness may testify as to who was present on the property each time a zoning inspection was conducted.

Even when establishing occupancy, the zoning official should keep in mind the *Harlow* decision, and develop evidence showing the current occupancy status.

27-313 Who is responsible when the landowner and the occupant are not the same

Zoning violations in Albemarle County are enforced primarily through civil penalties, and Albemarle County Code § 18-36.3 states that the following people are responsible for the condition of their property and subject to

civil penalties:

Any person, whether owner, lessee, principal, agent, employee or otherwise, who violates any provision of this chapter as provided in section 36.1, or permits either by granting permission to another to engage in the violating act or by not prohibiting the violating act after being informed by the zoning administrator that the act violates this chapter as provided in section 36.2 . . .

This language is typical. It would appear to be obvious that the owner is always responsible for the condition of his or her own property because the owner has control over its use and condition in most cases. The issue can become murky where the property is occupied by someone other than the owner and the owner has relinquished all control over the property's condition, or where third parties are responsible for its condition. Note, however, that the regulation does not impose responsibility for complying with the zoning ordinance on only those persons directly responsible for the condition of the property. An owner who "permits any such violation" is also responsible.

If the locality desires to enforce its regulations against the owner where an occupant is the direct violator, the zoning administrator must send a written notice of violation (*see section 27-500*) to both the owner and the occupant of the property. *See Virginia Code § 15.2-2204(H)* (requiring that when any "applicant" requesting a written order, requirement, decision or determination is not the owner of the real property in issue, written notice must be provided to the owner within 10 days) and *Virginia Code § 15.2-2311(A)* (a BZA decision is binding on the owner of the real property that is the subject of an appeal only if the owner has been provided notice of the zoning violation or written order in accordance with that section; actual notice or participation in the appeal waives the owner's right challenge the validity of the BZA's decision due to lack of notice).

There is little Virginia case law on the issue of whether the owner, the occupant, or some third party is ultimately responsible for the condition of the property. In *City of Charlottesville v. Rice*, 22 Va. Cir. 327 (1990), the landowner contracted to have aluminum siding and windows installed on his house, which was located in a historic preservation district. The contract provided that the contractor would obtain all required building permits. When cited for a zoning violation because the contractor failed to obtain all of the required permits, the landowner claimed that he was not liable because the contract provided that the contractor would obtain the permits. The court ruled in favor of the city, holding that the historic preservation district regulations applied to landowners, and the duty to comply could not be delegated or assigned to another person.

There also is little case law nationally on this issue. The cases that have considered the issue generally hold that so long as the landowner had actual or constructive knowledge of the violating conditions and the power to stop the violation, he can be liable for the violation. In *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 818 N.E.2d 425 (2004), the court held that a landowner can be held criminally liable for a zoning violation created by an occupant only if the owner had knowledge of the violation and had the power to obtain the occupant's compliance or the power to evict the tenant after receiving knowledge of the violation. "Where an owner has knowledge of a zoning violation on his or her property as a result of a tenant's acts, and the owner has the power to stop the violation but does nothing, he or she is promoting or facilitating the violation." *Rosenwinkel*, 353 Ill. App. 3d at 545, 818 N.E.2d at 439. This approach also has been followed in *Town of Boothbay v. Jenness*, 2003 ME 50, 822 A.2d 1169 (2003), *Commonwealth v. DeLoach*, 714 A.2d 483 (Pa. 1998) and *City of Webster Groves v. Erickson*, 789 S.W.2d 824 (Mo. App. E.D., 1990).

Steps to Ensure the Landlord is Responsible

- Authorize separate penalties against a landowner landlord by assuring that the zoning ordinance provides that any person who violates, or permits another to violate, is responsible.
- Assure that the landlord has notice of the violation by always sending a written notice of violation to the landowner and the occupant.
- Provide the landowner a reasonable opportunity to obtain the occupant's compliance or eviction by not proceeding with further enforcement until the 30-day period in which to appeal the notice of violation to the BZA has expired.

Although a lesser standard may apply when zoning violations are enforced in a civil proceeding, the zoning official should ensure that the landowner has notice of the violation if he or she is not physically occupying the property.

27-314 Identifying the correct violator

When the landowner or zoning violator is a natural person, identifying the correct violator is simple. When the landowner or zoning violator is an entity such as a corporation or a limited liability company (“LLC”), the zoning official must be certain to determine the correct name of the entity and proceed against that entity, rather than the corporate officers or the LLC’s members or manager, even if the corporation is a one-person operation or the LLC has only one or two members. In *Jordan v. Commonwealth*, 36 Va. App. 270 (2001), the Virginia Court of Appeals made this point perfectly clear. In a public nuisance action, the Commonwealth proceeded against the two members of an LLC that had no other employees, even though fee simple title to the property at issue was held by the LLC. The Commonwealth argued that the members were the owners in fact because they were the sole members in the LLC, shared its profits, and held themselves out to be the owners. The court held that the Commonwealth had failed to establish that the individual members were the owners of the property. In sum, the simple rule is that if the landowner is a corporation, LLC or some other legal entity and is violating the zoning ordinance, the zoning enforcement action should proceed against the entity, not any natural person.

When the landowner or zoning violator is a land trust, the zoning official must determine the correct names of the trustees of the land trust, and identify the violator as, for example, “John Doe, Trustee, and Jane Doe, Trustee, of the Doe Land Trust.”

27-315 Whether someone who is not an owner or occupant may be a violator

Occasionally, the charged violator may be neither an owner nor an occupant of the property. The typical situation is the adult-aged son who stores his junk on his parent’s property, and the son is neither an owner nor an occupant (a resident or lessee) of the property.

Whether an enforcement action may be successfully brought against that person depends on the language in the zoning ordinance. If the ordinance provides that “any person” may violate the zoning ordinance, or otherwise does not limit the class of violators to owners and occupants, then an enforcement action may be brought against anyone who fits within that broader class and need not be either an owner or occupant. *Turner v. City of Harrisonburg*, 2013 Va. App. LEXIS 275, 2013 WL 5537129 (2013) (Va. Ct. App.) (unpublished) (defendant was lawfully convicted of violating the zoning ordinance even though he neither owned nor occupied the property where the violation occurred, because the zoning ordinance provided that “any person” found in violation of the zoning ordinance was guilty of a class 1 misdemeanor).

27-320 Establishing the applicable zoning regulations

The second element to be established is the applicable zoning regulations that prohibit the condition or use. The zoning official must know what she needs to prove in order to establish a violation. This information is contained in the text of the zoning ordinance – in the definitions, the district regulations, and in other regulations. There are two facts that must be established:

- *The zoning of the property:* The zoning of the property may be established by introducing an authenticated copy of the relevant portion of the official zoning map, or by having the court take judicial notice of the map.
- *The applicable zoning regulations:* The applicable zoning regulations may be established by having the court take judicial notice of the zoning ordinance and, in particular, those regulations relevant to the action.

The applicable zoning regulations should be reduced to their fundamental elements. This exercise allows the zoning official to know precisely what she will have to prove in court, and to be certain that no element of a violation is overlooked.

Once each element of the violation is confirmed, the zoning official should then identify what facts will establish each element of the violation to be proven. Some of these facts will be obvious, others will not. It may be useful to discuss this with other zoning officials to learn from their experience.

27-330 Establishing the condition or use of the property

At this stage of the investigation, the zoning official must collect the evidence pertaining to the unlawful use or condition of the property, and then connect that evidence to the applicable zoning regulations.

27-331 Identify what evidence needs to be collected

The zoning official should first identify what facts will establish each element of the violation that must be proven. Some of these facts will be obvious, others will not. It may be useful to discuss this with other zoning officials to learn from their experience.

To assure the evidence collected will establish a violation, the zoning official should carefully determine the elements of the violation to be proven.

27-332 Collect the evidence

The zoning official must collect the evidence in a form that will be admissible in court. The following evidence would be gathered from an inspection of the property. *See section 27-400 regarding obtaining search warrants to enter property and conducting warrantless searches.*

- *Observations:* The zoning official may testify as to what he observed while on the property, from adjacent property, or from public property, such as a road. The relevant observations should be reflected in notes or a report describing the observations.
- *Photographs:* Photographs can be powerful evidence of the condition of a property. Photographs should be taken by persons who have some knowledge of the basics of photography to assure proper focus, lighting, and composition.
- *Detailed field notes:* For some violations, detailed information may need to be collected that cannot be reflected in more general notes describing the zoning official's observations. For example, if the violation is a junkyard comprised of inoperable vehicles, detailed field notes may be necessary to document how each vehicle was determined to be inoperable (*e.g.*, VIN number, and whether inoperability is based on a missing license, outdated tags, disassembled for more than 60 days or some other criterion).
- *Observations by others:* Neighbors of the violating property may be able to testify about their observations of the property, and their testimony may be particularly useful for those violations that are transitory in nature (*e.g.*, the storage of commercial vehicles on residential property at night), or when the owner is claiming nonconforming status. Testimony from neighbors may also be invaluable in those cases where the zoning violation seems to be minor or trivial. The neighbors' participation will show the court that, while the violation may not seem like much to a disinterested third party, it shows the court that the violation is, in reality, disrupting the neighborhood and is important to them.
- *Search public records:* The title to the property needs to be researched. Recorded deeds need to be located and authenticated copies need to be obtained.

27-333 Connect the evidence to the applicable zoning regulations

The final step in the process is to connect the evidence to the applicable zoning regulations to confirm that a violation exists. The zoning official should have evidence supporting a determination that each element of the violation exists.

The Value of a Measured Response: *Ihnken v. Gardner*, 927 F. Supp. 2d 227 (D. Md. 2013)

Ihnken is a civil rights case brought by a concert promoter whose permit was summarily revoked. It provides a fairly familiar scenario when a hasty response to a complaint of an alleged zoning violation ran afoul of certain established principles. A measured response to the alleged violation likely would have avoided this lawsuit.

The Facts: A concert promoter rented land from the owner of a farm for a 4-day music and arts festival. The landowner obtained a zoning permit from the county's zoning administrator for the festival. On the first night of the concert, the police received numerous noise complaints. The next morning, a county commissioner received an angry email from a constituent about the noise the night before. After a meeting between the sheriff and the zoning administrator, and with the endorsement of the county commissioners, the zoning administrator revoked the permit and the remainder of the festival was cancelled. The promoter sued various county officials alleging, among other things, a violation of his procedural due process rights because the permit was revoked without a hearing.

The Issue: Whether the county's summary revocation of a permit for a music festival – while the festival taking place, because the music was exceeding the county's noise standards – violated the concert promoter's procedural due process rights.

The Court's Ruling: In rejecting the county's request to dismiss the promoter's complaint, the court found that the county officials had violated the promoter's procedural due process rights when it revoked the permit without a hearing, because: (1) the revocation occurred in the morning when there was no violation of the noise ordinance; (2) the noise ordinance did not authorize summary revocations; instead it only provided that a violation of the noise ordinance was a misdemeanor; (3) although the zoning ordinance authorized the zoning administrator to revoke a permit for violating a condition of a permit, this provision addressed only the *legal authority* to revoke, but not the *process* to revoke; and (4) the zoning ordinance provided no summary process before revoking the permit.

Its Implications: This case has the following implications:

- Although the permit was issued to the landowner, not the concert promoter, the court concluded that the concert promoter had a property interest in the permit because of his contractual relationship with the landowner.
- Any provision in a locality's regulations that provide for a permit or other approval to be revoked should be viewed as only providing the legal authority to revoke; procedural due process requires notice and the opportunity to be heard; the process due in land use cases is not extensive.
- Permits for single events should be clearly stated; in this case, the parties disagreed over the allowed duration of the festival and what hours music was allowed (the court noted that the landowner was less than forthright about the nature of the festival).

The Aftermath: After discovery, the defendants' motion for summary judgment on the procedural due process claim was denied. *Ihnken v. Gardner*, 2014 U.S. Dist. LEXIS 122345 (D. Md. 2014) (notice of a pre-deprivation hearing did not occur when county official state that the issue would be "addressed" in the morning).

27-400 Authority to enter private property

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. Article I, Section 10 of the Virginia Constitution contains a similar prohibition. These constitutional protections apply to zoning inspections even when zoning violations are enforced civilly, instead of criminally.

The Fourth Amendment protects citizens from warrantless searches of private property where the owner has a reasonable expectation of privacy in the place searched. In other words, the "Fourth Amendment protects the curtilage of a house and . . . the extent of the curtilage is determined by factors that bear upon whether an individual may reasonably expect that the area in question should be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 1139 (1987), quoted in *Robinson v. Commonwealth*, 273 Va. 26, 639 S.E.2d 217 (2007). Searches of property conducted without a search warrant are *per se* unreasonable under the Fourth Amendment. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006). However, not every observation by a government official is a search within the meaning of the Fourth Amendment. Rather, a search occurs when an expectation of privacy

that society is prepared to consider reasonable is infringed. *Illinois v. Andreas*, 463 U.S. 765, 103 S. Ct. 3319 (1983); *United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996).

Before entering private property, particularly occupied private property, the zoning official should request permission from the owner or the occupant to enter the property to conduct the inspection. When requesting consent, the zoning official should explain to the owner or occupant that a complaint has been received about some use or activity on the property and that an investigation is being conducted to determine compliance with the zoning ordinance. In most cases, the owner or occupant will grant consent. Express consent for locality officials to enter and inspect property provided on a land use application is valid, provided that the entry and inspection is related to compliance with the laws for which the land use approval was sought. *McNeice v. Town of Waterford*, 607 Fed. Appx. 103 (2^d Cir. 2015) (building permit application) (unpublished). When consent is refused, and entry into portions of the property for which a reasonable expectation of privacy may exist is necessary in order for the zoning official to complete the investigation, a search warrant may be required and the zoning official should consult with the locality's attorney.

Four Reasons Why The Nonconsensual Warrantless Inspection of Occupied Property Should be Avoided

- Whether zoning violations are enforced in civil or criminal proceedings, zoning inspectors must respect the Fourth Amendment's prohibition against warrantless searches and the landowner's right to a reasonable expectation of privacy.
- Nonconsensual warrantless inspections of occupied property put the safety of the zoning inspector at risk.
- Nonconsensual warrantless inspections of occupied property may be perceived as overzealousness by the general public, potentially damaging the reputation and effectiveness of the locality's zoning enforcement program.
- Nonconsensual warrantless inspections of occupied property may only heighten the suspicions of the landowner and possibly reduce his cooperation towards compliance.

This section provides three different procedures for obtaining warrants to conduct inspections: (1) administrative search warrants issued by a judge of the circuit court; (2) criminal search warrants issued by a judge or magistrate; and (3) inspection warrants issued by a magistrate or court of competent jurisdiction. This section ends with a review of the law pertaining to warrantless inspections.

27-410 Administrative search warrants

A zoning violation that will be enforced in a civil proceeding may require that the zoning official obtain an administrative search warrant. The locality's attorney should work with the zoning official to secure the warrant, and will prepare all the paperwork.

Seeking an Administrative Search Warrant: One Approach

- Call the judge's secretary to let her know that the zoning administrator will be applying for an administrative search warrant to allow the county's zoning inspectors to enter the property. Also inform the court that the purpose of the inspection is to determine whether a violation of the zoning ordinance exists on the property.
- Inform the secretary when the papers (affidavits, supporting exhibits, and a proposed administrative search warrant) will be delivered.
- Ask the secretary for available times for the judge to meet with the zoning officials and the county attorney, if he or she desires, to answer questions about the application.
- Ask the secretary to inform the county attorney's office as soon as the administrative search warrant is issued because it has a short life.

Under Virginia Code §§ 19.2-393 through 19.2-397, the following rules and procedures apply:

- *Authority to issue warrant.* An administrative search warrant is issued by the judge of the circuit court. *Virginia Code § 19.2-393.*

- *Affidavit required, showing probable cause:* An administrative search warrant may be issued only upon a showing of probable cause, supported by an affidavit particularly describing the place, things or persons to be inspected and the purpose for which the inspection for testing is to be made. *Virginia Code § 19.2-394*. The affidavit must contain either a statement that consent to inspect has been sought and refused, or explain that the facts or circumstances reasonably justify the failure to seek consent in order to effectively enforce the zoning ordinance. *Virginia Code § 19.2-394*.
- *Probable cause explained:* Probable cause in the criminal sense is not required. Probable cause exists if either reasonable legislative or administrative standards for conducting the inspection are satisfied with respect to the particular place, things or persons, or there exists probable cause to believe that there is a condition, object, activity or circumstance which legally justifies the inspection. *Virginia Code § 19.2-394; Mosher Steel v. Teig*, 229 Va. 95, 103, 327 S.E.2d 87, 94 (1985) (the “warrant application must provide the judicial officer with factual allegations sufficient to justify an independent determination that the inspection program is based on reasonable standards and that the standards are being applied . . . in a neutral and nondiscriminatory manner”); *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967).

Suggested Items to Seek in an Administrative Search Warrant

- Authority to take photographs and video.
- Authority to obtain soil and water samples, especially if the nature of the violation, such as a junkyard, may have conditions in which hazardous substances may be stored on the property, where it is likely that spills may be observed, or where materials may be buried.
- Authority to bring a police officer or sheriff’s deputy for the sole purpose of providing security for the zoning inspectors, particularly if the zoning inspectors have received threats from the violator or the relationship between the zoning inspectors and the violator has been contentious.
- Ask that the 10-day life of the administrative search warrant be extended beyond 10 days, particularly in the winter when weather may prevent or delay access to the property, or when law enforcement officers will be accompanying the zoning inspectors.
- Ask that the warrant authorize the inspection to be conducted without the owner or the occupant being present, provided that prior notice of the date and time of the inspection is given.

- *Examination of affiant by the issuing judge:* The issuing judge may examine the affiant under oath or affirmation to verify the accuracy of any matter indicated by the statement in the affidavit. *Virginia Code § 19.2-394*.
- *Issuance of administrative search warrant; contents:* An administrative search warrant is a written order, made in the name of the Commonwealth, signed by a judge of the circuit court. The order must: (1) describe, either directly or by reference to any accompanying or attached supporting affidavit, the property or premises where the inspection is to occur, *Virginia Code § 19.2-393*; and (2) specify the duration of the warrant, which period shall not exceed ten days unless extended by the judge. *Virginia Code § 19.3-395*. The description of the property or premises to be searched must be sufficiently accurate so that the zoning official executing the warrant and the owner or custodian of the property or premises can reasonably determine from the warrant the activity, condition, circumstance, object or property of which inspection is authorized. *Virginia Code § 19.2-393*.
- *Conducting the inspection:* An inspection pursuant to a warrant may not be made in the absence of the owner, custodian or possessor of the particular place, things or persons unless specifically authorized by the issuing judge upon a showing that the authority is reasonably necessary to effectuate the purpose of the regulation being enforced. *Virginia Code § 19.2-396*. An entry pursuant to the warrant shall not be made forcibly, except that the issuing judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of an immediate threat to public health or safety, or where the facts establish that reasonable attempts to serve a previous warrant have been unsuccessful. *Virginia Code § 19.2-396*. In the case of entry into a dwelling, prior consent must be sought and refused and notice that a warrant has been issued must be given at least twenty-four hours before the warrant is executed, unless the issuing judge finds that failure to seek consent is justified and that there is a reasonable suspicion of an immediate threat to public health or safety. *Virginia Code § 19.2-396*. In Albemarle County, the zoning administrator routinely requests the court to authorize a police officer to accompany the zoning inspectors during the inspection for safety reasons.

- *Return of warrant:* After the administrative search warrant has been executed and the inspection conducted, the warrant must be returned to the issuing judge within the time specified in the warrant. *Virginia Code § 19.2-395.*

27-420 Criminal search warrants

A zoning violation that will be enforced criminally may require that the zoning official obtain a criminal search warrant. The locality's attorney should work with the zoning official and the locality's law enforcement agency in securing the warrant, and will prepare all paperwork.

Under Virginia Code §§ 19.2-52 through 19.2-60, the following rules and procedures apply:

- *Authority to issue warrant:* A criminal search warrant is issued by any judge, magistrate or "other person having authority to issue criminal warrants." *Virginia Code § 19.2-52.*
- *Affidavit required, showing probable cause:* A criminal search warrant may be issued only upon a complaint on oath supported by an affidavit. *Virginia Code § 19.2-52.* The affidavit may be made by any person, and must reasonably describe the place or thing to be searched, the things to be searched for, and briefly allege the material facts constituting probable cause for issuing the warrant. *Virginia Code § 19.2-54.* The affidavit must also allege substantially the offense requiring the search. *Virginia Code § 19.2-54.*
- *Probable cause explained:* Probable cause in the criminal sense is a probability of criminal activity. "The task of the issuing magistrate is simply to make a 'practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and the basis of knowledge of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place.'" *Lebedun v. Commonwealth*, 27 Va. App. 697, 706, 501 S.E.2d 427, 431 (1998).
- *Issuance of criminal search warrant; contents:* A criminal search warrant must: (1) be directed to a police officer, *not to the zoning administrator*; (2) identify the affiant; (3) recite the offense in relation to which the search is to be made; (4) name or describe the place to be searched (the property by tax map and parcel number and/or address); (5) describe the property to be searched; (6) recite that the magistrate has found probable cause to believe that the property constitutes evidence of a crime identified in the warrant, or tends to show that a person named or described in the warrant has committed or is committing a crime; (7) command that the place be forthwith searched, either in day or night, and that the objects described in the warrant, if found, be seized; (8) state the date and time the search warrant was issued; and (9) have the affidavit attached to the search warrant. *Virginia Code § 19.2-56.* Additional rules apply to search warrants for records or other information pertaining to a subscriber to, or customer of, an electronic communication service or remote computing service, whether a domestic corporation or a foreign corporation, that is transacting or has transacted any business in Virginia. *Virginia Code § 19.2-56.*
- *What may be searched and seized:* A criminal search warrant may be issued for the search of or for specified places, things or persons, and any object or thing, including documents, books, papers or records constituting evidence of a zoning violation may be seized. *Virginia Code § 19.2-53.*
- *Conducting the inspection:* An inspection pursuant to a criminal search warrant must be conducted within 15 days by the police officer or other law enforcement officer to whom it is delivered. No other person may be permitted to be present during or participate in the execution of the warrant except: (1) the owners and occupants of the place to be searched when permitted to be present by the officer in charge of the search; and (2) persons designated by the officer in charge of the search to assist or provide expertise in the conduct of the search. *Virginia Code § 19.2-56.*
- *Return of warrant:* The officer executing the warrant must endorse the date of execution on the warrant and file it, with an inventory of any property seized, and the accompanying affidavit, within three days after the execution

of the search. *Virginia Code* § 19.2-57. The return must be filed in the circuit court clerk's office. *Virginia Code* § 19.2-57.

Unlike administrative search warrants, criminal search warrants must be executed by law enforcement officers, and the zoning officials play secondary roles, assisting and lending their expertise to the officers in charge.

27-430 Inspection warrants to inspect dwellings

A zoning ordinance may provide for the issuance of inspection warrants by a magistrate or court of competent jurisdiction. *Virginia Code* § 15.2-2286(A)(15). The authority to inspect under an inspection warrant issued under *Virginia Code* § 15.2-2286(A)(15) is limited to dwellings.

Under this procedure, the zoning administrator or her agent must present sworn testimony to a magistrate or court of competent jurisdiction, and if the sworn testimony establishes probable cause that a zoning violation has occurred, the magistrate or court may grant an inspection warrant “to enable the zoning administrator or his agent to enter the subject dwelling for the purpose of determining whether violations of the zoning ordinance exist.” *Virginia Code* § 15.2-2286(A)(15). The zoning administrator or his or her agent must make a reasonable effort to obtain consent from the owner or tenant of the dwelling before requesting an inspection warrant. *Virginia Code* § 15.2-2286(A)(15).

27-440 Warrantless searches

In the context of a typical zoning inspection, the areas of a property subject to Fourth Amendment protections (*i.e.*, in which an owner is deemed to have a reasonable expectation of privacy) are the home and the curtilage of the home. *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984); *Robinson v. Commonwealth*, 273 Va. 26, 639 S.E.2d 217 (2007); *Jefferson v. Commonwealth*, 27 Va. App. 1, 497 S.E.2d 474 (1998). “This area around the home is ‘intimately linked to the home, both physically and psychologically,’ and is where ‘privacy expectations are most heightened.’ [citations omitted].” *Covey v. Assessor of Ohio County*, 777 F.3d 186, 192 (4th Cir. 2015) (plaintiffs’ complaint successfully alleged a plausible Fourth Amendment violation where deputy assessor ignored “no trespassing” sign, searched the house’s curtilage, including the walk-out basement patio). Achieving certain governmental interests, such as enforcing a locality’s zoning regulations, will likely not justify the inspector’s actions and the search may be found to be “unduly intrusive.” *Covey*, 777 F.3d at 195 (“What began as a mere regulatory violation turned into an affront to the Coveys’ constitutional rights when Crews entered the curtilage and the Coveys’ home”). In the end, however, the assessor prevailed when the Fourth Circuit Court of Appeals later affirmed the trial court’s grant of summary judgment in favor of the defendant assessors. *Covey v. Assessor of Ohio County*, 2016 U.S. App. LEXIS 20806 (4th Cir. 2016) (unpublished).

As a general proposition, the curtilage of the home is the area immediately surrounding the home “to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” *Oliver*, 466 U.S. at 180, 104 S. Ct. at 1742. Four factors are considered to determine whether an area is within the curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134 (1987). The curtilage can be conceived as an area inside a line that divides the private confines of the home from the surrounding open fields.

27-441 Various areas within the curtilage in which a reasonable expectation of privacy may or may not exist

It is recognized that absent any affirmative attempts to discourage trespassers, owners or possessors of private property impliedly consent to have members of the general public intrude upon certain, limited areas of their property. *Robinson v. Commonwealth*, 273 Va. 26, 34-35, 639 S.E.2d 217, 222 (2007) (“Implied consent can be negated by obvious indicia of restricted access, such as posting ‘no trespassing’ signs, gates, or other means that deny access to uninvited persons”); *Shaver v. Commonwealth of Virginia*, 30 Va. App. 789, 520 S.E.2d 393 (1999). This consent

extends to those areas of the property which would be used when approaching a house in an ordinary attempt to speak with the occupant, such as the driveway, the front sidewalk, the front porch and any other particular path. *See, generally, 1 Wayne R. LaFare, Search and Seizure § 2.3(f), at 600-03 (4th ed. 2004)*. The courts have said that the police have the same right as any other member of the public to enter these areas where the owner has granted implied consent to enter. *Shaver*, 30 Va. App. at 796, 520 S.E.2d at 397 (“If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.”). The scope of this implied consent does not also encompass the right to conduct a general search of the premises. Thus, if a zoning inspector searching for evidence of a zoning violation strays from the “path” that is impliedly open to the public, he or she has exceeded the scope of the implied consent and, as a result, the search conducted without a warrant is unreasonable.

Following are some very general guidelines as to how the Fourth Amendment may be applied to a warrantless search of various areas of residential property during a zoning inspection:

- *Driveway and walkway to front door*: Absent express orders from the person in possession of the property against a possible trespass, there is no reasonable expectation of privacy in the driveway and the walkway to the front door. *Robinson v. Commonwealth*, 273 Va. 26, 639 S.E.2d 217 (2007); *United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996).
- *Fenced backyard*: There is a reasonable expectation of privacy within a fenced backyard. *Kearney v. Commonwealth*, 4 Va. App. 202, 355 S.E.2d 897 (1987) (reasonable expectation of privacy existed in inoperable truck located behind fence, twenty feet from home).
- *Unfenced backyard*: Whether a reasonable expectation of privacy exists in an unfenced backyard depends on whether the area is within the curtilage of the home, but at the very least the area of a residential backyard immediately adjacent to the home’s backyard is within the curtilage. *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984). However, the warrantless entry into areas other than a residence’s front entrance does not always violate the Fourth Amendment. *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998).
- *Items in plain view*: There is no reasonable expectation of privacy in items that are in plain view to the public. *Taylor, supra*. This includes items within a house that are observed from the street or even through a front window when the government official is at the front door. *Taylor, supra*. An owner or occupant likely has a reasonable expectation of privacy for what may be observed from those windows that are beyond the walkway to the front door or beyond public view.
- *Looking into windows on dwellings*: Beyond what can be seen through open windows either from public vantage points or from the walkway to the front door as discussed above, an owner or occupant likely has a reasonable expectation of privacy with respect to any other windows. The zoning official should be aware of Virginia Code § 18.2-130, which makes it a crime to “enter upon the property of another and secretly or furtively peep, spy or attempt to peep or spy into or through a window, door or other aperture of any building, structure, or other enclosure of any nature occupied or intended for occupancy as a dwelling.”

It is impossible to consider all of the possible factual scenarios in which a Fourth Amendment question may arise. A zoning official should consult the locality’s attorney for guidance. In any case, the zoning official should first seek the express consent of the person in possession of the property before entering private property. For the public areas of non-residential property, an owner’s or occupant’s reasonable expectation of privacy is significantly less or nonexistent.

27-442 Undeveloped and unoccupied areas where no reasonable expectation of privacy exists

There is no reasonable expectation of privacy in open fields (undeveloped and unoccupied lands), even if the actions would be a trespass under the common law. *Oliver v. United States*, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741 (1984) (“an individual may not demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home”); *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445 (1924).

This rule applies even if the property has been posted with “No Trespassing” signs. *Oliver, supra*. The fact that an inspector ignores a “no trespassing” sign, even in light of a state or local rule to adhere to such signs, “does not per se amount to a violation of the Fourth Amendment.” *Covey v. Assessor of Ohio County*, 777 F.3d 186, 194 (4th Cir. 2015) (plaintiffs’ complaint successfully alleged a plausible Fourth Amendment violation where deputy assessor ignored “no trespassing” sign, searched the house’s curtilage, including the walk-out basement patio).

27-443 Extraordinary measures to observe a zoning violation

Although zoning officials who enter the areas of the curtilage that are impliedly open to the public are “free to keep their eyes open,” an official who uses overly intrusive means of investigation, such as the use of binoculars, ladders or other sensory-enhancing devices, may exceed the scope of the landowner’s implied consent discussed in section 27-441.

Following are some guidelines as to the extent to which a zoning inspector should go in observing the portion of a property within the curtilage without a warrant and without the consent of the owner. The criminal cases cited below are from other jurisdictions and are not zoning cases. They are provided for illustrative purposes only.

- *Binoculars*: Binoculars are usually characterized as low-powered visual aids. Whether using binoculars is an unreasonable search generally appears to turn on whether the binoculars allow the law enforcement officer to see more clearly what he or she can otherwise see unaided (no reasonable expectation of privacy and not a search), or whether it allows him or her to see what otherwise could not be seen (a search). *Compare United States v. Whaley*, 779 F.2d 585 (11th Cir. 1986) (use of binoculars to view criminal activities in basement from 40 yards was permissible to aid observations that could be made with the naked eye) with *People v. Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979) (use of binoculars by police officer who stationed himself on a hilltop 200 to 300 yards from the defendants’ building at an altitude approximately that of the sixth or seventh floor of the building was a search because his observations were not observable to anyone not using an optical aid); *see also Rook v. State*, 679 N.E.2d 997 (Ind. 1997) (use of binoculars to view defendant carrying a marijuana plant in his backyard was not an unreasonable search); *Colorado v. Oynes*, 920 P.2d 880 (1996) (police officer’s view of interior of defendant’s home with binoculars from nearby field not a search); *Oregon v. Carter*, 101 Ore. App. 281, 790 P.2d 1152 (1990), *reversed on other grounds* at 316 Ore. 6, 848 P.2d 599 (1993) (police officer’s use of binoculars to view plant inside window of home from adjoining land not a search); *Wisconsin v. Peck*, 143 Wis.2d 624, 422 N.W.2d 160 (1988) (use of binoculars to view garden plots near defendant’s rural home not a search).
- *Telescopes*: Telescopes are usually characterized as high-powered visual aids. The rule applicable to binoculars applies to telescopes as well – whether their use constitutes a search generally appears to turn on whether they allow the law enforcement officer to see more clearly what she can otherwise see unaided (no reasonable expectation of privacy and not a search), or whether it allows her to see what otherwise could not be seen (a search). However, by their very nature as high-powered visual aids, telescopes do much more than allow one to see more clearly what can be seen unaided and, therefore, their use without a search warrant likely constitutes an unreasonable search. *United States v. Tabor*, 635 F.2d 131 (2^d Cir. 1980) (use of telescope constituted a search); *United States v. Kim*, 415 F. Supp. 1252 (D. Haw. 1976) (use of high-powered telescope constituted a search).
- *Artificial vantage points over a fence*: Physical barriers such as fences indicate a desire by the landowner to keep certain areas of property private. *See, State v. Christensen*, 131 Idaho 143, 953 P.2d 583 (1998) (no implied invitation to enter where the entrance to the driveway was obstructed by a closed gate posted with a “no trespassing” sign). Creating an artificial vantage point over a fence may be an unreasonable search. Whether the measures to look over a fence or other barriers are reasonable will depend, in large part, on the height of the fence. *People v. Smola*, 174 Mich. App. 220, 435 N.W.2d 8 (1989) (standing on car bumper to look over 6-foot fence is not a search because no reasonable expectation that fence would shield backyard from observation); *State v. Corra*, 88 Ore. App. 339, 745 P.2d 786 (1987) (standing on rock to peer over 6-foot fence not a search; many people tall enough to see over fence); *Sarantopoulos v. State*, 629 So.2d 121 (1993) (standing on tip toes to look over 6-foot fence not a search); *United States v. McMillon*, 350 F. Supp. 593 (D.D.C. 1972) (viewing backyard from neighbor’s porch was not a search); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) (mounting a

video camera on a power pole to observe a backyard over a 10-foot fence was a search, even though portions of the backyard were surrounded by a 5-foot fence). In sum, if the fence was 7 feet in height or taller, and the backyard could not otherwise be observed from a neighbor's property, the courts would likely have found these observations to be searches requiring a warrant.

- *Aerial surveillance*: Aerial surveillance of either an open field or the curtilage is not a search. *Florida v. Riley*, 488 U.S. 445, 109 S. Ct. 693 (1989) (helicopter at height of 400 feet); *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809 (1986) (the realities of air travel force a modern householder to assume that his yard and anything in it are in plain view from the air); *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984); *United States v. Breza*, 308 F.3d 430 (4th Cir. 2002) (helicopter at height of 35 feet).
- *Breaching a locked or posted gate*: When the curtilage is fenced and the gate is locked or is posted with a “no trespassing” or “keep out” sign, breaching the gate is a search because, in effect, the fence and the locked or posted gate extend the walls of the house (to which a greater expectation of privacy exists) to the area enclosed by the fence. See *Robinson v. Commonwealth*, 273 Va. 26, 34-35, 639 S.E.2d 217, 222 (2007) (“Implied consent can be negated by obvious indicia of restricted access, such as posting ‘no trespassing’ signs, gates, or other means that deny access to uninvited persons”); see, e.g., *Ciraolo, supra*; *Alvarez, supra*; *State v. Brocuglio*, 64 Conn. App. 93, 779 A.2d 793 (2001).

Although questions regarding extraordinary measures often arise during training sessions, the reality is that these measures should rarely be needed in a zoning investigation because, as noted in section 27-441, most landowners allow the zoning official to enter the property to observe.

27-500 The notice of violation

The zoning administrator's authority includes the authority to order “in writing the remedying of any condition found in violation of the ordinance.” *Virginia Code* § 15.2-2286(A)(4). The zoning administrator exercises this authority in an individual case by issuing a notice of official determination of violation, also known as a *notice of violation* or *NOV*.

The notice of violation plays a crucial role in the enforcement process, even though it does so on the administrative level: (1) it advises the owner or occupant of the property that a condition or use of the property is in violation of the zoning ordinance, and orders the owner or occupant to bring it into compliance within a specified period of time; (2) it puts the owner or occupant on notice that if he or she desires to challenge the zoning administrator's determination that a zoning violation exists, he or she must appeal the determination to the BZA within 30 days; (3) if the owner or occupant fails to file a timely appeal, the determinations made in the notice of violation are *things decided* (see *chapter 15*), and are no longer subject to challenge or defense in a judicial enforcement proceeding.

For these reasons, the notice of violation should be carefully prepared and contain all of the following:

- *Key identifying information*: The notice of violation should the following information: (1) the name and address of the owner of the property; (2) the name and address of the occupant of the property, if different; (3) the tax map and parcel number of the property; (4) the street address of the property; and (5) the zoning designation of the property.
- *Date of the inspection of the property/ date of the violation*: The notice of violation should identify the date the property was inspected that resulted in the determination that a violation exists on the property.
- *Determination of nonconforming status*: The notice of violation should make an affirmative determination of the nonconforming status of the property. In most cases, the use or activity does not have nonconforming status, and this determination eliminates the issue from the proceeding immediately, unless it is appealed to the BZA. It also eliminates one key defense if the zoning violation is enforced in a civil proceeding in court.

- *Description of the violation and the supporting facts:* The notice of violation should identify each violation, identify the regulation of the zoning ordinance violated, and summarize the relevant facts supporting the conclusion that the use or activity violates the cited regulation. For example, in *Mills v. Board of Supervisors of the County of Henrico*, August 23, 2013 (unpublished), Mills, over a period of years, cared for feral cats by setting out food to attract them to her yard. Sometimes she captured the cats, took them to a veterinarian for rabies vaccinations, and had them spayed or neutered. In 2011, the county issued a notice of violation, informing her that she was in violation of the county code because “[c]aring for feral cats in an R-4 district is not a permitted use.” Mills appealed to the BZA, the BZA affirmed, and she appealed that decision to the circuit court. Although the circuit court ruled that the regular caring of feral cats was not customarily incidental to a permitted principal use in an R-4 zoning district and therefore is not a permissible accessory use in that district, it also ruled that the notice of violation was overbroad and was unenforceable. In an unpublished order, the Virginia Supreme Court ruled that, because neither Mills nor the county assigned error to the trial court’s finding that the notice of violation was overbroad, it became the “law of the case” and the county could not enforce the notice. If the violation still existed, the county could, of course, issue a new, more specific notice of violation.
- *Description of corrective action required:* The notice of violation should explain to the owner/occupant what steps must be taken in order for the property to be in compliance with the zoning ordinance.
- *Description of timeline for corrective action:* The notice of violation should explain that the property must be brought into immediate compliance, and that a re-inspection will be conducted on a certain date. This statement should also clearly state that compliance by the date of the re-inspection does not absolve the owner/occupant of the original violation. The goal of requiring immediate compliance is to assure that there is no perception by the owner/occupant that the violation will be allowed to continue without consequence until some future date. On the other hand, conducting the re-inspection on a certain date in the future recognizes the reality that some violations cannot be corrected immediately.
- *Notice of right to appeal:* Virginia Code § 15.2-2311 requires that the notice of violation include a “statement informing the recipient that he may have a right to appeal the notice of a zoning violation . . . within thirty days . . . and that the decision shall be final and unappealable if not appealed within thirty days. The appeal period shall not commence until the statement is given.”
- *Notice of the applicable fee and other information:* Virginia Code § 15.2-2311 requires that a notice of violation inform the recipient of the applicable appeal fee and provide a reference to where additional information may be obtained regarding filing an appeal.

The notice of violation can be either hand delivered or mailed by regular or certified mail. Experience has shown that the experienced zoning violator has learned to refuse the notice of violation sent by certified mail. Written notice of a zoning violation or a written order of the zoning administrator sent by registered or certified mail to, or posted at, the last known address of the property owner as shown on the current real estate tax assessment books or real estate tax assessment records, is deemed sufficient notice to the property owner and shall satisfy the notice requirements under general law. *Virginia Code § 15.2-2311(A)*.

27-600 The zoning official goes to court

When zoning violations are not corrected by the owner or occupant after the zoning administrator issues a notice of violation, the locality may enforce its zoning regulations by filing an action in court. The locality’s attorney should work closely with the zoning official in preparing the case for court.

Following are some basic guidelines to assist zoning officials for those cases that will go to court.

27-610 Understand the case

There are three fundamental steps that the zoning official must take when preparing for court:

- *Assemble the documentary and demonstrative evidence:* After consulting with the zoning official and the zoning administrator about what zoning regulations, maps, deeds, records and photographs will be used in court, the locality's attorney should assemble these documents in a form that is appropriate to submit as evidence. The zoning official should have previously obtained the zoning map, deeds and other records and had them authenticated.
- *Understand each zoning regulation the defendant has violated:* The zoning official must completely understand each zoning regulation the defendant has violated, and this understanding must be comprehensive to enable her to recall and explain every clause, every exception, and prior administrative interpretations.
- *Know the facts:* The zoning official must have first-hand knowledge of the facts surrounding the violation to be able to recite every material fact accurately without resorting to notes. The material facts the zoning official must know include: (1) the name of the owner of the property and, if different, the name of the occupant of the property; (2) the tax map and parcel number of the property; (3) the street address of the property; (4) that the property is located within the locality; (5) the zoning of the property, including overlay districts; (6) the relevant zoning history of the property including proffers, special use permits, variances and other zoning approvals; (6) the date a violation was determined to exist on the property; (7) the nature of the violation; (8) the facts supporting the determination that a violation existed; and (9) the condition of the property just before the trial date (which is not relevant to whether a violation existed, but may be information the court will want to know).

Neither the law nor the facts need to be particularly complicated in the overwhelming majority of the cases and documentary and demonstrative evidence other than photographs may not be necessary. The zoning official can keep her case simple by understanding which zoning regulations and facts are relevant to the court and focusing on those regulations and facts. For example, if the warrant in debt alleges that the defendant's property was used in violation of the zoning ordinance on May 19 of the year, the zoning official should focus on the facts surrounding the violation on that date alone, even if the property was inspected on other dates.

27-620 Communicate and work with the locality's attorney

In all but the routine zoning enforcement cases, the zoning official who will be a witness in a case should prepare an outline of the facts establishing the alleged violation, and then forward this to the locality's attorney. The zoning official should take great care in assuring that the outline includes facts sufficient to establish each element of the violation. However, the outline must be edited to omit those facts that are irrelevant because they neither establish, nor tend to establish, an element of the violation.

Based on the outline prepared by the zoning official, the locality's attorney will then prepare questions for the zoning official-witness. In addition, the attorney should meet with the zoning official prior to court to prepare the zoning official for court. Working together during the final stages of preparation assures that: (1) there is admissible evidence to establish every element of the violation; (2) the legal issues and the evidence are reduced only to those necessary to establish a violation; (3) the zoning official is prepared to respond to questions on both direct examination (questions by the attorney) and cross-examination (questions by the defendant); and (4) weaknesses in the case are acknowledged and addressed.

For the simple routine zoning enforcement cases, the zoning official and the locality's attorney should develop a simpler procedure to prepare.

27-630 General rules for testifying

The testimony of a zoning official is critical in a zoning enforcement case. The most effective witness is sincere, direct, well-prepared, and unemotional. The zoning official's testimony, brought out through the locality's attorney's questions, will educate the court about the facts in the case. The zoning official should paint the picture as clearly as possible, but without exaggeration. The truth will best be served by a deliberate and succinct recitation of facts the zoning official knows to be true.

The typical zoning enforcement case is tried before a judge (not a jury), so when the zoning official is testifying, she must pay close attention to what the judge is and is not saying. Likewise, in most cases the judge's knowledge of the case is based on the information contained in the pleadings, which may contain very little details about the case, without the benefit of a full elaboration of the facts that comes through testimony, documents, and photographs. Thus, the zoning official should not assume that the judge fully understands the nature of the case or the violation until the legal issues have been presented and the facts laid out.

Following is a list of fundamental rules for the zoning official to follow when testifying in court:

- Tell the truth.
- Give responsive answers.
- Listen to the question asked and think before answering; answer only the question that is asked; do not anticipate questions and the answer you will give; let the examiner finish each question.
- Do not give rambling or evasive answers; a simple "yes" or "no" answer may be all that is required; if the locality's attorney wants elaboration, she will ask for it.
- Do not guess an answer if you do not in truth know or remember the answer; however, you may testify that you think something is probably true, or probably untrue.
- If you need to explain an answer, do so.
- Do not ask the court if you can answer a question "off the record."
- If you do not understand the question, or have any doubt about it, ask to have the question restated.
- Do not answer over an objection made by a party; stop talking until the judge rules and you are asked a new question or instructed to answer the original question.
- Speak loudly, slowly, and clearly, and strive for clarity, crispness, and conviction.
- Look at the judge when answering questions.
- Do not memorize your testimony.
- Speak in your own words.
- Lean forward, keep your head up and make eye contact, and use hands for illustration.
- Do not kid or joke.
- Be courteous to the judge and the other party's attorney.
- Admit mistakes.
- Do not show anger or hostility at any time, particularly during cross-examination.
- Do not argue or attempt to advocate a particular position; be factual, direct, and straightforward; leave advocacy to the locality's attorney.

- If asked, do not be reluctant to admit on the stand that you have reviewed your testimony with your locality's attorney or that you have otherwise prepared for court.

A zoning official may be cross-examined by the defendant or his attorney. The primary purpose of cross-examination is to shake the witness' belief in what he has said. Stating the truth defeats this tactic. The cross-examination may stray from the search for the facts, and wander in an attempt to show bias or favoritism. When the cross-examination heads in this direction, the zoning official should not feel badgered by these questions. The other side may be searching for a way to discredit your direct testimony. The best way for the zoning official to handle cross-examination like this is to always state the truth and answer each question concisely, politely and honestly.

27-640 Courtroom decorum

The zoning administrator and the zoning officials who will be attending a court hearing in a zoning enforcement action should comply with the following rules of courtroom decorum:

- The zoning administrator or other representative of the locality sits at the plaintiff's table with the locality's attorney; all other zoning officials should be seated in the spectator section of the courtroom; any witnesses may be asked by the court to wait outside the courtroom while other witnesses are testifying.
- Dress conservatively and neatly.
- Do not read, chew gum, sleep, or talk while in the courtroom when court is in session.
- Do not talk to the defendant if he or she is represented by an attorney unless that attorney is present or gives express consent to do so.
- Do not talk to the defendant's attorney in the courtroom, hallways, or restrooms unless the locality's attorney is present.
- When seated in court, do not react to favorable or unfavorable testimony.
- When called to testify during direct examination, do not take any notes or papers to the stand unless the locality's attorney has first reviewed them.
- Be courteous and polite at all times, especially if the defendant's attorney is obviously hostile.

If the zoning official is unable to recall the details of the foregoing rules, courtroom decorum can be attained by maintaining professionalism and giving the court the respect it deserves.

27-700 Defenses commonly raised in zoning enforcement proceedings

There are several defenses that may be raised in a zoning enforcement proceeding. Most of them have little or no merit.

27-710 The use is nonconforming

As noted in section 27-500, the notice of violation should make a determination as to the nonconforming status of the use at issue. If this determination is made and it is not appealed to the BZA, it becomes a *thing decided* and may not be raised as a defense in a civil enforcement proceeding. *See chapter 18 for a detailed discussion of nonconformities; see chapter 14 for a discussion of the thing decided rule.*

27-720 The locality has delayed bringing the enforcement for so long that it should not be allowed to enforce its regulations against the violating landowner

In most Virginia localities, zoning enforcement is triggered by a citizen's complaint unless the violation is apparent to a zoning inspector from a public location, such as a road. As a result, it is possible for zoning violations to go unnoticed by the locality for years, sometimes decades. The passage of time, however, in no way makes an illegal use legal or prevents the locality from enforcing its zoning regulations. In fact, under Virginia Code § 15.2-2209 (civil penalties), each day during which a violation is found to exist is a separate offense. Thus, for as long as the violation continues, there is no running of a statute of limitations if a locality delays bringing an enforcement action.

The idea that an illegal use should be allowed to continue simply because of the length of time it has existed appears to be loosely based on the doctrine of *laches*. *Laches* is an equitable defense that may be raised by a party who claims that the failure to assert a known right for an unexplained length of time under circumstances that are prejudicial to the party raising the defense. *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987). Assuming for the sake of argument that the defense of laches applies against a locality, the landowner would contend that since the illegal use has continued for so long without the locality bringing an enforcement action, the illegal use should be immune from enforcement. Fortunately, laches does not apply against localities in the discharge of their governmental functions, and this includes the enforcement of its zoning regulations. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 349 S.E.2d 351 (1986).

In *Dick Kelly Enterprises*, the landowner argued that the doctrine should apply because it had been illegally operating an apartment building on land zoned for a motel use for six years before the city enforced its zoning regulations. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the circuit court rejected the landowner's claim that laches should prevent the county from enjoining him from operating his illegal vehicle light service business because the county had not enforced its regulations against his property for over 40 years, the business was now his sole source of income, and because he was no longer able to work away from his home due to his and his wife's medical conditions.

In *Staples v. Prince William County*, 81 Va. Cir. 308 (2010), a county zoning regulation restricted campers from staying in a campground for more than 14 consecutive days. When the county responded to a complaint that some guests were staying longer than 14 consecutive days, the landowners sought to enjoin the county from enforcing the regulation (which also was a special exception condition) against them. The landowners claimed that the county had known about long-term visitors to the campground for over 40 years and that its failure to enforce the regulation barred the county from now doing so under principles of waiver, laches and estoppel. Although the circuit court said that the "equities in this case can seem unsettling," the court rejected the landowners' argument and concluded that "the doctrine in Virginia is nevertheless clear that the equitable principles of waiver, estoppel, and laches do not operate against local governing bodies performing governmental functions." *Staples*, 81 Va. Cir. at 323.

Even if laches applied, it would not apply in most cases because the locality does not unreasonably delay enforcing the zoning regulations; rather, it simply does not know that a violation exists. It is also hard to imagine that a landowner could suffer prejudice in such a case. To put it simply, an illegal use does not become a legal use solely because it has escaped detection from zoning inspectors for a lengthy period of time.

27-730 Selective enforcement

Unaware that most localities have a team of zoning officials dedicated to zoning enforcement handling hundreds of cases each year, some defendants think that they alone have been singled out for enforcement and they raise the claim that the locality is selectively enforcing its regulations against them.

In *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992), the landowner contended that it was denied equal protection because the city *selectively enforced* its motel ordinance and

singled it out for punishment, while others also unlawfully operated motels as apartments. The Virginia Supreme Court held that this contention had no merit, stating:

Of course, the mere enforcement of the law against one individual and not against others does not amount to a denial of equal protection of the laws. *Union Tanning Co. v. Commonwealth*, 123 Va. 610, 639, 96 S.E. 780, 788 (1918) (taxpayer's equal protection argument rejected when state imposed seven years of previously omitted personal property tax assessments). And, while protection of the laws will be extended equally to all individuals in the pursuit of their lawful activities, no individual has the right to demand protection of the laws in the commission of an unlawful act. *See Sims v. Cunningham*, 203 Va. 347, 353, 124 S.E.2d 221, 225, *cert. denied*, 371 U.S. 840, 83 S.Ct. 68 (1962). Because the use of the subject property is unlawful, the so-called "retaliatory prosecution" defense is not applicable to this enforcement action against such unlawful conduct.

Dick Kelly Enterprises, 243 Va. at 382-383, 416 S.E.2d at 686.

In selective enforcement claims where First Amendment issues are involved (such as when a violation of the locality's sign regulations are in issue), the party claiming selective enforcement must demonstrate that the locality's enforcement process had a discriminatory effect and that it was motivated by a discriminatory purpose. *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524 (1985). Thus, the party claiming selective enforcement must show not only that similarly situated individuals were treated differently, but that there was "clear and intentional discrimination." *Sylvia Development Corporation v. Calvert County*, 48 F.3d 810, 825 (4th Cir. 1995). Following are several factors that will be considered: "(1) evidence of a 'consistent pattern' of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings." *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625, 635 (4th Cir. 2016).

A variation on this theme is the claim by the defendant that he or she knows of other zoning violations in the locality that have not been abated. Obviously, there is no requirement that all other violations in the locality be abated before the locality may proceed against that defendant, and the defendant is certainly not entitled to some form of immunity from enforcement until those violations are abated.

27-740 The zoning ordinance is vague

The claim that a zoning ordinance is vague, and therefore void, should be taken seriously. The void-for-vagueness doctrine requires that a legislative enactment define a *criminal offense* with sufficient definiteness and certainty that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983); *Vaughn v. City of Newport News*, 20 Va. App. 530 (1995) (regulation prohibiting "outside storage of goods, materials and equipment" not void for vagueness).

Although absolute precision is not required, a law must afford a reasonable degree of certainty so that a person is not left to guess at what conduct is prohibited. *Turner v. Jackson*, 14 Va. App. 423 (1992). *See section 6-213 for further discussion of the vagueness of a law as a procedural due process issue.*

Even if a locality enforces its zoning regulations only in civil proceedings, it should take a claim that its zoning regulations are vague seriously and amend its regulations if necessary.