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CHAPTER 16

PLANNING AND ZONING

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16.1 INTRODUCTION 1529
16.101 Purpose of Chapter 1529
16.102 Role of Courts 1530

16.2 ENABLING LEGISLATION 1534
16.201 General Nature of Zoning 1534
16.202 Purposes of Zoning 1535
16.203 Constitutional Limitations 1540
16.204 Limitations on Local Authority 1542
16.205 Legislative and Nondelegable Nature of Zoning 1549

16.3 CONDITIONAL ZONING 1550
16.301 In General 1550
16.302 Proffers 1551
16.303 Types of Conditional Zoning 1555
16.304 Strengths and Weaknesses of Conditional Zoning 1558
16.305 Amendments to Approved Conditional Rezonings 1563

16.4 IMPACT FEES 1564
16.401 In General 1564
16.402 Requirements 1564
16.403 *Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach* 1565
16.404 2007 Amendments to Section 15.2-2317 *et seq* 1567

16.5 HISTORIC DISTRICTS 1567

16.6 COMPREHENSIVE PLANNING 1571
16.601 In General 1571
16.602 Nature of the Plan and Its Implementation 1572
16.603 Urban Development Areas 1573
16.604 Limitations on the Usefulness of the Plan 1573
16.605 Section 15.2-2232 Review 1574

16.7 UPZONINGS 1577
16.701 In General 1577
16.702 Presumption of Validity 1578
16.703 Judicial Treatment of Upzoning Denials 1581
16.704 "Spot Zoning" 1584
16.705 *Board of Supervisors v. Lerner* 1585
16.706 *Board of Supervisors v. Jackson* and *Board of Supervisors v. International Funeral Services, Inc.* 1588
16.707 Demurrer of Claim That Rezoning Decision Was Arbitrary, Capricious, or Unreasonable 1588
16.708 Remand to Governing Body 1589

16.8 DOWNZONINGS 1590
16.801 In General 1590
16.802 Piecemeal Versus Comprehensive Downzoning 1590
16.803 Sustaining Piecemeal Downzoning 1592
16.804 Downzoning Legislation 1595

16.9 SPECIAL USE PERMITS 1596
16.901 Nature of Special Use Permit 1596
16.902 Standards for Issuing Special Use Permit 1597
16.903 Conditions on Grant of Special Use Permit 1598
16.904 Standard of Review on Appeal 1600
16.905 Limitation on Requirement of Special Use Permits 1601

16.10 SITE PLANS 1602

16.11 PROCEDURAL ISSUES 1604
16.1101 In General 1604
16.1102 Notice by Applicant; Applicant Who Is Not Owner of Subject Property 1608
16.1103 Notice for Additional Matters 1609
16.1104 Notice of Imposition of Fees and Levies 1609
16.1105 Requirement to Pay Past-Due Taxes 1609
16.1106 Procedural Due Process Requirements 1609
16.1107 Mandatory Nature of Hearings; Controlling Nature of the Enabling Legislation 1610
16.1108 Sufficiency of Resolution by Which Zoning Ordinance Amendment Is Initiated 1610
16.1109 Form and Codification of Ordinances 1612
16.1110 Importance of Procedural Correctness 1612
16.1111 Limitations of Actions 1613
16.1112 Exhaustion of Remedies 1615

16.1113 Necessary Parties ... 1615
16.1114 Standing ... 1616
16.1115 Federal Land Use Proceedings ... 1618

16.12 VARIANCES ... 1621
16.1201 In General ... 1621
16.1202 Unreasonable Restriction of Use ... 1621

16.13 NONCONFORMING USES ... 1626
16.1301 In General ... 1626
16.1302 Expansion or Alteration of Use ... 1627
16.1303 Termination of Use ... 1629

16.14 VESTED RIGHTS ... 1630
16.1401 In General ... 1630
16.1402 Continuum of Vested Rights ... 1631
16.1403 Nature of Vested Rights ... 1631
16.1404 Statutory Vesting Generally ... 1632
16.1405 Statutory Vesting of Subdivision and Site Plans ... 1636
16.1406 Forfeiture of Vested Rights ... 1637
16.1407 Who Makes Vested Rights Determinations ... 1637
16.1408 Void Permits ... 1638
16.1409 Vesting and Grandfathering Distinguished ... 1639

16.15 ADMINISTRATION AND ENFORCEMENT ... 1640
16.1501 The Zoning Administrator ... 1640
16.1502 Zoning District Boundary Disputes ... 1642
16.1503 Variances ... 1642
16.1504 Finality of Zoning Administrator's Determinations ... 1643
16.1505 Limitations on Zoning Administrator's Authority ... 1643
16.1506 Appeal of Zoning Administrator's Determinations Generally ... 1644
16.1507 Appeal of Zoning Administrator's Rulings on Proffers ... 1645
16.1508 Criminal and Civil Penalties ... 1645
16.1509 Challenges to Building Permits ... 1646

16.16 REGULATORY TAKINGS ... 1647
16.1601 In General ... 1647
16.1602 When the Taking Occurs ... 1652
16.1603 Ripeness ... 1652
16.1604 Forum for Regulatory Taking Case ... 1653
16.1605 Temporary Taking Versus Normal Administrative Delay ... 1654

16.1606 Damages 1654
16.1607 Exactions by Special Use Permits, Site Plans, Subdivisions, Impact Fees, and Proffers............................ 1656
16.1608 Virginia Regulatory Takings Cases 1659

CHAPTER 16

PLANNING AND ZONING

16.1 INTRODUCTION[1]

16.101 Purpose of Chapter. Land use law is integral to almost all real estate transactions, becoming of equal interest to the real estate bar in numbers far beyond those relatively few lawyers who practice that peculiar brand of law known as "land use" in Virginia's board and council chambers and in its circuit courts.

A broad summary of land use law is also useful because in virtually no other area of the law do the technical legal rules, the raw and unfettered forces of politics, and the many arcane intricacies of the legislative, administrative, and judicial branches of government interact so thoroughly and with so much direct impact on individuals and commerce. In practice, land use is constrained only very loosely by the legal rules that the courts and the legislature so diligently craft, and yet it is at the same time a world of complex procedural and technical requirements that must be mastered. It is not a world for the faint of heart, for those who do not wish to see the making of laws or sausages.

In thinking about zoning law, it is essential to remember that, as the court said in *Lynchburg v. Amherst County*,[2] every Virginia locality is a "mere administrative subdivision" of the commonwealth. All power to regulate land use resides with the General Assembly, which delegates parts of that power to localities under narrow conditions. If those preconditions to the exercise of that power are not observed, the locality's attempt to exercise that element of police power is void ab initio, as the court ruled in *Glazebrook v. Board of Supervisors*[3] and *Gas Mart v. Board of Supervisors*.[4]

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[1] This chapter is based, in part, on materials originally prepared by John H. Foote as a chapter of *The Handbook of Virginia Local Government Law* published by the Local Government Attorneys of Virginia. Virginia Law Foundation and the author are deeply grateful for his past contributions to this chapter.

[2] 115 Va. 600, 80 S.E. 117 (1913).

[3] 266 Va. 550, 587 S.E.2d 589 (2003).

[4] 269 Va. 334, 611 S.E.2d 340 (2005).

16.102 Role of Courts.

A. Deference to Legislative Will. At the outset, it is essential to observe a major theme of the development of land use law, one that informs virtually every question and creates substantial uncertainty in the area. In the early 1980s, not long after the Virginia Supreme Court had decided *Board of Supervisors v. Allman*[5] and *Board of Supervisors v. Williams*,[6] and when its decisions in *Board of Supervisors v. Lerner*,[7] *Board of Supervisors v. International Funeral Servs., Inc.*,[8] and *Board of Supervisors v. Jackson*[9] were freshly before us, the raging debate in Virginia land use circles was whether there was reason to believe that the Virginia Supreme Court had abated its former ardor for the ascendancy of private property over public authority. It was speculated that there might be a revolution of sorts in progress in the judicial treatment of land use, but it was too early to tell.

Since then, following rare published criticism[10] and a changing court composition, there has indeed been an upheaval in the judicial approach to land use questions. Virginia's courts have abandoned almost entirely their prior inclination to constrain public authority, in a manner that few could have predicted. The Virginia Supreme Court seemed to conclude that if its early interventionist sentiment was bad, then policies of virtually complete deference to legislative power are good.[11] The court has taken no opportunity to articulate the bases for this broader conception of the legislative power in the land use arena. In fact, the court has never actually altered its formulation of the rules or given a substantive and practical meaning to such

[5] 215 Va. 434, 211 S.E.2d 48, *cert. denied*, 423 U.S. 940 (1975).

[6] 216 Va. 49, 216 S.E.2d 33 (1975).

[7] 221 Va. 30, 267 S.E.2d 100 (1980).

[8] 221 Va. 840, 275 S.E.2d 586 (1981).

[9] 221 Va. 328, 269 S.E.2d 381 (1980).

[10] The seminal 1981 report by Professors Lillian BeVier of the University of Virginia and Denis Brion of Washington & Lee University, *Judicial Review of Local Land Use Decisions in Virginia: A Report to the Joint Land Use Task Force of the Virginia Association of Counties and the Virginia Municipal League* (1981), effectively criticized the court with respect to its then-existing land use jurisprudence, concluding that it had applied a "single criterion of validity" to its decision-making processes, to wit, the maximization of profit for the landowner. Although there is no evidence that this report had direct impact on the court, it was in fact contemporaneously with its publication that the judicial tide began to turn for local governments.

[11] *See Ames v. Town of Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990) (noting that the principle of separation of powers requires courts to refrain from inquiry into the motives of legislative bodies elected by the people; the inquiry is only into whether such body acted arbitrarily, capriciously, or in accordance with policies and standards in the legislative delegations).

a term as “fairly debatable.”[12] It has, rather, recited its formulations virtually unaltered, with an occasional thin foray into theory.[13]

All that has changed are the results. Where the locality once regularly lost substantive challenges to exercises of its zoning power, today it wins. The balance struck by local governments is, in large measure, now the balance that will adhere. A single example illustrates the extent of the shift. In *City Council v. Wendy’s of Western Virginia, Inc.*,[14] the city council had refused an upzoning from residential to commercial for a property in an area that had changed over time to commercial and industrial uses, and the landowner sued. The trial court made detailed findings that the underlying zoning of the property was unreasonable and remanded the case to the city council for reconsideration. On appeal, however, the Virginia Supreme Court reversed, conducting an independent and thorough review of the record for evidence to support its conclusion that the underlying zoning was, in fact, reasonable and that the city council had sustained its burden of proving that zoning to be fairly debatable. The result itself was unremarkable, for the evidence indeed supports the court’s conclusion that the underlying zoning was reasonable. However, the decision is significant for its clear demonstration of the full extent to which the court will today go in reassessing and limiting the actions of the lower courts as they adjudicate legislative decisions in the zoning arena; allowing localities to choose winners and losers among potential users and homeowners.

This judicial deference necessarily shifts the bargaining balance in the proffer process, putting more pressure on the landowner to offer conditions that will induce the governing body to approve a proposed project in order to resolve land use or political issues.[15] Though the court has not actually said so, it has by its shift in result left participants in the process to the remedy, if it is one, of the ballot box and the General Assembly. This is, of course, an axe and not a scalpel, and thus it is not possible in the proper case for localities, private parties, or the courts to escape the fact that since

[12] “An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.” *Board of Supervisors v. Williams*, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975). The term is so amorphous that precise definition is probably impossible.

[13] *County Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 227, 377 S.E.2d 368, 371 (1989) (quoting *Board of Supervisors v. Lerner*, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980) (citations omitted)).

[14] 252 Va. 12, 471 S.E.2d 469 (1996).

[15] *See Gregory v. Board of Supervisors*, 257 Va. 530, 514 S.E.2d 350 (1999).

Virginia local governments are both legislative and administrative, the only effective check on the locality is the judiciary. As much as the courts have properly removed themselves from second guessing decisions made by local governments, judges retain the responsibility of policing the parameters of the political process. While the "box" in which localities may roam has grown quite large, there remain occasions in which the courts will properly step in to find that a local practice or decision has run afoul even of the broadest current conception of local powers.[16] Surely, where the local governing body has failed to follow procedural requirements of either statutory or constitutional law, or where there is evidence that a landowner has been badly treated for the wrong reasons, then courts, federal or state, will step in with a potentially formidable remedy.[17]

It is perhaps anomalous that at the same time the Virginia Supreme Court has been moving toward a much more relaxed supervisory role over local governments in their legislative functions, the federal courts have been moving toward an expanded understanding of the once arcane and practically inconsequential field of takings law, that "ultimate bottom line" of land use regulation.

Much attention has been given in recent years to the question of when a restriction on use has gone so deeply into a property owner's legitimate expectations that the courts must deem it the theoretical and practical equivalent of impressment into public service and require compensation for so severe a loss. Even where there is no doubt that the public purpose in such regulation is legitimate and that the public power could clearly accomplish the desired result if it moved in a more direct fashion to its end, rights in property have sometimes been too much circumscribed by the very processes of land use regulation—either directly through zoning or through other land use restrictions arising from other sources such as the Endangered Species Act. The United States Supreme Court has sought, admittedly without clear doctrinal success, to establish that "bottom line" to land use decision-making, to say that as long as there is a Takings Clause it means something where regulatory impositions are concerned and to declare

[16] *See Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995) (finding that the exaction of monetary proffers as essentially involuntary contributions constitutes the imposition of unlawful conditions on a rezoning).

[17] *See Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (noting that the federal courts found a deprivation of federally protected civil rights after the Virginia state courts had consistently found no legal defect in the denial of a conditional use permit for a palmistry operation opposed by the neighbors on "religious" grounds); *see also Scott v. Greenville Cnty.*, 716 F.2d 1409 (4th Cir. 1983).

that there is some point at which the police power has gone too far. This is no easy task, of course, for the question when the government has gone too far has no fixed answer. It has only been in recent times that the Virginia Supreme Court has ventured into these thickets.

B. Importance of Procedural Issues. Having abjured a more substantive role, however, the Virginia Supreme Court appears convinced—and not without justification—that the principal function of the judiciary is to ensure that the *processes* surrounding land use practices are pure: if it will not substitute its judgment for that of the locality with regard to the merits of a given decision, it will insist to a fault that the procedural means by which that decision is made comport with the (mostly statutory) requirements of notice and an opportunity to be heard. Should the locality fail in this, there is little to save its legislative actions.[18]

C. "Federalization" of Land Use. It cannot be entirely coincidental that the property rights movement shares a timeline with, and in large measure is a backlash to, the evolution of the environmental movement and the restrictive overlay that it has indisputably imposed on land use. Whatever one's view of the importance of this trend, this relatively recent phenomenon has indeed had the effect of removing a significant amount of land from economically viable use and of "federalizing" the land use process to a remarkable and previously unheard of extent. It has thereby generated a deregulatory and compensatory fervor that has not yet spent its course. Aggressive public and private enforcement of the Clean Water, Endangered Species, Clean Air, and National Historic Preservation Acts, among others, and an aggressiveness that has occasionally been fueled by forces that have less interest in the specific purposes of those laws than in their capacity to thwart development, have generated a counterrevolution among landowners and developers.

All of this has made the study of land use more complex and important, as many of today's economic and political issues are fought out over the questions of growth and development. It is no longer simply a matter of balancing the local transportation system and tax rate against market patterns of growth. It is a struggle over how we envision the future, and how we will get there.

[18] *See infra* ¶ 16.9.

16.2 ENABLING LEGISLATION

16.201 General Nature of Zoning. The authority to zone property, to regulate uses within those zones, and to plan comprehensively for future uses of land is among the most significant of local government powers. Zoning decisions can, as can virtually no other exercise of local government civil law power, substantially and dramatically affect the use and value of property and the relationships of the major parties in the land use equation: the locality, the community, and the landowner or developer.

The processes of zoning and planning have grown more sophisticated and complex throughout Virginia, from rural areas to urban, as the courts and the General Assembly have continued to change the rules to reflect contemporary pressures. Moreover, the regulation of land use is no longer entirely local. While federal environmental protection legislation and other federal laws with direct application are generally beyond the scope of this chapter, they are an increasingly complex and important overlay on traditional land use concepts, even in jurisdictions without zoning ordinances, and add legal twists and turns that are often of greater consequence than purely local land use considerations.

Stripped to essentials, the governmental planning and zoning processes that are discussed here are intended to interject into the land use equation values that are often not market driven.

Land use law necessarily occurs in a market-based system. It theoretically strives first to authorize, and then to constrain, the exercise of the *public* power deemed essential to provide a counterweight to the *private* market decision-making process that initially determines the use of land. Purposes that are deemed essential to the harmony and quality of life in the community, such as (i) maximizing efficient regional transportation networks; (ii) providing regional stormwater management facilities to control off-site flooding and water pollution; (iii) buffering adjacent and potentially incompatible uses in order to protect older or developing neighborhoods; (iv) protecting the environment; and (v) advancing aesthetic and other social goals legislatively set forth in section 15.2-2283 of the Virginia Code are not always foremost in the calculation of private economic choice and are often in conflict with the profit motive.

The courts have very generally concluded, not without exception, that it is the proper and lawful role of local government within broad boundaries to decide the appropriate use of land, and in doing so they are not to be

substantively policed by the judiciary except in the extraordinary circumstance. While nonmarket interests emerged with greater force in the latter part of the 20th century, no one should underestimate the continuing importance of market forces in land use. Planning and zoning decisions must take into account the complex interrelationship between the public and private forces involved and the profound tensions that can arise between public necessity and legitimate private need. Otherwise, they produce, at best, short-term results and can lead to long-term difficulties that may not be easily remedied. Examples include a shortage of affordable housing for many workers in several localities and the resulting long commutes as workers "drive until they qualify." At the same time, the General Assembly has, over the last two decades, repeatedly amended the Virginia Code to correct what it has seen as abuses of the zoning power it has delegated to localities and to rebalance the forces at play between individual land owners and the local government.[19] However, the fundamental presumption of legislative validity that underlies each local land use decision[20] means that this balancing of market and nonmarket factors is to be done principally through the legislative—and thus the overtly political—process to which much judicial deference is necessarily given.

16.202 Purposes of Zoning. Zoning is intended to "strike a balance between private property rights and public interests."[21] To this ultimate general end, all Virginia zoning and planning powers derive from the enabling legislation in chapter 22 of title 15.2 of the Virginia Code.[22] These statutes are not set out in detail here, but general mention must be made of the framework within which decisions are made.

The first zoning enabling legislation for Virginia was adopted in 1922 and gradually expanded in scope and coverage until the present framework was adopted in 1962. These basic statutes continue to change in greater or lesser measure with almost every session of the General Assembly.

[19] *See, e.g.*, Va. Code §§ 15.2-2288 (Right to Farm Act); -2286(A)(12) (cluster subdivision); -2307 (vested rights); -2204(B) (notice to individual land owners of proposed zoning changes).

[20] *See infra* ¶ 16.402.

[21] *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 657, 202 S.E.2d 889, 892 (1974).

[22] After several years of study, in 1997 the General Assembly recodified title 15.1 of the Virginia Code. While the legislature was assured that the recodification did not effect a substantive change in the law, experience has shown that there are some such changes, though none of surpassing importance.

The General Assembly has statutorily identified several purposes for zoning and other land use ordinances that encourage localities

> to improve the public health, safety, convenience, and welfare of their citizens and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the need for mineral resources and the needs of agriculture, industry, and business be recognized in future growth; that . . . residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds.[23]

> Zoning ordinances themselves must be designed expressly for the general purpose of promoting the health, safety, or general welfare of the public and of further accomplishing the objectives of § 15.2-2200. To these ends, such ordinances shall be designed to give reasonable consideration to each of the following purposes, where applicable: (i) to provide for adequate light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime, and other dangers; (ii) to reduce or prevent congestion in the public streets; (iii) to facilitate the creation of a convenient, attractive and harmonious community; (iv) to facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (v) to protect against destruction of or encroachment upon historic areas and working waterfront development areas; (vi) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, impounding structure failure, panic or other

[23] Va. Code § 15.2-2200.

> dangers; (vii) to encourage economic development activities that provide desirable employment and enlarge the tax base; (viii) to provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment; (ix) to protect approach slopes and other safety areas of licensed airports, including United States government and military air facilities; (x) to promote the creation and preservation of affordable housing suitable for meeting the current and future needs of the locality as well as a reasonable proportion of the current and future needs of the planning district within which the locality is situated; (xi) to provide reasonable protection against encroachment upon military bases, military installations, and military airports and their adjacent safety areas, excluding armories operated by the Virginia National Guard; and (xii) to provide reasonable modifications in accordance with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 *et seq.*) or state and federal fair housing laws, as applicable. Such ordinance may also include reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and ground waters as defined in § 62.1-255.[24]

Section 15.2-2284 of the Virginia Code requires a broad review of factors relevant to ordinance composition, mandating reasonable consideration of (i) the existing use and character of property; (ii) the locality's comprehensive plan; (iii) the suitability of property for various uses; (iv) the trends of growth or change; (v) current and future requirements of the community as to land for various purposes (as determined by population, economic, and other studies); (vi) the transportation requirements of the community, (vii) the requirements for airports, housing, schools, parks, playgrounds, recreation areas, and other public services; (viii) the conservation of natural resources, (ix) the preservation of flood plains, (x) the protection of life and property from impounding structure failures, (xi) the preservation of agricultural, and forestal land; and (xii) the conservation of

[24] Va. Code § 15.2-2283; *see Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974); *see also City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982), *appeal dismissed*, 459 U.S. 1166 (1983) (illuminating the relationship between sections 15.2-2200 and 15.2-2283 of the Virginia Code).

properties and their values and (xii) the encouragement of the most appropriate use of land throughout the locality.[25]

Section 15.2-2286 of the Virginia Code sets out in further detail some things that zoning ordinances may specifically include. It authorizes (i) variances and special exceptions; (ii) temporary application of ordinances in cases of annexation; (iii) granting special exceptions; (iv) appointment of a zoning administrator; (v) imposition of criminal penalties for violation of the ordinance; (vi) imposition of review fees; (vii) amendment of the ordinance and zoning map; (viii) submission of site plans; (ix) mixed use or planned use developments; (x) incentive zoning; (xi) agreements with landowners to downzone property in exchange for tax credits; (xii) consideration of environmental site assessments; (xiii) disclosure and remediation of property contamination before development approvals; and (xiv) enforcement of ordinance provisions relating to the number of occupants in single-family dwelling units, and (xv) issuance of inspection warrants by a magistrate or court of competent jurisdiction.[26]

Beyond the matters addressed in section 15.2-2286, zoning ordinances may include any number of reasonable provisions, including division of permitted land uses into various zoning districts and the application of those districts to particular properties, together with reasonable regulations pertaining to those permitted land uses. Localities may adopt reasonable regulations with respect to area and dimensions of land, water, and air space to be occupied by buildings, structures, and uses. They may also regulate courts, yards, and other open space to be unoccupied by uses or structures.[27]

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[25] *See Board of Supervisors v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991) (noting that the enabling legislation sets forth the purpose of zoning ordinances and a number of factors that a zoning authority must consider when taking zoning actions; holding that the weight of the relevant factors is a legislative function, and judicial review is limited to determining whether the resulting decision was reasonable).

[26] Section 15.2-2288 contains an affirmative limitation to the effect that an ordinance shall not require that a special exception or special use permit be obtained for any "production agriculture or silviculture activity" in an area that is zoned as an agricultural district or classification. For the purposes of this statute, production agriculture and silviculture are the bona fide production or harvesting of agricultural products, as defined in section 3.2-6400 of the Virginia Code, or silvicultural products, but do not include the processing of agricultural or silviculture products, the above ground application or storage of sewage sludge, or the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm, subject to the provisions of the Virginia Waste Management Act. However, localities may adopt setback requirements, minimum area requirements, and other requirements that apply to land used for agriculture or silviculture activity within the locality that is zoned as an agricultural district or classification. Section 15.2-2288 does not apply to agencies or contractors of the commonwealth.

[27] Va. Code § 15.2-2280; *City of Virginia Beach v. Hotaling*, 218 Va. 14, 235 S.E.2d 311 (1977).

There are some affirmative statutory limitations on what localities may do, however. Section 15.2-2286 does not permit a locality to refuse to accept refiling of a rezoning application made within 12 months even if the application was withdrawn by the applicant after planning commission review but before consideration by the governing body. Nor can a zoning ordinance limit the period during which a rezoning petition may be withdrawn.[28]

The regulation that is possible under this authority is extremely broad, as long as the locality seeks to advance the enumerated purposes for zoning ordinances. For example, the Virginia Supreme Court has recognized substantial local legislative authority to draw residential and commercial distinctions.[29] It is possible for an ordinance to be so broad and general as to be "void for vagueness," but this is rare.[30]

The court has recognized that localities may, in proper cases, prohibit certain uses altogether.[31] In such cases, of course, the question is not whether the locality has the power to make such exclusions but whether the decision was "fairly debatable." Such an exclusion may run afoul of more fundamental legal concerns, such as exclusion on the basis of a suspect classification, which would bring to bear constitutional considerations far beyond the question of fair debatability.

It is important to note that the court has thus far said that the Virginia enabling legislation was meant to permit only "traditional" zoning ordinances directed to physical characteristics of land and having the purpose neither to include nor exclude any particular socio-economic group.[32] This position, as so many others, may no longer be adhered to with complete

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[28] 1996 Report of the Attorney General 56.

[29] *See, e.g.*, *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984); *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982), *appeal dismissed*, 459 U.S. 1166 (1983) (noting that the court will scrutinize regulation of property interests to ensure that the means employed are "reasonably suited" to the achievement of legitimate public goals, but in practice it has given great leeway); *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981).

[30] *See Kolender v. Lawson*, 461 U.S. 352 (1983); *Vaughn v. City of Newport News*, 20 Va. App. 530, 458 S.E.2d 591 (1995) (finding that an ordinance forbidding the outside storage of "goods, material and equipment" was not unconstitutionally vague or overbroad).

[31] *Resource Conservation Mgmt., Inc. v. Board of Supervisors*, 238 Va. 15, 380 S.E.2d 879 (1989).

[32] *Board of Supervisors v. De Groff Enters., Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973); *see also Board of Zoning Appeals v. Columbia Pike, Ltd.*, 213 Va. 437, 192 S.E.2d 778 (1972); *Board of Cnty. Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959); *Board of Cnty. Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958).

fidelity, however, both because of the court's increased deference to local decision-making generally and because the General Assembly has itself begun to include such social, nonland use considerations as affordable housing programs directly in the Virginia Code.[33]

A zoning ordinance may be either inclusive, permitting only those uses specifically named, or exclusive, prohibiting specified uses and permitting all others, or it may be a mix of both.[34]

Zoning ordinances must be uniform for buildings within each zoning district.[35] In *Schefer v. City Council of Falls Church*,[36] the Virginia Supreme Court upheld a zoning ordinance that employed a formula for calculating maximum permissible building heights based on lot size, finding that the ordinance met the uniformity requirement. However, using magisterial boundaries within zoning districts to differentiate permitted uses allowed within the magisterial districts is not permitted.[37]

16.203 Constitutional Limitations. Because zoning ordinances are legislative enactments, they enjoy a presumption of constitutional validity.[38] This presumption, however, may be challenged on First Amendment grounds. While a detailed discussion of how First Amendment rights can serve to override the presumption is beyond the scope of this chapter, the land use attorney should have an understanding of how these rights may operate to limit land use policies.

Because of the presumption of constitutional validity, if it appears to the court that the legislative body could reasonably have believed that the ordinance would directly advance a substantial government interest, the

[33] *See, e.g.*, Va. Code §§ 15.2-2286(A)(3), -2305.

[34] *Fairfax Cnty. v. Parker*, 186 Va. 675, 684, 44 S.E.2d 9, 15 (1947) (general description of distinction between inclusive and exclusive types of zoning ordinances, concluding that Fairfax's is inclusive); *Board of Supervisors v. Gaffney*, 244 Va. 545, 422 S.E.2d 760 (1992) (holding that a private recreational nudist club was not permitted by right under the county's inclusive zoning ordinances, as a "preservation or conservation area"); *see Colandrea v. Zoning Appeals Bd.*, 45 Va. Cir. 112 (Loudoun 1998) (holding that, under an inclusive zoning ordinance, the failure to mention front yard fencing means that such fencing is prohibited).

[35] Va. Code § 15.2-2282.

[36] 691 S.E.2d 778 (2010).

[37] Va. Att'y Gen. Op. No. 13-053 (Sept. 20, 2013). All opinions of the Virginia Attorney General are available at www.oag.state.va.us.

[38] *Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981).

enactment will be upheld.[39] For instance, "[i]t is well within the constitutional power of a municipality to adopt zoning regulations that limit the areas in which adult entertainment enterprises may operate."[40] Regulation of the location of such businesses is a time, place, and manner restriction on speech, and such restrictions are generally upheld as long as they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.[41]

A 2015 United States Supreme Court opinion illustrates the interplay of the First Amendment with local ordinances.[42] An Arizona town ordinance imposed different size and time standards on signs of different purpose: political signs, ideological signs, and temporary direction signs. The Court ruled that the distinctions made among the different types of signs facially violated of the First Amendment because the inquiry into a sign's purpose necessarily involved analysis of the content of the sign. The Court held that the regulations were not narrowly tailored content-neutral time, place, and manner regulations that advanced a legitimate state interest. Contrast that decision with a 2015 Fourth Circuit opinion in *Central Radio Co. v. City of Norfolk*,[43] After its decision in *Town of Gilbert*, the United States Supreme Court remanded the *Central Radio* case to the Fourth Circuit for further review in light of the *Town of Gilbert* decision. The Fourth Circuit held that the city's sign ordinance did violate the principals of First Amendment review set out in *Gilbert* but the case was mooted by the City's amendment adopted after the *Gilbert* decision.[44]

Similarly, zoning ordinances that regulate only the location of, and require permits for the operation of, churches place only a "minimal burden" on the right to the free exercise of religion.[45]

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[39] *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996).

[40] *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 145 (4th Cir. 1991) (finding that the locality has a substantial government interest in regulating nudity in public places).

[41] *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

[42] *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

[43] 776 F.3d 229 (4th Cir. 2015). See also *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012), for an example of the standards applicable to commercial signs.

[44] *Central Radio Co. v. City of Norfolk*, 811 F.3rd 625 (2016).

[45] *Thanh Van Tran v. Gwinn*, 262 Va. 572, 554 S.E.2d 63 (2001). But see the discussion of the Religious Land Use and Institutionalized Persons Act of 2000 at paragraph 16.204(B) below.

16.204 Limitations on Local Authority.

A. In General. There are occasions when the General Assembly, and more recently the federal government, have limited (or attempted to limit) the authority of localities to reach certain land use outcomes. For example, zoning approval for family day care homes with five to twelve children[46] in addition to resident children may be administratively granted if, after notice, adjoining landowners do not object.[47] Section 15.2-2291 of the Virginia Code limits the capacity of localities to "zone out" certain residential facilities for not more than eight persons with mental illness, intellectual disabilities, or developmental disabilities and residential facilities in which no more than eight aged, infirm, or disabled persons reside. The Virginia Supreme Court has ruled that this statute is a "classic example of 'a use restriction and complementing family composition rule,' and is not a maximum occupancy restriction." It is, therefore, permissible to permit group homes of more than eight persons.[48] Section 15.2-2283.1 of the Virginia Code prohibits facilities for treatment of convicted sex offenders in residentially zoned subdivisions.

B. Religious Uses. Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[49] This act, which makes certain small amendments to the previously adopted and judicially circumscribed Religious Freedom Restoration Act, expressly provides, inter alia, that[n]o government shall impose or implement a land use regulation in

> a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates

[46] Effective July 1, 2016, this sentence will read ". . . homes with five to twelve children . . . ." 2015 Va. Acts ch. 758.

[47] Va. Code § 15.2-2292. While the Virginia Supreme Court has approved "pure" referenda for zoning matters (*see R.G. Moore Bldg. Corp. v. Committee for Repeal of Ordinance R(C)-88-13*, 239 Va. 484, 391 S.E.2d 587 (1990)), it is quite a different matter where neighboring citizens are granted a "veto" over the land use. It is doubtful that a provision granting such a neighborhood veto would withstand challenge. *County of Fairfax v. Fleet Indus. Park Ltd. P'ship*, 242 Va. 426, 431, 410 S.E.2d 669, 671 (1991).

[48] *Trible v. Bland*, 250 Va. 20, 458 S.E.2d 297 (1995) (internal citation omitted) (in *Trible*, the home housed twenty-one residents); *see also City of Edmonds v. Oxford House*, 514 U.S. 725 (1995) (throwing into doubt whether the locality can in fact limit the number of residents of such group homes under the Fair Housing Amendments Act of 1988); Va. Code §§ 15.2-2288.1 (no locality shall require as a condition of approval of a subdivision plat, site plan, or plan of development or issuance of a building permit that a special use permit be obtained for construction of residential dwellings at the use, height, and density permitted by right), -2290 (manufactured homes must be permitted in agricultural zones).

[49] 42 U.S.C. § 2000cc *et seq.*

that imposition of the burden on that person, assembly, or institution—

A. is in furtherance of a compelling governmental interest; and

B. is the least restrictive means of furthering that compelling governmental interest.[50]

Persons who claim to be aggrieved by action that runs afoul of this act have an immediate cause of action in federal court, and Congress has expressed its intention that RLUIPA "shall be construed in favor of broad protection of religious exercise, to the maximum extent permitted by the terms of this act and the Constitution."[51] It is the manifest purpose and intent of this statute to impose severe impediments to the regulation of religious uses by localities nationwide.

The District Court for the Eastern District of Pennsylvania has held that the land use elements of RLUIPA are constitutional.[52] This opinion has been cited with approval by several other district courts, though none are in Virginia. The Seventh and Eleventh Circuits have also held that RLUIPA's land use elements are constitutional.[53] Until there is a divergence of opinions in the federal circuit courts on this point, it is not likely to be addressed by the United States Supreme Court.[54]

The Fourth Circuit applied RLUIPA in a land use case without addressing the Act's constitutionality when it remanded a case to the district court for application of the "substantial burden" test to the claim of a church that the locality's newly adopted regulation completely prohibited the church's religious use of land that it had acquired before the adoption of the local regulation.[55]

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[50] 42 U.S.C. § 2000cc(a)(1).

[51] 42 U.S.C. § 2000cc-3(g).

[52] *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

[53] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003).

[54] *See Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding constitutionality of RLUIPA as applied to prison inmates).

[55] *Bethel World Outreach Ministries v. Montgomery Cnty. Council,* 706 F.3d 548 (4th Cir. 2013); *see also Andon, LLC v. City of Newport News*, 813 F.3d 510 (2016).

It can be assumed that religious uses will bring federal suits challenging almost every zoning requirement that might be applied to them. Assuming that RLUIPA is constitutional, it is difficult to see how the locality will be able to demonstrate a compelling governmental interest for much regulation. That test is, of course, the test that has been applied historically to the regulation of suspect classifications and has proved an almost insuperable burden to governmental regulation where it properly applies.[56] In *Chase v. City of Portsmouth*,[57] the United States District Court for the Eastern District of Virginia held that a RLUIPA claim was not subject to *Burford*, *Pullman* or *Younger* abstention.

C. Production Agriculture and Silviculture. The General Assembly has been most active in protecting farming activities. The Right to Farm Act[58] prohibits localities from requiring a special use permit for any production agriculture or silviculture activity in an area zoned agricultural, with certain limitations as to the land application of sewage sludge. Localities are also prohibited from enacting zoning ordinances that unreasonably restrict or regulate farm structures or farming and forestry practices in agricultural districts.[59] However, amendments to section 15.2-2288 clarify that only the production or harvesting of agricultural products, including silvicultural products, is protected from local regulation, not the processing of those products.[60] Localities may also adopt setback requirements, minimum area requirements, and other requirements that apply to land used for agriculture or silviculture activity within the locality that is zoned as an agricultural district or classification. The Attorney General has been beset

[56] In *Murphy v. Zoning Comm'n of Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001), a town was enjoined from enforcing a zoning cease and desist order pending resolution of the case because the order was not the least restrictive means of meeting governmental concerns about traffic safety. The order imposed a substantial burden on prayer group meetings at a residence and, instead of taking action that would directly regulate increased volume of traffic on Sunday afternoons, about which neighbors had complained, the order attempted to control the number of people present in plaintiff's home.

[57] Civ. No. 2:05cv446, 2005 U.S. Dist. LEXIS 29551 (E.D. Va. Nov. 16, 2005).

[58] Va. Code § 3.2-300 *et seq.*; *see also* Va. Code § 15.2-2288.

[59] *See Recyc Sys., Inc. v. Spotsylvania Cnty.*, 64 Va. Cir. 68 (Spotsylvania 2004) (ordinance restricting surface application of bio-solid fertilizers in agricultural district prohibited by statute).

[60] Pursuant to section 15.2-2288 of the Virginia Code, localities are not forbidden under the prohibition against local zoning restrictions on "production agriculture" from regulating the above-ground application or storage of sewage sludge, or the storage or disposal of nonagricultural excavation material, waste, and debris if the excavation material, waste, and debris are not generated on the farm. *But see* Va. Code § 62.1-44.19:3 (creating a comprehensive state regulatory and permitting program for bio-solids application).

with requests for opinions as to what localities can regulate under these statutes.[61]

Farm wineries represent a special class of agriculture, and section 15.2-2288.3 restricts localities from regulating multiple aspects of these operations.

Silvicultural activity is also protected by section 10.1-1126.1 of the Virginia Code, which forbids a locality through its zoning power to prohibit or unreasonably limit silvicultural activity conducted in accordance with best management practices. Ordinances and regulations pertaining to such silvicultural activity must be reasonable and necessary to protect the health, safety, and welfare of citizens residing in the locality and must not conflict with the purposes of promoting the growth, continuation, and beneficial use of the commonwealth's privately-owned forest resources. Before adopting any ordinance or regulation pertaining to silvicultural activity, a locality may consult with and request a determination from the state forester as to whether the ordinance or regulation conflicts with the purposes of the statute. A locality may require a review by the zoning administrator to determine whether a proposed silvicultural activity complies with applicable local zoning requirements.[62]

Another activity related to agricultural operations is the application of bio-solids to farm fields as a fertilizer and soil conditioner. Bio-solids are the end product of the sanitary wastewater treatment process. The commercial application of bio-solids is regulated by section 62.1-44.19:3 of the Virginia Code, which establishes a state-wide permitting program for the application, marketing, and distribution of bio-solids. The statute confers most of the regulatory authority on the State Water Control Board and appears to preempt local zoning authority in this area.[63] Localities, however, may adopt ordinances that provide for the testing and monitoring of the land

[61] *See, e.g.*, Va. Att'y Gen. Op. No. 11-132 (June 21, 2013) (rural residential is not an agricultural district for the purposes of the Right to Farm Act); Va. Att'y Gen. Op. No. 13-035 (Oct. 11, 2013) (disposal of construction debris generated off site is not exempt from local zoning ordinance restrictions by Right to Farm Act).

[62] This statute was applied in *Dail v. York Cnty.*, 259 Va. 577, 528 S.E.2d 447 (2000). *See also* 1999 Report of the Attorney General 44.

[63] *Recyc Sys., Inc. v. Spotsylvania Cnty.*, 64 Va. Cir. 68 (Spotsylvania 2004). *But see* Va. Code § 15.2-2288, exempting the above-ground application or storage of sewage sludge from the prohibition against local zoning restrictions on "production agriculture" in agricultural districts.

application of sewage sludge within their political boundaries to ensure compliance with applicable laws and regulations.[64]

D. Telecommunications. The federal government has been quite active in the telecommunications area. The Telecommunications Act of 1996 (the Telecommunications Act)[65] addresses the ability of a locality to regulate the provision of telecommunications service through zoning regulation. Section 704(c)(7) of the Telecommunications Act, entitled "Preservation of Local Zoning Authority," provides in relevant part that

> [e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> * * *
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> * * *
>
> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service

[64] Va. Code § 62.1-44.19:3(C).

[65] Pub. L. No. 104-104, 110 Stat. 56 (1996).

> facilities shall be in writing and supported by substantial evidence contained in a written record.[66]

In *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*,[67] the court upheld a city's denial of a conditional use permit to install two towers in a residential neighborhood against a Telecommunications Act challenge. The court held that there had been no unreasonable discrimination between functionally equivalent providers and that only blanket prohibitions effectively prohibit service. Most significantly, the court held that the decision denying the permit need not be supported by written findings of facts and explanation. Moreover, widespread opposition by residents, as manifested by the "written" record of hearing transcripts and petitions, met the Telecommunications Act's requirement that the zoning decision be supported by "substantial evidence."[68]

Petersburg Cellular P'ship v. Board of Supervisors[69] presents an interesting twist, because Judge Niemeyer concluded that the federally imposed standard authorizing a state or local legislative body to deny a permit only on substantial evidence violates the Tenth Amendment. Judge Widener concurred in the judgment, without reaching the constitutional issue, because he concluded that the district court erred in reversing the board based on the evidence. Judge King dissented from the judgment, concluding that section 704(a) of the Telecommunications Act does not violate the Tenth Amendment.

In *360 Degrees Communications Co. v. Board of Supervisors*,[70] the court rejected other circuits' tougher standards regarding whether a single

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[66] 47 U.S.C. § 332(c)(7); *see T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808 (2015) (requirement for written decision applied).

[67] 155 F.3d 423 (4th Cir. 1998).

[68] *Id.*; *accord AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999) (also holding that a writ of mandamus is not appropriate relief under the Telecommunications Act); *see also Virginia Metronet, Inc. v. Board of Supervisors*, 984 F. Supp. 966 (E.D. Va. 1998) (discussing the blanket prohibition provision of the Act; holding that the requirement of specific written findings is not valid after *AT&T Wireless*); *American PCS, L.P. v. Fairfax Cnty. Zoning Appeals Bd.*, 40 Va. Cir. 211 (Fairfax 1996) (holding that denial of a special use permit for "monopole" is not a violation of the Telecommunications Act). *But see Petersburg Cellular P'ship v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) (finding that speculative safety concerns and minimal citizen opposition were insufficient as a matter of law to justify denial).

[69] 205 F.3d 688 (4th Cir. 2000); *see also USCOC of Va. RSA #3, Inc. v. Montgomery Cnty.*, 343 F.3d 262 (4th Cir. 2003).

[70] 211 F.3d 79 (4th Cir. 2000).

tower denial has the effect of denying service, holding that the alternative towers could still be reasonable even if significantly more were required to cover the area at a significantly higher cost.

The Fourth Circuit's proclivity to uphold the local government's denial of cell tower permits has continued as represented by three T-Mobile cases the court has decided: *T-Mobile Northeast, LLC v. Fairfax County Board of Supervisors*,[71] *T-Mobile Northeast, LLC v. Howard County Board of Appeals*,[72] and *T-Mobile Northeast, LLC v. Loudoun County Board of Supervisors*.[73] In each case, the Fourth Circuit found that (i) there was substantial evidence to support the denial; (ii) the proponent had not demonstrated that the denial amounted to a prohibition of service; and (iii) the proponent had also failed to prove that there was a lack of reasonable alternative locations.

Virginia also has its own telecommunications statute. On any application for section 15.2-2232 review of a telecommunications facility, the planning commission must act within 90 days (unless the governing body extends the period for no more than 60 days or the applicant agrees to an extension), or the application is deemed approved.[74]

E. Chesapeake Bay Preservation Act. In the interest of protecting the Chesapeake Bay, the Chesapeake Bay Preservation Act requires localities in the Tidewater region to promulgate certain water quality protection measures and land use regulations.[75] Localities outside the Tidewater area may choose to employ the criteria enacted by regulations written pursuant to the Act by the Chesapeake Bay Local Assistance Board.[76] Generally, localities that adopt the Act's requirements must, among other things, minimize development impact on undeveloped land, maximize preservation of existing vegetation, employ certain water management practices, and closely oversee large development projects. Most local governments in the Tidewater region have chosen to incorporate ordinances required by the Chesapeake

[71] 672 F.3d 259 (4th Cir. 2012).

[72] 524 Fed. Appx. 9 (4th Cir. 2013).

[73] 748 F.3d 185 (2014).

[74] Va. Code § 15.2-2232(F).

[75] Va. Code § 62.1-44.15:67.

[76] 9 VAC 25-830-120 *et seq.*

Bay Preservation Act into their zoning ordinances. Some, like Fairfax County, have free-standing "Ches Bay" ordinances.

The Act includes specific performance criteria that limit development in "resource protection areas" (RPAs), which are lands in the Preservation Area that are "adjacent to water bodies with perennial flow" and "such other lands that, if developed, might cause significant degradation of state waters." Localities designating RPAs within their jurisdictions must do so according to the specific procedures laid out in the Act.[77]

A locality adopting the Act's requirement must include certain elements in its comprehensive plan, which delineates and tracks the locality's policies on land use and impact as well as water quality management. These localities are also required to revise their land use regulations to bring them into conformity with the Act and to incorporate the performance criteria promulgated by the Local Assistance Board.

The Act does not change the presumptions and standards of review of the actions of local governing bodies. It simply places additional limitations on what land use ordinances may include or allow. For instance, a property owner whose land the BZA has determined contains an RPA that restricts development of the land may overcome the presumption of the ruling's correctness by showing, by a preponderance of the evidence, that the BZA's decision was unreasonable.[78] Likewise, if a landowner seeks to obtain variances to allow development of lots within a setback required by the Act, the landowner must prove that the lots existed when the Act was adopted by the locality and the zoning requirements would interfere with all reasonable uses of the property.[79]

16.205 Legislative and Nondelegable Nature of Zoning. The enactment of zoning ordinances and the amendment of the ordinance text or zoning classification is a purely legislative function that must be exercised by

[77] *Pony Farm Assocs., L.L.C. v. City of Richmond*, 62 Va. Cir. 386 (Richmond 2003).

[78] *Chappell v. Board of Zoning Appeals*, 65 Va. Cir. 142 (Fairfax 2004) (petitioner landowners presented testimony from a wetlands expert that their land did not contain an RPA, but BZA's evidence was limited to general policy considerations).

[79] *Cherrystone Inlet, LLC v. Board of Zoning Appeals*, 271 Va. 670, 628 S.E.2d 324 (2006).

the board of supervisors in a county, or the council in a city or town, and cannot be delegated to any other entity or to private citizens.[80]

The Virginia Supreme Court has held that delegation by the county to the planning commission of the authority to grant or deny a waiver application was inconsistent with the general role of planning commissions, was legislative in nature, and was not authorized by state law.[81] The General Assembly, however, has delegated to local BZAs the power to issue special use permits[82] and allowed governing bodies to reserve to themselves the power to issue special permits.[83]

16.3 CONDITIONAL ZONING

16.301 In General. Among the land use powers granted to localities by the enabling legislation, perhaps none stands out so consequentially as conditional zoning. Indeed, Virginia's system of conditional zoning is unique in the United States, and it gives land use in the commonwealth its unique character.

Since 1987, every Virginia jurisdiction has been authorized to use some form of conditional zoning as part of its land use regulation.[84] The concept goes back, however, to 1976, when such zoning powers were first granted to Fairfax County and other surrounding jurisdictions and to the counties of Virginia's eastern shore.[85]

Under whatever form of conditional zoning may be available to it, a locality may accept "proffered" conditions (when reduced to writing in advance of the public hearing before the governing body) that are in addition to the general, uniform regulations otherwise applicable in the same zoning

[80] *County of Fairfax v. Fleet Indus. Park Ltd. P'ship*, 242 Va. 426, 410 S.E.2d 669 (1991); *Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983); *Mumpower v. Housing Auth.*, 176 Va. 426, 11 S.E.2d 732 (1940); *see also Eubank v. City of Richmond*, 226 U.S. 137 (1912). The approval of a special use permit is similarly legislative in nature. *Board of Zoning Appeals v. Cedar Knoll, Inc.*, 217 Va. 740, 232 S.E.2d 767 (1977); *see also Board of Supervisors v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982).

[81] *Sinclair v. New Cingular Wireless, PCS*, 283 Va. 198, 730 S.E.2d 543 (2012) (violation of Dillon Rule).

[82] *See* Va. Code § 15.2-2309(6).

[83] *See* Va. Code § 15.2-2286(A)(3).

[84] *See* Va. Code §§ 15.2-2296 to -2302.

[85] Va. Code § 15.2-2303.

district.[86] Conditions and restrictions proffered by the applicant, once accepted by the locality, become a part of the zoning of the property and are binding on it until it is "rezoned" or when the proffered conditions are themselves amended in the same manner as the original rezoning.[87]

16.302 Proffers. As noted below, proffers are meant to be voluntary. The use of proffers to address planning and zoning needs in a locality is, despite the contemporary controversies that surround them, actually a rather time-honored, if often questioned, process. As the court noted in *Board of Cnty. Supervisors v. United States*,[88]

> [e]fforts by local governments to control land development blossomed in the 1920s when the idea of land use zoning, blessed by the federal government, spread rapidly across the country. Not long after, regulation of large scale residential (and later, non-residential) developments through planning and subdivision control ordinances followed. However euphemistically described, it has now become common practice for local government units with zoning and planning authority to exact from developers various concessions as a condition to granting the necessary zoning changes and planning code approvals for proposed developments. These exactions range from requiring the developer to install at the developer's own cost the roads and sewers needed to serve the development, to dedicating land for

[86] There is an anomaly in the Virginia Code with respect to whether proffered conditions can only be "in addition" to district regulations or may be something else. Sections 15.2-2297 and 15.2-2298 of the Virginia Code both provide that the locality may accept proffers "in addition to" other regulation. The definitions in section 15.2-2201, however, say that "conditional zoning" permits reasonable conditions "in addition to, *or modification of*" those regulations (emphasis added). It is uncertain whether this is a distinction with a difference, but it is defensible to argue that the specific provisions of the several enabling statutes must be read together and that proffered conditions may modify the otherwise applicable regulations in a particular district, if the local ordinance so provides. In Prince William County, for example, the ordinance establishes basic height limitations in certain districts but provides that they may be modified and increased from underlying ordinance requirements, if an accepted proffer so authorizes. *But see Clark v. Town of Middleburg*, 26 Va. Cir. 472 (Loudoun 1990) (finding that proffers cannot be construed to provide a variance from or to exceed the requirements of the zoning ordinance and cannot authorize a use that is not permitted in the applicable zoning district, because to do so would violate the ordinance).

[87] Traditional zoning need not be found inadequate before conditional zoning may be employed. The grant of authority to use conditional zoning, once enacted by the locality, is case-specific. A locality may permit certain residential uses by right in a zoning district and apply conditional zoning to other residential uses in the same zoning district. 1997 Report of the Attorney General 66. Conditional zoning proffers may be only be accepted, of course, at the time of a rezoning action of a particular parcel of property.

[88] 48 F.3d 520 (Fed. Cir.), *cert. denied*, 516 U.S. 812 (1995).

> public recreation facilities and other public needs, to making cash payments to local schools as recompense for the additional students generated by the development.[89]

Proffers are theoretically not exactions in the same sense that impact fees or involuntary conditions on special use permits are—assuming that proffers are indeed voluntary and that the landowner cannot demonstrate in some fashion that they have been forced upon it.[90] However, they are used in Virginia in a similar manner to that described by the Federal Circuit.

The Virginia Supreme Court has never extensively discussed conditional zoning. The federal courts, however, have spent time on the question, and their discussion is useful. In *Board of Cnty. Supervisors v. United States*,[91] the Claims Court examined conditional zoning in a case arising out of the legislative taking of additional land for the Manassas National Battlefield Park. Against the county's claim that it was entitled to be compensated for lost proffers that were swept away in that taking, the court held that proffers alone are not property interests that are subject to being "taken" within the meaning of the Fifth Amendment, but rather constitute "only those legislative expectancies existing in the zoning amendment itself." Proffers are *development restrictions*, not property rights or restrictive covenants. As development restrictions, proffers are essentially identical to other provisions of a zoning ordinance, as they may be applicable to a particular property, except that proffers are restrictions crafted with the particular use of a particular property in mind. They are enforceable as such conditions are generally enforceable and differ only in that they must have been voluntarily offered to the locality through the conditional zoning process. Once accepted, they do not differ from setbacks, lot coverage requirements, and height limitations otherwise generally applicable. (The Circuit Court of Loudoun County has held on the same general theoretical grounds that "[a] violation of a proffer must be considered as equivalent to a violation of a zoning ordinance.")[92]

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[89] *Id.* at 523 (internal citations omitted).

[90] *See infra* ¶ 16.304(A) (discussion of *Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995)).

[91] 23 Cl. Ct. 205 (1991), *aff'd in part, rev'd in part,* 48 F.3d 520 (Fed. Cir.), *cert. denied*, 516 U.S. 812 (1995).

[92] *Barton v. Town of Middleburg*, 27 Va. Cir. 20 (Loudoun 1992).

In an important further aspect of its opinion, the Claims Court also rejected the United States' contention that the Virginia conditional zoning system is simply ultra vires. Although the court thought that "[t]he express arrangement—proffers in exchange for rezoning—presents a strong argument for characterizing this relationship as a contract[ ]," because proffers do not give rise to contractual obligations on the part of the locality and because the locality retains its ultimate legislative authority over land use, the General Assembly had properly granted localities power to employ this form of conditional zoning. Indeed, in rejecting this argument, the court expressly, if with express reluctance, "recognize[d the county's] need to be able to tailor land use requirements closely to the characteristics of particular parcels of land." As long as the county undertakes no affirmative obligations through conditional zoning and proffers remain development conditions and restrictions applicable to the proposed use, then it is probable that the courts will not find that the locality has engaged in impermissible "contract" zoning.

In a separate but related proceeding arising out of the Battlefield taking, the Court of Federal Claims held that the county was not entitled to just compensation for the asserted taking of public street rights-of-way that had been dedicated to the county through the zoning and subdivision processes. It found that the rights-of-way possessed no compensable value because they were "irrevocably dedicated to non-profitable uses at the time of the taking."[93]

On appeal, however, the Federal Circuit affirmed in part and reversed in part, agreeing with the lower court as to the fundamental nature of proffers.[94] The court rejected the notion advanced by the county that proffers are "contractually created" rights.

> The fact that, in some cases, the process by which proffers become incorporated into the zoning system may involve a degree of negotiation does not convert an exercise of the police power into an exercise in contract. It is basic law that when local governments engage in land use planning and control, they do so by exercising the sovereign's police power delegated to them by the state, typically through general enabling legislation.

[93] *Board of Cnty. Supervisors v. United States*, 27 Fed. Cl. 339 (1992), *aff'd in part, rev'd in part*, 48 F.3d 520 (Fed. Cir.), *cert. denied*, 516 U.S. 812 (1995).

[94] *Board of Cnty. Supervisors v. United States*, 48 F.3d 520, 524 (Fed. Cir.), *cert. denied*, 516 U.S. 812 (1995).

> * * *
>
> The object of the proffers was not to give the County something of intrinsic value with which it could go into the market place and trade, or which it could use and possess for county purposes. The purpose of the proffers was to commit the developer to undertake his project with a specified degree of concern for and responsibility toward surrounds and the people who in future years would live and work there. Buffer zones, preservation of trees, even tennis courts and ball parks, were not assets for the general benefit of the county, but were amenities and facilities that the developer agreed to include, both for his own economic interest and for that of the citizens who would be directly affected by the development. . . . There is nothing in the document of proffers that suggests these were to be County property.[95]

The court also rejected a claim that the county had a sufficiently enforceable right, in the nature of a security interest or materialman's lien, that constituted a valid grant of property that could be taken.

The court did agree with the county, however, that it was entitled to compensation for the taking of 16.05 acres of land that had been dedicated to the public through deeds and plat dedications as street and related rights-of-way. The court engaged in an extended analysis of the nature of the title that is passed through such actions and concluded that the county obtains an unrestricted fee simple absolute thereby, not an ownership interest so burdened by their original purpose as to have rendered them essentially valueless, as the Claims Court had earlier concluded.[96] "The interests held by the County in these five parcels, constituting the 16.05 acres, are no different from the fee simple estates held by other owners of property within the [condemned Battlefield] tract."[97] The compensation, however, could not include the amount spent on improvements to the property as that would constitute compensation for investment, which was not a proper assessment of the fair market value.[98] The Court of Claims on remand was to determine

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[95] *Id.* at 524-25.

[96] *Id.* at 526-28.

[97] *Id.* at 528.

[98] *Board of Cnty. Supervisors v. United States*, 116 F.3d 454 (Fed. Cir. 1997).

the fair market value of the "odd pieces" of land, taking into account their potential uses, current condition and improvements thereon, and considering the most profitable uses to which the land could probably be put in the reasonably near future. The court valued the land at $1.2 million.[99]

16.303 Types of Conditional Zoning. There are three distinct types of conditional zoning authorized by the General Assembly.

A. "Old" Conditional Zoning.[100] "Old" conditional zoning, authorized by section 15.2-2303 of the Virginia Code, is available in Arlington, Alexandria, Fairfax, Prince William, and Loudoun Counties, their included cities and towns, and certain other eastern shore localities. Under old conditional zoning, there are no apparent constraints on what may be proffered and accepted, and landowners and local government have used this device to address many development-related problems as well as other social concerns of the community that are not related to the project in issue.

B. "New" Conditional Zoning.[101] Before 1978, only a handful of jurisdictions could use "old" conditional zoning. In 1978, however, the General Assembly adopted a version of conditional zoning that is available to all other localities.[102]

Because of concerns that conditional zoning might have been abused by old conditional zoning jurisdictions, however, the General Assembly placed specific and important limitations on the conditions that may be accepted under "new" conditional zoning. Each proffered condition must arise from the rezoning application itself and have a reasonable relationship to the rezoning. Moreover, conditions may not include cash contributions to the locality or dedications of real or personal property for open space, parks, schools, fire departments, or other facilities or off-site improvements not expressly authorized under the subdivision enabling legislation.[103]

[99] *Board of Cnty. Supervisors v. United States*, 47 Fed. Cl. 714 (Fed. Cl. 2000).

[100] Va. Code § 15.2-2303(A).

[101] Va. Code § 15.2-2296 *et seq.*

[102] Va. Code §§ 15.2-2296 to -2302.

[103] The applicant may not be required to create a property owners' association whose members are assessed for the maintenance of public facilities owned in fee by a public entity. Va. Code §§ 15.2-2297, -2298, -2303.

Each condition must be related to the physical development or operation of the site and must conform to the local comprehensive plan.[104] These limitations have severely restricted the use of new conditional zoning since the proffer system that has evolved in old conditional zoning jurisdictions has been directed in substantial measure to the proffering of conditions such as those that are forbidden under the new conditional zoning statutes. Where new conditional zoning exists, therefore, it appears that a willing landowner cannot even *agree* to solve a problem created by the impact of his or her project, although without such mitigation the impact may prove severe enough to warrant legitimately reasonable denial of the proposal. Creative use of the process can sometimes remedy this defect, but it is a potential difficulty nonetheless.[105]

C. "New/Old" Conditional Zoning. In 1989, a form of "old" conditional zoning was extended to jurisdictions that experienced a population growth of five percent or more between the next-to-last and the latest decennial census and jurisdictions adjacent to them.[106]

"New/old" conditional zoning is somewhat different from "true" old style conditional zoning, in that local authority is not as wholly unlimited as it likely is in old conditional zoning localities. Proffers may be accepted in jurisdictions enacting proper ordinances, provided the zoning itself gives rise to the need for the conditions, the conditions have a reasonable relation to the rezoning, and the conditions are in conformity with the local comprehensive plan as defined in section 15.2-2223 of the Virginia Code.

In order to accept proffers or dedications of real property, the local government must also adopt a capital improvement plan pursuant to section 15.2-2239 or the local charter, and proffers of public improvements must be consistent with that plan. Moreover, provisions must be made for the ultimate disposition of proffered cash, in the event the improvements for which the cash is proffered are not completed.[107]

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[104] Va. Code § 15.2-2297(A).

[105] *See Riverview Farm Assocs. v. Board of Supervisors*, 259 Va. 419, 528 S.E.2d 99 (2000) (on demurrer, addressing conformance with the comprehensive plan and proffer issues).

[106] Va. Code § 15.2-2298 *et seq.*

[107] A locality that accepts voluntarily proffered cash payments must disclose to the Commission on Local Government the aggregate amount of the proffered cash payments collected, the amount expended, and a list of public improvements on which the money was expended. Va. Code § 15.2-2303.2.

Section 15.2-2303.3(C) provides that no locality can accept or request a proffer made after January 1, 2012 that contains language in which the profferor purports to waive future legal rights against the locality or its agents. Section 15.2-2303.2 was amended in 2013 to prohibit the use of cash proffer payments for operating expenses or ordinary maintenance and repair of an existing capital facility.

In new and new/old conditional zoning jurisdictions, the Virginia Code requires that a proffered condition be in "conformity" with the local comprehensive plan. It is unclear what the consequence would be of a locality's acceptance of proffers that either are not authorized by the enabling legislation or are found to be inconsistent with the comprehensive plan. In the event of a successful challenge on either of these grounds (likely only to arise in third-party litigation—citizen challenges—over a land use decision) it is unlikely that a court would invalidate a rezoning in its totality even if it finds some noncompliance with the conditional zoning enabling legislation. Rather, it seems reasonable to invalidate only the offending proffer and to conduct a form of "severability" analysis to determine whether the locality would have approved the rezoning, despite the elimination of any particular proffer. Courts routinely engage in such exercises where validly adopted legislation contains invalid provisions.[108]

Moreover, the comprehensive plans to which proffers under these forms of conditional zoning must relate are by their very nature "general or approximate" policy documents not binding in any relevant legal sense. The courts would likely give substantial leeway to a locality's determination (implicit in the acceptance of conditions) that a proffered condition advances the ends of the plan.

The legislative limitations in new/old conditional zoning were, in any event, intended primarily to protect landowners from legislative overreaching, and the harm of agreeing to a proffer that may not be specifically articulated in a local plan falls largely on the parties who, by executing the proffer statement, willingly agree to it.

[108] In a related context, in *Clark v. Town of Middleburg*, 26 Va. Cir. 472 (Loudoun 1990), Judge Chamblin ruled (on demurrer) that if the Town Council's acceptance of proffers in fact would violate the zoning ordinance, he would (on the particular facts of that case) invalidate those proffers and uphold the rezoning. The court allowed the complaint to go forward but the next round of demurrers led to the complaint being dismissed and unsuccessfully appealed.

This also focuses attention on what it means to be in conformity with a comprehensive plan at all, since such plans are written to give general guidance to the locality in individual decisions and are not "codes." They occasionally contain contradictory statements and principles and even contrary goals, and it is sometimes possible to find support for almost any position. There is often little guidance as to how to make case-specific application of goals, and it is not at all uncommon to find significant discrepancies between the land use map (which has traditionally been the most important element of the plan when matters have reached litigation) and the *text* of the plan. In view of the imprecision often found, it is likely that the courts will be unwilling or unable to delve deeply into them and to use them instead as a substantial source of authority for answers to such broad-brush questions as whether a particular proffer is "in conformity with" a plan.

Section 15.2-2298(A) allows jurisdictions that were previously under new/old conditional zoning to proceed under old conditional zoning pursuant to section 15.2-2303.

16.304 Strengths and Weaknesses of Conditional Zoning.[109]

A. Supplement to the General Fund. Conditional zoning has in recent years come under fire for, among other things, its increased use as a source of general fund revenue to offset costs that are either unrelated to development impact mitigation or only loosely related and that have assertedly been "extorted" from a rezoning applicant as a price for development approval—one must pay to play. This use of the proffer system overreaches its original role as a means of tailoring on-site impacts of a given proposal or of creating greater certainty with respect to it.

In *Board of Supervisors v. Reed's Landing Corp.*,[110] the first Virginia decision dealing specifically with this abuse of the proffer system, the court held invalid the denial of a rezoning application that had been based *solely* on the landowner's refusal to proffer a $2,349 per lot contribution that had been set forth in the county's formally adopted "Proffer Guidelines" establishing the amounts that the landowner was to "voluntarily" proffer.

[109] In 2008 the General Assembly considered replacing the cash proffer system with a system of impact fees. Senate Bill 768 passed the Senate 21-19 and was continued until 2009 by the House Rules Committee. The bill died in committee in the 2009 Session.

[110] 250 Va. 397, 463 S.E.2d 668 (1995).

The court held that under the facts of the case, it was clear that the requirement was not a voluntary proffer at all but rather an impact fee.[111]

Four years later, in *Gregory v. Board of Supervisors*,[112] the court sustained a rezoning denial that it found had not been based *solely* on the landowner's refusal to proffer a fee of $5,156 per lot determined on the basis of a "methodology for calculating the cost to the County of providing public facilities for each new residence in a proposed subdivision, including schools, roads, parks, libraries, and fire stations."[113] Although the policy in *Gregory* was virtually indistinguishable from the policy in *Reed's Landing*, the court concluded that since there were other factors behind the refusal, the voluntariness of the proffer system was maintained. It appeared that some 51 percent of all lots approved since the adoption of the county policy had met their obligations by means other than the payment of money. Thus, *Reed's Landing* is confined to the specific finding that refusal to pay was the *only* reason for the rejection. However, the interplay of *Reed's Landing* and *Gregory* does makes it plain that one may not, in fact, be forced to pay.

Although *Reed's Landing* did not invalidate either conditional zoning or the use of cash proffers, it did limit the ability of localities to make overt and inflexible demands on landowners to pay money for rezoning approval. In fact, a short three-and-a-half weeks after that decision, in *National Ass'n of Home Builders v. Chesterfield Cnty.*,[114] Judge Merhige held that Chesterfield's policy identifying a "maximum" anticipated proffer in zoning cases was not a taking and that conditional zoning substantially advances a legitimate state interest.

B. *Koontz v. St. Johns River Water Management District* and Section 15.2-2008.1. One school of thought had argued that government exactions, which required only the payment of money instead of the dedication of land, were not subject to *Nollan* and *Dolan* proportionality

[111] There can be no doubt that the court considered Powhatan's actions to have been an illegal imposition of an impact fee, since it noted that the General Assembly has frequently refused to grant localities the power to impose impact fees and, thus, to do directly what Powhatan had attempted to do by indirection.

[112] 257 Va. 530, 514 S.E.2d 350 (1999).

[113] *Id.* at 533, 514 S.E.2d at 351.

[114] 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (table), *cert. denied*, 519 U.S. 1056 (1997).

analysis[115] because those governmental actions did not constitute a taking of real property and, thus, were not covered by the Fifth Amendment. That theory was rejected by the United States Supreme Court in *Koontz v. St. Johns River Water Management District*,[116] which held that the cost to improve another's property, as had been required of Koontz, was a burden on the applicant's land and, therefore, was an unconstitutional taking and subject to *Nollan* and *Dolan* proportionality analysis. This holding suggested the fixed price cash proffer system adopted in several Virginia localities was ripe for *Nollan-Dolan* review, although *Reed's Landing*[117] had already held a fixed price cash proffer schedule to violate the Virginia Constitution.

Prompted by the *Koontz* holding, during its 2014 session, the General Assembly adopted section 15.2-2208.1, which prohibits localities from asking for unconstitutional exactions from applicants during rezonings, special permit, site plan, or subdivision review. Thus, under *Rowe* and *Cupp*,[118] 15.2-2208.1 prohibits localities, during the rezoning and special permit process, from suggesting proffers or development conditions for public improvements where the need for that improvement is not substantially generated by the project itself. It also prohibits localities from asking for improvements to existing public rights of way during the subdivision and site plan review process.[119]

To invoke the protections of section 15.2-2208.1, the applicant must object in writing to the requested exaction before the locality's decision on the application.[120] If the land use approval is subsequently denied, section 15.2-2208.1(B) directs that, absent clear and convincing evidence to the contrary, the denial is presumed to be based on the applicant's refusal to agree to the unconstitutional exaction, thus overriding *Gregory v. Board of Supervisors*.[121] The successful aggrieved applicant is entitled to (i) recover

[115] See paragraph 16.903 for a discussion of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[116] 133 S. Ct. 2586 (2013).

[117] 250 Va. 397, 463 S.E.2d 668 (1995).

[118] See paragraph 16.903 for a discussion of *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) and *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984).

[119] *Hylton Enters., Inc. v. Board of Supervisors*, 220 Va. 435, 258 S.E.2d 577 (1979).

[120] Va. Code § 15.2-2208.1(B).

[121] 257 Va. 530, 514 S.E.2d 350 (1999) (the court sustained a rezoning denial that it found had not been based solely on the landowner's refusal to proffer a fee).

compensatory damages; (ii) a remand to the locality directing it to issue the land use approval sought; and (iii) possibly attorney fees.[122]

No court cases have applied 15.2-2208.1 at the time of publication of this handbook. However, the statute did not achieve the prophylactic effect on the "zoning for dollars" practices of some localities as intended by the General Assembly which then took further action in 2016 when it enacted 15.2-2303.4.

C. Mitigating Project-Specific Impacts and Committing the Landowner to a Course of Development. Conditional zoning has proved to be virtually essential to Virginia zoning practice, both for the landowner and the locality, by providing a flexible means of accommodating site-specific issues without forcing all such cases into "all-or-nothing" conflict or halting proposals that are objectionable because of relatively minor considerations reasonably addressed. Many zoning disputes have been resolved by means of proffers that mitigate identifiable community concerns in a manner that is acceptable to the landowner and to the public.

Conditional zoning has also proved invaluable because it can bind a landowner legally to what was said during the rezoning process. Indeed, absent conditional zoning (or in the rarer case the use of restrictive covenants) it is probable that no oral, or even written, representation of any kind made by an applicant during the rezoning process is legally enforceable against the property once the zoning is approved. Truths, half-truths, and outright falsehoods can pepper the legislative record in a battle for governing body approval and may even constitute the basis on which an approval was granted. Unless such representations are reduced to a legally binding commitment, as they may be through proffer statements, they are just so much advocacy offered to persuade a local governing body to grant a rezoning application. Localities have found to their chagrin that representations made by a rezoning applicant are not binding and that uses permitted by the underlying zoning, but never contemplated by the locality when it approved a rezoning, cannot be halted. Land zoned to a category permitting a variety of uses, some perhaps desirable in a given location and some not, may be used for any of those permitted uses barring the limitations possible in conditional zoning, since it is the zoning classification that controls and not the representations of an applicant. In a 2009 case, the Virginia Supreme Court, stating that the locality and developer are bound by the terms of the proffer,

[122] Va. Code § 15.2-2208.1(A).

ruled that acceptance of a development proffer that prohibited certain uses did not by implication allow all other permissible uses for which the land was zoned.[123]

Section 15.2-2303.1:1(A) of the Virginia Code, enacted in 2010, provides that cash proffers that are to be paid on a per unit basis may be collected only after final inspection and prior to issuance of a certificate of occupancy. The statute also permits an award of reasonable attorney fees, expenses, and court costs to the prevailing party in an action that successfully challenges an ordinance or administrative or other action that conflicts with subsection (A).[124] The locality cannot bring a zoning enforcement action solely because the developer delays payment until the occupancy permit is issued.[125] The Attorney General has ruled that the section applies retrospectively to proffers made before the July 1, 2010 effective date of the section.[126]

The courts have not addressed the extent to which statements made by members of the governing body constitute any kind of "legislative history" that illuminates the meaning of an adopted enactment. The important point to recall, however, is that much like a court that speaks through its orders, a locality speaks only through its formally adopted ordinances, resolutions, and policies, which are customarily analyzed within their four corners.

D. Planned Zoning Districts. As more and more complex proposals pepper the landscape, the efficacy of traditional Euclidean zoning[127] to meet the demands placed on the locality can be diminished. The General Assembly has authorized the use of planned zoning districts, which by their very nature are not Euclidean but rather more fluid in concept and application.

The Virginia Supreme Court has twice noted in the relatively distant past that it has not ruled on the validity of planned district zoning in

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[123] *Hale v. Board of Zoning Appeals*, 277 Va. 250, 673 S.E.2d 170 (2009).

[124] Va. Code § 15.2-2303.1:1(C); *see Board of Supervisors v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014). *But see D.R. Horton, Inc. v. Board of Supervisors*, 285 Va. 467, 737 S.E.2d 886 (2013) (voluntary payment doctrine prevents recovery of proffers paid in violation of section 15.2-2303.1:1).

[125] Va. Code § 15.2-2303.1:1(B).

[126] Va. Att'y Gen. Op. No. 10-065 (2010).

[127] *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Virginia. If planned district zoning is to survive, there must be some means of fleshing out the bare bones of the typical planned district ordinance, which can conceivably give unconstitutionally broad discretion to planning officials to impose design and use requirements after a planned district rezoning has been granted.[128] It is possible that the courts would find the enabling authority to enact ordinance provisions for "areas and districts designated for mixed use . . . and planned unit developments" to constitute a sufficient framework for binding local requirements as to uses and development standards that many jurisdictions address through conditional zoning.[129]

16.305 Amendments to Approved Conditional Rezonings. There have been questions among land use practitioners as to whose consent was required when an owner of part of a larger tract subject to proffers wishes to amend them as they apply to his or her own property. The answer offered by the Loudoun Circuit Court in *Long Lane v. Town of Leesburg*[130] was deemed unsatisfactory by the General Assembly and was later reversed by the Virginia Supreme Court.[131] Section 15.2-2302 of the Virginia Code was amended in response to the circuit court decision to provide that an owner of part of the land subject to proffers was authorized to seek amendment of those proffers as they applied to his or her own land and that the consent of the other landowners in the project subject to the proffers is not required, nor can those other land owners impair the right of the applicant to seek such an amendment. The governing body also has the authority in this situation to waive the written notice requirement of section 15.2-2302(A) and to reduce, suspend, or eliminate the landowner's outstanding unpaid cash proffer payments for residential construction that have been calculated on a per-dwelling-unit or per-home basis.[132]

[128] *See Board of Supervisors v. Allman*, 215 Va. 434, 440 n.1, 211 S.E.2d 48, 52 n.1, *cert. denied*, 423 U.S. 940 (1975); *Board of Supervisors v. Lukinson*, 214 Va. 239, 198 S.E.2d 603 (1973).

[129] Va. Code § 15.2-2286(A)(9).

[130] Case No. 62077 (Loudoun Cir. 2011).

[131] *Town of Leesburg v. Long Lane Assocs.*, 284 Va. 127, 726 S.E.2d 27 (2012).

[132] Va. Code § 15.2-2302(E).

16.4 IMPACT FEES

16.401 In General.[133] Impact fees are a tool available to localities to offset the cost of development. They are charges assessed or imposed on new development to fund or recover the costs of reasonable infrastructure improvements related to the new development.

Before 1990, the only impact fee authorized by the legislature was for mandatory pro rata contributions to off-site sewerage, water, and drainage facilities, where the need for such facilities was "necessitated or required, at least in part, by the construction or improvement of [a landowner's] subdivision or development."[134]

In 1989, however, the General Assembly enacted section 15.2-2317 *et seq*. of the Virginia Code specifically authorizing road impact fees for Fairfax County and the counties and cities either adjacent to Fairfax or any city contiguous to such an adjacent county or city and towns within them all. These sections now apply to "any locality that has adopted zoning pursuant to [section 15.2-2280 *et seq.*] and that (i) has a population of at least 20,000 and has a population growth rate of at least 5% or (ii) has population growth of 15% or more."[135] Under these sections, a locality may pass an ordinance to assess and impose fees on new development to pay all or part of the cost of reasonable road improvements benefitting the new development.

16.402 Requirements. The Virginia Code sets out fairly detailed requirements for local impact fee ordinances. Foremost among them is a requirement that localities first conduct an assessment of road improvement needs and prepare a detailed road improvement plan for a relevant service area within the jurisdiction. The plan must be incorporated into the locality's comprehensive plan and its capital improvements plan or six-year secondary road construction plan.[136] The road improvements plan itself must be presented at a public hearing.[137]

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[133] In 2008 the General Assembly considered replacing the cash proffer system with a system of impact fees. Senate Bill 768 passed the Senate 21-19 and was continued until 2009 by the House Rules Committee. The bill died in committee in the 2009 Session.

[134] Va. Code § 15.2-2243.

[135] Va. Code § 15.2-2317.

[136] Va. Code § 15.2-2321.

[137] *Id.*

Once the road improvements plan is in place, the locality may adopt a schedule of impact fees to be assessed against developers. The maximum fee is determined by dividing projected road improvement costs in the service area when fully developed by the number of projected "service units" when fully developed.[138] Alternatively, the fee may be calculated for a period of time, not less than 10 years, by dividing the projected costs necessitated by development by the service units projected to be created in the next 10 years.[139] A developer may receive credits against impact fees for the extent to which other developments have already contributed to the cost of existing roads that will benefit the development, the extent to which new development will contribute to the cost of existing roads, and the extent to which new development will contribute to the cost of road improvements in the future other than through impact fees, including any special taxing districts, special assessments, or community development authorities.[140]

Only one locality, Stafford County, has availed itself of this legislation, imposing a $2,999 per house transportation impact fee. It remains to be seen whether Stafford County's system can survive scrutiny under the *Nolan, Dollan* and *Koontz* decisions.[141] Other localities have complained that the difficulty in applying the legislation equitably to properties that are conditionally zoned and those that are not makes the statute impractical.

16.403 *Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach.*[142] Because only one locality has recently adopted an impact fee ordinance, there has been little Virginia experience with the Virginia Code provisions and no litigation as to such schemes. It is not clear how impact fees will actually work or be tested. The Virginia Supreme Court's remarkable decision in *Tidewater* is critical to an assessment of how the court might treat impact fee legislation if it were presented to it.

In *Tidewater*, the court upheld the city's imposition of a water resource recovery fee (WRRF) on connections made to the city's water system after January 6, 1986 and on modifications to existing connections that resulted in an increase in drainage fixture units, which were the basis for

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[138] Va. Code § 15.2-2323. For an explanation of "service units," see section 15.2-2321(3).

[139] *Id.*

[140] Va. Code § 15.2-2324.

[141] These cases are discussed in paragraph 16.903 of this book

[142] 241 Va. 114, 400 S.E.2d 523 (1991).

calculating the fee. It was conceded that the city had the authority to provide a water system for its residents, but the Association of Homebuilders (the Association) challenged the fee on several grounds, one of which was that it was an unauthorized impact fee. Pointing to section 15.2-2317 *et seq.* of the Virginia Code, the Association argued that if localities already possessed the authority to levy charges such as the WRRF, then there would have been no reason for the General Assembly to enact authorizing legislation for road impact fees.

The court rejected this argument, finding that the WRRF was not an impact fee at all but rather a "proprietary fee" charged for providing utility service on the city's lines. The court adopted the definition of impact fees contained in section 15.2-2318, but it concluded in part that because the Association's position in the litigation had apparently been that the WRRF was not imposed on those whose developments actually generated the need for the facilities, the fee did not meet the statutory definition. According to the court, the "'passage of time between the collection of the fee and payment of the cost it is intended to defray,' belied the proposition that the need for those facilities . . . was generated by those required to pay the impact fee."[143]

This conclusion is perplexing, for later in the same opinion the court expressly stated that, without the prospect of connecting the water system to Lake Gaston (the project for which the WRRF had been initially imposed), "new developments or connections to the existing water system *would not have been possible*."[144] Thus, it appears that the WRRF could only have been imposed as a direct means of partially offsetting the impact of improvements to the water system, the need for which was manifestly created by new development. It is unclear why any delay between the imposition of the fee and the construction of the improvements made any difference—the fee was imposed only on those who added impact to the system to defray costs of future improvements substantially necessitated by the impact they generated. If this were not so, then the fee was nothing more than a revenue device, which the court expressly held that it was not.

The case is important for its demonstration that the court sees a distinction among fees, taxes, and proprietary fees. It is also important not only because it is one of the very few occasions upon which the court has ever

[143] *Id.* at 120, 400 S.E.2d at 526.

[144] *Id.* at 121, 400 S.E.2d at 527 (emphasis added).

found the existence of an implied power but also because *it marks the first and only time that the court has found an implied power to raise money*. It was only a few years ago that the court held that the authority to process rezoning applications did not carry with it the implied power to charge a *fee* for such processing.

It is important to keep in mind that any impact fee legislation and its implementation will have to be concerned with the takings cases, insofar as they deal with the constitutional issues raised by any involuntary exaction of property.[145]

16.404 2007 Amendments to Section 15.2-2317 *et seq.*

Amendments to section 15.2-2317 *et seq*. removed the standards required by *Rowe, Cupp, Nollan*, and *Dolan.*[146] Impact fee provisions enacted in 2007 also declined to follow the standards from those cases.[147] Thus, these impact fee provisions are of questionable constitutionality under both the federal and the Virginia Constitutions.

16.5 HISTORIC DISTRICTS

In addition to the other matters addressed specifically in the enabling legislation,[148] the General Assembly has expressly authorized counties and municipalities to enact ordinances for the preservation of historical sites and areas.[149]

Historical preservation legislation has been dramatically strengthened in the past several years by the inclusion of enhanced regulatory powers. Localities may identify historic landmarks within their boundaries "as established by the Virginia Board of Historic Resources" or consisting of any other buildings or structures "having an important historic, architectural,

[145] *See infra* ¶ 16.16 (regarding regulatory takings).

[146] These cases are discussed in paragraph 16.903 of this book.

[147] Sections 15.2-2328 and 15.2-2329 of the Virginia Code require localities to have created an urban transportation service district and adopted an impact fee ordinance by December 31, 2008 for those sections to apply.

[148] *See supra* ¶ 16.202.

[149] Va. Code § 15.2-2306.

archaeological or cultural interest,"[150] or any historic area[151] and defined as "areas of unique architectural value located within designated conservation, rehabilitation or redevelopment districts." The locality may identify such landmarks and create historic districts surrounding them.[152] However, designation of a town as a historic district by the Virginia Historic Landmarks Commission did not satisfy the provisions of the enabling statute, which require the designation of a historic landmark to enable the town to adopt a historic district ordinance. The locality may also designate a historic area as a historic district without identifying a specific historic landmark.[153]

Any locality that establishes or expands a local historic district pursuant to section 15.2-2306 must identify and inventory all landmarks, buildings, or structures in the areas being considered for inclusion in the proposed district. Before adopting an ordinance that establishes or expands a historic district, the locality must

> (i) provide for public input from the community and affected property owners in accordance with [section] 15.2-2204; (ii) establish written criteria to be used to determine which properties should be included within a local historic district; and (iii) review the inventory and the criteria to determine which properties in the areas being considered for inclusion within the proposed district meet the criteria.[154]

Local historic district boundaries may be adjusted to exclude properties along the perimeter that do not meet the criteria. The locality must also include only the geographical areas in a local historic district where a majority of the properties meet the criteria established by the locality. However, parcels of land that are contiguous to arterial streets or highways found by the governing body to be significant routes of tourist access to the locality or to designated historic landmarks or to those in a

[150] *Id.*

[151] Va. Code § 15.2-2201 (defining a historic area as "an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological or other features relating to the cultural or artistic heritage of the community, of such significance as to warrant conservation and preservation").

[152] *Worley v. Town of Washington*, 65 Va. Cir. 14 (Rappahannock 2004).

[153] *Covel v. Town of Vienna*, 78 Va. Cir. 190 (Fairfax 2009).

[154] Va. Code § 15.2-2306(C).

contiguous locality may be included in a local historic district even if the provisions of section 15.2-2306(C) are not met.

The locality may also provide for a "review board" to administer this ordinance. Given the permissive nature of this language, it also appears that the governing body may retain for itself the powers granted. Once a historic district has been properly created consistent with these enabling provisions (including its imposition according to the procedural requirements for the enactment of zoning ordinances), then certain significantly restrictive provisions may be applied to buildings and structures within them. First, the locality may require that "no building or structure, including signs, shall be erected, reconstructed, altered or restored . . . unless the same is approved by the review board or, on appeal, by the governing body as being architecturally compatible with the historic landmarks within the district."[155] The ordinance may provide height restrictions for new construction, with "authorized variations" approved by the planning commission or city council.[156] Further, and subject to the provisions outlined below preserving the landowner's right to dispose of his or her property, "no historic landmark, building or structure within any such historic district shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the review board" or, once again, upon appeal to the governing body, which rules "after consultation with such review board."[157] However, where a structure is deemed unsafe and ordered demolished by a local building official acting under authority granted pursuant to the Statewide Building Code, the building official's authority to demolish unsafe structures supersedes the demolition authority of a review board.[158]

The Attorney General has said that local architectural review boards may not dictate the types of materials or manner of construction of a building or structure and may not establish "building regulations" under section 36-97

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[155] Va. Code § 15.2-2306(A)(1).

[156] *See Owens v. City Council of Norfolk*, 78 Va. Cir. 436 (Norfolk 2009) (finding that variable height requirements in the historic district ordinance provided appropriate flexibility to the locality). Interestingly, the circuit court in *Owens* did not discuss how the uniformity requirements in section 15.2-2282 apply to the approved variable height scheme in Norfolk.

[157] Va. Code § 15.2-2306(A)(2). While a helpful tool for local governments, the review board can be a two-edged sword. *See* 1997 Report of the Attorney General 48 (a county must obtain the permission of a town's architectural review board before erecting temporary courthouse facilities at the county courthouse located in the town's historic district).

[158] Va. Att'y Gen. Op. No. 07-009 (2007).

of the Virginia Code.[159] This opinion is significant, as many of the disputes that arise in those localities have to do precisely with the material used in construction or restoration of structures and nothing else. If the Attorney General is correct, then there is no basis for the contest.

The locality is required to provide for appeals to the circuit court from any final decision upon application by the landowner, specifying the "persons entitled to appeal."[160] (This suggests that the locality can define who has standing, although it is improbable that the courts would permit a locality to *eliminate* persons with the kind of direct and pecuniary interest otherwise determined to have standing in Virginia. It is more likely that the locality could *expand* the range of those who may appeal.) The appeal must be by petition, setting forth the alleged illegality of the local action, and must be filed within 30 days after a final decision is rendered.[161]

When an appeal to the court is noted in accordance with these requirements, there is an automatic stay of the decision appealed from, unless the decision denies the right to raze or demolish a structure (insuring that the landowner may not destroy the historic structure pending the resolution of the appeal under the protection of the stay).[162] The court may reverse or modify the decision below if it finds that the decision was contrary to law or was arbitrary and an abuse of discretion. It may also, of course, affirm the decision of the governing body.[163] The "fairly debatable" test[164] applies to decisions of local government regarding certificates of appropriateness under the historic district statute.[165]

Although these provisions are clearly intended to assist in the preservation of historic landmarks, the General Assembly has not seen fit to permit localities simply to forbid a landowner from taking action with regard to a landmark that is inconsistent with the purposes of the law. Rather, it is more accurate to say that it has simply set up significant roadblocks along the path of a determined owner who is intent on taking action in any event.

[159] 1996 Report of the Attorney General 139.

[160] Va. Code § 15.2-2306(A)(3).

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *See infra* ¶ 16.702(B).

[165] *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004).

Thus, in addition to appeal, the landowner actually possesses an absolute right to raze or demolish a historic structure despite local opposition if

> (i) he has applied to the governing body for such right, (ii) the owner has for the period of time set forth in the same schedule hereinafter contained and at a price reasonably related to its fair market value, made a bona fide offer to sell the landmark, building or structure, and the land pertaining thereto, to the locality or to any person, firm, corporation, government or agency thereof, or political subdivision or agency thereof, which gives reasonable assurance that it is willing to preserve and restore the landmark, building or structure and the land pertaining thereto, and (iii) no bona fide contract, binding upon all parties thereto, shall have been executed for the sale of any such landmark, building or structure, and the land pertaining thereto, prior to the expiration of the applicable time period set forth in the time schedule hereinafter contained.[166]

16.6 COMPREHENSIVE PLANNING

16.601 In General. All localities are required to develop a comprehensive plan for the development of their communities. The plan must be reviewed by the locality at least once every five years.[167] Comprehensive plans have been mandatory in Virginia since 1980.[168] Indeed, a zoning ordinance adopted after the 1980 legislation without one is void ab initio.[169] In land use decision-making, it has become increasingly important to adhere closely to a good comprehensive plan and to develop a sound factual basis for individual decisions.

The General Assembly has delegated the development and administration of the plan to the planning commission, which the locality must create "in order to promote the orderly development of the locality and

[166] Va. Code § 15.2-2306(A)(3).

[167] Va. Code § 15.2-2230.

[168] Va. Code § 15.2-2223.

[169] *Town of Jonesville v. Powell Valley Village L.P.*, 254 Va. 70, 487 S.E.2d 207 (1997).

its environs."[170] Localities may participate in a joint local commission under section 15.2-2219 of the Virginia Code.[171]

It is difficult to determine what constitutes a good plan and what does not. A "good" comprehensive plan may be one that treats similarly situated properties in a similar manner, is grounded in sound planning principles, and recognizes the relationship between market forces and ideal circumstances. Plans range in quality from the sublime to the ridiculous and are honored more in some places than in others. They remain important, however, as the framework within which individual decisions are made.

Comprehensive plans are perhaps the single most important land use control device available to local governments to guide ultimate decision-making in land use matters. Conformity to comprehensive plans in individual zoning decisions can provide the single strongest and most defensible basis for action by substantially removing the potential of discrimination against individual landowners.[172] Substantial adherence to a comprehensive plan provides a larger context for the individual decision and can support the locality's claim of reasonableness in achieving legitimate public goals.

16.602 Nature of the Plan and Its Implementation. Comprehensive plans must take into consideration present and future land uses, existing and planned public utilities and facilities,[173] and the purposes for which land use ordinances are adopted.

Comprehensive plans are general in nature, designating

> the general or approximate location, character, and extent of each feature, including any road improvement and any transportation improvement, shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.[174]

[170] Va. Code § 15.2-2210.

[171] *Id.*

[172] *See, e.g.*, *Town of Vienna Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978).

[173] For instance, section 15.2-2230.1 of the Virginia Code requires that any public facilities study undertaken by a planning commission be forwarded to utilities and cable operators.

[174] Va. Code § 15.2-2223(A).

In other words, they are general programs for the physical development of the locality, intended to provide advance planning effectively and fairly to meet the purposes for which land use ordinances may be adopted.

Comprehensive plans may be implemented through the various land use tools available to localities, including an official map, a capital improvements program, a subdivision ordinance, a zoning ordinance, a zoning district map, a mineral resources map, a recreation and sports resource map, and a map of dam break inundation zones.[175]

16.603 Urban Development Areas. Section 15.2-2223.1 of the Virginia Code, as amended in 2012, permits any locality to include in its comprehensive plan provisions for the designation of "urban development areas" (UDAs).

Section 15.2-2223.1 requires that comprehensive plans of localities provide UDAs that are appropriate for development at a density of at least

> four single-family residences, six townhouses, or 12 apartments, condominium units, or cooperative units per acre, and an authorized floor area ratio of at least 0.4 per acre for commercial development, any proportional combination thereof, or any other combination or arrangement that is adopted by a locality in meeting the intent of this section.

UDAs must be sufficient to accommodate projected growth for a period of at least 10, but not more than 20, years. The maximum planning horizon is 40 years for UDAs in counties with the urban county executive form of government and existing or planned rail transit. The boundaries and size of each UDA must be reexamined every five years and revised if necessary in conjunction with the review of the comprehensive plan and in accordance with the most recent available population growth estimates and projections.

All comprehensive plans must incorporate principles of "traditional neighborhood design" in urban development areas.

16.604 Limitations on the Usefulness of the Plan. A comprehensive plan is not a land use ordinance, and it is not self-effectuating.

[175] Va. Code § 15.2-2224(B). Beginning in 2013, section 15.2-2223.2 of the Virginia Code requires comprehensive plans for Tidewater localities to include the Virginia Institute of Marine Science's coastal resource management guidance.

Indeed, the Virginia Supreme Court has often referred to the comprehensive plan as merely an advisory "guide" that does not bind the locality.[176]

In the past, the court has treated the plan as something more, by effectively requiring the locality to upzone to its plan.[177] The court has ruled against localities even when the action taken was consistent with the plan but such considerations were trumped by other concerns. In *Matthews v. Board of Zoning Appeals*,[178] for example, the court invalidated an "interim zoning ordinance" that placed all of Greene County into a single rural residential district. Despite the fairly extensive planning that underlay the ordinance, the court held that the very fact that the final zoning ordinance adopted by the board of supervisors contained eight districts demonstrated the arbitrary, capricious, and unreasonable nature of a single district.[179]

16.605 Section 15.2-2232 Review. There is a significant exception to the proposition that plans have only an advisory effect in directing land use decisions. In one area, the plan has a binding effect and becomes the "Zoning Ordinance" for *public* uses. According to section 15.2-2232 of the Virginia Code, the comprehensive plan, once approved, controls the general or approximate location, character, and extent of each public facility or utility feature shown on the plan. Thereafter, unless such a facility or feature is in fact shown on the plan or is exempt from review under one of several statutorily specified categories, or unless the locality determines that the facility or feature is in substantial accord with the plan even if not expressly identified, then

> no street or connection to an existing street, park or other public area, public building or public structure, public utility facility or public service corporation facility other than a railroad facility or an underground natural gas or underground electric distribution facility of a public utility

[176] *Board of Supervisors v. Safeco Ins. Co.*, 226 Va. 329, 310 S.E.2d 445 (1983); *Board of Supervisors v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980); *Board of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974); *Rohr v. Board of Supervisors*, 75 Va. Cir. 167 (Fauquier 2008); *Guest v. King George Cnty. Bd. of Supervisors*, 42 Va. Cir. 348 (King George 1997).

[177] *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Board of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975).

[178] 218 Va. 270, 237 S.E.2d 128 (1977).

[179] *See also Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Board of Cnty. Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

> . . . whether publicly or privately owned, shall be constructed, established or authorized, unless and until the general location or approximate location, character, and extent thereof has been submitted to and approved by the commission as being substantially in accord with the adopted comprehensive plan or part therof.[180]

The comprehensive plan also must show "designated transportation corridors of statewide significance" that appear in the Statewide Transportation Plan and are within the locality's boundaries.[181]

Where a feature is not mentioned in the comprehensive plan, the local planning commission is required to determine whether the feature would be substantially in accord with the plan.[182] However, where the comprehensive plan contemplates a feature in a certain location but the feature is proposed to be constructed in an entirely different location, the proposal does not meet the "general or approximate location" requirement of the plan and is the "functional equivalent of no feature at all."[183]

Similarly, the widening, narrowing, extension, enlargement, vacation, or change of use of streets or public areas must be approved as in conformance with the plan.[184] The plan thus becomes the means by which the governing body controls the general location, character, and extent of all public infrastructure.[185]

The decisions of the planning commission can be reversed by the local governing body:

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[180] Va. Code § 15.2-2232(A).

[181] *Id.*

[182] *Board of Supervisors v. Town of Purcellville*, 276 Va. 419, 441, 666 S.E.2d 512, 523 (2008).

[183] *Id.* (finding that school contemplated for construction in northeast corner of the UGA but proposed for construction in the northwest corner was not contemplated as a feature at all).

[184] Va. Code § 15.2-2232(C).

[185] The power to control infrastructure location and extent is perhaps of planning interest to localities that control their own utility extensions. In some jurisdictions, however, utilities are supplied by private, public and private, public service companies, or by quasi-independent authorities. Since all entities are subject to section 15.2-2232, the comprehensive plan is a valuable means of ensuring at least that capital infrastructure does not go beyond what the governing body has planned.

> The commission shall communicate its findings to the governing body, indicating its approval or disapproval with written reasons therefor. The governing body may overrule the action of the commission by a vote of a majority of its membership. Failure of the commission to act within sixty days of a submission, unless the time is extended by the governing body, shall be deemed approval. The owner or owners or their agents may appeal the decision of the commission to the governing body within ten days after the decision of the commission. The appeal shall be by written petition to the governing body setting forth the reasons for the appeal. The appeal shall be heard and determined within sixty days from its filing. A majority vote of the governing body shall overrule the commission.[186]

A third party, such as an abutting landowner, has no right to seek judicial review of the "2232" decision of the planning commission or governing body.[187]

There are exceptions to a "2232" review for those items that are determined by appropriate procedures to be already in the plan, to constitute normal utility service extensions and road work, or to be identified within, but not be the entire subject of, a subdivision or site plan or of a conditional zoning proffer.[188]

Comprehensive plan conformity is not universal control.[189] However, there is little doubt that the requirement to comply with a local

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[186] Va. Code § 15.2-2232(B); *see Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995) (holding that section 15.2-2232(B) does not require the governing body to make specific written findings when it grants a special use permit for a use that is not shown on the comprehensive plan); *Guest v. King George Cnty. Bd. of Supervisors*, 42 Va. Cir. 348 (King George 1997) (holding that neither a formal "456" review nor specific written findings are required to overrule a planning commission's conclusion that the rezoning was not in accord with the comprehensive plan).

[187] *Miller v. Highland Cnty.*, 274 Va. 355, 650 S.E.2d 532 (2007).

[188] Va. Code § 15.2-2232(C), (D). There are certain special cases even here, however, because high power transmission lines that have undergone review by the State Corporation Commission are also exempt from this requirement. Va. Code § 56-46.1. *Virginia Elec. & Power Co. v. Citizens for Safe Power*, 222 Va. 866, 284 S.E.2d 613 (1981). On any application for a "2232" review of a telecommunications facility, the planning commission must act within 90 days (unless the governing body extends the period for no more than 60 days or the applicant agrees to an extension) or the application is deemed approved. Va. Code § 15.2-2232(F).

[189] In *Myers v. Prince William County Board of Zoning Appeals*, 21 Va. Cir. 547 (Prince William 1989), the court held that an extension of a sewer line through an area of the county in which the comprehensive plan then forbade the extension of the sewer on a run of several thousand feet to property zoned to require public

comprehensive plan is a significant source of local authority over public facilities to the extent authorized in the enabling legislation.[190]

While limiting utility extensions may help control growth, there is no authority in the Virginia Code that allows a locality to place a complete moratorium on growth. Therefore, it follows that comprehensive plans must accommodate public services in an appropriate timeframe.

The use of a comprehensive plan to limit residential, commercial, office, and industrial uses by limiting the extent of public sewer and water facilities has been put into doubt. The jurisdictional area of a local public utility authority as reflected in its revenue bond agreements will supersede limits on the extension of utilities incorporated into a comprehensive plan.[191]

16.7 UPZONINGS

16.701 In General. After a comprehensive plan has been established and a zoning ordinance enacted to provide the primary means for implementing the policies of the plan, focus shifts to the proper classification of individual parcels of land. Although the majority of Virginia localities still maintain a fairly simple zoning classification system, an increasing number use numerous subclassifications of major use groups that incorporate detailed regulations for development in those classifications.[192]

Probably most land use cases appearing before governing bodies involve upward changes from one use classification to another or the grant of a special use permit. "Upzonings" are legislative decisions that increase the intensity of development permitted on a given parcel of land.

sewer was not subject to "456" review since the line was not a public utility facility and, alternatively, was a "normal service extension." *See also Kernan v. Fairfax Cnty. Water Auth.*, 70 Va. Cir. 212 (Fairfax 2006).

[190] In *Board of Supervisors v. Washington, D.C.*, 258 Va. 558, 522 S.E.2d 876 (1999), the court reversed the trial court and held that telecommunications facilities constructed by a private commercial owner on its leasehold on land within the rights-of-way of VDOT are not exempt from the zoning authority of the locality in which that land is located, pursuant to its powers under section 15.2-2232.

[191] *See Schwartz v. Board of Supervisors*, 53 Va. Cir. 163 (Fairfax 2000); *Feldman v. Board of Supervisors*, Law No. 29409 (Fairfax County Cir. Ct. 1973).

[192] The Fairfax County Zoning Ordinance, for example, is as large as the rest of the Fairfax County Code. Many uses are permitted only by special use permit or special exception.

16.702 Presumption of Validity.

A. In General. The basic structure of an upzoning case is deceptively straightforward. Land use decisions by local governing bodies are legislative actions enjoying a presumption of validity, and those actions will not be lightly overturned by the courts. Although certain aspects of this process have been simplified or clarified over the last 20 years, the rules of litigation in a land use case have been reiterated in decisions reaching back decades. The Virginia Supreme Court has stated that

> [t]he legislative branch of a local government in the exercise of its police powers has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on [the person] who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained. . . . The presumption of reasonableness, however, is not absolute. Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness.[193]

Not only the legislature's but also the trial court's findings in a land use decision are entitled to deference by higher reviewing authority, for the court's decision itself "carries a presumption of correctness," and the Supreme Court "still accord[s] the action a presumption of legislative validity in [its] review."[194] In any challenge to legislative action, the challenger must overcome the presumption at every level.

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[193] *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 658-59, 202 S.E.2d 889, 892-93 (1974) (citing *Board of Cnty. Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959)).

[194] *City of Manassas v. Rosson*, 224 Va. 12, 17-18, 294 S.E.2d 799, 802 (1982), *appeal dismissed*, 459 U.S. 1166 (1983); *see also Board of Supervisors v. International Funeral Servs., Inc.*, 221 Va. 840, 275 S.E.2d 586 (1981); *Board of Supervisors v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980); *Board of Supervisors v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980); *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Fairfax Cnty. v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881 (1937).

B. "Fairly Debatable" Standard. If the challenger produces evidence that the locality's action was arbitrary, capricious, or unreasonable, the locality must respond with countervailing evidence that its decision was in fact reasonable. If, upon weighing the parties' evidence, the court finds the governmental decision to have been "fairly debatable," that is, one upon which the evidence would lead objective and reasonable persons to reach different conclusions, *the legislative action must prevail regardless of the intrinsic merit of the landowner's proposal*.[195]

In a frequently cited formulation, the court has said that an issue may be said to be fairly debatable "when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions."[196]

C. Reasonableness of Underlying Zoning. While the court has continued to articulate the "fairly debatable" standard in the foregoing terms, it has added a gloss to that standard by refocusing judicial inquiry from the reasonableness *vel non* of the governing body's denial of an upzoning to the prima facie question of whether the underlying zoning of the property after the governing body's action in the case remains reasonable without regard to consideration of the landowner's application.[197] In *Miller & Smith, Inc.*, for example, the court affirmatively blessed the practice of granting a "lesser included zoning," whereby the governing body is permitted, upon denial of an application for a particular zoning classification, to rezone property to some *other* category that it deems reasonable, which is less intense than the category for which notice was given. In that case, the applicant had sought rezoning to Fairfax County's C-3 office classification, and the trial court had upheld the board's refusal to approve a C-3 classification. The board had rezoned the land to its R-5 district, permitting single family homes. The trial court's order, however, had expressly found

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[195] *Board of Supervisors v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991); *see also Ames v. Town of Painter*, 239 Va. 343, 348, 389 S.E.2d 702, 704 (1990) (holding that, once the presumption of reasonableness has been thrown into doubt, "[t]he governing body is not required to go forward with evidence sufficient to persuade the fact-finder of reasonableness by a preponderance of the evidence. It must only produce evidence sufficient to make the question 'fairly debatable,' for the legislative act to be sustained."); *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982).

[196] *County Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 227, 377 S.E.2d 368, 371 (1989) (quoting from *Board of Supervisors v. Lerner*, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980) (citations omitted)); *see also Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Guest v. Board of Supervisors*, 42 Va. Cir. 348 (King George 1997) (noting that the evidence was fairly debatable).

[197] *Board of Supervisors v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991); *City Council v. Harrell*, 236 Va. 99, 372 S.E.2d 139 (1988) (involving a special use permit, but applicable to rezoning decisions as well).

that both R-5 and R-8 zoning were reasonable on the evidence and forbade the board to refuse a rezoning application to either classification. The Virginia Supreme Court reversed and held that the board had only to consider the R-5 classification. "When two reasonable zoning classifications apply to a property, the legislative body (the board of supervisors in this case) has the legislative prerogative to choose between those reasonable zoning classifications."[198] This is true even if the classification that the board ultimately chooses is not the *most* appropriate.[199] If the underlying zoning is reasonable ("fairly debatable"), then it does not matter whether the landowner's application was profoundly reasonable or even the best use of the property.

Thus, it has become a part of the landowner's prima facie case to allege and prove that the underlying zoning of its property is unreasonable, as well as to allege that the decision of the governing body was itself arbitrary, capricious, and unreasonable.[200] This is not a hypothetical effort. In *City Council v. Wendy's of Western Virginia, Inc.*,[201] Wendy's had sought commercial rezoning of a parcel of property located in a 40-acre residentially zoned subdivision. The property was located on a major road, and although there were approximately thirty-seven homes in the subdivision, development in the area along the road had changed to a mix of commercial and industrial uses. The comprehensive plan, however, contemplated not commercial but industrial development of the land in the future. When the council denied the commercial rezoning, Wendy's sued. The trial court looked closely at the underlying zoning of the property and determined that residential uses were no longer reasonable for the property. It remanded the case to the council with a finding that the requested commercial rezoning was reasonable. In reversing, the Virginia Supreme Court held that the trial court had erred on the underlying zoning issue, for the area remained a stable residential community, and the city was reasonable in trying to protect a diminishing stock of land for future industrial uses. The court reiterated the fundamental point that even assuming the reasonableness of the rezoning

[198] *Miller & Smith, Inc.*, 242 Va. at 384, 410 S.E.2d at 650.

[199] *Id.*

[200] Regardless of the presumption of validity, when a court thinks that a landowner has been treated wrongly, it will remedy the situation without much attention to the technical niceties it has otherwise created. In *Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995), neither the trial court nor the Virginia Supreme Court so much as mentioned the validity of the underlying zoning as they reached past that question to strike down illegal proffer exactions. *See supra* ¶ 16.304 (further discussion of this case).

[201] 252 Va. 12, 471 S.E.2d 469 (1996).

applied for, "when, as here, the existing zoning and the proposed zoning are both appropriate for the property in question, the legislative body has the prerogative to choose the applicable classification, not the property owner or the courts."[202]

16.703 Judicial Treatment of Upzoning Denials. While it is impossible here to detail all of the conditions and circumstances that can make an issue fairly debatable, it is possible to identify certain common characteristics of rezoning cases and those factors that have been enumerated by the Virginia Supreme Court over the years.

In the three decades following World War II, the court was plainly unwilling to support denials of rezonings on the grounds that public facilities such as roads, schools, fire stations, sewer and water systems, and the like were, or would be, insufficient to bear the weight of additional development. The high water mark of this approach was probably *Board of Supervisors v. Allman*,[203] where the court noted explicitly in reversing a Fairfax zoning denial that "[a]s a practical matter, and because of ever-existing problems of finance, the construction and installation of necessary public facilities usually follow property development and the demand by people for services."[204] *Board of Supervisors v. Lerner*[205] and other cases discussed below significantly weakened the impact of *Allman* but did not overrule it. Thus, the availability of services such as roads, water, sewer, and schools remains relevant to zoning decisions, but this availability does not appear to be as dispositive as it once was.

Other cases indicate that the court will not support denials of rezonings where it appears that the purpose of the denial is to favor one economic interest over another.[206]

While the zoning of neighboring or adjacent land is significant to upzoning determinations, it is not dispositive. The court has looked closely at

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[202] *Id.* at 18, 471 S.E.2d at 473.

[203] 215 Va. 434, 211 S.E.2d 48 (1975).

[204] *Id.* at 439, 211 S.E.2d at 51; *see also Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975) (a similarly consequential case).

[205] 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980).

[206] *See Board of Supervisors v. De Groff Enters., Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973); *Board of Zoning Appeals v. Columbia Pike, Ltd.*, 213 Va. 437, 192 S.E.2d 778 (1972); *Board of Cnty. Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958).

surrounding classifications when it appears that an applicant has been subject to discriminatory zoning decisions.[207] Localities have significant leeway, however, to establish lines separating commercial from other uses, especially where that line is clearly and justifiably established in the comprehensive plan.[208]

The court will probably not sustain a denial of a rezoning solely on the basis of citizen opposition, although public sentiment may properly reflect legitimate local concerns about one or more of the eight purposes of zoning ordinances. The court has expressly stated that "while the views of persons owning property in the neighborhood should be considered, property owners have no *vested right* to continuity of the zoning of the general area in which they reside. The mere purchase of land does not create a right to rely on existing zoning."[209]

While it is true that the Virginia courts have not shown any particular deference to citizen opposition without more, the Fourth Circuit, in *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*,[210] took a different approach in the context of the location of cellular towers. In evaluating the bases on which the city council could properly have denied AT&T's application for permission to install certain towers, the court issued a remarkable paean to the popular will and its impact on land use decision-making:

> The record here consists of appellees' application, the Planning Department's report, transcripts of hearings before the Planning Commission and the City Council, numerous petitions opposing the application, a petition supporting the application, and letters to members of the Council both for and against. Appellees correctly point out that both the Planning Department and the Planning Commission recommended approval. In addition, appellees of course had numerous experts touting both the necessity and the minimal impact of towers at the Church. Such

[207] *See, e.g.*, *Vienna Town Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978); *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Board of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975).

[208] *Board of Supervisors v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983).

[209] *Kohler*, 218 Va. at 976, 244 S.E.2d at 547-58 (emphasis in original, footnote omitted).

[210] 155 F.3d 423 (4th Cir. 1998).

> evidence surely would have justified a reasonable legislator in voting to approve the application, and may even amount to a preponderance of the evidence in favor of the application, but the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views—at the Planning Commission hearing, through petitions, through letters, and at the City Council meeting—amounts to far more than a "mere scintilla" of evidence to persuade a reasonable mind to oppose the application. Indeed, we should wonder at a legislator who ignored such opposition. In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy. The district court dismissed citizen opposition as "generalized concerns." Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected this scornful approach.[211]

It is not known whether the Virginia Supreme Court would follow such an approach, but even if citizen opposition alone is not a valid basis for a decision made by a governing body, it may form the basis of such decisions in a unique class of cases, for zoning decisions may be made directly subject to a plebiscite. The court has upheld a provision of the City of Chesapeake charter that authorized a referendum on a zoning (or indeed any) ordinance.[212] The court has left unclear how an aggrieved landowner might challenge an adverse result in such a referendum, but it appears that the challenge would be made in the same circumstances and in the same manner as if the decision had been made by the governing body.

While the locality cannot use its zoning power to depress the value of land in order to lower costs of a future public taking, diminution in value of

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[211] *Id.* at 430-31 (citation omitted).

[212] *R.G. Moore Bldg. Corp. v. Committee for Repeal of Ordinance R(C)-88-13*, 239 Va. 484, 391 S.E.2d 587 (1990).

property resulting from a good faith denial of rezoning does not *alone* constitute basis for reversal.[213]

Zoning ordinances cannot be "exclusionary" in their effect, freezing out low- and middle-income residents in the interests of more affluent citizens,[214] nor may a rezoning be denied in order to protect a business from competition.[215]

Finally, protection of purely aesthetic values does not, by itself, appear a permissible basis for denial of rezonings, though it can presumably be added to other factors to create fair debatability about a particular decision.[216]

16.704 "Spot Zoning."

Citizen suits frequently challenge zoning actions as "spot zoning." The term is generally used to describe a zoning that is simply different from surrounding classifications. However, the Virginia Supreme Court has upheld what might look very much like spot zoning as a valid exercise of legislative discretion where the action also serves some identifiable public interest. Spot zoning is only objectionable where a court can find that it has no public benefit and hence is effected "solely to preserve the private interests of one or more landowners [rather than] to further the welfare of the entire county [which simultaneously benefits private interests.]"[217] In *Barrick v. Board of Supervisors*,[218] the court held that failure to comply with the comprehensive plan does not in and of itself support a finding of spot zoning. Rather, complainants must produce evidence that the zoning is solely for the benefit of private interests by focusing on the legislative purpose of the action. In *Barrick*, the complainants had failed to produce any evidence on

[213] *See, e.g.*, *Gayton Triangle Land Co. v. Board of Supervisors*, 216 Va. 764, 222 S.E.2d 570 (1976); *see also City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1*, 239 Va. 412, 389 S.E.2d 312 (1990).

[214] *Board of Cnty. Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959); *Kansas-Lincoln, L.C. v. Arlington Cnty. Bd.*, 66 Va. Cir. 274 (Arlington 2004).

[215] *Board of Cnty. Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958).

[216] *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969).

[217] *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967).

[218] 239 Va. 628, 391 S.E.2d 318 (1990).

the point, and it appears that this will be difficult to do in all but the most extraordinary circumstance.[219]

In practice, most Virginia zoning actions take place for the benefit of the particular applicant, and because most localities use the "floating zone" concept, whereby a particular zoning district "floats" in the air until it is imposed upon some parcel of ground, spot zoning challenges will rarely prevail. The spot zoning argument has a chance of success only in the exceptional case in which there is *no* arguable public purpose or benefit.

16.705 Board of Supervisors v. Lerner.[220] Perhaps the principal concern expressed by local governments in growing areas has been their difficulty in financing the cost of infrastructure required to support the growth that has generated the need for it. The court has historically taken the view that the locality must find the means of raising the necessary revenue and that it must do so largely from resources other than from the developer.

It once seemed settled that localities could not time or phase development to coincide with the availability of public facilities.[221] In *Board of Supervisors v. Allman*,[222] the court reversed a rezoning denial in large part because the Fairfax County Board of Supervisors had attempted to phase development of the landowner's property. The county had refused to upzone the property (for what the court thought to be unacceptable and discriminatory reasons) to a category contemplated by the then-existing Fairfax comprehensive plan. The court found that the board had in fact denied the Allman application "primarily because of its timing, rather than because of its impact on public facilities," which were then available or would become so in the reasonably foreseeable future.[223] The court then added its dictum that these facilities follow, and do not precede, development. Denial, therefore, was an "unjustifiable refusal" to increase the permissible development density of certain property to the category established by the duly adopted comprehensive or master land use plan.[224] This result was

[219] *See Guest v. Board of Supervisors*, 42 Va. Cir. 348 (King George 1997) (finding no spot zoning).

[220] 221 Va. 30, 267 S.E.2d 100 (1980).

[221] *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Board of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975).

[222] 215 Va. 434, 211 S.E.2d 48 (1975).

[223] *Allman*, 215 Va. at 440, 490, 211 S.E.2d at 52.

consequential because of the extent to which the court went to find the existence of public facilities adequate to support the Allman proposal.

In *Board of Supervisors v. Lerner*,[225] the trial court specifically found *Allman* to be dispositive. The landowner had applied to rezone a large parcel of land in Loudoun County from its existing planned industrial classification to a category that permitted construction of a large regional shopping center. This request was denied, and the trial court reversed the denial, faithfully tracking the language in *Allman* with respect to the present availability of public facilities.

The Loudoun County comprehensive plan anticipated that a shopping center would be feasible for the Lerner site, but only on the condition that certain population densities be reached in the surrounding market area. On appeal, the parties did not focus on whether the facilities existed to service Lerner's shopping center but on whether the county's method of interpreting its comprehensive plan should prevail over the developer's interpretation. The county's position was that the development of the center was premature under the plan; the developer contended that the minimum population required by the plan already existed.

The Virginia Supreme Court reversed almost without mention of the availability of infrastructure and held that the county's interpretation of its plan (that "minimum population to support" was not the same as "minimum population") was entitled to a presumption of reasonableness and that it was fairly debatable whether the county or the developer was correct. Thus, the county prevailed on the basis of its interpretation and application of its comprehensive plan alone. The zoning itself was barely mentioned.

While some have thought *Lerner* to be a timed development case that stands in direct contrast to *Allman* and *Williams*, there are enough differences to establish certain ground rules for the phasing of development over time. First, the decision to phase development should be expressed in the plan itself[226] and may not be so vague as to permit discriminatory application. Second, the actual timing of the development must be determinable by reasonably objective criteria. Even under the county's view of its plan in

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[224] *Id.* at 445, 211 S.E.2d at 55.

[225] 221 Va. 30, 267 S.E.2d 100 (1980).

[226] *But see Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975) (finding such expression was insufficient).

Lerner, a regional shopping center would have been proper in due time, once conditions in the plan were met. This was not a case, therefore, where the locality established artificial or impermissible bases for evaluation of the ultimate propriety of the planned land use. What this suggested, for the first time, was that the plan must be based on some "fairly debatable" grounds, and *Lerner* may foreshadow a time when the fundamental dispute will be over the reasonableness of the comprehensive plan itself rather than the individual rezoning decision ostensibly at issue. Third, the plan must likely provide the means for the locality to absorb, in reasonable measure, its "fair share of growth."[227] Fourth, the event upon which the approval of the regional mall was dependent was not the extension of some public facility that the governing body might withhold and thereby impose a moratorium but, rather, an external event—the attainment of a certain population necessary to support the mall. The existence of that population was largely beyond the direct control of the local government.

One last point may be noted. Contrary to the court's increasing emphasis on the significance of the underlying zoning of the land, there was absolutely no discussion in *Lerner* of the reasonableness of that zoning. The *Lerner* property was zoned to presumably valuable and defensible light industrial uses for which public facilities were already available. Had the court concluded that the existing industrial zoning was reasonable under the analysis that it later developed in *Board of Supervisors v. Jackson*[228] and *Board of Supervisors v. International Funeral Servs, Inc.*,[229] then the rest of its reasoning with respect to the significance of the comprehensive plan would have been surplusage. Some suggest that *Lerner* is valuable to the local government precisely because the court chose a broader basis for its ruling.

Lerner does not stand alone. In *City Council v. Wendy's of Western Virginia, Inc.*,[230] the court cited *Lerner* as it held that the council was not obligated to upzone property to a *commercial* category when it was residential land planned for future industrial uses.

[227] *See Board of Cnty. Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

[228] 221 Va. 328, 269 S.E.2d 381 (1980).

[229] 221 Va. 840, 275 S.E.2d 586 (1981).

[230] 252 Va. 12, 471 S.E.2d 469 (1996).

16.706 *Board of Supervisors v. Jackson*[231] and *Board of Supervisors v. International Funeral Servs., Inc.*[232] Since *Lerner*, the court has decided several cases that refine the traditional tests to be applied in zoning litigation, substantially strengthening the presumption of legislative validity upon which local government defenses depend and enhancing the locality's ability to protect land use decisions.

As noted above in the discussion of the "fairly debatable" standard, the court has now plainly said that the initial inquiry in any zoning case is whether the *existing* zoning of the subject land is reasonable and not whether the landowner's alternative choice is equally or more so.[233] This shift more clearly forces the landowner to assume the burden of proving the unreasonableness of the existing zoning than was once the case. In *International Funeral Servs., Inc.* and *Jackson*, the court held that an applicant for rezoning bears a "threshold burden" to demonstrate that the existing zoning of the land is no longer reasonable or appropriate. While this notion had perhaps been stated or subsumed in the general tests articulated by the court, these cases clarified the principle that if the existing zoning is reasonable, then that alone will suffice to sustain the local decision to deny an upzoning or to upzone to some other category than that sought by the landowner but which is itself reasonable.[234]

16.707 Demurrer of Claim That Rezoning Decision Was Arbitrary, Capricious, or Unreasonable. It is generally thought that an allegation that a rezoning decision was arbitrary, capricious, and unreasonable is essentially nondemurrable, because it is so thoroughly a fact-dependent inquiry.

This rule, while generally correct, may not be without exception, where the pleadings themselves at the demurrer stage fail to demonstrate the unreasonableness of the legislative decision, or the ground asserted for the unreasonableness is simply insufficient as a matter of law. For example,

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[231] 221 Va. 328, 269 S.E.2d 381 (1980).

[232] 221 Va. 840, 275 S.E.2d 586 (1981).

[233] *City Council v. Harrell*, 236 Va. 99, 372 S.E.2d 139 (1988).

[234] *See also Board of Supervisors v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991) (finding that, presented with two issues, both of which are reasonable, the legislative body may choose between those uses, even though one use may have been the more appropriate, or even the most appropriate, use for the land); *City of Covington v. APB Whiting, Inc.*, 234 Va. 155, 360 S.E.2d 206 (1987).

in *Concerned Taxpayers v. County of Brunswick*,[235] the court affirmed dismissal on demurrer of a zoning challenge based upon the locality's asserted failure to comply with the provisions of section 15.2-2223 requiring the location of recycling centers to be shown on a comprehensive plan[236] and section 15.2-2232 involving the legal status of the plan. The court concluded that even if those sections were not complied with, such failure alone could not vitiate a zoning decision. Where the complainants challenged the reasonableness of the ordinance on environmental grounds, however, alleging that the county had failed to give adequate consideration to those grounds, the court reversed the lower court's dismissal, stating:

> A demurrer does not permit the trial court to evaluate and decide the merits of the claim set forth in a bill of complaint or a motion for judgment, but only tests the sufficiency of the factual allegations to determine whether the pleading states a cause of action. . . . Until it has heard evidence in this case, the trial court cannot determine whether the Board's decision is "fairly debatable."[237]

Similarly, one circuit court has dismissed a case on demurrer where the complainant failed to allege facts sufficient to show how minor, technical noncompliance with the notice requirements of section 15.2-2204 and failure to adhere strictly to the comprehensive plan was unreasonable.[238]

Another Virginia circuit court has held that if the complainant does allege facts sufficient to put reasonableness into question, the locality must then "allege facts showing evidence of reasonableness in [its] answer."[239]

16.708 Remand to Governing Body. When the locality does lose, it is clear that circuit courts do not have the authority to zone property.[240] Therefore, if a court finds for the plaintiff and strikes down the local decision,

[235] 249 Va. 320, 455 S.E.2d 712 (1995).

[236] *Id.* (decided under prior law; the statute has not required that recycling centers be shown on the comprehensive plan since 1996).

[237] *Id.* at 327-28, 455 S.E.2d at 716.

[238] *See Rohr v. Board of Supervisors*, 75 Va. Cir. 167 (Fauquier 2008).

[239] *See Clark v. Town of Middleburg*, 26 Va. Cir. 472, 475 (Loudoun 1990).

[240] *Board of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *see also Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971).

it must then determine what zoning classifications the evidence has shown to be reasonable and remand the case to the governing body with instructions to consider rezoning the property to one or the other of those classifications within a period of time, generally 90 days. Should the governing body fail to act within that period, the court then issues a final injunction prohibiting it from interfering with the use of the property in any of the categories deemed reasonable on remand. The property can therefore end up "zoned" to more than one use classification.[241] If the locality has already taken the course of reasonably rezoning the land, the probability of this result is diminished and the chances of successful defense for the locality are increased.

16.8 DOWNZONINGS

16.801 In General. Downzoning is a reduction in formerly permitted land use intensity, as when a commercially zoned property is rezoned to permit only low intensity residential use. It may also mean, however, any action that reduces permitted intensity of development by right, such as textual amendments reducing permitted floor area ratio in a given zone or requiring a special use permit for a use that was formerly of right. Zoning ordinances are specifically permitted to allow a locality to "enter into a voluntary agreement with a landowner that would result in the downzoning of the landowner's undeveloped or underdeveloped property in exchange for a tax credit."[242]

Rezoning a property from a residential district to an industrial district is not a downzoning where there would be no decrease in land use intensity or density.[243]

16.802 Piecemeal Versus Comprehensive Downzoning. In a downzoning case, the threshold question is whether the action was "comprehensive" or "piecemeal." If the court finds the action to have been comprehensive, the traditional "fairly debatable" zoning rules apply to its consideration of the matter, and the locality will usually prevail if the issue is indeed fairly debatable.

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[241] *See, e.g.*, *City Council v. Swart*, 216 Va. 170, 217 S.E.2d 803 (1975).

[242] Va. Code § 15.2-2286(A)(11).

[243] *Board of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006).

In the case of a piecemeal downzoning, however, the standard is substantially modified to the material benefit of the landowner. Where the landowner can make a prima facie case by showing that "since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward shifts to the locality to demonstrate fraud, mistake, or changed circumstances justifying its course."[244]

In *Board of Supervisors v. Snell Constr. Corp.*,[245] the court said that a comprehensive downzoning enjoys a presumption of validity because it is adopted only "after a period of investigation and community planning" that lends predictability to the process. Piecemeal downzonings, however, do not satisfy this predictability test because they may be adopted "suddenly, arbitrarily, or capriciously." In *Snell*, the court found the downzoning to have been piecemeal where the ordinance was (i) initiated by the zoning authority on its own motion; (ii) addressed to a single parcel and an adjacent parcel; and (iii) reduced the permissible residential density below that recommended in the master plan.[246]

The factors considered by the *Snell* court to analyze the nature of the downzoning are not exhaustive. A court might find other defects to be piecemeal downzoning, and most efforts to downzone will be found to be piecemeal.[247] Indeed, it is unclear what can ever be a "comprehensive" downzoning. In *Aldre Properties, Inc. v. Board of Supervisors*,[248] the court ruled that the downzoning of one-third of the county, consistent with an amended comprehensive plan, was a *piecemeal* legislative decision. However, one of the interlocutory rulings of the Fairfax County Circuit Court in *Southern Iron Works v. County of Fairfax*[249] denied a challenge to a major

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[244] *Board of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981); *see also City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1*, 239 Va. 412, 389 S.E.2d 312 (1990); *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974). One circuit court has also ruled that a complaint alleging a piecemeal downzoning must allege that the downzoning only affected the plaintiff's land. *See Purcellville West, L.L.C. v. Loudoun Cnty. Bd. of Supervisors,* 75 Va. Cir. 284 (Loudoun 2008).

[245] 214 Va. at 658, 202 S.E.2d at 892.

[246] *Id.* at 658, 202 S.E.2d at 893.

[247] *See City of Virginia Beach v. Virginia Land Inv. Ass'n*, 239 Va. 412, 389 S.E.2d 312 (1990) (Justice Lacy concurring).

[248] Chancery No. 78463-A (Fairfax Cir. Ct. Mar. 22, 1984) (commonly referred to as the Occoquan Downzoning Case).

[249] This interlocutory ruling was not published. For subsequent proceedings in the case, see *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991).

Fairfax County downzoning as a piecemeal downzoning. The trial court reasoned that the downzoning, having been accomplished by a zoning text amendment, was inherently comprehensive because, as a text amendment, it necessarily applied to all land within the districts affected by the text change.

Similarly, in *City of Virginia Beach v. Virginia Land Investment Ass'n*,[250] the Virginia Beach "Green Line" downzoning, the court held that a downzoning of some 3500 acres of Virginia Beach was piecemeal and not comprehensive, even though the parcels affected represented 25 percent of the city's land zoned for development. A large portion of the rezoned land consisted of a single parcel, 80 percent of which was undevelopable marsh-lands, and the entire area rezoned constituted no more than two percent of the city's land area. The pattern of properties selected by a newly elected city council for downzoning was, according to both the trial court and the Virginia Supreme Court, indecipherable and smacked of discriminatory purpose or effect.

Despite these qualifications, *Virginia Land Investment Ass'n* raises the question of whether a locality can ever adopt zoning ordinance changes for only a portion of its jurisdiction, even when those changes are mandated by a change in the comprehensive planning for that area, unless it can meet the difficult test for sustaining a piecemeal downzoning. Such changes, according to the court thus far, are not in fact comprehensive. Indeed, no Virginia reported case has ever found a downzoning challenged as piecemeal to have been comprehensive, and it is a fair inference that the court will continue to look askance at efforts to eliminate the sort of rights and privileges that accrue upon a rezoning, absent rather compelling circum-stances.

16.803 Sustaining Piecemeal Downzoning. As noted above, in piecemeal downzoning litigation, the locality has the burden of demon-strating a compelling justification for its action by evidence of fraud, mistake, or change in circumstances in its decision to upzone. Fortunately, fraud is rare and where it exists is a relatively straightforward and self-explanatory legal concept. No Virginia downzoning case has turned on the existence of fraud.

"Mistake" requires proof that "material facts or assumptions relied upon by the legislative body at the time of the previous rezoning were

[250] 239 Va. 412, 389 S.E.2d 312 (1990).

erroneous."[251] Because the local governing body is presumed to know all that it knew or could have known at the time of legislative action, this is exceedingly difficult to demonstrate if the facts could have been known but were not. "Mistake" does not include errors of political judgment and does not include changes in the composition of the governing body.[252]

Thus, "changed circumstances" must generally be shown if the locality is to prevail on a piecemeal downzoning. This means a changed condition, as shown by objectively verifiable evidence, that substantially affects the character of the neighborhood insofar as the public health, safety, or welfare is concerned.[253]

For a long time, it was an article of faith among the land use bar that once a court determined a downzoning decision to have been piecemeal, the locality simply could not win. In *Aldre Properties, Inc. v. Board of Supervisors*,[254] however, the court found that Fairfax County had met its burden of proving changed circumstances by demonstrating advances in the understanding of the impact of development on water quality in the Occoquan Reservoir.

Aldre remained, for a while, a unique decision, and one limited in its effect to Fairfax County. Then, in 1990, the Virginia Supreme Court upheld a piecemeal downzoning for the first time in *Seabrooke Partners v. City of Chesapeake*.[255] In *Seabrooke*, the Chesapeake City Council almost 20 years earlier had rezoned a 34-acre tract of land to multi-family use. The tract was never developed, and the property owner later submitted a subdivision plat for approximately half of the tract to be developed as single-family housing and applied for rezoning to single-family residential use. The plat and rezoning were approved. A plat was subsequently submitted and approved for the remainder to be developed as single-family residential housing, but the owner did not request that the property be rezoned for that purpose. A number of individuals subsequently built and occupied single-family homes on the single-family lots. The owner then conveyed a portion of the property

[251] *Fralin & Waldron*, 222 Va. at 225, 278 S.E.2d at 863.

[252] *Id.*

[253] *Id.*; *see Seabrooke Partners v. City of Chesapeake*, 240 Va. 102, 393 S.E.2d 191 (1990) (applying the principle of changed circumstances).

[254] Chancery No. 78463-A (Fairfax Cir. Ct. Mar. 22, 1984).

[255] 240 Va. 102, 393 S.E.2d 191 (1990).

to another corporation. This approximately 10-acre tract was conveyed as a single parcel, and no subdivision plat was ever recorded for it. The land was then conveyed to the plaintiffs, who contracted to sell to yet another corporation, conditioned upon continued multi- family zoning on the tract. The new corporation submitted an application for site plan approval for the development of an apartment complex. Before the commission had decided upon the site plan application, however, the city council downzoned the 10 acres to single-family use consistent with the actual development of the remainder of the parcel.

On appeal, the court found that the landowner's evidence was sufficient to make a prima facie showing that there had been no change in circumstances since the zoning classification of the tract as multi-family 20 years earlier sufficient to sustain the evident piecemeal downzoning of the land. The court found, however, that the city had produced sufficient evidence of changed circumstances to overcome the presumptions against it in a piecemeal downzoning case. The neighborhood, as defined by the city, had manifestly changed from the original zoning, since the original 34-acre tract had been developed as single-family housing, not the multi-family dwellings that had concededly been approved. Therefore, it was fairly debatable that the circumstances justified the compatible zoning of the residue, despite the landowner's anticipated use of the land for more valuable purposes. The case is important both because of the court's willingness to let the city define the appropriate "neighborhood" for purposes of downzoning analysis and because the court actually agreed that circumstances had changed.

A question remained as to the date from which the "change of circumstances" would be measured. That question was answered in *Turner v. Board of Cnty. Supervisors*[256]: it is measured from the date of the last comprehensive rezoning of the local jurisdiction and not from the time when the property in question was first placed in the zoning district it inhabited before the downzoning. In *Turner*, the subject property was downzoned in 1998. Prince William County argued that the change of circumstances had to be measured from a 1958 zoning ordinance in which zoning that affected the property at issue was specifically addressed, but the Virginia Supreme Court ruled that a 1991 zoning ordinance was the last comprehensive ordinance enacted. The court held that the county failed as a matter of law to present sufficient evidence of a change in circumstances to support the 1998

[256] 263 Va. 283, 559 S.E.2d 683 (2002).

downzoning. The court also held that predictions of future changes in traffic conditions would not support a piecemeal downzoning.

As *City of Virginia Beach v. Virginia Land Investment Ass'n*[257] makes plain, however, the court has not abandoned its more intense scrutiny of downzoning decisions, and no one should think that downzonings have been made significantly easier to accomplish. On the contrary, it will likely remain the rare case that circumstances have changed sufficiently to permit the locality to overcome the court's disinclination to permit local governments to reduce development rights that have already been granted. The locality will be hard pressed to overcome the fundamental presumption that a downzoning is piecemeal and that downzonings remain perhaps the single most disfavored land use action that a locality can take.

16.804 Downzoning Legislation. In the wake of Fairfax County's effort to downzone its commercial and industrial zoning districts in the late 1980s, the General Assembly first demonstrated in the 1990 session its significant opposition to the elimination of zoning approvals that had been earlier granted, in effect to downzoning in almost any form, especially where landowners have arguably relied heavily on the earlier action and significant value has been created. This was initially true with respect to "proffered" zonings wherein the landowner has made significant promises in return for zoning authorization. The General Assembly passed several amendments to the conditional zoning provisions of section 15.2-2303(B) of the Virginia Code and the similar provisions of the other forms of conditional zoning which provide in almost identical language that

> [i]n the event proffered conditions include a requirement for the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective

[257] 239 Va. 412, 389 S.E.2d 312 (1990).

> with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.[258]

Because the statute has not been litigated as of this writing, it is not clear how far its protections will reach. The courts have been left with a substantial responsibility to assess whether a particular property is subject to the statute's terms, but the statute is clearly designed to protect landowners who pursue heavily proffered projects in good faith, while allowing the locality to rezone the property if it can demonstrate changed circumstances.

Land subject to a final approved site plan or recorded subdivision plat is immune from any change or amendment in local ordinances for a period of five years from final approval or recordation, plus agreed-upon extensions, unless the change is due to "mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare."[259]

Recognizing that the housing crisis associated with the recession of 2008 might cause developers to miss significant deadlines, the General Assembly enacted section 15.2-2209.1 in 2009 to extend the period of validity for certain preliminary and recorded plats and final site plans, along with other land use approvals. Permits and plans associated with a project must also be extended. That section was again amended in 2017 to extend the sunset dates for its provisions to 2020.

16.9 SPECIAL USE PERMITS

16.901 Nature of Special Use Permit. There are certain uses that, by their nature, are thought to require additional regulation beyond the general requirements applicable to a particular zoning district. These uses, although permitted in a zoning district, are made subject to special or conditional use permits or special exceptions.[260] There is no difference among

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[258] This legislation is generally known as the "Quillen Bill," named after its chief sponsor, former Gate City Delegate (and former circuit court judge) Ford Quillen.

[259] Va. Code § 15.2-2261. See also section 15.2-2209.1(A) of the Virginia Code regarding extension of approvals to address the housing crisis associated with the recession of 2008. Legislation enacted in 2012 states that plats and plans that were valid as of January 1, 2009 will remain valid until July 1, 2017.

[260] These terms have been deemed to be interchangeable in Virginia. *Rinker v. City of Fairfax*, 238 Va. 24, 30, 381 S.E.2d 215, 218 (1989) ("The terms 'special exception' and 'special use permit' are interchangeable. *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 521-22, 297 S.E.2d 718, 721-22 (1982).").

these permits and exceptions. For ease of reference, they are all referred to here as special use permits. Notice must be given pursuant to section 15.2-2204, and a public hearing must be held before the issuance of the permit.

The grant or denial of these permits may be handled by the board of zoning appeals or directly by the governing body itself.[261] There is no difference in the standard of review applied by courts to decisions regarding special use permits issued by either, for they both act legislatively when they grant or refuse such permits. Nor is there any difference between those standards and the standards applicable to rezonings.[262] One circuit court has held that the grant of a special use permit is not a "change in zoning" sufficient to trigger roll-back taxes under Virginia's land use taxation system.[263]

The grant of a special use permit is, moreover, an affirmative legislative, not administrative, action,[264] and the court has treated the granting or denial of special exceptions as it would any other rezoning decisions.[265]

16.902 Standards for Issuing Special Use Permit. From time to time, the Virginia Supreme Court has touched on the question of whether special use permits must be issued pursuant to some standards contained in the zoning ordinance to guide and restrain the exercise of legislative discretion. In general the answer seems to be no.

While the court has held that special permits must be issued in accordance with standards designed to carry out local zoning policies and according to clear and definite procedures,[266] in *Bollinger v. Board of Supervisors*,[267] the court specifically held that it is not necessary that a

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[261] Va. Code §§ 15.2-2286(A)(3), -2309(6).

[262] *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *see also County Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989).

[263] *Luck Stone Corp. v. Loudoun Cnty.*, 31 Va. Cir. 391 (Loudoun 1993).

[264] *County Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 377 S.E.2d 368, (1989); *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982); *Bollinger v. Board of Supervisors*, 217 Va. 185, 227 S.E.2d 682 (1976); *Byrum v. Board of Supervisors*, 217 Va. 37, 225 S.E.2d 369 (1976).

[265] *County Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989); *see also Board of Supervisors v. McDonald's Corp.*, 261 Va. 583, 544 S.E.2d 334 (2001); *City of Richmond v. Randall*, 215 Va. 506, 211 S.E.2d 56 (1975).

[266] *National Maritime Union v. City of Norfolk*, 202 Va. 672, 682, 119 S.E.2d 307, 314 (1961).

[267] 217 Va. 185, 227 S.E.2d 682 (1976).

zoning ordinance contain "standards" for the exercise of legislative discretion by a governing body that has retained the power to issue special use permits, since the enabling legislation itself contains sufficient safeguards to survive a due process challenge.

In *Cole v. City Council of Waynesboro*,[268] the court found invalid an ordinance that allowed a locality to issue a special permit without considering good zoning practices or considering the objectives that the zoning ordinance sought to accomplish. The use allowed by the permit was not even listed under "permitted" uses but instead was authorized by a section of the ordinance that empowered the City Council to issue such permits "whenever public necessity and convenience, general welfare or good zoning practice justifies" the issuance of such a permit in any zone.[269]

It is doubtful that the court would require statutory standards against which the special use permit might be measured in order to provide "adequate protection in the issuance of permits."[270] However, the court has also, and confusingly, suggested that without standards for the delegation of legislative authority, at least to a BZA, decisions are void if they do not establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of power.[271]

The local governing body need not make written findings of fact to override a decision by its planning commission under section 15.2-2232 when the governing body considers a special use permit for a public use.[272]

16.903 Conditions on Grant of Special Use Permit. The unique characteristic of special use permits, that which distinguishes them from conditional zoning, is the authority reposed in the locality to issue them "under suitable regulations and safeguards."[273] This phrase is uniformly understood to mean that the locality may impose reasonable conditions on

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[268] 218 Va. 827, 833, 241 S.E.2d 765, 769 (1978).

[269] *Id.*

[270] *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982); *Bell v. City Council*, 224 Va. 490, 297 S.E.2d 810 (1982); *see also First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir.), *cert. denied*, 469 U.S. 1019 (1984). *But see National Mem'l Park, Inc. v. Board of Zoning Appeals*, 232 Va. 89, 348 S.E.2d 248 (1986).

[271] *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990).

[272] *Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995).

[273] Va. Code § 15.2-2286(A)(3).

the issuance of such permits or exceptions in contrast to proffers, which supposedly come voluntarily from the applicant.

Once a permit is issued, the locality may revoke it only for failure to comply with these conditions.[274] It may also seek affirmative compliance with the conditions through a civil action. How to revoke a permit is not made clear in any case, but it may presumably be done in the same fashion as granted and not otherwise.

In the very few cases that address the substance of such conditions, Virginia courts have suggested that there are reasonable limits on the authority to impose conditions on a special use permit. It seems, for example, that the locality can impose conditions that address on-site access to public roads[275] but cannot lawfully address matters solely within the purview of the Department of Transportation, such as entrance design, sight distances, and the like. The imposition of mandatory reservations of property, so that the costs of condemnation for future road improvements will not be increased by any development that might be permitted in that right-of-way, is almost surely unlawful, though commonplace.

Moreover, the authority to impose conditions does not extend to any requirement for dedication or construction of on- or off-site road improvements, if the need for these improvements is not substantially generated by the development at issue.[276]

United States Supreme Court decisions also suggest that there is a federal constitutional basis to these limitations and that the relationship between involuntary development conditions and the demands generated by the subject development must meet the requirements of the Fifth and Fourteenth Amendments.[277] However, the restrictions on the prerogatives of local government under the relevant Virginia Supreme Court decisions[278] are more

[274] *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir.), *cert. denied*, 469 U.S. 1019 (1984); *Board of Zoning Appeals v. Cedar Knoll, Inc.*, 217 Va. 740, 232 S.E.2d 767 (1977).

[275] *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982).

[276] *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984); *Kansas-Lincoln, L.C. v. Arlington Cnty. Bd.*, 66 Va. Cir. 274 (Arlington 2004).

[277] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[278] *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984); *Hylton Enters., Inc. v. Board of Supervisors*, 220 Va. 435, 258 S.E.2d 577 (1979).

stringent than the U.S. Supreme Court standards.[279] Even under state law, there must be "suitable regulations and safeguards,"[280] and a court may therefore inquire into the reasonableness as well as the constitutional validity of any involuntarily imposed condition.

16.904 Standard of Review on Appeal. As with the review of other decisions of a BZA, the issuance of a writ of certiorari by a circuit court to review the actions of the BZA regarding special use permits is a matter of right.[281] It is imperative when the BZA acts on a case that it make a good record of its findings and conclusions, for it is "essential to the exercise of judicial review that a sufficient record be made to enable the reviewing court to make an objective determination whether the issue is 'fairly debatable' . . . We hold that the 'fairly debatable' standard cannot be established by a silent record."[282] A failure to follow this requirement can result in an adverse result for the locality, even when that result might have been different if evidence as to reasonableness (of the underlying zoning remaining or of the denial itself) had been properly presented to the trial court.[283]

Previously the denial of a special use permit appeared to be virtually immune from successful challenge. This view was based on *Board of Supervisors v. International Funeral Servs., Inc.*[284] and *City Council v. Harrell*,[285] which held that the denial of a special use permit was not unreasonable where the applicant had not made a showing that the underlying zoning did not unreasonably restrict the uses permitted on the property. In *Board of Supervisors v. Robertson*,[286] the Supreme Court specifically limited the *Harrell* requirement to rezoning cases but still upheld the denial of the special exception, finding that the county had satisfied the "fairly debatable" test. Thus, while the *Harrell* requirement has been removed, the

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[279] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, (1994) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[280] Va. Code § 15.2-2286(A)(3).

[281] *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Board of Supervisors v. Board of Zoning Appeals*, 225 Va. 235, 302 S.E.2d 19 (1983).

[282] *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990).

[283] *See Daniel v. Greene Cnty. Zoning Appeals Bd.*, 30 Va. Cir. 312 (Greene 1993).

[284] 221 Va. 840, 275 S.E.2d 586 (1981).

[285] 236 Va. 99, 372 S.E.2d 139 (1988).

[286] 266 Va. 525, 587 S.E.2d 570 (2003).

"fairly debatable" test, as applied by the *Jackson* decision,[287] is still a formidable obstacle to a party challenging the denial of a special use permit.

16.905 Limitation on Requirement of Special Use Permits. In response to abuses of the special use permit process by several local governments, the General Assembly has limited the circumstances in which special permits can be required. Many local governments on the fringes of metropolitan areas had begun to require special permits for agricultural uses in portions of their jurisdictions where recent residential development had begun to encroach on longstanding farming operations. Pursuant to the Right to Farm Act,[288] special permits cannot generally be required for any production agriculture, horticulture, or silviculture activity in an area zoned as an agricultural district.[289] Additionally section 15.2-2288.01 prevents localities from requiring special permits for the small-scale conversion of bio-mass to alternative fuels where the operation meets certain specified conditions.

In response to Fauquier County's requirement of special permits to subdivide property, the General Assembly adopted section 15.2-2288.1 of the Virginia Code, which provides that special permits cannot be required for residential dwellings at the use, height, and density permitted by right under the local zoning ordinance. This provision was used by the Prince William County Circuit Court to invalidate the Town of Occoquan's requirement for a special exception when clearing, land disturbance, or development was proposed on slopes of 20% or greater.[290]

Section 15.2-2286.1 of the Virginia Code provides that special permits for cluster development may only be required where increased density development (a "density bonus") is permitted for such developments; otherwise if cluster developments are allowed, they must be permitted by right, and the locality cannot impose more stringent land use requirements. The locality also must permit the extension of water or sewer services from an adjacent property to a cluster development if the development is located in an areas designated to receive these.

[287] *See supra* ¶ 16.706.

[288] Va. Code § 15.2-2288. *See supra* ¶ 16.203.

[289] *Dail v. York Cnty.*, 259 Va. 577, 528 S.E.2d 447 (2000).

[290] *Elm St. Dev., Inc. v. Town of Occoquan*, 82 Va. Cir. 53 (Prince William 2010), *aff'd*, Rec. No. 110075, 2012 Va. LEXIS 104 (Va. Sup. Ct. Apr. 6, 2012) (unpublished).

Section 15.2-2157(C) of the Virginia Code prevents localities from prohibiting the use of approved alternative onsite sewage systems when sewers or sewerage disposal facilities are not available. The Virginia Attorney General and the Circuit Court of Accomack County have opined that this provision prohibits localities from requiring a special exception to the zoning ordinance before installation of an alternative onsite sewage system.[291]

16.10 SITE PLANS

The enabling legislation authorizes the submission of "plans of development" before the issuance of building permits "to assure compliance with regulations contained in [the] zoning ordinance."[292] This is universally understood to mean that the locality can require "site plans,"[293] which are defined as

> proposal[s] for a development or a subdivision, including all covenants, grants or easements and other conditions relating to use, location and bulk of buildings, density of development, common open space, public facilities and such other information as required by the subdivision ordinance to which the proposed development or subdivision is subject.[294]

"Development" is itself defined as a

> tract of land developed or to be developed as a unit under single ownership or unified control which is to be used for any business or industrial purposes or is to contain three or more residential dwelling units. The term "development" shall not be construed to include any tract of land which will be principally devoted to agricultural production.[295]

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[291] Va. Att'y Gen. Op. No. 10-061 (Dec. 3, 2010); *Atlantic Town Ctr. Dev. Corp. v. Accomack County Bd. of Supervisors,* 94 Va. Cir. 35 (2016).

[292] Va. Code § 15.2-2286(A)(8).

[293] Section 15.2-2258 of the Virginia Code refers to "[s]ite plans or plans of development required by subdivision (A)(8) of § 15.2-2286" and provides that they shall be subject to that section, which is, primarily, a *subdivision* plat procedural statute.

[294] Va. Code § 15.2-2201.

[295] *Id.*

Site plans are significant events in the development process, but their approval is a *ministerial* function, as to which the locality has little or no discretion. When a landowner has submitted a site plan that complies with the requirements of the ordinance, then its approval can be compelled through mandamus.[296] If there is a dispute as to whether the site plan complies with the regulations, an action for declaratory judgment is the better course of action.[297]

The Virginia Code sets out a detailed process for forcing approval of site plans. Under sections 15.2-2259 and 15.2-2260 the landowner may first compel consideration of a site plan and, if the locality denies the plan, obtain judicial review of that action.[298]

Local governments are severely restricted in what off-site improvements can be required as a condition of site plan approval. In *City of Alexandria v. Texas Co.*,[299] the Virginia Supreme Court held:

> The principle is well settled that a State cannot grant a privilege subject to the agreement that the grantee will surrender a constitutional right, even in those cases where the State has the unqualified power to withhold the grant altogether. Where such a condition is imposed upon the grantee, he may ignore or enjoin the enforcement of the condition without thereby losing the grant. . . .
>
> If a State, possessing the power to deny a grant altogether, cannot grant a privilege subject to the condition that the grantee will surrender a constitutional right, certainly it cannot constitutionally exact this price of the grantee where, as in the instant case, it has no lawful power to decline the grant.[300]

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[296] *Planning Comm'n v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971) (finding that the site plan was denied in order to permit the locality to amend the zoning ordinance to delete the use for which the plan had been submitted in good faith).

[297] *Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 650 S.E.2d 527 (2007).

[298] The former language in section 15.2-2259(A)(2) restricting application of the statute to "localities with a population greater than 90,000 based on the 2000 United States census" was removed by 2015 legislation. 2015 Va. Acts ch. 420.

[299] 172 Va. 209, 1 S.E.2d 296 (1939).

[300] *Id.* at 217, 1 S.E.2d at 299.

In *Hylton Enterprises, Inc. v. Board of Supervisors,*[301] the Virginia Supreme Court held that even though the evidence showed that the development would generate substantial new demand on an existing public road, the local government could not condition subdivision approval upon improvement to the existing public road. Section 15.2-2208.1 of the Virginia Code, adopted in 2014, prohibits localities from conditioning site plan approval on either (i) improvements to existing public rights of way or (ii) other improvements where the need for those improvements is not substantially generated by the project itself. Provided a prior written objection was given to the locality, an aggrieved applicant is entitled to compensatory damages and an order directing approval of the site plan and may be entitled to reasonable attorney fees and court costs.

16.11 PROCEDURAL ISSUES

16.1101 In General.

A. Dillon's Rule. Any discussion of the powers of Virginia's local governments to regulate land use must include a review of the implications of Dillon's Rule.[302] Dillon's Rule is quite vigorous in Virginia. In 1969 and 1970, during preparation of the current Constitution of Virginia, consideration was given to repudiating Dillon's Rule,[303] but no such provision was incorporated in the new Constitution, and the Virginia Supreme Court has interpreted that omission as a reaffirmation of the Rule in Virginia.[304]

Dillon's Rule is set forth in detail in *Commonwealth v. County Bd. of Arlington Cnty.*[305]: localities have only those powers that are (i) expressly granted, (ii) necessarily or fairly implied from express grants, and (iii) essential and indispensable. The court looks to the purpose and objective of statutes in considering whether authority is necessarily implied from powers

[301] 220 Va. 435, 258 S.E.2d 577 (1979).

[302] John Forrest Dillon, *Commentaries on the Law of Municipal Corporations* 145 (Boston: Little Brown & Co., 4th ed. 1890).

[303] *See Report to Commission on Constitutional Revision* 228-83 (1969).

[304] *Commonwealth v. County Bd. of Arlington Cnty.*, 217 Va. 558, 574, 232 S.E.2d 30 (1977).

[305] *Id.*

expressly granted.[306] The force of Dillon's Rule in Virginia is evident from the strictness with which the Virginia Supreme Court has applied the Rule. Unless the General Assembly has provided an express grant of the power in question, the court rarely upholds local authority to exercise that power.[307] If there is a reasonable doubt as to whether legislative power exists, the doubt must be resolved against the existence of the asserted authority.[308]

Thus, in the period between 2012 and 2015, the Attorney General has issued five opinions (i) limiting or denying the power of localities to prohibit oil and gas exploration;[309] (ii) to impose more stringent regulation on alternative onsite sewage systems than adopted by the Virginia Department of Health;[310] (iii) to regulate wineries;[311] (iv) to use zoning ordinances to regulate advertising on bicycles;[312] and (v) to regulate uranium mining.[313]

B. General Notice Requirements. Compliance with the notice requirements set out in the enabling legislation, and in some cases in local charters, is the *sine qua non* of all land use actions of a legislative nature. This includes, of course, all matters that are taken to the Board of Zoning Appeals.[314]

[306] *Gordon v. Board of Supervisors*, 207 Va. 827 153 S.E.2d 270 (1967); *Pony Farm Assocs., L.L.C. v. City of Richmond*, 62 Va. Cir. 386 (Richmond 2003) (holding that local government could not adopt a definition of the "Resource Protection Area" more extensive than that provided in the regulations adopted by the state agency).

[307] *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84 (2010) (for purposes of implementing the Chesapeake Bay Preservation Act, a locality may not designate preservation areas by reference to the lands designated by federal statute or authorization); *County Bd. of Arlington Cnty. v. Brown*, 229 Va. 341, 329 S.E.2d 468 (1985) (authority to lease "unused" county land does not allow locality to lease parking lot to a developer); *Tabler v. Board of Supervisors*, 221 Va. 200, 269 S.E.2d 358 (1980) (authority to regulate trash does not allow locality to require deposits on disposable containers); *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975) (authority to require subdivision plat approval does not allow locality to suspend acceptance of applications for such approval).

[308] *City of Richmond v. Confrere Club of Richmond, Inc.*, 239 Va. 77, 387 S.E.2d 471 (1990).

[309] Va. Att'y Gen. Op. No. 12-102 (Jan. 11, 2013).

[310] Va. Att'y Gen. Op. No. 12-045 (Nov. 9, 2012).

[311] Va. Att'y Gen. Op. No. 12-063 (July 19, 2013).

[312] Va. Att'y Gen. Op. No. 14-050 (Nov. 20 2014).

[313] Va. Att'y Gen. Op. No. 12-077 (Oct. 11, 2013).

[314] Va. Code § 15.2-2309. Notice requirements are set out in detail in section 15.2-2204 of the Virginia Code. The notice requirements apply to first adoption of the zoning ordinance as well as to subsequent amendments to the ordinance. Va. Att'y Gen. Op. No. 07-025 (June 26, 2007).

The Virginia Code states that all plans or ordinances, or amendments thereof, recommended or adopted under the powers conferred by the enabling legislation need not be advertised in full but may be advertised by reference with a descriptive summary of the proposed action and a reference to the place or places within the county or municipality where copies of the proposed plans, ordinances, or amendments may be examined.[315]

C. Public Notice. The planning commission may not recommend, nor the governing body adopt, any plan, ordinance, or amendment until notice of intention to do so has been published once a week for two successive weeks in a newspaper published or having general circulation in the locality; however, the notice for the local commission and the governing body may be published concurrently. The notice must specify the time and place of the hearing at which persons affected may appear and present their views. The hearing must be held not less than 5 days or more than 21 days after the second advertisement appears in the newspaper. The commission and governing body may hold a joint public hearing after public notice. If a joint hearing is held, only the public body needs to give public notice. The term "two successive weeks" means that notice must be published at least twice in an appropriate newspaper with not less than six days elapsing between the first and second publication.[316]

D. Notice to Property Owners. Section 15.2-2204(B) of the Virginia Code establishes detailed requirements for notice to adjacent property owners. When a proposed amendment of the zoning ordinance involves a change in the zoning classification of 25 or fewer parcels of land, then in addition to public notice, written notice must be given by the commission or its representative at least five days before the hearing to the owner or owners, their agent, or the occupant of each parcel involved and to the owners, their agent, or the occupant of all abutting property and property immediately across the street or road from the property affected, including parcels that lie in other localities of the commonwealth. If any portion of the affected property is within a planned unit development, written notice must also be given to any incorporated property owners' associations within the

[315] *See McLean Hamlet Citizens v. Fairfax Cnty. Bd. of Supervisors*, 40 Va. Cir. 69 (Fairfax 1995) (holding that, when specific measures are contemplated, the published notice must reference those specific measures, a general reference to the issue is not sufficient, and adoption of the specific measures is invalid).

[316] Va. Code § 15.2-2204; *see Greene v. Fairfax Cnty. Bd. of Supervisors*, 40 Va. Cir. 144 (Fairfax 1996) (finding adequate a notice for a hearing that was rescheduled even though the subsequent hearing was held more than 21 days after the notice).

planned unit development that have members owning property located within 2,000 feet of the affected property.[317] Notice may be sent by registered or certified mail to the last known address of an owner as shown on the current real estate tax assessment books or current real estate tax assessment records. If the hearing is continued, notice must be remailed. Costs of any notice required under this chapter are taxed to the applicant.

When a proposed amendment of the zoning ordinance involves a change in the zoning map classification of more than 25 parcels of land, or a change to the applicable zoning ordinance text regulations that decreases the allowed dwelling unit density of any parcel of land, then in addition to public notice, written notice must be given by the local commission or its representative at least five days before the hearing to the owners or owners' agents of each parcel of land involved.[318] One notice sent by first-class mail to the last known address of the owner as shown on the current real estate tax assessment books or records is adequate, provided that a representative of the local commission affirms by properly filed affidavit that the mailings have been made. Inadvertent failure by the representative of the local commission to give written notice does not invalidate the adoption of the amendment or ordinance.

The governing body may provide that, in the case of a condominium or a cooperative, the written notice may be mailed to the unit owners' association or proprietary lessees' association, respectively, in lieu of each individual unit owner. Reliance upon records of the local real estate assessor's office to ascertain the names of persons entitled to notice is deemed sufficient.

Whenever the required notices are sent by an agency, department, or division of the local governing body or its representative, the notices may be sent by first class mail provided that a representative of the agency, department, or division affirms by properly filed affidavit that the mailings have been made.

[317] A 2012 amendment to section 15.2-2204(B) added: "However, when a proposed amendment to the zoning ordinance involves a tract of land not less than 500 acres owned by the Commonwealth or by the federal government, and when the proposed change affects only a portion of the larger tract, notice need be given only to the owners of those properties that are adjacent to the affected area of the larger tract."

[318] If the amendment is to the zoning ordinance text regulations, no written notice is required to be given to the owners of lots of less than 11,500 square feet if the lots are shown on a properly recorded subdivision plat.

A party's actual notice of, or active participation in, the proceedings for which the written notice is required waives that party's right to receive written notice.

E. Notice of Actions Within One-Half Mile of Adjoining Jurisdiction. When a proposed comprehensive plan or amendment, a proposed change in zoning map classification, or an application for a special exception for a change in use or to increase by greater than 50 percent the bulk or height of an existing or proposed building involves any parcel of land located within one-half mile of a boundary of an adjoining Virginia county or municipality, then in addition to the foregoing notice, written notice shall also be given by the commission or its representative at least 10 days before the hearing to the chief administrative officer of that locality. This requirement does not apply to renewals of previously approved special exceptions.[319]

16.1102 Notice by Applicant; Applicant Who Is Not Owner of Subject Property. The governing body of any locality may require that a person applying for local approval be responsible for all notices, and those notices must comply with section 15.2-2206 of the Virginia Code.

The governing body may provide that, in the case of a condominium or cooperative, the written notice be mailed to the unit owners' association or proprietary lessees' association, respectively, in lieu of each individual unit owner. Reliance on records of the local real estate assessor's office to ascertain the names of persons entitled to notice is deemed sufficient.

A certification of notice and a list of the persons to whom notice has been sent must be supplied by the applicant as required by the local governing body at least five days before the first hearing. The governing body must allow any person entitled to notice to waive such right in writing.

When an applicant who is not the owner, or agent of the owner, of real property requests a written order or determination related to that property from the zoning administrator, zoning appeals board, or other administrative officer, written notice must be given to the owner of the property within 10 days of receipt of the request. The official receiving the request must give the notice or direct the requesting applicant to give the notice and provide satisfactory evidence of compliance.[320]

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[319] Va. Code § 15.2-2204(C).

[320] Va. Code § 15.2-2204(H).

16.1103 Notice for Additional Matters. The governing body of any county, city, or town may, in addition to any specific notice required by law, give notice by direct mail or any other means it deems appropriate, of any planning or zoning matter.[321] Many localities have adopted extensive site posting requirements under this provision.

16.1104 Notice of Imposition of Fees and Levies. Pursuant to section 15.2-107 of the Virginia Code, all levies and fees imposed or increased by a county, city, or town pursuant to the zoning enabling statutes must be adopted by ordinance. The advertising requirements of section 15.2-1427(F) or section 15.2-2204, as appropriate, apply, and the advertisement must also contain (i) the time, date, and place of the public hearing; (ii) the actual dollar amount or percentage change, if any, of the proposed levy, fee, or increase; (iii) a specific reference to the section of the Virginia Code or other legal authority that grants the power to enact the proposed levy, fee, or increase; and (iv) a designation of places where the complete ordinance and information concerning the documentation for the proposed fee may be examined no later than the first publication.

16.1105 Requirement to Pay Past-Due Taxes. The governing body may require that before the initiation of an application "by the owner of the subject property, the owner's agent, or any entity in which the owner holds an ownership interest greater than 50 percent," or before issuance of final approval, any applicant for a special exception, special use permit, variance, rezoning "or other land disturbing permit," including building permits and erosion and sediment control permits, produce satisfactory evidence "that any delinquent real estate taxes, nuisance charges, stormwater management utility fees, and any other charges that constitute a lien on the subject property, that are owed to the locality and have been properly assessed against the subject property, have been paid."[322]

16.1106 Procedural Due Process Requirements. Procedural due process, in its constitutional sense, applies only to adjudicative or quasi-adjudicative and not to legislative processes. A locality, therefore, need meet only the statutory requirements for notice and hearing of zoning matters.[323]

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[321] Va. Code § 15.2-2205.

[322] Va. Code § 15.2-2286(B).

[323] *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 444, 410 S.E.2d 674, 679 (1991).

16.1107 Mandatory Nature of Hearings; Controlling Nature of the Enabling Legislation. Hearings before the local commission and the governing body are mandatory and must be procedurally correct in order for the ultimate decision to stand. The court has repeated that the "role of a planning commission is critical in the zoning process. Indeed, a local governing body is powerless to adopt zoning regulations until the planning commission has held a public hearing and made its recommendation to the governing body."[324]

In *City Council v. Potomac Greens Associates Partnership*,[325] the court considered the relationship of a city charter—itself silent as to any notice for a planning commission hearing—and an ordinance requiring only one notice (as opposed to the two required by section 15.2-2204 The court held that although the General Assembly could have expressly specified in the city's charter different notice for a planning commission hearing than set out in general law, the fact that it did not do so put the local ordinance into direct conflict with state law.[326]

16.1108 Sufficiency of Resolution by Which Zoning Ordinance Amendment Is Initiated. There are occasions when a zoning action is not initiated by the landowner but rather is a textual amendment or government-initiated rezoning. The Virginia Code states that localities may amend their zoning ordinances "[w]henever the public necessity, convenience, general welfare, or good zoning practice requires."[327] The amendments may be initiated by "resolution" of the governing body or on "motion" of the local commission.[328] In *Ace Temporaries, Inc. v. City Council*,[329] the Virginia Supreme Court held that while the text of an amendment to a zoning ordinance need not be written, each time an amendment is made, it must be properly

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[324] *City Council v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 376, 429 S.E.2d 225 (1993) (citing what is now section 15.2-2285 and *Town of Vinton v. Falcun Corp.*, 226 Va. 62, 306 S.E.2d 867 (1983)).

[325] 245 Va. 371, 376, 429 S.E.2d 225, 227 (1993).

[326] Since Alexandria contended that the court's decision would, in effect, nullify every city zoning ordinance since 1950, the court held that "our decision today shall be limited to the present case, shall operate prospectively only, and shall not affect other amendments enacted prior to our decision in this case." *Potomac Greens Assocs. P'ship*, 245 Va. at 378, 429 S.E.2d at 228. The court later held that this statement applied only to zoning decisions that were final when *Potomac Greens* was decided. *Kole v. City of Chesapeake*, 247 Va. 51, 57 n.1, 439 S.E.2d 405, 409 n.1 (1994).

[327] Va. Code § 15.2-2286(A)(7).

[328] *Id.*

[329] 274 Va. 461, 649 S.E.2d 688 (2007).

initiated. The General Assembly has provided further that "[a]ny such resolution or motion . . . proposing the rezoning shall state the above public purposes therefor."[330] This phrase clearly refers to the public necessity language contained in the statute.

The Virginia Supreme Court has held that it is not necessary under this language for the locality to state the underlying substantive bases for its decision to initiate a zoning amendment under the statute. It is sufficient for the locality simply to state in the initiating resolution or motion which of the four listed purposes necessitates local action.[331]

Section 15.2-2204 requires local governments to include a descriptive summary of the proposed action in the published notice. In *Glazebrook v. Board of Supervisors*,[332] Spotsylvania County had undertaken a major downzoning of the county, but the notice referred only to changes to "development standards." The Virginia Supreme Court held that the notice did not satisfy the descriptive summary requirement of section 15.2-2204. The court further held that, because a local government cannot invoke the power to zone until the statutory notice requirement has been satisfied, the amendment was void ab initio.

In *Gas Mart Corp. v. Board of Supervisors*,[333] the Virginia Supreme Court reviewed the notice published before Loudoun County's downzoning for compliance with the descriptive summary requirement of section 15.2-2204 and ruled that the published notice of the area to be downzoned was inaccurate and misleading. The court also found that a single reference to "conservation design policies" was inadequate. Again, it struck down the amendment as void ab initio. An interlocutory ruling of the trial court in *Gas Mart*, which was not at issue in the Supreme Court, had also held that certain overlay districts were void ab initio because the descriptive summary of those districts was deficient.

In 2002, in response to the Spotsylvania downzoning and in anticipation of the Loudoun downzoning, the General Assembly further amended section 15.2-2204 to require local governments to provide individual

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[330] *Id.*

[331] *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991).

[332] 266 Va. 550, 587 S.E.2d 589 (2003).

[333] 269 Va. 334, 611 S.E.2d 340 (2005).

notice to most landowners whose property is the subject of potential downzoning ordinance text amendments. Localities may not avoid the requirements of the notice of a proposed downzoning by taking simultaneous action to upzone other properties resulting in no net loss of subdividable lots in the locality.[334]

16.1109 Form and Codification of Ordinances. As long as the procedural prerequisites to ordinance initiation by the locality have been satisfied, there is no particular form that an ordinance must take in order to be validly adopted. It is sufficient that the action of the locality be clear and that any material that is incorporated by reference be sufficiently identified and made part of the public record.[335]

Once the governing body has performed its legislative duty of adopting an ordinance, its staff may then "codify" the ordinance, provided that it makes no substantive changes, alterations, amendments, deletions, or additions.[336]

16.1110 Importance of Procedural Correctness. As noted previously, there does not seem to be a "no harm–no foul" rule in procedural matters. Compliance with statutory requirements must be strict or the action complained of will not stand.[337]

The Virginia Supreme Court considers strict procedural compliance to be critical. In *Town of Madison v. Ford*,[338] the court held that minutes which reflected at the beginning that all members were present and which later reflected that a zoning ordinance was passed unanimously did not meet the state constitutional requirement that each member's name and vote be recorded and, thus, the ordinance was void. The court held that the decision should operate prospectively only and that ordinances adopted before this

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[334] Va. Att'y Gen. Op. No. 13-045 (Aug. 23, 2013).

[335] *Id.* at 445-46, 410 S.E.2d at 680.

[336] *Id.* at 449, 410 S.E.2d at 682. *County of Fairfax v. Fleet Indus. Park Ltd. P'ship*, 242 Va. 426, 410 S.E.2d 669 (1991).

[337] *Parker v. Miller*, 250 Va. 175, 459 S.E.2d 904 (1995) (holding that failure to give notice to an abutting property owner invalidates variance proceedings); *Lawrence Transfer & Storage Corp. v. Board of Zoning Appeals*, 229 Va. 568, 331 S.E.2d 460 (1985) (holding that notice must be given to the abutting property owners of a larger parcel when the application for zoning approval is only for a portion of that larger parcel not physically abutting the neighbors); *see also Potomac Greens Assocs. P'ship v. City Council*, 761 F. Supp. 416 (E.D. Va. 1991), *vacated on other grounds*, 6 F.3d 173 (4th Cir. 1993).

[338] 255 Va. 429, 498 S.E.2d 235 (1998).

decision with the same deficiencies were not affected. Because not all lower courts were adhering to that admonition, section 15.2-1427 of the Virginia Code was amended to provide that all ordinances and resolutions recorded as adopted unanimously before the date of the decision are deemed valid.

16.1111 Limitations of Actions.

A. Appeal to Circuit Court. According to section 15.2-2285(F) of the Virginia Code, contest of "a decision of the local governing body adopting or failing to adopt a proposed zoning ordinance or amendment thereto or granting or failing to grant a special exception" must be filed in the appropriate circuit court within 30 days of the decision complained of. In *Friends of Clark Mountain Foundation, Inc. v. Board of Supervisors*,[339] the court held that this 30-day period is neither a statute of limitations nor a statute of repose, without saying what it might be. It appears, therefore, that the provision is nothing more than a statutory appeal period, identical to the 30-day appeal period provided for judicial orders.[340] The Virginia Supreme Court has held that, because a proceeding filed to appeal the decision of a local board of zoning appeals[341] is not a trial, a nonsuit may not be granted.[342]

B. *Kole v. City of Chesapeake*. Perhaps the most sweeping procedural decision by the Virginia Supreme Court is *Kole v. City of Chesapeake*,[343] where the court clarified a number of procedural points that had never been previously addressed, one of limited application to the City of Chesapeake and others of more general importance.

In *Kole*, the plaintiff had filed a declaratory judgment action challenging a downzoning of his property, and the city filed a "Demurrer and Special Plea in Bar and Plea of Statute of Limitations" asserting that the complaint had not been filed within the 30 days provided by section 15.2-2285(F). The landowners filed a response that questioned the factual assertions in the pleas and demanded an evidentiary hearing. The trial court refused the hearing, refused leave to amend, and dismissed the complaint.

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[339] 242 Va. 16, 406 S.E.2d 19 (1991).

[340] *See also Riverview Farm Assocs. v. Board of Supervisors*, 259 Va. 419, 528 S.E.2d 99 (2000) (holding that nonnecessary parties cannot be added to a suit after the expiration of the 30-day period); *Parker v. Miller*, 250 Va. 175, 459 S.E.2d 904 (1995).

[341] Va. Code § 15.2-2314.

[342] *Board of Zoning Appeals v. Board of Supervisors*, 275 Va. 452, 657 S.E.2d 147 (2008).

[343] 247 Va. 51, 439 S.E.2d 405 (1994).

The pleas had been predicated on the fact that the city council had voted to rezone the landowners' property on July 16, 1991, but suit had not been filed until September 13, 1991, more than 30 days after council action. The court held, however, that because of the unique provision of the City of Chesapeake's charter, which authorizes a referendum on any legislative matter,[344] no such matter—including a rezoning action—could be considered final until the passage of 30 days from the council's vote, and that the 30-day appeal period of section 15.2-2285(F) did not begin to run until the initial 30-day referendum period expired.

The Chesapeake referendum provision is unique. Of more general importance in Virginia land use, the court also held that the 30-day appeal period applies only to "judicial review of the reasonableness of the rezoning enactment."[345] It does not bar claims that a rezoning ordinance is void ab initio for asserted procedural defects nor does it bar claims of vested rights, claims of inverse condemnation, or claims of federal constitutional violations.

C. Section 15.2-2204 of the Virginia Code. The *Kole* decision and others left litigants with the fairly clear view that there was no limitation period on *procedural* claims that might arise from some defect in the land use process. Recognizing this, the General Assembly amended section 15.2-2204 to do two things. First, it brought forward to July 1, 1996 the procedural curative statute that had formerly "cleansed" actions taken before January 1, 1974 with the sole exception of cases filed before that date. Second, all actions "contesting a decision of a locality based on a failure to advertise or give notice as may be required . . . shall be filed within 30 days of such decision with the circuit court having jurisdiction of the land affected by the decision." All parties must now bear in mind that the appeal period for substantive land use claims will cut off the most common kinds of procedural claims as well.

D. Vested Rights. Vested rights claims are property rights claims[346] and, thus, are subject to the five-year limitation period of section 8.01-243(B) of the Virginia Code.

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[344] *See R.G. Moore Bldg. Corp. v. Committee for Repeal of Ordinance R(C)-88-13*, 239 Va. 484, 391 S.E.2d 587 (1990).

[345] *See also City Council v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 429 S.E.2d 225 (1993).

[346] *See Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 356 (1991).

E. Federal Actions. Federal actions, typically brought under 42 U.S.C. § 1983, are subject to the two-year limitation period of section 8.01-243(A) of the Virginia Code.[347]

16.1112 Exhaustion of Remedies. A landowner may be precluded from making a direct judicial attack on a zoning decision if the landowner has failed to exhaust "adequate and available administrative remedies" before proceeding to a court challenge.[348] However, the Virginia Supreme Court has ruled that where a landowner has already "fully run the [local] legislative gauntlet once," he or she need not pursue the legislative process again before being permitted to challenge in court the zoning placed on his or her property.[349] *Rinker v. City of Fairfax*[350] holds that remedies such as special use permits and special exceptions are legislative in nature and do not qualify as "administrative" remedies that a complainant must first exhaust before seeking redress from the courts.[351]

Furthermore, the Virginia Supreme Court has allowed suits for relief from a zoning ordinance where there had been no appeal to the board of zoning appeals (BZA) because the appellants were seeking a determination that the ordinance in question was invalid and the BZA could not grant the relief sought.[352]

16.1113 Necessary Parties. In *Friends of Clark Mountain Foundation, Inc. v. Board of Supervisors*,[353] the court held that one who files a challenge to a land use action under section 15.2-2285(F) within the 30 days provided for such appeals need only name the local governing body in the petition in order to toll the running of the appeal period, because the governing body and the contestant are the only "required" parties. "After the contesting action has been instituted and is pending, however, and the absence of a necessary party is noted of record, the trial should not adjudicate the controversy until that party has intervened or has been brought into the

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[347] *See, e.g.*, *Van Horn v. Lukhard*, 392 F. Supp. 384 (E.D. Va. 1975).

[348] *Vulcan Materials Co. v. Board of Supervisors*, 248 Va. 18, 445 S.E.2d 97 (1994).

[349] *Rinker v. City of Fairfax*, 238 Va. 24, 30, 381 S.E.2d 215, 218 (1989).

[350] *Id.*

[351] *Id.* at 29-31, 381 S.E.2d at 218.

[352] *Town of Jonesville v. Powell Valley Village Ltd. P'ship*, 254 Va. 70, 487 S.E.2d 207 (1997); *Dail v. York Cnty.*, 259 Va. 577 528 S.E.2d 447 (2000).

[353] 242 Va. 16, 406 S.E.2d 19 (1991).

proceeding."[354] The necessary parties are, of course, the applicants for the land use approval at issue and the owner of the land involved if the applicants do not own the land. If the contestant fails to name these necessary parties, the matter cannot go forward until the proper parties are all before the court.

16.1114 Standing. Among the issues that constantly bedevil litigants is the question of who has "standing" to bring a land use action. Historically, the court has drawn the issue quite narrowly, requiring that one contesting a land use action have a manifestly justiciable interest. The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such *a personal stake in the outcome of the controversy* as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[355] The courts have drawn generally on the use of the word "aggrieved" in other statutes to determine what constitutes a party with sufficient interest in litigation:

> The term "aggrieved" has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be "aggrieved," it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks *to* attack. The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest" . . . The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.[356]

Whether taxpayers in general have standing to challenge local ordinances under the declaratory judgment statute[357] has not been directly

[354] *Id.* at 21, 406 S.E.2d at 22.

[355] *Cupp v. Board of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984).

[356] *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419-20, 344 S.E.2d 899, 903 (1986) (citations omitted); *see also Pearsall v. Virginia Racing Comm'n*, 26 Va. App. 376, 494 S.E.2d 879 (1998).

[357] *See* Va. Code § 8.01-187 *et seq.*

addressed by the Virginia courts, but in *City of Fairfax v. Shanklin*,[358] the Virginia Supreme Court speculated that taxpayers might have standing.

In 2000, the Virginia Supreme Court appeared to have loosened its previously strict standing requirements, and it has also appeared to recognize a broader concept of standing where landowners in the "vicinity" of a rezoning had a justiciable interest in a challenge to it.[359] In *Riverview Farm Assocs. v. Board of Supervisors*,[360] the court suggested that standing lies not simply because of physical proximity to a rezoned property but also where the *impact* of a land use decision can give rise to such a justiciable interest. The court stated that

> [c]ount I . . . stated a cause of action [because it] challenged the "off-site" proffers regarding truck traffic on the basis of the alleged impact of the proffered conditions on the plaintiffs' use of their own properties, not on the basis of any property right held by [others]. The plaintiffs live within sufficiently close proximity to the property that is the subject of the rezoning to possess a "justiciable interest" in the litigation of Count I.[361]

Then, in 2013, the court retrenched, in *Friends of the Rappahannock v. Caroline Cnty. Board of Supervisors*,[362] when it held that several adjacent lot owners and a lessee of adjacent property, despite their proximity to the land subject to the approved special permit, did not have standing to challenge the approval of the special permit because they had not pled particularized harm from the approved use that was different from harm the general public would experience. The court distinguished *Riverview* by noting that the *Riverview* plaintiffs were challenging a rezoning from commercial to industrial where the Caroline County land was already zoned industrial. The court also held that there was no difference between an "aggrieved party," as

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[358] 205 Va. 227, 135 S.E.2d 773 (1964).

[359] *Friends of Clark Mountain Found., Inc. v. Board of Supervisors*, 242 Va. 16, 406 S.E.2d 19 (1991).

[360] 259 Va. 419, 427, 528 S.E.2d 99, 103 (2000).

[361] *See also Board of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 224, 278 S.E.2d 859, 862 (1981).

[362] 286 Va. 38, 743 S.E.2d 132 (2013); *see also In re Nov. 20, 2013 Decision of Board of Zoning Appeals*, 89 Va. Cir. 345 (Fairfax 2014) and *Granata Homeowners Ass'n v. Loudoun County*, 93 Va. Cir. 192 (2016).

that term is used in section 15.2-2314, and the "justiciable interest" standard of the Virginia Declaratory Judgment Act.[363]

The court has held that the governing body of a local jurisdiction has standing to appeal a decision of the local BZA.[364] A member of the governing body also has standing to appeal a zoning administrator's determination to the BZA.[365]

16.1115 Federal Land Use Proceedings. There are a number of hurdles to the prosecution of a federal land use case. Claims are customarily brought under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, most commonly using the procedural device of 42 U.S.C. § 1983, since attorney fees are available to a prevailing party under 42 U.S.C. § 1988.

A preliminary, and major, difficulty in federal suits is the Fourth Circuit's clear hostility to the choice of a federal forum. In the crucial case of *Pomponio v. Fauquier County Board of Supervisors*,[366] the court held that the *Burford* abstention doctrine[367] is properly invoked in a federal land use case, except where there is a legitimate and independent federal claim. Reviewing all of the Fourth Circuit's decisions in the area, the court said that

> [v]irtually all of these cases, when stripped of the cloak of their federal constitutional claims, are state law cases. The federal claims are really state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims . . . questions of state and local land use and zoning law are a classic example of situations in which "the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to

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[363] Va. Code § 8.01-184 *et seq.*

[364] *Board of Supervisors v. Board of Zoning Appeals*, 268 Va. 441, 604 S.E.2d 7 (2004). *But see Braddock, L.C. v. Board of Supervisors*, 268 Va. 420, 601 S.E.2d 552 (2004); *Kirkpatrick & Blaker Assocs. v. Loudoun Cnty. Bd. of Supervisors*, 62 Va. Cir. 242 (Loudoun 2003).

[365] *In re Oct. 25, 2018 Decision of the Bd. of Zoning Appeals*, 2019 Va. Cir. Lexis 31 (2019)

[366] 21 F.3d 1319 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 870 (1994), *vacated in part sub nom. Henry v. Jefferson Cnty. Planning Comm'n*, 2000 U.S. App. LEXIS 12844 (4th Cir. 2000) (unpublished).

[367] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

> establish a coherent policy with respect to a matter of substantial public concern.'"[368]

Pomponio held that where *Burford* abstention lies, the district court's proper remedy is to dismiss the case, rather than to retain jurisdiction pending resolution of any state law matters. Since then, however, the United States Supreme Court reformulated the issue as one decided not by the type of abstention but by the type of relief sought. In *Quackenbush v. Allstate Ins. Co.*,[369] the Court held that federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Federal courts applying abstention principles in damages actions may only enter a stay.

Following *Quackenbush*, the Fourth Circuit felt compelled to change its position, not regarding abstention, to which it continues to adhere in deference to federalism concerns,[370] but regarding the proper course for the district courts to follow. The court said that

> [s]ince our decision in *Pomponio*, however, the Supreme Court has declared that dismissal, based on abstention principles, is appropriate only where the relief sought is equitable or otherwise discretionary. In damages actions, a federal court cannot dismiss the action but can enter a stay to await the conclusion of state proceedings. *See Quackenbush v. Allstate Ins. Co.*, 135 L. Ed. 2d 1, 22 (1996). *Quackenbush* dealt with an action that sought neither equitable nor other discretionary relief that was dismissed under the *Burford* abstention doctrine. Although the Court did not so hold, it left open the possibility that "*Burford* might support a federal court's decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law." *Id.* Although not squarely before us, we note that *Quackenbush* appears to have implicitly overruled our holding on this issue in *Pomponio*, a damages action. At the same time, it appears that our earlier decision in this case in *Front Royal*

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[368] *Pomponio*, 21 F.3d at 1326-27 (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)).

[369] 517 U.S. 706 (1996).

[370] *See Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999).

> *V*, *viz.* the instruction to the district court to retain federal jurisdiction, remains supportable under current abstention jurisprudence.[371]

When such claims are brought in federal court, substantive due process claims are particularly difficult since it is probable that the landowner must first demonstrate the existence of a "property" right sufficient to survive a Rule 12(b)(6) motion to dismiss. With few exceptions, the courts have failed to find a property interest in zoning in and of itself, making it difficult for the litigant to use the Due Process Clause in zoning challenges.[372]

In a per curiam opinion, the United States Supreme Court held that the Equal Protection Clause could be invoked by a class of one.[373] Although there was evidence that the locality was acting out of spite in demanding of the landowner more than it demanded of others, the Court explicitly refused to consider whether a locality's decision could be overturned because of subjective ill will. This case does open up the possibility, however, that legislative motive (perhaps as opposed to a *legislator's* motive) may be challenged in a federal proceeding. *Village of Willowbrook v. Olech*[374] also raises the possibility that land use decisions may give rise to federal claims that had been effectively precluded in the Fourth Circuit.

In *Northern Virginia Community Hospital v. Loudoun County Board of Supervisors*,[375] a Virginia circuit court held that a complaint for deprivation of equal protection must set forth "sufficient facts that lead a reader to conclude the same result would not have obtained absent consideration of an impermissible purpose."

[371] *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *see also Virdis Dev. Corp. v. Board of Supervisors*, Civ. A. No. 3:14-CV-589, 2015 U.S. Dist. LEXIS 19413 (E.D. Va. Feb. 18, 2015). *But see Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013).

[372] *Compare Gosnell v. City of Troy*, 59 F.3d 654 (7th Cir. 1995) ("developers cannot move land-use disputes to federal court by crying 'substantive due process' . . . [t]hat doctrine is not a 'blanket protection against unjustifiable interferences with property'"), *with DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir.) (holding that zoning itself gives rise to legitimate expectations of the use of property, and deprivation of zoning rights may be subject to due process challenge), *cert. denied*, 516 U.S. 937 (1995), *overruled in part sub nom. UA Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003).

[373] *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

[374] *Id.*

[375] 70 Va. Cir. 283 (Loudoun 2006) (citing *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 819 (4th Cir. 1995)).

Federal courts have supplemental jurisdiction to conduct an on-the-record review of local administrative decisions.[376] The United States Supreme Court has noted, however, that while the deferential nature of a review of state administrative claims does not bar supplemental jurisdiction, the principles of abstention as expounded in *Quackenbush* may result in the state claims not being heard.

16.12 VARIANCES

16.1201 In General. There are rare occasions when the literal enforcement of a zoning ordinance will result in particular hardship to the property owner, and no relief is available through a special use permit.[377] The Virginia Code provides the variance as the only way to solve this type of problem.[378]

Variances are defined in section 15.2-2201 of the Virginia Code as reasonable deviations from provisions of a zoning ordinance that regulate the shape, size or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the use of the property, and the need for a variance would not be shared generally by other properties. The section further provides that the granting of a variance must not be contrary to the purpose of the ordinance. A variance may not include a change in use, which can only be accomplished by a rezoning or a conditional zoning.

16.1202 Unreasonable Restriction of Use. Sections 15.2-2201 and 15.2-2309 were substantially revised in 2015. Where once a variance could only be issued where the BZA found “unnecessary hardship” amounting to a confiscation, the BZA now must issue a variance where the applicant shows, by a preponderance of the evidence, that the zoning restriction imposes an unreasonable restriction on the use of the property or that an unreasonable hardship would be alleviated. The variance applicant must now show only that (i) the property was acquired in good faith and that the hardship was not created by the applicant; (ii) the granting of the variance will not be of

[376] *City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156 (1997) (denial of demolition permit).

[377] *See Bell v. City Council*, 224 Va. 490, 297 S.E.2d 810 (1982) (noting that height standards otherwise generally applicable in an ordinance may be varied by the governing body—or the BZA if it has the power to issue special use permits—by means of conditions appended to a special use permit).

[378] Va. Code § 15.2-2309.

substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception or the process for modification of a zoning ordinance.[379]

Section 15.2-2309(2) specifies when an expansion of the use of a structure or area for which a variance has been granted requires a new variance. Expansion of the use authorized by a variance is permitted if it is "within an area of the site or part of the structure for which no variance is required under the ordinance." However, where the expansion is "proposed within an area of the site or part of the structure for which a variance is required," an additional variance is needed.

The notion of good faith acquisition of property does not mean that the applicant for a variance must have acquired the property without fore-knowledge of the restrictions upon it. In *Spence v. Board of Zoning Appeals*,[380] the Virginia Supreme Court, in upholding the decision of the BZA to grant a variance, found that an owner who purchased property at a low price knowing that it could not be developed without a variance (knowing, in fact, that a previous variance request had been denied), nonetheless acted in good faith. Further, the Court has held that the doctrine of *res judicata* does not apply to variance decisions of the BZA.[381] The court distinguished *Steele v. Fluvanna Cnty. Board of Zoning Appeals*[382] by declaring that a self-inflicted hardship exists when an owner violates the zoning ordinance and then seeks relief by means of a variance from the consequences of the zoning violation.[383] A further example of a self-created hardship was described by the Supreme Court in *Cherrystone Inlet, LLC v. Board of Zoning Appeals*,[384]

[379] *Id.* Prior law required that the "demonstrable hardship" be so serious that it approached a confiscation. The "approaching confiscation" language was removed from the statute in 2009.

[380] 255 Va. 116, 496 S.E.2d 61 (1998).

[381] *Chilton-Belloni v. Angle ex rel. City of Stauton*, 294 Va. 328 (2017).

[382] 246 Va. 502, 436 S.E.2d 453 (1993).

[383] *See also Riles v. Board of Zoning Appeals*, 246 Va. 48, 431 S.E.2d 282 (1993).

[384] 271 Va. 670, 628 S.E.2d 324 (2006).

where the landowner subdivided its property to create a lot that needed a variance.

The variance has been the most misunderstood and misapplied element of Virginia land use practice, and it is almost certain that variances were granted to property owners who did not, in fact, qualify under then prevailing law. Variances were often made available to accomplish a "fair" result, even though the varied restrictions had absolutely no impact that amounted to the sort of hardship previously contemplated by the statute. The variance was a remedy that was properly applicable only in rare circumstances, and the Virginia Supreme Court narrowly interpreted the statutory provisions to amount only to a "constitutional safety valve."[385] Under prior versions of the statute, it was difficult for a property owner to demonstrate near confiscation allowing grant of a variance.[386] However, over the last 15 years, the General Assembly has repeatedly modified the statute to make the variance process more lenient for the applicant.

A BZA cannot grant variances that are not specifically related to the size or area of a lot or parcel of land or the size, area, bulk, or location of a building or structure.[387] Variances from provisions of a zoning ordinance such as sign codes or parking requirements, for example, do not come within the meaning of the term at all. They are matters that are more properly addressed through general code amendments made by the governing body.

The BZA is empowered to order case-specific relief for the subject property and to impose conditions upon that relief if necessary, once the predicate requirements for a variance have been met.[388] A BZA cannot grant a "use" variance authorizing use of the property for a purpose not otherwise contemplated by the district in which the property was located. This action would amount to rezoning, and a BZA is not empowered to rezone property.[389] Indeed, the definition in section 15.2-2201 specifically states that no variance can include a "change in use." Distinguishing from a change in use,[390] in

[385] *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980).

[386] *See Hendrix v. Board of Zoning Appeals*, 222 Va. 57, 278 S.E.2d 814 (1981); *Dixon v. Zoning Appeals Bd.*, 50 Va. Cir. 424 (Va. Beach 1999).

[387] *Adams Outdoor Adver. v. Board of Zoning Appeals*, 261 Va. 407, 544 S.E.2d 315 (2001).

[388] *See Azalea Corp. v. City of Richmond*, 201 Va. 636, 112 S.E.2d 862 (1960).

[389] *Prince William Cnty. Bd. of Zoning Appeals v. Bond*, 225 Va. 177, 300 S.E.2d 781 (1983).

[390] *See* Va. Code § 15.2-2201.

Tolman v. Board of Zoning Appeals,[391] the court held that a variance can include an increase in the intensity of the use and, thus, a variance granted to allow a legal nonconforming use of three apartments to operate as seven was valid.

The Fairfax County Board of Zoning Appeals, and others, had for years relied on language in *Natrella v. Board of Zoning Appeals*[392] to the effect that the prior statute's disjunctive listing of the elements that could support the granting of a variance implied that a finding that an inconvenient ordinance provision "unnecessarily restrict[s] the use of the property" meant that something less than an unconstitutional interference with property rights would enable a BZA to grant a variance. In *Cochran v. Fairfax County Board of Zoning Appeals*,[393] the Virginia Supreme Court distinguished that interpretation of *Natrella* and emphasized yet again that variances were to be granted only to avoid an unconstitutional regulatory taking. In reaction to the *Cochran* decision, the General Assembly amended section 15.2-2309 in 2009 by removing the words "approaching confiscation" after "demonstrable hardship."

In 2015, as part of a substantial rewriting of the BZA provisions of the Virginia Code, the General Assembly further loosened the standards for variances substituting an "unreasonable restriction" standard for the "undue hardship" standard adopted in 2009.[394] Those amendments also change the grant language from permissive to mandatory: the variance "shall be granted."

Decisions to grant or deny variances are appealed to the circuit court by a writ of certiorari filed with the clerk of the circuit court within 30 days after the final decision of the board.[395] These appeals may be brought by "[a]ny person or persons jointly or severally aggrieved . . . or any aggrieved taxpayer or any officer, department, board, or bureau of the locality."[396] On appeal, the decision of the BZA is entitled to a presumption of correctness

[391] 46 Va. Cir. 359 (Richmond 1998).

[392] 231 Va. 451, 345 S.E.2d 295 (1986).

[393] 267 Va. 756, 594 S.E.2d 571 (2004).

[394] 2015 Va. Acts ch. 597.

[395] Va. Code § 15.2-2314; *see West Lewinsville Heights Citizens Ass'n v. Board of Supervisors*, 270 Va. 259, 618 S.E.2d 311 (2005).

[396] Va. Code § 15.2-2314.

appropriate to a quasi-judicial body, and the burden is on the appellant to demonstrate that the board erred in its decision.[397]

Section 15.2-2314 provides that an appellant from a BZA ruling on an administrative determination may introduce evidence to the trial court beyond the record before the BZA, and the burden of proof on the appellant is a "preponderance of the evidence." These evidentiary standards were applied in *Chappell v. Board of Zoning Appeals*,[398] in which the additional evidence and the changed standard of review enabled the landowner to prevail. The Virginia Supreme Court subsequently ruled that the preponderance of evidence standard applies only to questions of fact and not questions of law.[399] In response, the General Assembly in 2006 amended section 15.2-2314 to provide for de novo circuit court review of the BZA's application of law. Consistent with this amendment, the Supreme Court subsequently ruled that because the circuit court "acts as a reviewing tribunal rather than a trial court," procedural matters, such as a nonsuit allowed as a matter of right at trial, are not available in what is essentially an appellate review of a BZA decision.[400] Sections 15.2-2308 and 15.2-2388.1, as amended and enacted, respectively, in 2015, (i) prohibit substantive ex parte communication between the members of the BZA and either the nonlegal staff of the locality or the applicant; (ii) require any materials prepared by the locality's staff to be shared with the applicant; and (iii) require the applicant to be given equal time before the BZA as the locality's staff.[401]

To avoid the extreme results of *Cochran*, some localities amended their zoning ordinances to allow deviations from yard and lot width standards by special exception. This approach was invalidated by one circuit court in *Blakeley v. Board of Supervisors*,[402] which held that the definition of "special exception" and "variance" required that only "uses" can be authorized by special exception and that deviations from dimensional regulation could only be authorized by variance.

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[397] *Id.* Chapter 597 of the Acts of 2015 changed the standard of review on appeal.

[398] 65 Va. Cir. 142 (Fairfax 2004).

[399] *Lamar Co. v. Board of Zoning Appeals*, 270 Va. 540, 620 S.E.2d 753 (2005).

[400] *Board of Zoning Appeals v. Board of Supervisors*, 275 Va. 452, 657 S.E.2d 147 (2008).

[401] *See* 2015 Va. Acts ch. 597.

[402] Case No. CL-2010-0005765, 2011 Va. Cir. LEXIS 62, (Fairfax Cir. Ct. April 12, 2011).

In 2008, the Virginia Supreme Court ruled that the BZA may not be a party to a review of its decisions.[403] In response to this decision, the General Assembly in 2010 amended section 15.2-2314 to clarify that while a BZA is not a party to the circuit court review proceedings, it may participate to the extent required by that section. In *Frace v. Johnson*,[404] the Virginia Supreme Court applied the 2010 amendments to section 15.2-2314 to require a petitioner appealing a BZA decision to name the governing body of a locality as a party defendant before the circuit court. But failure to serve the governing body within the 30-day appeal period is not grounds for dismissal of the petition.[405]

The Virginia Supreme Court has ruled that a circuit court decision reviewing a BZA action can only be appealed to it and not to the Court of Appeals.[406]

The Virginia Supreme Court has often criticized the quality of records made before the BZA.[407] In *Ames v. Town of Painter*,[408] the record of an application for a special use permit contained no evidence demonstrating compliance with the requirements for findings by a BZA. The court held that the "fairly debatable standard" cannot be established by a "silent record." Unless the BZA makes appropriate findings supported by the record or the record as a whole suffices to render the issues fairly debatable, probative evidence of unreasonableness introduced by the litigant attacking the BZA's action will be deemed unrefuted.

16.13 NONCONFORMING USES

16.1301 In General. Section 15.2-2307 of the Virginia Code authorizes localities to protect nonconforming uses "so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years." Nonconforming uses are those that were lawful at

[403] *Board of Zoning Appeals v. Board of Supervisors*, 276 Va. 550, 666 S.E.2d 315 (2008).

[404] 289 Va. 198, 768 S.E.2d 427 (2015).

[405] *In re Decision of Bd. of Zoning Appeals*, 88 Va. Cir 114 (Fairfax 2014).

[406] *Virginia Beach Beautification Comm'n. v. Board of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986).

[407] *See, e.g.*, *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980).

[408] 239 Va. 343, 389 S.E.2d 702 (1990).

the time of adoption of a zoning ordinance or amendment thereto, but which would be unlawful if subjected to the existing provisions of law.[409] The Virginia Supreme Court has specifically identified a nonconforming use as a species of "vested right."[410]

Generally, only existing or approved uses and structures are protected under section 15.2-2307. Raw land acquires no rights to development, except to the extent the landowner can claim vested rights.[411] It also appears clear that no nonconforming use can ever be established solely on the basis of an accessory use. Only a primary use of property can qualify for continuing legal protection.[412]

In 2014, the General Assembly amended Section 15.2-2307 to provide that when the owner had paid taxes to a locality on a building or structure for more than the 15 previous years, it would become a nonconforming use and not subject to removal solely due to its nonconformities. This new language has yet to be tested in a court but raises the possibility that the equivalent of a "safe harbor" against enforcement for long-standing noncompliance with local ordinances now exists.

16.1302 Expansion or Alteration of Use. Perhaps the most commonly faced questions involve expansions of nonconforming uses. The Virginia Supreme Court has said that the principal inquiry in this regard is whether the "character" of the use has been continued or impermissibly changed. The court considers increase in size or scope of a nonconforming use to be "merely one circumstance relevant to the key determination of whether the character of the use has been changed," the relevance of which depends in each case on the "quantum of the increase and its effect upon the purposes and policies . . . [that] the zoning ordinance was designed to promote."[413]

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[409] In *Hardy v. Board of Zoning Appeals*, 257 Va. 232, 508 S.E.2d 886 (1999), the appeal of a BZA decision construing the term "lumbering" to include operation of a portable sawmill on- and off-site was not rendered moot by the Board of Supervisor's amendment of the zoning ordinance to allow only on-site use of a sawmill as a permitted use. If the BZA was in error, the sawmill was not lawful pre-amendment and could not be a lawful nonconforming use postamendment; if the BZA was correct, the sawmill operation was a legitimate nonconforming use. See also *Town of Front Royal v. Martin Media*, 261 Va. 287, 542 S.E.2d 373 (2001).

[410] *Holland v. Board of Supervisors*, 247 Va. 286, 289 n*, 441 S.E.2d 20, 22 n* (1994).

[411] *See infra* ¶ 16.14.

[412] *Knowlton v. Browning-Ferris Indus.*, 220 Va. 571, 260 S.E.2d 232 (1979); *see also Hurd v. Zoning Appeals Bd.*, 50 Va. Cir. 213 (Warren 1999); *Seekford v. Zoning Appeals Bd.*, 49 Va. Cir. 112 (Shenandoah 1999).

[413] *Knowlton v. Browning-Ferris Indus.*, 220 Va. 571, 260 S.E.2d 232 (1979).

In *Knowlton v. Browning-Ferris Indus.*,[414] the transformation of a general trucking business using four trucks engaged in hauling random cargoes into a commercial refuse operation with eighteen large trash compactors and a spacious garage was deemed a manifest change in the character of the previously existing use. Similarly, transformation of an auto body shop into a plant manufacturing metal railings was a proscribed change in character.[415] In adopting the change of character test, the court specifically rejected the argument that the property owner retains the right to use his or her property for any other use permitted by the same zoning classification that would apply to the original nonconforming use.[416] Rather, the changed use must be either "more restrictive" (and itself permitted in the district) or of substantially similar character to the original use.[417]

In *Patton v. City of Galax*,[418] the Virginia Supreme Court held that a nonconforming use could be expanded within a building only upon a showing that the space into which the nonconforming use was proposed to be expanded was arranged or designed for such use at the time of adoption or amendment of the zoning ordinance.

While section 15.2-2307 does not expressly address the construction of *additional* facilities to support a nonconforming use, the Virginia Supreme Court has held that the power to prohibit such construction is necessarily implied from the powers expressly granted by the statute, whose general purpose is to allow the government to regulate changes to nonconforming uses.[419] *Masterson v. Board of Zoning Appeals*,[420] which had allowed additions to nonconforming uses that were themselves in conformity with the zoning ordinance, can be distinguished on the ground that the city's charter was worded so as to allow such additions.

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[414] *Id.*

[415] *Board of Zoning Appeals v. McCalley*, 225 Va. 196, 300 S.E.2d 790 (1983); *see also Wheelabrator Clean Water Sys., Inc. v. King George Cnty.*, 43 Va. Cir. 370 (King George 1997) (finding that the character of a legal nonconforming use which allows bio-solids storage and application of bio-solids on the same property would be impermissibly changed by the transport of bio-solids from the storage facility to other properties).

[416] *McCalley*, 225 Va. at 200, 300 S.E.2d at 792.

[417] *See also Masterson v. Board of Zoning Appeals*, 233 Va. 37, 353 S.E.2d 727 (1987).

[418] 269 Va. 219, 609 S.E.2d 41 (2005).

[419] *City of Chesapeake v. Gardner Enters., Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997).

[420] 233 Va. 37, 353 S.E.2d 727 (1987).

Improper expansion of a pre-existing nonconforming use will not result in forfeiture of that use.[421]

16.1303 Termination of Use. Substantial confusion often surrounds the future of a structure or use once it is determined to be nonconforming. A locality's amendment of its zoning ordinance in an attempt to terminate a pre-existing nonconforming use impairs the landowner's vested rights and therefore violates section 15.2-2307.[422]

Depending on the severity of local regulations with respect to reconstruction and expansion of such uses, very small changes in development regulations can dramatically affect the future use of the property in ways that no party finds desirable. Some jurisdictions have, therefore, begun to differentiate between buildings that do not conform as to *use* and those that do not conform to newly imposed *development restrictions* such as density, height, and setback. The fate of such regulations has yet to be determined.

Without determining whether the circuit court's interpretation of section 15.2-2307 was correct, the Virginia Supreme Court held that the circuit court did not err in the means and methods it used to determine that the period during which preparatory actions were taken to reopen the business after a fire did not constitute a discontinuance of the business.[423] A nonconforming use of property as a duplex is not discontinued because one unit was vacant for more than two years. The court focused on the intent of the owners to not discontinue the use and also held that passive inaction by owners does not indicate discontinuance.[424] Establishing an illegal use for two years on property previously used for a legal, pre-existing nonconforming use will cause the pre-existing nonconforming use to be deemed abandoned.[425]

The court has held that a valid and lawful nonconforming use (an automobile graveyard) did not terminate for failure to comply with requirements that the use be "screened" within three years after the adoption of the ordinance. The locality was not powerless to require compliance with the law

[421] *Gwinn v. Herring*, Ch. No. 162484, 2000 Va. Cir. LEXIS 392 (Fairfax Aug. 16, 2000).

[422] *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007).

[423] *Board of Zoning Appeals v. Kahhal*, 255 Va. 476, 499 S.E.2d 519 (1998).

[424] *Montgomery v. Zoning Appeals Bd.*, 45 Va. Cir. 126 (Norfolk 1998).

[425] *Town of Mt. Jackson v. Fawley*, 53 Va. Cir. 49 (Shenandoah 2000).

by other means. The zoning administrator could have sought criminal penalties for failure to comply with the screening requirement or injunctive relief requiring that the screening be provided. The mere failure to screen did not terminate the use.[426]

A landowner lost the right to maintain a legal pre-existing barn when she constructed a new house on the lot, causing the barn to become an illegal accessory use.[427] In another case, a landowner lost the right to maintain separate lots as nonconforming lots on the date when the adjacent lots fell under common ownership.[428] Strangely, this opinion, while acknowledging the constitutional protection afforded nonconforming uses, nevertheless ruled that the public policy favoring the eventual elimination of nonconformities required the lots to lose their protected status despite the lack of any affirmative action by the landowner to abandon the nonconforming use.

16.14 VESTED RIGHTS

16.1401 In General. As localities find themselves seeking means of dealing with older zonings or zonings that no longer comport with comprehensive planning, questions of vested rights have become increasingly critical. Some localities seeking greater direct control over properties that have already been zoned and may not have been developed and on which development would be inconsistent with prevailing policies search for means by which they may lawfully restrict development rights formerly approved. Not surprisingly, this is threatening to landowners who have held on to properties through lean times or as investments awaiting an opportune time to develop or owners whose properties have passed through numerous hands as a consequence of hard economic times and who now find themselves more advantageously placed. Vested rights have, therefore, captured the attention of the courts and have directly involved the General Assembly itself in a fashion that indisputably changes prior law.

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[426] *Donovan v. Board of Zoning Appeals*, 251 Va. 271, 467 S.E.2d 808 (1996). *See also Prince William Bd. of Cnty. Supervisors v. Archie*, 296 Va. 1 (2018). *But cf. Grigorovich-Barsky v. Board of Zoning Appeals*, 43 Va. Cir. 24 (Northumberland 1997) (holding that an otherwise lawful nonconforming use must partly terminate because the nonconforming use had not been catalogued and permitted by the county as required by a subsequent ordinance. The degree to which the use must cease, however, would be governed by the extent property rights had "vested" under section 15.1-492 of the Virginia Code (now section 15.2-2307)).

[427] *Aesy v. Zoning Appeals Bd.*, 66 Va. Cir. 382 (Salem 2005).

[428] *Gray v. Zoning Appeals Bd.*, 65 Va. Cir. 281 (Norfolk 2004).

Whether projects are large or small, the development approval process has become more protracted, and land use regulations have become increasingly volatile. Whatever the reason for the frequency of vested rights claims, it is important for both the locality and the landowner to know when changed rules may or may not affect a particular land use.

16.1402 Continuum of Vested Rights. Land development exists on a continuum from initial development of plans for the use or reuse of land, through formal plan submission to plan approval to initiation of construction and, finally, to completion and establishment of the use. Vested rights arise at the latter stages of the land use process, conceptually before and distinct from "nonconforming uses."[429] A vested right is a constitutionally protected property right acquired by the landowner's good faith reliance on a significant governmental act that the landowner diligently pursues to occupancy or commencement. Legal pre-existing, nonconforming uses include both vested rights uses and grandfathered uses. Some uses can be both a vested right use and a grandfathered use.

16.1403 Nature of Vested Rights. Although not expressly stated in the decisions, the concept of vested rights seems to be grounded in the Virginia and United States Constitutions as well as in section 15.2-2307. In *Holland v. Johnson*,[430] the court specifically described a vested right as a "property right." If a vested right is a *property right* as opposed to a simple governmental license, its deprivation can be more than unlawful and could in rare cases be a compensable event. It is uncertain whether the Virginia Supreme Court recognizes the implications of its rulings in this regard, and thus, it is uncertain what consequences might flow in a case where a claimant seeks compensation for impairment of a vested right.[431]

Vested rights are sometimes seen as based on estoppel, and despite the theoretical differences between estoppel and vesting, most commentators

[429] It is important to contrast vested rights with "grandfathering." The two are conceptually quite different. *See infra* ¶ 16.1409.

[430] 241 Va. 553, 403 S.E.2d 356 (1991) (finding that the zoning administrator had exceeded her authority in determining that a landowner had acquired a vested right to develop and operate a quarry on its property).

[431] *See generally* Grayson P. Hanes & J. Randall Minchew, *On Vested Rights To Land Use and Development*, 46 Wash. & Lee L. Rev. 373 (1989). Although this article is now dated, it remains a good starting point for all study of vested rights. *See also* John J. Delaney & William Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 St. Louis U. L.J. 219 (1979); Note, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations*, 2 Geo. Mason L. Rev. 77 (1994).

have concluded that there are no practical distinctions between the doctrines.[432]

In *Dick Kelly Enterprises v. City of Norfolk*,[433] the court specifically held that estoppel does not apply against the government's enforcement of a zoning ordinance and that vested rights (nonconforming use) cannot arise out of an illegal nonconforming use of the land. The owner had received approval to construct a motel but operated apartments instead and had tried to bootstrap that into a contention that he had retained a right to motel use.[434]

In Virginia, vested rights are not a question of whether the government has been "fair" but whether the complex processes of government, as they relate to development plans, have advanced to a stage of governmental approval past which the expectations of the landowner can properly defeat the interests of the government. *Notestein v. Board of Supervisors*[435] makes plain that it is possible for the locality to be demonstrably "unfair" and yet prevail on a vested rights claim.

16.1404 Statutory Vesting Generally. Before 1998, the determination of when rights vested was solely a matter of common law, but the General Assembly's codification of vested rights materially expanded the circumstances under which rights vest. Section 15.2-2307 provides that a landowner's rights are deemed vested when the landowner (i) obtains a significant affirmative governmental act that remains in effect allowing development of a specific project; (ii) relies in good faith on that act; and (iii) incurs extensive obligations or substantial expenses pursuing the project in reliance on the affirmative act. The nonexclusive list of significant affirmative governmental acts are: (i) acceptance of proffers; (ii) approval of an application for rezoning for a specific use or density; (iii) granting of a special use permit with conditions; (iv) approval of a variance; (v) approval of a preliminary subdivision plat, site plan, or development plan with diligent pursuit of approval of the final plat or plan; (vi) approval of a final

[432] *See* Daniel R. Mandelker, *Land Use Law* § 6.12 (1988). The court has long and often held that neither laches nor estoppel can be used against a local governing body. *E.g.*, *Board of Supervisors v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 164, 349 S.E.2d 351 (1986) (laches); *Hurt v. Caldwell*, 222 Va. 91, 97, 279 S.E.2d 138, 141-42 (1981) (noting that in Virginia estoppel does not operate against the government).

[433] 243 Va. 373, 416 S.E.2d 680 (1992).

[434] *See also Wolfe v. Board of Zoning Appeals*, 260 Va. 7, 532 S.E.2d 621 (2000).

[435] 240 Va. 146, 393 S.E.2d 205 (1990).

subdivision plat, site plan, or development plan; or (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.

While section 15.2-2307 incorporates several governmental acts that had been recognized by the courts, it is a rather significant expansion of Virginia's common law of vesting. To a great extent, it negates the holdings in *Stephens City v. Russell*,[436] *Snow v. Amherst County Board of Zoning Appeals*,[437] and possibly *Town of Rocky Mount v. Southside Investors, Inc.*,[438] all of which found that no significant governmental act had occurred.

Section 15.2-2307 was applied by the Virginia Supreme Court for the first time in *City of Suffolk ex rel. Herbert v. Board of Zoning Appeals*.[439] In 1985, a developer had obtained a rezoning for a mixed-use development on 310 acres that described a specific number of dwelling units on a "bubble plan," under which specific house locations were not identified but gross unit totals were assigned to land bays. There was a subsequent amendment to that rezoning in 1994. A preliminary recreation and traffic analysis for full build-out was approved by the City of Suffolk in 1995. A preliminary plan for 154 acres of the project was approved in 1996 and extended in 1998, which accommodated utilities for the full build-out of the project. In 1997 the developer, without compensation, dedicated 1.1 acres to VDOT for road improvements. In 1999, the city rezoned the property. The zoning administrator determined that the developer's rights in the land use plan for the 154 acres were not vested. On appeal, the BZA reversed the zoning administrator's decision. The city appealed to the circuit court, which found for the landowner, and the city appealed to the Virginia Supreme Court. The

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[436] 241 Va. 160, 399 S.E.2d 814 (1991) (preliminary subdivision plat).

[437] 248 Va. 404, 448 S.E.2d 606 (1994) (variance).

[438] 254 Va. 130, 487 S.E.2d 855 (1997) (if interpreted as a density rezoning).

[439] 266 Va. 137, 580 S.E.2d 796 (2003) (decided under prior law). *Herbert* was superseded by statute as stated in *Hale v. Board of Zoning Appeals*, 277 Va. 250, 268, 673 S.E.2d 170, 179 (2009). The point of contention was whether the presumption of correctness of the BZAs decisions applied to both issues of fact *and* conclusions of law, which it no longer did after the 2006 amendment to section 15.2-2314. *See also* Va. Att'y Gen. Op. No. 04-093 (Mar. 25, 2005), www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/2005opns/04-093w.pdf (circumstances may support vesting of rights that will not be affected by subsequent amendment of zoning ordinance, and amendments to Chesapeake Bay Preservation Act ordinance do not affect landowner until adopted by local ordinance).

supreme court upheld the trial court's decision, finding that the 1988 rezoning met the statutory requirement for a significant governmental act allowing development of a specific project. The court also held that the developer's bubble plan satisfied the "specific use" requirement of section 15.2-2307 and was not too vague and that development plans in great detail were not required by the statute. The court further found that the developer's activities between 1994 and 1999 demonstrated due diligence and that substantial expenses were incurred to serve the whole project.[440] Section 15.2-2307(D) provides vested rights protection for buildings where the owners have paid taxes on the building for more than fifteen years.[441] However, that subsection does not granted vested rights to uses on which taxes have been paid for 15 years.[442]

Because section 15.2-2307's list of significant governmental acts is nonexclusive, arguably the decisions that were not implicitly overruled by the statutory expansion remain good law as to what is not a significant governmental act.[443] However, approval of well and drainfield permits, although required by local ordinance for preliminary plan submission, was held not to be a significant governmental act from which vested rights could arise.[444] While acceptance of a proffer is a significant governmental act, if it specifies the uses contemplated, it does not vest rights for *any* purpose for which the property was zoned at the time the proffer was accepted.[445]

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[440] *See also Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013).

[441] *Lamar Co., LLC v. City of Richmond*, 287 Va. 348 (2014).

[442] *Board of Supervisors v. Cohn*, 296 Va. 465 (2018).

[443] *See Board of Zoning Appeals v. Caselin Sys.*, 256 Va. 206, 501 S.E.2d 397 (1998) (pre-amendment) (board of supervisors' letter of support and certification of compliance with local ordinances); *Holland v. Board of Supervisors*, 247 Va. 286, 441 S.E.2d 20 (1994) (application for permits); *Notestein v. Board of Supervisors*, 240 Va. 146, 393 S.E.2d 205 (1990) (statements by officials).

In *Island Grill, Inc. v. Board of Zoning Appeals*, 34 Va. Cir. 492 (Richmond 1994), the city had a longstanding practice of treating the filing of an adequate building permit application as the moment of vesting, on the grounds that its application review process was uniquely thorough and plans that were accepted would be approved. The BZA agreed and held the owner was vested by his application, even though the applicable ordinance changed before his permit could issue. The circuit court reversed, holding, on the basis of *Parker v. County of Madison*, 244 Va. 39, 418 S.E.2d 855 (1992), and *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994), that in the absence of any affirmative legislative policy, no vested rights can arise from the mere application for a building permit.

[444] *In re Zoning Ordinance Amendments Enacted by Board of Supervisors of Loudoun Cnty. (Consolidated Cases)*, 66 Va. Cir. 375 (Loudoun 2005).

[445] *Hale v. Bd. of Zoning Appeals*, 277 Va. 250, 673 S.E.2d 170 (2009).

In determining whether a specific act is potentially a significant affirmative governmental act, the Virginia Supreme Court places heavy emphasis on the act being clear, express, and unambiguous.[446] This principle was tested in *Board of Supervisors v. Crucible, Inc.*,[447] in which the zoning administrator responded by letter to a landowner who sought to confirm the zoning classification of his land and whether his proposed use—the training of government agents in antiterrorism measures—would be considered a "school" under the then-existing zoning ordinance. The letter, issued in response to a general inquiry that contained no specific development proposal, verified that the use fell under the definition of "school" but stated that the verification was subject to change. After a subsequent change to the zoning of his land, the landowner sought a vested rights ruling from the circuit court. The Virginia Supreme Court, overturning the circuit court, ruled that because the letter was not issued as an approval of any specific project and contained a statement that it was "subject to change," it did not operate to vest the landowner's rights in his contemplated use.[448]

In response to *Crucible*, the General Assembly, in 2010, added a seventh act to the list of affirmative governmental acts in section 15.2-2307:

> [T]he zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.[449]

Finally, it must be noted that section 15.2-2307 provides that "a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance" when the required elements for vesting are present. However, no decision has yet turned on what rights "in a land use" might consist of. In the 2003 Loudoun County downzoning litigation, scores of landowners had projects in

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[446] *Id.*

[447] 278 Va. 152, 677 S.E.2d 283 (2009).

[448] *Id.* at 160, 677 S.E.2d at 287. One circuit court, though inexplicably avoiding an analysis of section 15.2-2307 in its discussion of vested rights, suggested that the sufficiency of allegations of vested rights is an issue ripe for judicial review whether or not ruled upon by the zoning administrator. *Purcellville West, L.L.C. v. Loudoun Cnty. Bd. of Supervisors*, 75 Va. Cir. 284 (Loudoun 2008).

[449] *See Board of Supervisors v. McQueen*, 287 Va. 122, 752 S.E.2d 851 (2014) (prior statute applied).

various stages of the development process on the date the downzoning was adopted. They sued the county, claiming vested rights for their projects under section 15.2-2307.[450] As a responsive pleading, the county filed a "Rules Matrix," which provided that the new zoning regulations would be applied to otherwise vested projects unless an approved project's features specifically conflicted with the new regulations. Projects based on proffered rezonings would have different guidelines than projects based on approved preliminary plans. The county further asserted that the new laws were to be implemented by each project to the extent possible. Counsel for the landowners moved to strike the Rules Matrix because it embodied too narrow a reading of section 15.2-2307, especially as interpreted by the *Suffolk* decision. The court agreed, noting that vested rights are grounded in the due process clauses of the Virginia Constitution and that the Rules Matrix interjected uncertainty and discretion where the General Assembly, by adopting the 1999 amendments to section 15.2-2307, had clearly demonstrated a preference for certainty in development-based expectations. The court ruled that all projects could proceed without regard to the Rules Matrix and would be governed by the development rules that existed before the downzoning.

16.1405 Statutory Vesting of Subdivision and Site Plans. Recorded subdivision plats and final site plans are valid for five years from the date of the last recorded plat.[451] Finality is achieved when the only thing the applicant has left to do is to post bonds. During the statutory period, no changes or amendments to any local zoning ordinance or regulation will adversely affect the right of the developer to complete the project in accordance with the recorded plat and final site plan, unless the change is to comply with state law or there has been a mistake, fraud, or change in circumstances substantially affecting public health, safety, or welfare.[452] Additionally, while conditional approval of a subdivision plat is a significant affirmative governmental act for purposes of vesting, a subsequent failure of the condition is sufficient to avoid a vesting of rights, since the statute explicitly requires the governmental act to remain in effect.[453]

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[450] *See In re Zoning Ordinance Amendments*, 67 Va. Cir. 462 (Loudoun 2004).

[451] In response to a 2008 opinion from the Attorney General (No. 09-038), the General Assembly acted to clarify section 15.2-2260(G) by specifying that the five-year period of validity extends from the date of the last recorded plat.

[452] Va. Code § 15.2-2261.

[453] *Commonwealth-Abingdon Partners, LP v. Town of Abingdon*, 79 Va. Cir. 226 (Washington 2009).

As a response to the housing crisis associated with the recession of 2008, the General Assembly provided an emergency extension of the validity of plats and plans that were valid and outstanding on July 1, 2009 until July 1, 2020.[454]

16.1406 Forfeiture of Vested Rights. Section 15.2-2307 and case law recognize that failure to pursue the completion of the project can result in the forfeiture of vested rights.[455] For example, in the *Suffolk* decision, the court noted that if the 1999 downzoning had occurred before 1994, the developer's vested rights claim would have been defeated.

16.1407 Who Makes Vested Rights Determinations. In *Holland v. Johnson*,[456] the court held that because vested rights are property rights and zoning administrators have no power to determine property rights, they cannot make binding vested rights rulings. This decision produced confusion and difficulty for local zoning administrators, who are called upon to make determinations affecting property rights on an almost daily basis. It also created difficulty for landowners, who have found themselves unable to obtain a definitive determination of status without testing the issue judicially, something no landowner appears yet to have done. The practical consequences may continue long after the locality and the landowners believe the issue has been resolved. In *Holland*, for example, the citizen-initiated contest was filed sometime after the zoning administrator's determination of vested rights.

After the *Holland* decision, section 15.2-2286 was amended several times with the express purpose of permitting vested rights determinations to be made by zoning administrators without judicial intervention. The section now provides that the zoning administrator may make findings of fact and, with the concurrence of the local government attorney, "conclusions of law regarding determinations of rights accruing under section 15.2-2307." In *Board of Supervisors v. Crucible, Inc.*, the Virginia Supreme Court found that that while it is permissible for a zoning administrator to make a vested rights determination under section 15.2-2286, changes to that provision did not

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[454] Va. Code § 15.2-2209.1.

[455] *See Snow v. Amherst Cnty. Bd. of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994); *Board of Supervisors v. Trollingwood P'ship*, 248 Va. 112, 445 S.E.2d 151 (1994).

[456] 241 Va. 553, 403 S.E.2d 356 (1991).

"divest the circuit court of this power," and the landowner is not required to seek a vested rights determination from the zoning administrator.[457]

Thus, it is now *statutorily* permissible for zoning administrators to make vested rights determinations. It is not clear, however, whether this provision can in fact withstand judicial challenge, given the Virginia Supreme Court's *constitutionally based* conclusion in *Holland*[458] that a vested right is a *property right*, adjudication of which can be made only by a court. If the General Assembly is powerless to grant authority to the zoning administrator to make these property rights determinations, neither the locality nor the landowner can know for certain whether rights have vested without a final adjudication of the question by a circuit court.

16.1408 Void Permits. There is a line of cases in which landowners' claims of vested rights were defeated by local government assertions that the permit was erroneously granted and therefore void ab initio.[459] The cases reflect a concern that "erroneously issued" permits had been obtained through nefarious means. On the other hand, the private sector was concerned that technical errors were being found after the fact so that applications would have to be resubmitted and exactions and adjustments to development plans renegotiated after leases and other contracts were signed and substantial costs incurred. The General Assembly addressed this conflict, in specific response to the *Gwinn v. Collier*[460] decision, by enacting section 15.2-2311(C) of the Virginia Code, which overrode *Collier*, *Segaloff* and *Booher*. This provision was applied in *McGhee v. Board of Zoning Appeals*[461] and *Norfolk 102, LLC v. City of Norfolk*.[462]

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[457] 278 Va. 152, 677 S.E.2d 283 (2009). One circuit court, though inexplicably avoiding an analysis of section 15.2-2307 in its discussion of vested rights, suggested that the sufficiency of allegations of vested rights is an issue ripe for judicial review whether or not ruled upon by the zoning administrator. *Purcellville West, L.L.C. v. Loudoun Cnty. Bd. of Supervisors*, 75 Va. Cir. 284 (Loudoun 2008).

[458] *See Holland, supra*, at 556, 403 S.E.2d at 358.

[459] *Board of Supervisors v. Booher*, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987) (finding an erroneous interpretation by zoning administrator); *In re Commonwealth Dep't of Corrections*, 222 Va. 454, 281 S.E.2d 857 (1981); *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138 (1981); *Blacksburg v. Price*, 221 Va. 168, 171, 266 S.E.2d 899, 900 (1980); *WANV, Inc. v. Houff*, 219 Va. 57, 62-3, 244 S.E.2d 760, 763-64 (1978); *Segaloff v. City of Newport News*, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968); *Norfolk & W. Ry. Co. v. Board of Supervisors*, 110 Va. 95, 65 S.E. 531 (1909).

[460] 247 Va. 479, 443 S.E.2d 161 (1994).

[461] 57 Va. Cir. 47 (Roanoke 2001).

[462] 285 Va. 340, 738 S.E.2d 895 (2013).

In 2009, however, one circuit court appeared to effectively strip section 15.2-2311(C) of its purpose in bringing predictability to zoning decisions.[463] Four years after a lot line adjustment was approved, the court declared the approval void as against the county's grandfathering provision. Rather, the ruling came in response to a timely challenge to the approval of building permits and grading plans by the zoning administrator for the lots in question. The circuit court invalidated the permits by declaring the 2005 lot line adjustment void *ab initio*.[464] The court characterized the BZA's approval of the permits as a "nondiscretionary error," relying on the statutory provision waiving the 60-day limit "where . . . modification is required to correct clerical or other nondiscretionary errors." In reaction to this case, the General Assembly in 2012 eliminated the reference to "other nondiscretionary errors," leaving only clerical errors to be corrected after 60 days have passed.[465]

16.1409 Vesting and Grandfathering Distinguished. In *City Council of Alexandria v. Lindsey Trusts*,[466] the court recognized the difference between a vested right and "grandfathering." Vested rights are property rights created by sufficient compliance with existing law. Grandfathering is a matter of *legislative grace*, whereby the governing body, by ordinance or other legitimate formal policy, carves out a legislative exception to the general application of regulations for one or more classes of cases.[467] In *Lindsey Trusts*,[468] the court held that because a city had the power to terminate a "grandfathered" use, it also had the power to regulate it, and it could exercise that power by enacting and enforcing an ordinance requiring a special use permit should the use be intensified. Property owners had no vested right in the continuation of their property's "grandfathered" status.

There are other points to be made about grandfathering. First, of course, is that any carving out of exceptions to a rule of general application must not deny anyone a right to equal protection of the laws. Given the very

[463] See paragraph 16.1504 below regarding finality of decisions of the zoning administrator.

[464] *Board of Supervisors v. Board of Zoning Appeals*, CL-2008-2729, 2009 Va. Cir. LEXIS 119 (Fairfax Cir. Ct. Apr. 8, 2009).

[465] Section 15.2-2311(C) applied in *Board of Supervisors of Richmond Cnty. v. Rhoads*, 294 Va. 83 (2017).

[466] 258 Va. 424, 520 S.E.2d 181 (1999).

[467] *County of Fairfax v. Fleet Indus. Park Ltd. P'ship*, 242 Va. 426, 431, 410 S.E.2d 669, 672 (1991); *see also Parker v. County of Madison*, 244 Va. 39, 418 S.E.2d 855 (1992).

[468] 258 Va. 424, 520 S.E.2d 181 (relying on *Board of Zoning Appeals v. Caselin Sys.*, 256 Va. 206, 501 S.E.2d 397 (1998).

large element of deference that is given to land use regulation under the Equal Protection Clause, however, this will not likely present any consequential constraint.

Of greater relevance, however, is the fact that the Virginia Supreme Court, in *Parker v. County of Madison*,[469] made it plain that there is no such thing as "implied" grandfathering. Such policies must be in writing and be formally adopted by the governing body in order to be effective. No rights of any kind can be derived even from a "longstanding practice" by the locality.[470] Although *Parker* is technically a subdivision case, there is little doubt that its holding is equally applicable in the zoning context.

16.15 ADMINISTRATION AND ENFORCEMENT

16.1501 The Zoning Administrator.

A. Authority. Zoning ordinances are enforced by a number of participants in the process, but the principal official is the zoning administrator, whose appointment is authorized by section 15.2-2286(A)(4). This official has "all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance." The zoning administrator is the agent of the local governing body and is responsible to it, but he or she possesses significant statutory authority to administer and enforce the ordinance.

The zoning administrator's authority extends to (i) ordering in writing the remedying of any condition found in violation of the ordinance; (ii) insuring compliance with the ordinance by bringing legal action, including injunction, abatement, or other appropriate action or proceeding (subject to appeal to the BZA); and (iii) in specific cases, "making findings of fact, and with the concurrence of the attorney for the governing body, conclusions of law" regarding determinations of vested rights.[471]

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[469] 244 Va. 39, 418 S.E.2d 855 (1992).

[470] *Id.* at 42, 418 S.E.2d at 857 ("[a]bsent express authorization written into the pertinent ordinance, a governing body has no authority to recognize an unwritten practice that is inconsistent with the existing law").

[471] Va. Code § 15.2-2286(A)(4); *Cook v. Board of Zoning Appeals*, 244 Va. 107, 418 S.E.2d 879 (1992), contains a restatement of the useful proposition that "great weight is to be given to the consistent construction of an ordinance by the officials charged with its enforcement." *See also Donovan v. Board of Zoning Appeals*, 251 Va. 271, 467 S.E.2d 808 (1996); *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 353 S.E.2d 727 (1987); *Belle-Haven Citizens Ass'n v. Schumann*, 201 Va. 36, 109 S.E.2d 139 (1959); *Rountree Corp. v. City of Richmond*, 188 Va. 701, 51 S.E.2d 256 (1949).

The zoning administrator must make a decision or determination on zoning matters within 90 days of a request unless a longer period has been agreed to.[472] In *Greene v. Board of Zoning Appeals*,[473] the circuit court held that a zoning administrator may make determinations affecting property rights without a pending application for specific relief.

B. Notice of Right to Appeal. Section 15.2-2311 of the Virginia Code requires that a zoning administrator's written order or notice of a zoning violation include a statement that the aggrieved party has a right to appeal.[474] Unless an appeal is taken within 30 days, the decision is final and unappealable.[475] This provision overrides contrary charter provisions.[476]

The courts are authorized to enjoin, restrain, correct, or abate violations of the ordinance, whether or not the ordinance itself expressly so provides.[477] The zoning administrator or governing body is permitted to file a lis pendens memorandum where an injunction or other abatement proceeding has been previously filed. The memorandum expires after 180 days.[478]

C. Conditional Zoning Powers. Under conditional zoning ordinances, zoning administrators have further enforcement powers with respect to proffered conditions. In addition to their customary authority to issue correction orders and bring civil suits, zoning administrators may also require "proffer performance bonds" when the local ordinance authorizes it. These bonds are guarantees of satisfaction to the governing body. The bonds must be reduced or released upon submission of satisfactory evidence that construction of improvements has been properly completed in whole or in

[472] Va. Code § 15.2-2286(A)(4).

[473] 34 Va. Cir. 227 (Fairfax 1994).

[474] *See also* Va. Att'y Gen. Op. No. 08-025 (June 16, 2008).

[475] A zoning ordinance may prescribe an appeal period of less than 30 days, but not less than 10 days, for a notice of violation involving temporary or seasonal commercial uses, parking of commercial trucks in residential zoning districts, or similar short-term, recurring violations. Va. Code § 15.2-2286(A)(4).

[476] *See Fairfax Cnty. Bd. of Supervisors v. Zoning Appeals Bd.*, 46 Va. Cir. 20 (Fairfax 1998) (holding that written notification by the zoning administrator within 30 days that a use permit had been erroneously granted was final and not subject to appeal to the BZA five years later when a notice of violation was issued). The decision of the zoning administrator need not be in writing. *Lilly v. Caroline Cnty.*, 259 Va. 291, 526 S.E.2d 743 (2000) (holding that the zoning administrator's oral ruling at a board meeting was final after 30 days).

[477] Va. Code § 15.2-2208; *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988); *McNair v. Clatterbuck*, 212 Va. 532, 186 S.E.2d 45 (1972).

[478] Va. Code § 15.2-2208(B).

part. Section 15.2-2209.1(D) provides for the continuation of performance bonds, agreements, or other financial guarantees of completion of public improvements in or associated with a proposed development if the extensions of certain deadlines set forth in section 15.2-2209.1(A) are being relied on by the developer.

Failure to meet all proffered conditions is reason to deny issuance of any use, occupancy, or building permit.[479] This authority is potentially of great importance to ensure that the landowner complies with proffered conditions. The locality cannot, however, deny issuance of these permits or take other action under section 15.2-2299 solely because the developer delays payment of cash proffers.[480] Section 15.2-2303.1:1(A) prohibits localities from attempting to collect proffer payments as a condition of site plan approval.[481]

A private party has no general right to enforce zoning laws.[482]

16.1502 Zoning District Boundary Disputes. The Board of Zoning Appeals (BZA) itself, without the necessary intervention of the zoning administrator, is empowered to settle zoning district boundary disputes, provided it only interprets boundaries and does not purport to make wholesale rearrangements of them.[483]

16.1503 Variances. Although variance determinations are ordinarily made exclusively by local BZAs, section 15.2-2286(A)(4) of the Virginia Code provides that the local ordinance may authorize the zoning administrator to grant variances upon findings of undue hardship as previously required of a BZA. Before such a grant, the zoning administrator must give or require the applicant to give written notice of the request to all adjoining property owners, providing them an opportunity to respond to the request within 21 days of the date of the notice. Upon receipt of any objection, the case must be transferred to the BZA for disposition as other variances.

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[479] Va. Code § 15.2-2299.

[480] Va. Code § 15.2-2303.1:1(B).

[481] *Board of Supervisors of James County v. Windmill Meadows*, 287 Va. 170, 752 S.E.2d 837 (2014).

[482] *Shepard v. AOC/VNC P'ship*, 61 Va. Cir. 261 (Loudoun 2003); *Fields v. Elkins*, 52 Va. Cir. 206 (Alexandria 2000). *But see infra* ¶ 16.1509.

[483] Va. Code § 15.2-2309(4).

16.1504 Finality of Zoning Administrator's Determinations. Section 15.2-2311 of the Virginia Code provides that written orders, requirements, decisions, or determinations made by a zoning administrator or other administrative officer are not subject to

> change, modification or reversal . . . after 60 days have elapsed from the date of the written order . . . where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator . . . unless it is proven that such . . . order . . . was obtained through malfeasance of the zoning administrator . . . or through fraud.[484]

Previously, this provision did not apply where the zoning administrator, with the concurrence of the local government attorney, determines that modification is required "to correct clerical or other nondiscretionary errors."[485] The phrase "to correct clerical or other nondiscretionary errors" was used by one circuit court to effectively strip section 15.2-2311(C) of its purpose in bringing predictability to zoning decisions.[486] In reaction to this case, the General Assembly in 2012 eliminated the reference to "other nondiscretionary errors," leaving only clerical errors to be corrected after 60 days have passed.

16.1505 Limitations on Zoning Administrator's Authority. It is important to remember that zoning administrators must "work within the lines." They must adhere to the provisions of the local ordinance, and the courts have overturned zoning decisions when zoning administrators have, in effect, gone beyond interpretation into outright legislation. This is true of matters such as boundary interpretation as well as ordinance interpretation.

In *Krisnathevin v. Board of Zoning Appeals*,[487] two parcels of land were rezoned. One was designated as a convenience store and the other as community facilities. Subsequently, the developer asked that the zoning map be changed, switching the designations of the parcels. The zoning administrator viewed this as a minor modification and authorized the

[484] Va. Code § 15.2-2311(C).

[485] *See also supra* ¶ 16.1501(B).

[486] *Board of Supervisors v. Board of Zoning Appeals*, CL-2008-2729, 2009 Va. Cir. LEXIS 119 (Fairfax Apr. 8, 2009).

[487] 243 Va. 251, 414 S.E.2d 595 (1992).

change. A subsequent owner of the land challenged the change and the court held that a change in the permitted use of the land was a significant modification requiring legislative action by the governing body.[488]

16.1506 Appeal of Zoning Administrator's Determinations Generally. With the exceptions noted below, the decisions and interpretations rendered by the zoning administrator, as well as the interpretations of any official charged with any aspect of zoning ordinance administration, are appealable to the local BZA,[489] and thence, by certiorari, to the circuit court.[490] The appeal of these interpretations and decisions appears to be open to any party who may demonstrate a legitimate grievance.[491]

The proper role of the BZA when hearing appeals was examined at length in *Board of Supervisors v. Board of Zoning Appeals*.[492] The statutory authority of a BZA on appeal is strictly limited to the terms of the statutes under which those appeals are taken. In *Board of Zoning Appeals v. University Square Associates*,[493] the court held, for example, that the section 15.2-2314 certiorari process does not permit the trial court to consider the validity or constitutionality of a zoning ordinance provision underlying a BZA decision. The sole issue for the trial court is whether the decision was plainly wrong or based on erroneous principles of law.[494]

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[488] *See also Board of Zoning Appeals v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999) (holding that the zoning administrator had gone beyond interpretation into legislation in "fairly" interpreting a density ordinance; *Board of Supervisors v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987).

[489] Va. Code §§ 15.2-2309, -2311, -2312.

[490] Va. Code § 15.2-2314; *see Miller v. State Bldg. Code Tech. Review Bd.*, Rec. No. 0365-02-2, 2003 Va. App. LEXIS 412 (Va. Ct. App. July 22, 2003) (unpublished).

[491] *See Virginia Beach Beautification Comm'n. v. Board of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986); *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978). *But see Middleburg Town Council v. Thomas*, 42 Va. Cir. 56 (Loudoun 1997) (prohibiting the town from intervening because third party interventions are not allowed in certiorari proceedings to review the action of a BZA). The 90-day period in which a BZA decision must be made is directory, not mandatory. *Tran v. Board of Zoning Appeals*, 260 Va. 654, 536 S.E.2d 913 (2000).

[492] 72 Va. Cir. 342 (Fairfax 2006).

[493] 246 Va. 290, 435 S.E.2d 385 (1993).

[494] *See e.g.*, *Donovan v. Board of Zoning Appeals*, 251 Va. 271, 467 S.E.2d 808 (1996); *Pima Gro Sys., Inc. v. Zoning Appeals Bd.*, 47 Va. Cir. 356 (King George 1998).

A zoning administrator does not have standing to file a petition for certiorari from a decision of a BZA if the filing is not on behalf of the local governing body.[495]

If a petition to appeal a decision of the BZA is withdrawn after the return is filed, the BZA may request the circuit court to hear the matter on the question of whether the appeal was frivolous.[496]

A challenge to a zoning ordinance based on the ordinance being unconstitutional, ultra vires, or otherwise void cannot be acted upon by the BZA and should be brought directly to the circuit court through an action for declaratory judgment.[497] However, a challenge based on any of these factors can be raised during the defense of a criminal enforcement action.[498]

16.1507 Appeal of Zoning Administrator's Rulings on Proffers. There is an important exception to the foregoing rules that zoning decisions are appealable to the BZA. When a locality has adopted the provisions of conditional zoning under section 15.2-2297 or 15.2-2298 of the Virginia Code, a zoning administrator's interpretations in enforcement of proffers is appealable directly to the governing body.[499]

16.1508 Criminal and Civil Penalties.

A. Criminal Penalties. The locality may also classify violations of the zoning ordinance (including violations of correction orders) as criminal misdemeanors punishable by fines of not less than $10 or more than $1,000.[500]

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[495] *Wolfe v. Board of Zoning Appeals*, 260 Va. 7, 532 S.E.2d 621 (2000) (where the zoning administrator had expressly stated she did not have authority to file suit on behalf of the board, refraining from expressly holding that a zoning administrator who decides to petition for certiorari must secure authorization from the board of supervisors each time, and from clarifying how such authorization is to be made known).

[496] Va. Code § 15.2-2314.

[497] *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Dail v. York Cnty.*, 259 Va. 577, 528 S.E.2d 447 (2000); *Orion Sporting Group, LLC v. Board of Supervisors*, 66 Va. Cir. 16 (Nelson 2004).

[498] *Miller v. Commonwealth*, Rec. No. 2971-02-2, 2005 Va. App. LEXIS 64 (Va. Ct. App. Feb. 15, 2005) (unpublished); *see also Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968), *Vaughn v. City of Newport News*, 20 Va. App. 530, 458 S.E.2d 591 (1995).

[499] Va. Code § 15.2-2301.

[500] Va. Code § 15.2-2286(A)(5).

In response to an opinion of the Virginia Court of Appeals[501] that enabling legislation did not authorize a county's zoning ordinance to classify each day's violation as a separate misdemeanor, the General Assembly amended section 15.2-2286(A)(5) of the Virginia Code to provide that if the violation is uncorrected at the time of conviction, the court must order abatement of the violation within a specified time, and failure to so abate is a separate misdemeanor punishable by a fine of not more than $1,000. Failure to abate "during a succeeding 10-day period shall constitute a separate misdemeanor offense punishable by a fine of not more than $1,500; and any such failure during any succeeding 10-day period shall constitute a separate misdemeanor offense for each 10-day period punishable by a fine of not more than $2,000.

B. Civil Penalties. A locality may also provide for civil penalties for zoning violations in lieu of criminal citations.[502] The intention is to provide a uniform schedule of fines for certain land use violations, in the manner of the uniform fines for traffic violations. The penalty for one violation may not be more than $200 for an initial summons and not more than $500 for each additional summons. Each day of violation may constitute a separate offense, provided that in no case may the locality charge more than one violation arising from the same body of operative facts within a 10-day period and that total penalties may not exceed $5,000. When civil penalties total $5,000 or more, the violation may be prosecuted as a criminal misdemeanor. Zoning administrators are authorized to issue civil summonses for scheduled zoning violations.

16.1509 Challenges to Building Permits. Under section 15.2-2313 of the Virginia Code, nongovernmental parties without notice of the issuance of building permits may seek to enjoin or vacate construction of structures believed to be contrary to the zoning ordinance directly to the circuit court without first having recourse to the board of zoning appeals, as might otherwise be required.

Notwithstanding all of the procedural limitations on challenging zoning actions at the *beginning* of the process, this statute is a back door means of challenging virtually all such actions at an exceptionally late stage

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[501] *Lawless v. County of Chesterfield*, 21 Va. App. 495, 465 S.E.2d 153 (1995) ("By remaining silent on the issue of continuing criminal sanctions while expressly authorizing continuing civil sanctions, the legislature evinced an intent to preclude treatment of each day's violation as a separate misdemeanor.").

[502] Va. Code § 15.2-2209.

of the matter, and it is rarely used. However, if suit is filed by a properly aggrieved party within 15 days of the start of construction, the court may hear and determine the issue and prescribe appropriate relief.[503]

16.16 REGULATORY TAKINGS

16.1601 In General.

A. History of Regulatory Takings Law. Historically, the United States Supreme Court has chosen to remain largely above the fray in local land use matters, perhaps in large part because land use regulation remained relatively benign throughout the greater part of the 20th century. After it established the constitutionality of zoning[504] and the principle that zoning ordinances might be constitutional on their faces but unconstitutional as applied to a given fact situation,[505] the Court devoted little further attention to the federal aspects of the land use process.

Even before it had blessed zoning as constitutional, however, the Court had looked at the proper balance between such regulation and the Takings Clause of the Fifth Amendment. In *Pennsylvania Coal Co. v. Mahon*,[506] a case involving restrictions on coal mining and land subsidence following mining operations, Justice Holmes remarked that it was possible for a governmental regulation to go "too far," and in so doing to so diminish the value of property as to constitute a taking of property for public uses, requiring just compensation. There must be a balance, Justice Holmes stated, between the public's justification for the regulation and the diminution in value to the private landowner, which strikes some "average reciprocity of advantage" between the two. The underpinning of the doctrine of regulatory takings lies in the fact that "[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[507]

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[503] *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978).

[504] *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Board of Public Works*, 274 U.S. 325 (1927); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[505] *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

[506] 260 U.S. 393 (1922).

[507] *Id.* at 416.

While the general concept of "regulatory takings" (as distinguished from outright physical invasions by the government) received some notice over the years, the Court had not answered the specific question whether a *land use* regulation could tip the scales in the landowner's favor, and whether, if it did so, *monetary compensation* might be required. For many years, these scales were quite heavily weighted in favor of the public interest, and the Court found that even severe reductions in value as a consequence of proper exercises of the police power were insufficient to work a compensable taking.[508] Moreover, takings law was of little concern to the land use lawyer since the courts long held that because the proper challenge to an oppressive regulation was under the Due Process Clause and not the Takings Clause, the landowner's *sole* remedy for an unconstitutional land use regulation was removal or modification of the offending restriction on use.

The latter half of the 20th century brought vastly expanded controls over the use and development of land, both in traditional local zoning and from rapidly growing environmental and historic preservation regulation. In consequence, landowners whose interests in their properties were severely restricted brought new waves of challenges to the courts, focusing not simply on takings without due process but on takings for public use without just compensation.

For a good while, this effort was fruitless, but the United States Supreme Court began to look at the matter with a more jaundiced eye, and takings doctrine began to move in a different and more substantive direction. This evolution in takings law was not, moreover, limited to conservative reaction to land restrictions. Indeed, it was Justice Brennan who first articulated the notion that even a temporary restriction on property that went "too far" could constitute a compensable event.[509] This dissent became the law with the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*,[510] which held that a temporary taking was indeed compensable. That case did not, however, advance understanding of what constituted a taking, since the Court assumed that there was *no* use permitted of the land in question because of the procedural posture of the

[508] *See, e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

[509] *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting).

[510] 482 U.S. 304 (1987).

case, but it did make it plain that regulatory activity could have a price tag.[511]

What regulation may in fact constitute a taking has been somewhat clarified over the years, but the issue remains in a fair amount of confusion, and the Court itself has admitted that it has been unable to develop any set formula for determining when a taking has occurred.[512] Still, the Court has attempted to articulate a takings framework and has stated that if a regulation "denies an owner economically viable use of his land" it will likely be found to be a taking.[513] Regulatory impositions in the form of zoning restrictions or otherwise can, indeed, so restrict the use of land that they have the functional effect of making private property public and requiring the payment of just compensation.

Regulatory takings fall into three rather large categories, loosely identified as "per se," "categorical," and "ad hoc." Per se takings derive from *Loretto v. Teleprompter Manhattan CATV Corp.*,[514] "categorical" takings derive from *Lucas v. South Carolina Coastal Council*,[515] and "ad hoc" takings derive from *Penn Cent. Transp. Co. v. New York City*.[516]

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[511] The United States Supreme Court has again declined to state definitively the elements of a claim of temporary regulatory taking or even to explain fully the requirement that the regulation must substantially advance legitimate public interests. However, it stated the trial court's instructions in this regard were "consistent" with its prior decisions. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). The trial court instructed the jury that legitimate public interests include protecting the environment, preserving open spaces, protecting health and safety of citizens, and regulating the quality of the community and that regulatory actions substantially advance such objectives if they bear a reasonable relationship to an objective.

The Court also held in that in actions brought under 42 U.S.C. § 1983, landowners are entitled to a jury trial on the issue of whether the owner was deprived of all economically viable use of the land and whether the government's denial of the development bore a reasonable relation to (concededly) legitimate public interests.

[512] *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, *reh'g denied,* 439 U.S. 883 (1978); *see also Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("[a]s the role of Government [has] expanded, our experience taught that a strict line between a taking and a regulation is difficult to discern or maintain").

[513] *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *as modified by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (The Court struck down the first prong of *Agins*, which required that the challenged ordinance "substantially advance" legitimate state interests, stating that this test was more properly part of a substantive due process analysis.); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986).

[514] 458 U.S. 419 (1982).

[515] 505 U.S. 1003 (1992).

[516] 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978). It is worth noting that, in the view of at least some members of the United States Supreme Court, the Takings Clause has historically been invoked only when regulation adversely affects a specific interest in physical or intellectual property. *Eastern Enters. v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting). Notwithstanding this observation, the majority of the Court found in *Apfel*

B. Per Se Takings. Regulatory takings are involved when the impact of a regulatory structure goes "too far." However, when the government attempts a *physical invasion* of property in any manner, any such intrusion, regardless of how minor, is a compensable taking.[517]

C. Categorical Takings. In *Lucas v. South Carolina Coastal Council*,[518] the landowner had acquired two oceanfront lots, but before he could begin construction, the state passed the "Beachfront Management Act," whose terms prevented any construction on the lots. The Court found that South Carolina's legislative findings on the need to prevent erosion and inland flooding were insufficient to support complete deprivation of the use of the property absent compensation. However, the Court held that compensation is not required, even if a regulation deprives a landowner of all use of his or her property, if the regulation prohibits a use that was not included "in the title to the property" in the first place, as is the case when "background principles of nuisance and property law . . . prohibit the uses [the property owner] now intends in the circumstances in which the property is found."[519] The Court left open the issue of whether economic deprivation should be evaluated on the basis of the portion of the tract "burdened" by the regulation or on the effect of the regulation on the tract as a whole. The Court then remanded the case to the South Carolina Supreme Court to determine whether the principles of nuisance and property law prohibited the uses the owner intended.

The Court has suggested that the proper analysis is as to the entire parcel and not only that which has been taken. In *Concrete Pipe & Products v. Construction Laborers Pension Trust*,[520] the Court noted that the claimant had tried to shoehorn its assertions that federal law had effected a taking on the basis that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety."[521] However, the Court said it had

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that certain monetary allocation provisions contained in the Coal Industry Retiree Health Benefits Act of 1992 constituted a taking of property rights in those funds.

[517] *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[518] 505 U.S. 1003 (1992).

[519] *Id.* at 1031.

[520] 508 U.S. 602 (1993).

[521] *Id.* at 643.

> rejected [that] in *Penn Central* [citation omitted] where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating that taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question. *Accord Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) ("[O]ur test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'") (Citation omitted).[522]

While the matter is not entirely free from doubt, it would appear that the proper analysis of a taking affecting only a portion of a parcel (as, for instance, with respect to a wetland) must look to the effect on the value of the entire parcel involved.

It had been hoped that the United States Supreme Court would shed additional light on this issue in *Palazzolo v. Rhode Island*,[523] but the Court remanded the case for further consideration by the Rhode Island Supreme Court after reversing the Rhode Island court's holding that the plaintiff had no right to challenge a regulation predating the plaintiff's acquisition of the land.

D. Ad Hoc Takings. If there is no categorical taking, then one must turn to *Penn Cent. Transp. Co. v. New York City*,[524] where the United States Supreme Court articulated three factors it thought relevant to a determination of whether a taking had occurred. They were (i) the character of the governmental action; (ii) the economic impact of the regulation on the claimant; and (iii) the extent to which the regulation interfered with the claimant's legitimate investment-backed expectations. If *some* economically

[522] *Id.* at 644.

[523] 533 U.S. 606 (2001).

[524] 438 U.S. 104, 124, *reh'g denied*, 439 U.S. 883 (1978).

viable use continues, then a more complex factual analysis is required.[525] Takings cases are rare, but when they are found, they can be costly to the government.[526]

16.1602 When the Taking Occurs. Takings occur when the government action complained of effectively prevents economic development of the property in question.[527] Ordinarily, where there is a permit system, no taking occurs until the permit has been applied for and denied.[528] This requirement for a determination of a "starting point" in takings cases is, thus, directly linked to the next topic: ripeness.

16.1603 Ripeness. There are a number of procedural hurdles facing a takings claim, perhaps the most important of which is the requirement that the claim be ripe for adjudication. There must be a final determination of the uses to which the locality will permit land to be put before a landowner can assert that a regulation has, in fact, deprived it of all economically viable use of the property.[529] Some commentators believe that *Lucas v. South Carolina Coastal Council*,[530] *Nollan v. California Coastal Commission*,[531] and *Dolan v. City of Tigard*[532] have weakened the ripeness requirement, but where there truly is no final determination of what will be permitted, ripeness remains the most difficult hurdle a plaintiff will face in takings litigation, short of establishing the taking at all.[533] Ripeness is not much of an issue in Virginia

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[525] *Eastern Enters. v. Apfel*, 524 U.S. 498, 529 (1998).

[526] The extended legacy of one such litigation can be found in the *Florida Rock* cases. *Florida Rock Indus. v. United States*, 8 Cl. Ct. 160 (1985) (Florida Rock I), *rev'd in part and aff'd in part*, 791 F.2d 893 (Fed. Cir. 1986) (Florida Rock II), *cert. denied*, 479 U.S. 1053 (1987); *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990) (Florida Rock III); *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (Florida Rock IV), *cert. denied*, 513 U.S. 1109 (1995); *see also Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

[527] *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1559 (Fed. Cir. 1985); *Barnes v. United States*, 538 F.2d 865, 873 (Ct. Cl. 1976).

[528] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

[529] *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *modified by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (The Court struck down the first prong of *Agins*, which required that the challenged ordinance "substantially advance" legitimate state interests, stating that this test was more properly part of a substantive due process analysis.).

[530] 505 U.S. 1003 (1992).

[531] 483 U.S. 825 (1987).

[532] 512 U.S. 374 (1994).

because of the *Rinker*[534] decision, which held that where a landowner has already "fully run the [local] legislative gauntlet once," he or she is not obligated to pursue the legislative process again before being permitted to challenge the zoning placed on his or her property in court.

16.1604 Forum for Regulatory Taking Case. The 1985 *Williamson* decision held that when a local or state regulation is claimed to have effected a taking, that claim cannot be brought first in federal court but must be brought in state court where those courts provide an adequate remedy.[535] In 2019, the U.S. Supreme Court reversed that holding allowing a landowner to bring a takings claim in federal court in the first instance.[536] A landowner who loses a takings claim brought in state court may be faced with a claim of res judicata if the claim is then sought to be relitigated in a federal forum.[537] Because of concern about claims of res judicata, property owners may consider the expedient of formally "reserving" their federal constitutional claims in state takings litigation.[538] However, in *San Remo Hotel, L.P. v. City & County of San Francisco*,[539] the United States Supreme Court held that reserved claims will not be reviewed de novo in federal court if they have been raised and adjudicated in the state court proceeding. The state court's decision on the federal constitutional claims is res judicata, and there is no exception to the full faith and credit statute for litigants seeking to advance federal takings claims.

In Virginia, it is well established that the provisions of the Declaratory Judgments Act[540] constitute a statutory proceeding for inverse

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[533] For further guidance through this complex and detailed area, see G. Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 9 J. Land Use & Envtl. Law 183 (1994), and Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1 (1995).

[534] *Rinker v. City of Fairfax*, 238 Va. 24, 30, 381 S.E.2d 215, 218 (1989).

[535] *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Picard v. Bay Area Reg'l Transit Dist.*, 823 F. Supp. 1519, 1523 (N.D. Cal. 1993); *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 (1st Cir. 1987). *But see Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013).

[536] *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

[537] *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1303-09 (11th Cir. 1992) (suggesting that under the facts of the case the doctrine of res judicata did not apply and implying that, on different facts, it would).

[538] *See id.*

[539] 545 U.S. 323 (2005).

[540] Va. Code § 8.01-187 *et seq.*

condemnation claims, and thus, in any regulatory takings case this process likely must be used first.[541]

16.1605 Temporary Taking Versus Normal Administrative Delay. Although *First English Evangelical Lutheran Church v. County of Los Angeles*[542] established that a temporary taking could be compensable, not every regulatory action is such a taking, for the court has also said that the ordinary processes of land use approval do not constitute a taking.[543] The United States Supreme Court has gone so far as to say that mere implementation of development moratoria is not per se an unconstitutional taking of property.[544] However, moratoria are of little concern in Virginia because the Virginia Supreme Court has ruled them to be ultra vires.[545]

16.1606 Damages. An owner is entitled to the fair market value of land that has been taken.[546] This is not a new concept and is derived directly from common concepts of valuation in eminent domain cases. Fair market value is not necessarily tied to the present use of the property, and a landowner may show that there are other potential uses.[547] However, there is a presumption in favor of valuing the property for its present use, and the burden is on the landowner to demonstrate the likelihood of obtaining regulatory permission to make a change in use. That use cannot be speculative but must have a reasonable likelihood of approval.[548]

The courts that have addressed the measure of damages in temporary takings cases have focused on loss of rents and royalties rather than loss of

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[541] *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999) (holding that a federal court cannot entertain a 42 U.S.C. § 1983 takings claim unless the landowner is denied an adequate postdeprivation remedy); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (holding that a final decision is made when transferred development rights are granted to the landowner; the landowner need not try to use the rights).

[542] 482 U.S. 304 (1987).

[543] *See Friel v. Triangle Oil Co.*, 543 A.2d 863 (Md. 1988); *see also Drakes Bay Land Co. v. United States*, 424 F.2d 574, 586 (Ct. Cl. 1970); *Eastern Minerals Int'l v. United States*, 36 Fed. Cl. 541 (1996) (holding that extraordinary delay in acting on a permit application constituted de facto denial of that application, making a takings claim ripe), *rev'd on other grounds sub nom. Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001).

[544] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

[545] *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975), *Matthews v. Board of Zoning Appeals*, 218 Va. 270, 237 S.E.2d 128 (1977).

[546] *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

[547] *Olson v. United States*, 292 U.S. 246, 255 (1934).

[548] *See United States v. Land, 62.50 Acres*, 953 F.2d 886, 890 (5th Cir. 1992).

profits and other consequential damages.[549] They have also calculated those damages based on loss of fair market value for a project multiplied by a market rate for the lost money. Perhaps the best known of the cases involving such calculations are a series of decisions from the Eleventh Circuit. In *Wheeler v. City of Pleasant Grove (Wheeler III)*,[550] the court held:

> The owner's loss is measured by the extent to which governmental action has deprived him of an interest in property. The value of that interest, in turn, is determined by isolating it as a component of the overall fair market value of the affected property. (Citations omitted.) The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction.[551]

In *Wheeler v. City of Pleasant Grove (Wheeler IV)*,[552] the court returned to the issue and found that

> [a]fter the City prohibited appellants from constructing apartments, appellants retained only the land, appraised at $200,000. Experts at the damages hearing testified that the loan-to-value ratio was seventy-five percent in 1978, so that appellants would have held a twenty-five percent equity interest. The investment on which appellants could have expected a return, then, was twenty-five percent of the project's value, or $575,000. After the City withdrew the permit, appellants held a twenty-five percent equity in the land, a value of $50,000. The difference in fair market value lost as a result of the regulatory restrictions was $525,000 . . . The period of temporary taking spans fourteen

[549] *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577 (Fed. Cir. 1990).

[550] 833 F.2d 267 (11th Cir. 1987).

[551] *Id.* at 270-71.

[552] 896 F.2d 1347 (11th Cir. 1990).

> months and three days. According to the experts, the market rate of return for that period was 9.77 percent . . . When we compute the return on the $525,000 over fourteen months at 9.77 percent, we arrive at a figure of $59,841.23. This is the correct amount of damages sustained by the appellants.[553]

16.1607 Exactions by Special Use Permits, Site Plans, Subdivisions, Impact Fees, and Proffers. While land use regulations can effect a taking, it is also true that these takings are rarely found. Perhaps a more consequential line of takings cases are those that have focused on the takings implications of property exactions. In Virginia, those exactions may arise as impact fees or conditions applicable to special exceptions, site plans, subdivisions, and, more distantly, in the case of conditional zoning proffers. While the Commonwealth does not currently use impact fees, even to the limited extent they are authorized, increased attention will almost inevitably be paid to them and exactions jurisprudence will prove consequential to a constitutionally sufficient program.[554]

Virginia's limitations on permissible conditions are far more stringent than the United States Supreme Court's standards in *Nollan* and *Dolan*.[555] A local government may not condition approval of a rezoning or special exception upon dedication or construction of a public improvement when the need for the dedication or improvement is not substantially generated by the proposed development.[556] In *Cupp v. Board of Supervisors*, the Virginia Supreme Court held that Fairfax County could not require a special permit applicant to build a third lane of west bound Route 7 and a deceleration lane leading from Route 7 into the driveway of their plant nursery because the need for those improvements was generated by the regional character of Route 7 and not by the nursery.[557]

Local government may not condition site plan or subdivision approval on improvements to existing public roads even where the need for the

[553] *Id.* at 1351-52.

[554] *See Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

[555] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[556] *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984).

[557] *Cupp,* 227 Va. 580, 318 S.E.2d 407.

dedication or improvement is substantially generated by the proposed development.[558]

Section 15.2-2208.1 of the Virginia Code, enacted in 2014, prohibits localities, during the rezoning and special permit process, from suggesting proffers or development conditions for public improvements where the need for that improvement is not substantially generated by the project itself. It also prohibits localities from asking for improvements to existing public rights of way during the subdivision and site plan review process.[559]

To invoke the protections of section 15.2-2208.1, the applicant must object in writing to the requested exaction before the locality's decision on the application.[560] If the land use permit is subsequently denied, section 15.2-2208.1 directs that, absent clear and convincing evidence to the contrary, the denial is presumed to be based on the applicant's refusal to agree to the unconstitutional exaction, thus overriding *Gregory v. Board of Supervisors*.[561] The successful aggrieved applicant is entitled to (i) recover compensatory damages; (ii) a remand to the locality directing it to issue the land use approval sought; and (iii) possibly attorney fees.

After 2014, localities continued to require compliance with unconstitutional proffer schedules in residential rezonings. This prompted the General Assembly to adopt section 15.2-2303.4 in 2016. The 2016 amendment applies only to residential development. Like section 15.2-2208.1, its proponents sought to prohibit localities from asking for a certain class of proffers. Where section 15.2-2208.1 sought to prohibit "unconstitutional" proffers, subsection (B) of the 2016 amendment seeks to prohibit the solicitation of "unreasonable proffers" which are defined in subsection (C).

Subsection (C) defines the prohibited proffer as one that is not "specifically attributable" to the proposed project. The proponents of the 2016

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[558] *Hylton Enters., Inc. v. Board of Supervisors*, 220 Va. 435, 258 S.E.2d 577 (1979); *City of Alexandria v. Texas Co.*, 172 Va. 209, 1 S.E.2d 296 (1939); *Commonwealth Transp. Comm'r v. NA Dulles Real Estate Investor, LLC,* 78 Va. Cir. 365 (Loudoun 2009).

[559] *Hylton Enters., Inc. v. Board of Supervisors*, 220 Va. 435, 258 S.E.2d 577 (1979).

[560] Va. Code § 15.2-2208.1(B).

[561] 257 Va. 530, 514 S.E.2d 350 (1999). See paragraph 16.304(A) above for a discussion of *Gregory*.

amendment appear to have taken this standard from several Illinois court decisions[562] and a New Jersey case.[563]

Other than being more mellifluous, it is not clear exactly how "specifically attributable" differs from the existing Virginia constitutional standard found in *Rowe*[564] and *Cupp*:[565] the need for the proffer must be substantially generated by the proposed project.

Regarding off-site proffers, clause (ii) of subsection (C) imposes additional limitations by requiring (i) proffers to provide a direct and material benefit to proposed development which is a requirement not found in but might be fairly implied from *Rowe* and *Cupp* and (ii) limiting such off-site proffers to public transportation, public safety, public schools and public parks.

Like Section 15.2-2208.1(B), subsection (D) of the 2016 amendment establishes a rebuttable presumption that any denial of a land use application where an unreasonable proffer was solicited by the locality was based on the refusal of the applicant to acquiesce in the unreasonable proffer. And just as in section 15.2-2208.1(B), the refutation of the statutory presumption requires clear and convincing evidence, a higher standard than generally applied in civil litigation.

While subsection 15.2-2208.1(B) provides for compensatory damages, a remedial injunction and attorneys' fees, subsection (D) of the 2016 amendment does not provide for compensatory damages.

The exemptions contained in subsection (E) of the 2016 amendment for small planning areas have in Fairfax, Loudoun, and Prince William swallowed the whole.

Designation of hundreds of square miles of a locality as being within such areas would be contrary to the obvious intent of the General Assembly and, clearly, does not provide localities relief from the strictures of *Rowe* and *Cupp* or section 15.2-2208.1.

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[562] *Pioneer Trust & Savings Bank v. Village of Mount Prospect,* 176 N.E. 799, 802 (Ill. 1961); *Northern Illinois Homebuilders Assn. v. County of DuPage,* 649 N.E.2d 384 (Ill. 1995).

[563] *Divan Builders, Inc. v. Planning Bd. Of Wayne Tp.*, 334 A.2d 30, 41 (N.J. 1975).

[564] *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

[565] *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984).

16.1608 Virginia Regulatory Takings Cases. The Virginia Supreme Court's treatment of takings cases in the 1990s expanded understanding of the court's approach to takings, perhaps most notably in the 1997 case of *Board of Supervisors v. Omni Homes*.[566]

In a 1971 decision, the court had found invalid the denial of a zoning category that would have permitted the only "practically" viable use of the property.[567] The court stated:

> [I]f the application of a zoning ordinance has the effect of completely depriving the owner of beneficial use of his property by precluding all practical uses, the ordinance is invalid as to that property. A zoning of land for single family residences is unreasonable and confiscatory and therefore illegal where it would be practically impossible to use the land in question for single family residences.[568]

Despite this finding, the court followed then-existing law and simply invalidated the ordinance. It seems evident that under current law, such a confiscatory zoning would implicate the Takings Clause and render the locality subject to compensation of the landowner.

In a 1990 case, *City of Virginia Beach v. Virginia Land Investment Ass'n No. 1*,[569] the court gave short shrift to any takings claim arising out of the city's "Green Line" downzoning, holding that the land involved could have been leased, even if it could no longer be developed as a planned unit development, for the time the downzoning was in effect. Since the ordinance did not "deprive [the landowner] of all economically viable uses," there had been no taking.[570]

Justice Lacy, in her concurrence, elaborated on the takings issue slightly, writing that Virginia Land Investment Association's reliance on *First English Evangelical Lutheran Church v. County of Los Angeles*[571] failed

[566] 253 Va. 59, 481 S.E.2d 460, *cert. denied*, 522 U.S. 813 (1997).

[567] *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971).

[568] *Id.* at 491, 178 S.E.2d at 510.

[569] 239 Va. 412, 389 S.E.2d 312 (1990).

[570] *Id.* at 416-17, 389 S.E.2d at 314.

[571] 482 U.S. 304 (1987).

to establish a claim. *First English* had assumed that *all* use of the church's property had been eliminated by regulation. Virginia Land Investment Association had not, in fact, been denied "*all* use of its land."[572]

Justice Lacy also concluded that the Green Line downzoning did not run afoul of section 11 of article I of the Virginia Constitution, because the landowner was "not deprived of the use of or right to sell the land. Diminution in salability or potential market value does not rise to the level of a constitutional taking or damage to the property."[573]

In *Board of Supervisors v. Omni Homes*,[574] the court declined to expand the concept of "damage" under the Virginia Constitution to include frustrated business development expectations that are unsecured by any sort of appurtenant property right.[575] *Omni Homes* involved a property (Property 1) to which there was no road access. The developer of Property 1 informally agreed with the owner of the adjoining property (Property 2) to jointly share road and utility access. After the preliminary plat for Property 2 was approved, the preliminary plat for Property 1 was filed. It was not accepted because it did not show approved bonded road access through Property 2. Because of county regulations, the owner of Property 2 filed an inverse condemnation suit. A settlement was reached that resulted in the county buying Property 2. The owner of Property 1 then sued the county, claiming that its acquisition of Property 2 had, by precluding its ability to develop Property 1, effected a taking of that property. The trial court held that the county's purchase of Property 2 was in fact a regulatory taking of Property 1, because the developer could not afford to subdivide the property without road access and utility easements through Property 2.

The court sidestepped the issue of whether a county's purchase of property could by itself be classified as regulatory action. The court first held that the county action was not a categorical taking, citing *Lucas v. South Carolina Coastal Council*,[576] because the land continued to have economically viable uses, even if a *particular* owner could not afford to effectuate the

[572] 239 Va. at 419, 389 S.E.2d at 315.

[573] *Id.* at 419-20, 389 S.E.2d at 316.

[574] 253 Va. 59, 481 S.E.2d 460, *cert. denied*, 522 U.S. 813 (1997).

[575] *See also* 1999 Report of the Attorney General 116 (discussing the law concerning regulatory takings); *The Virginia Lawyer: A Deskbook for Practitioners* ch. 12 (Virginia Law Foundation 5th ed. 2015).

[576] 505 U.S. 1003 (1992).

original plan of development. The court then rejected the county's position that a regulatory taking must deprive property of *all* economic use to be compensable; it held that a partial regulatory taking is compensable and is to be evaluated under the three-factor test outlined in *Penn Cent. Transp. Co. v. New York City*.[577] The court held, however, that the county's action was not a partial taking because (i) gaining road access was always a risk, not an investment-backed expectation and (ii) the economic diminution suffered was not significant, because the valuation impact analysis could not properly include a fair market value calculation that assumed road access. The access was a contingency, not assured.[578]

In *City of Virginia Beach v. Bell*,[579] the court again construed *Lucas* in holding that the denial of a permit under the Sand Dune Protection Act could not be found to be a categorical taking, because the landowner acquired the property after the regulation was in effect. The regulation was part of the "bundle of rights" that came with the title. The court rejected the argument that the landowner, as a 50-percent shareholder in the company from which the title was transferred, in substance owned the property before the regulation was effective. However, the United States Supreme Court thoroughly rejected the analysis used by the Virginia Supreme Court in *Bell* when it decided *Palazzolo v. Rhode Island*.[580] In a case with facts quite similar to *Bell*, the Court, citing its earlier holding in *Nollan*, held:

> The State may not put so potent a Hobbesian stick into the Lockean bundle . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.[581]

[577] 438 U.S. 104, 124, *reh'g denied*, 439 U.S. 883 (1978).

[578] *See also Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) (finding no partial taking because of mere diminution in value); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997) (finding that the owner was not deprived of "all" economic use of the land).

[579] 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 525 U.S. 826 (1998).

[580] 533 U.S. 606 (2001). *See supra* ¶ 16.1601(C); *see also Spence v. Board of Zoning Appeals*, 255 Va. 116, 496 S.E.2d 61 (1998) (landowner's purchase of land for which a variance had previously been denied did not preclude the BZA from granting the new landowner a variance).

[581] *Palazzolo*, 533 U.S. at 627.

It is also worth noting that article I, section 11 of the Virginia Constitution prohibits taking or *damaging* private property for public purposes. This language is broader than the Fifth Amendment of the federal Constitution. While the prohibition on damaging property did not assist the plaintiff in *Omni*, it does suggest that the interests protected by the Virginia Constitution are broader than those protected by the federal Takings Clause.