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PLANNING AND ZONING

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1-1 INTRODUCTION

1-1.01 The Purpose of This Chapter

The practice of land use law is integral to the labors of almost every local government lawyer. It is, moreover, one of the very few bodies of law, public or private, that the many non-lawyer members of planning commissions, boards of zoning appeals, and local governing bodies must grasp in substantial detail to perform their public duties satisfactorily. Land use questions invest almost all real estate transactions, thus becoming of equal interest to the real property 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. The complexities of its practice arise in no small measure from the fact that in virtually no other area of the law do technical legal rules, the raw and unfettered forces of politics, and the many 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.

1-1.02 Judicial Treatment of Land Use

1-1.02(a) The Current State of Judicial Thought

Over the past few decades, the Virginia Supreme Court’s approach to the separation of powers and the role of the judiciary in what the Court considers to be political issues has essentially caused it to remove Virginia courts from a consequential role in policing localities’ freedom to make legislative land use decisions. Where the “fairly debatable” standard applies (as it does to all legislative decision making), the courts have not intervened in many decades. *Lamar Co. v. City of Richmond*, 287 Va. 322, 757 S.E.2d 15 (2014); *Town of Leesburg v. Long Lane Assocs. Ltd. P’ship*, 284 Va. 127, 726 S.E.2d 27 (2012); *Town of Leesburg v. Giordano*, 280 Va. 597, 701 S.E.2d 783 (2010); *Bd. of Sup’rs of Fairfax Cnty. v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003); *Byrne v. City of Alexandria*, 298 Va. 694, 842 S.E.2d 409 (2020); *see also Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990) (principle of separation of powers requires courts to refrain from inquiry into the motives of legislative bodies elected by the people¹; inquiry is only into whether such body acted arbitrarily, capriciously, or in accordance with policies and standards in legislative delegations).

¹ Immunity from inquiry into legislative motive can, however, be waived by an explicit and unequivocal renunciation of the protection. *Bd. of Sup’rs of Fluvanna Cnty. v. Davenport & Co.*, 285 Va. 580, 742 S.E.2d 59 (2013) (board waived immunity by: (1) declining to assert legislative immunity, (2) voluntarily filing a complaint that, due to the board’s burden of proof, involved issues protected by legislative immunity, and (3) making an unequivocal waiver of protection from inquiry into legislative motivation in the text of its complaint). *Davenport* is not a land use case, but rather a suit against a county’s financial advisor in connection with legislative decisions as to bond issues, but the principle articulated in the decision are likely not limited to its facts.

Deference is great, indeed, and the Virginia Supreme Court has affirmatively reined in lower courts when they have failed to accord the fairly debatable standard sufficient breadth. As an example, in *City Council of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996), the council had refused an upzoning from residential to commercial for a property in an area that had changed over time to similar commercial and industrial uses. The trial court made detailed findings that the underlying zoning of the property was unreasonable and remanded the case to the council for reconsideration. On appeal the Supreme Court reversed, conducting an independent and thorough review of the record for evidence supporting the council's legislative determination that the underlying zoning of the property was, in fact, reasonable and that it had sustained its burden of proving its decision to be fairly debatable. The result itself is unremarkable, for the evidence supported a conclusion that the underlying zoning was reasonable. The decision is significant for its demonstration of the extent to which the Court will reassess—and limit—decisions of the lower courts as they adjudicate legislative land use decisions. See also the Court's reversal of a lower court decision striking down the denial of a special exception for a fast-food restaurant, despite the trial court's detailed findings of fact and conclusions of law that the county's action had been discriminatory. *Bd. of Sup'rs of Fairfax Cnty. v. McDonald's Corp.*, 261 Va. 583, 544 S.E.2d 334 (2001).

Local discretion in land use is very substantial, but there remain occasions in which the courts will yet step in. Most significantly, this is the case where the local governing body has failed to follow procedural requirements. See *Renkey v. Cnty. Bd. of Arlington Cnty.*, 272 Va. 369, 634 S.E.2d 352 (2006). And although there was a time when the federal courts offered an alternative venue not so inclined to recognize this discretion (see *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (finding a deprivation of federally protected civil rights after 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) and *Scott v. Greenville Cnty.*, 716 F.2d 1409 (4th Cir. 1983)), the present disinclination of the Fourth Circuit to engage in land use disputes makes federal court review more academic than real. See section 1-12.16. While Virginia courts have pursued a relaxed supervisory role over local governments in performance of their legislative functions, however, the courts have employed an expanded view of takings law, the "ultimate bottom line" in land use regulation. Rights in property may be so circumscribed by land use regulation that they will be found to have been taken without just compensation. It is no easy task to determine the point at which the police power has gone "too far," of course, for the question has no fixed answer, and it is in fact the rare situation in which a land use restriction will be so found. As case (and now Virginia statutory) law has evolved, however, it is of particular interest whether a locality has ventured into the realm of "unconstitutional conditions" in connection with land use decision making, a topic addressed further below. See section 1-17.07.

1-1.02(b) The Importance of Procedural Issues

The Virginia Supreme Court appears to have concluded that the principal function of the judiciary is to assure 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 essentially any 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, then there is little to save its legislative actions. See, e.g., *Renkey v. Cnty. Bd. of Arlington Cnty.*, 272 Va. 369, 634 S.E.2d 352 (2006).

1-1.02(c) The "Federalization" of Land Use

In recent decades, there has been a striking "federalization" of the land use process. Aggressive public and private enforcement of the Clean Water, Endangered Species, Clean Air, and National Historic Preservation Acts, among others, have had a dramatic effect on land use, and even on the role of local governments not charged with the administration and enforcement of these laws. In addition to the importance of laws such as the Clean

Water Act (given the extent of wetlands in Virginia) and the National Historic Preservation Act, the Court of Appeals for the Fourth Circuit has, for example, held that the federal Natural Gas Act preempted a county's zoning amendment prohibiting the siting of liquefied natural gas facilities in certain environmentally sensitive areas of the county. *AES Sparrows Point LNG, LLC v. Smith*, 539 F. Supp. 2d 788 (D. Md. 2007), *rev'd in part*, 527 F.3d 120 (4th Cir. 2008); *Atlantic Coast Pipeline, LLC v. Nelson Cnty. Bd. of Sup'rs*, 443 F. Supp. 3d 670 (W.D. Va. 2020) (county floodplain regulations were obstacle to goals of the Natural Gas Act and therefore preempted); *cf. Wash. Gas Light Co. v. Prince George's Cnty. Council*, 711 F.3d 412 (4th Cir. 2013) (no preemption by Natural Gas Act as it does not apply to local distributor nor by the Pipeline Safety Act because it only addresses pipeline safety). The ability of localities to apply their zoning regulations to religious and telecommunications facilities is also limited by federal law. See sections [1-3.01\(b\)](#) and [1-3.01\(d\)](#).

1-2 THE ENABLING LEGISLATION

1-2.01 The 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.

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 necessities. Moreover, as noted, the regulation of land use is no longer entirely local. Federal and state environmental protection legislation (and other federal laws with direct application, which are generally beyond the scope of this chapter) increasingly constitutes a complex and important overlay on traditional land use concepts, even in jurisdictions without zoning ordinances. Further, they add legal twists and turns that are often of greater consequence than purely local land use considerations.

The governmental planning and zoning processes outlined here are intended to interject into the land use equation values that are often not market driven but rather directed at the protection of communal interests, as those values and interests are articulated in the political process, and to attempt to bring some order to the pace and direction of development as it relates to the cost of the provision of public infrastructure and the development (or destruction) of local community.

Land use necessarily occurs in a market-based system, and it remains the case that most land use issues arise out of private decisions to commence the processes of development of a parcel of property. Land use law authorizes, and constrains, the exercise of the *public* power deemed essential to provide a counterweight to the *private* market decision-making process. Maximization of efficient regional transportation networks, provision of regional stormwater management facilities to control off-site flooding and water pollution, buffering of adjacent and potentially incompatible uses in order to protect older or developing neighborhoods, environmental protection, and the advancement of aesthetic and other social goals legislatively set forth in Va. Code § 15.2-2283 (listing the permitted purposes of zoning ordinances), purposes deemed essential to the harmony and quality of life in the community, are not always foremost in the calculus of private economic choice and are often in conflict with the profit motive. The General Assembly and the courts have generally concluded—though not without exception—that it is the proper and lawful role of local government within reasonable but very broad boundaries to decide the appropriate use of land, and in doing so, they are not to be materially policed by the judiciary.

1-2.02 The Purposes of Zoning

Zoning is intended to “strike a deliberate balance between private property rights and public interests.” *Bd. of Sup'rs of Fairfax Cnty. v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974). To this ultimate and general end, all Virginia zoning and planning powers derive

from the enabling legislation² contained in Chapter 22 of Title 15.2 of the Code of Virginia. 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 adoption of the present framework in 1962. These basic statutes continue to change with virtually every session of the General Assembly and must be constantly reviewed.

The General Assembly has statutorily identified several purposes for zoning and other land use ordinances to the end that localities are encouraged:

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 the concerns of military installations be recognized and taken into account in consideration of future development of areas immediately surrounding installations and that where practical, installation commanders shall be consulted on such matters by local officials; 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.

Va. Code § 15.2-2200.

Zoning ordinances themselves shall expressly be designed:

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 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

² The Attorney General has opined that localities do not have authority outside of the zoning enabling statutes to prohibit or regulate specific uses of land. 2005 Op. Va. Att’y Gen. 54.

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 water as defined in § 62.1-255.

Va. Code § 15.2-2283; see *Bd. of Sup'rs of Fairfax Cnty. v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974); *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982) (illuminating the relationship between Va. Code §§ 15.2-2200 and 15.2-2283).

Virginia Code § 15.2-2284 requires a broad review of factors relevant to ordinance composition, mandating reasonable consideration of the existing use and character of property; the locality's comprehensive plan; the suitability of property for various uses; the trends of growth or change; current and future requirements of the community as to land for various purposes (as determined by population, economic, and other studies); the transportation requirements of the community and the requirements for housing, schools, parks, playgrounds, recreation areas and other public services; the conservation of natural resources and preservation of flood plains, agricultural, and forestal land; and the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the locality. See *Bd. of Sup'rs of Fairfax Cnty. v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991) (enabling legislation sets forth the purpose of zoning ordinances and a number of factors that a zoning authority must consider when taking zoning actions; weight of the relevant factors is a legislative function over which the governing body has broad discretion, and judicial review is limited to determining whether the resulting decision was reasonable); *Norton v. Bd. of Sup'rs of Fairfax Cnty.*, 299 Va. 729, 858 S.E.2d 170 (2021) (Board of Supervisors did not need to present evidence because its interpretation of the original zoning ordinance was correct and its amendment to it was reasonable on its face, and petitioners did not overcome burden of providing probative evidence of unreasonableness).

The Code of Virginia further sets out in detail some things that zoning ordinances may include. See Va. Code § 15.2-2286. This section also authorizes certain variances and special exceptions, temporary application of ordinances in cases of annexation, the appointment of a zoning administrator, imposition of criminal penalties for violation of the ordinance, imposition of review fees, amendment of the ordinances, residential cluster development, and submission of site plans.

Beyond the matters addressed in Va. Code § 15.2-2286, zoning ordinances may include any number of reasonable provisions, including the distribution 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. Va. Code § 15.2-2280³; *City of Virginia Beach v. Hotelling*, 218 Va. 14, 235 S.E.2d 311 (1977).

As an outgrowth of efforts to better relate transportation and land use, each locality must include as part of its comprehensive plan⁴ a transportation plan that is consistent with the Commonwealth Transportation Board's statewide plan. Va. Code § 15.2-2223. The transportation plan must also "take into consideration" alignment with affordable, accessible housing and community services. *Id.* Moreover, localities should "consider incorporating" into their comprehensive plans "strategies to promote transit-oriented development for the purpose of reducing greenhouse gas emissions through coordinated transportation, housing, and land-use planning." Va. Code § 15.2-2223.4. Localities must submit proposed comprehensive plans, or amendments thereto, and rezonings to the Department of Transportation for review and comment if the proposed plan or rezoning will substantially affect transportation on state-controlled highways. Va. Code § 15.2-2222.1.

As noted in section 1-3, there are some statutory limitations on what localities may do. Virginia Code § 15.2-2286(7) precludes a locality from refusing to accept re-filing of a rezoning application made within twelve 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. 1996 Op. Va. Att'y Gen. 56.

The regulation possible under this authority is extremely broad when the locality seeks to advance the enumerated purposes for zoning ordinances. For example, the Court has recognized substantial local legislative authority to draw residential and commercial distinctions. *See, e.g., Cupp v. Bd. of Sup'rs of Fairfax Cnty.*, 227 Va. 580, 318 S.E.2d 407 (1984); *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982) (the Court will scrutinize regulation of property interests to assure that the means employed are "reasonably suited" to the achievement of legitimate public goals, but in practice it has given very substantial leeway); *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981). There is no requirement, however, that a statement of the zoning purpose be expressed in a conditional use permit. *Cnty. of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 559 S.E.2d 627 (2002) (finding prohibition on sale of alcohol is a valid zoning condition in a use permit) (amicus brief filed by LGA).

It is possible for an ordinance to be sufficiently broad and general as to be "void for vagueness," but this will be rare indeed. *See Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855 (1983); *Vaughn v. City of Newport News*, 20 Va. App. 530, 458 S.E.2d 591 (1995) (an ordinance forbidding the outside storage of "goods, materials and equipment" was not unconstitutionally vague or overbroad). *But see McClellan v. City of Alexandria*, 363 F. Supp. 3d 665 (E.D. Va. 2019) (for purposes of surviving motion to dismiss, opera singer adequately alleged noise control provisions were unconstitutionally vague where they used "vague, standardless language" and contained "multiple and overlapping" regulations that "may prove difficult for laymen to understand").

The Court has recognized that under the Virginia enabling legislation localities may, in proper cases, prohibit certain uses altogether. *Res. Conservation Mgmt., Inc. v. Bd. of*

³ The Attorney General has opined that pursuant to Va. Code § 15.2-2280, a locality has the authority to ban "fracking" and that authority is not preempted by the Gas and Oil Act, Va. Code § 45.2-1600 et seq. (previously § 45.1-361.1 et seq.). 2015 Op. Va. Att'y Gen. 76 (overruling 2013 Op. Va. Att'y Gen. 231). However, the power to prohibit land uses under § 15.2-2280 is not absolute; "[w]here a particular use throughout a locality would be inconsistent with state law, such a prohibition cannot be sustained." 2022 Op. Va. Att'y Gen. 27 (town is not authorized to enact a total prohibition on opioid treatment clinics within its boundaries, as state law permits the establishment of opioid treatment clinics).

⁴ The comprehensive plan is discussed in detail in section 1-7.

Sup'rs of Prince William Cnty., 238 Va. 15, 380 S.E.2d 879 (1989). In such cases, the question is not whether the locality possesses the raw power to make such exclusions but rather will likely involve the question whether the decision was “fairly debatable.” It is also possible for such an exclusion to run afoul of other legal concerns, such as exclusion on the basis of a suspect classification, which would bring to bear considerations far beyond the question of fair debate.

Virginia Code § 15.2-2286 lists other powers and limitations with respect to the content of zoning ordinances, including provisions for transitional zoning⁵ in cases of annexation, the grant of special exceptions (also known interchangeably as special use or conditional use permits), and the administration and enforcement of the ordinance. Virginia Code § 15.2-2286 also sets out the basic requirements for amending the zoning ordinance and map. *See also* Va. Code §§ 15.2-2297 through 15.2-2300 and 15.2-2204, 15.2-1426, and 15.2-1427.

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 to neither include nor exclude any particular socioeconomic group. *Bd. of Sup'rs of Fairfax Cnty. v. DeGroff Enters.*, 214 Va. 235, 198 S.E.2d 600 (1973); *see also Bd. of Cnty. Sup'rs v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958); *Bd. of Cnty. Sup'rs v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959); *Bd. of Zoning Appeals of Fairfax Cnty. v. Columbia Pike, Ltd.*, 213 Va. 437, 192 S.E.2d 778 (1972); 2014 Op. Va. Att’y Gen. 157 (locality does not have authority through its zoning ordinance to regulate signs on bicycles as zoning power extends only to land use, not to traffic or vehicle regulation). This position, as so many others, may no longer be adhered to with complete fidelity, however, both because of the Court’s almost complete deference to local decision-making generally, and because the General Assembly has itself begun to include such social, non-land use considerations as affordable housing programs by statute. *See, e.g.,* Va. Code §§ 15.2-2286(A)(3), 15.2-2304, 15.2-2305, and 15.2-2305.1. As further example, Va. Code § 15.2-735.1 was added in 2006 to give Arlington County (and certain other counties) the statutory authority to require affordable housing units or contributions to an affordable housing fund as a special exception condition. A circuit court had previously found that the county did not have such authority. *Kansas-Lincoln, L.C. v. Cnty. Bd. of Arlington*, 66 Va. Cir. 274 (Arlington Cnty. 2004); *see also Town of Leesburg v. Giordano*, 280 Va. 597, 701 S.E.2d 783 (2010) (upholding a 100 percent surcharge on water and sewer consumption rates for residents of Loudoun County served by Town of Leesburg utilities).

Zoning ordinances 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. *See Bd. of Sup'rs v. Gaffney*, 244 Va. 545, 422 S.E.2d 760 (1992) (a private recreational nudist club was not permitted by right under the county’s inclusive zoning ordinances, as a “preserve and conservation area”); *Colandrea v. Zoning Appeals Bd. of Town of Middleburg*, 45 Va. Cir. 112 (Loudoun Cnty. 1998) (under an inclusive zoning ordinance, the failure to mention front yard fencing means that such fencing is prohibited).

The power of a locality to adopt an inclusive ordinance was made plain in *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005), where the Court held that a road

⁵ *See Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 831 S.E.2d 483 (2019), in which the Virginia Supreme Court held that a municipality had authority to enact an ordinance providing that any annexed territory would have a specific zoning classification. The landowner had argued that the predecessor statute to Va. Code § 15.2-2286 (Va. Code § 15.1-491(b)) required that the ordinance could only provide a “temporary” classification upon annexation. The Court held that nothing in the statute required all recently annexed property be given an expressly temporary zoning classification, even though the City had not altered the transitional and “temporary” zoning classification that had been applied to the annexed property for 30 years. Alternatively, it held that all zoning was temporary as it was always subject to amendment.

serving a mining operation could not pass through a limited residential area, as an “accessory use” to the mining. Under the county ordinance, “[a]ny use not expressly permitted or permitted by special use permit in a specific district is prohibited.” *Id.* Read together with other provisions of the county ordinance, the Court concluded that the accessory uses permitted in the residential area were solely those associated with residential uses. *See also Lamb Center v. City of Fairfax*, Rec. No. 111485 (Va. June 7, 2012) (unpubl.) (Circuit court erred in ruling charitable services such as the provision of food, clothing, showers, and haircuts were not accessory or complementary to the permitted use of a counseling center in an office district).

1-2.03 The Uniformity Clause

Section 15.2-2282 of the Code of Virginia provides that “[a]ll zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.” *See, e.g.,* 2013 Op. Va. Att’y Gen. 116 (county may not enact a zoning ordinance amendment that applies to parcels located in areas defined by the boundaries of electoral districts, without regard to the boundaries of the county’s zoning districts).

Before its decision in *Schefer v. City Council of Falls Church*, 279 Va. 588, 691 S.E.2d 778 (2010), the Court’s only significant address of this statute had been in *Bell v. City Council of Charlottesville*, 224 Va. 490, 297 S.E.2d 810 (1982), where it held that the uniformity requirement “is in reality a statutory reaffirmation of the equal protection of the law guaranteed to all persons by the Fourteenth Amendment to the Constitution.” *Schefer* challenged a city ordinance that imposed different height restrictions for single family dwellings on “standard” and “substandard” lots in the same zoning district, depending on lot size. In *Schefer* the Supreme Court reaffirmed the proposition that it articulated in *Bell*, and further concluded that the dispute was actually over two different kinds of uses based on the underlying lot size: residential uses on standard, and those on substandard, lots. The Uniformity Clause, however, makes no reference to lot size, and there was no dispute that each of the proposed uses of the land was for a single-family dwelling: the identical use. Thus, the Court’s decision re-emphasizes the breadth of discretion that a locality possesses in classifying uses and structures without running afoul of the Uniformity Clause.

1-3 AFFIRMATIVE LIMITATIONS

There are occasions when both the General Assembly and the federal government have limited (or attempted to limit) the authority of localities to reach certain land use outcomes. For example, a family day-care home with no more than five children, in addition to those children residing in the home, is to be considered residential occupancy by a single family, and no zoning conditions more restrictive than those that apply to single dwellings may apply to family day homes. Zoning approval for family day-care homes with five to twelve children, in addition to resident children, will be administratively granted if, after notice, adjoining landowners do not object and it otherwise complies with the law. Va. Code § 15.2-2292.⁶ In addition, with Va. Code § 15.2-2291, the General Assembly has limited the capacity of localities to “zone out” certain residential homes for not more than eight aged or mentally or physically disabled persons. 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. *Trible v. Bland*, 250 Va. 20, 458 S.E.2d 297 (1995) (internal citation omitted) (indeed in *Trible*, the home housed 21 residents); *see also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776 (1995) (throwing into doubt whether the locality can limit the number of residents of such group homes under

⁶ If adjacent neighbors object, the zoning administrator must consider the objection and either (1) issue or deny the permit or (2) if required by ordinance, refer the permit for local government consideration. Va. Code § 15.2-2292(B).

the Fair Housing Amendments Act of 1988); *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84 (2010) (city not permitted to use criteria not specified in state regulations to establish resource protection areas under the Chesapeake Bay Preservation Act); 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)⁷; § 15.2-2288.5 (specifying the uses that must be included without further zoning approval when a cemetery is approved); § 15.2-2290 (manufactured homes must be permitted in agricultural zones); § 15.2-2307(H) (a nonconforming manufactured home may be replaced and retain its valid nonconforming status); § 15.2-2307.1 (family-owned, established commercial fishing operation may continue operations despite any zoning changes); § 36-98 (by-right residential zoning requirements may not conflict with building code requirements regarding foundations or crawl spaces, use of specific building materials or finishes, or minimum surface area or numbers of windows, although there are exceptions for proffered zonings, special use permit conditions, residential cluster development conditions, and overlay districts).

As other examples of the affirmative limitations the General Assembly places on a locality's land use powers, see Va. Code § 15.2-917, which limits the application of noise control standards to shooting ranges; Va. Code § 15.2-2288.2, which prohibits the requirement of a special use permit for the erection of a tent on private property for three or fewer days for a private event; Va. Code §§ 15.2-2288.3, 15.2-2288.3:1, 15.2-2288.3:2 (licensed farm wineries, breweries, and distilleries); 2022 Op. Va. Att'y Gen. 73 (town may not use zoning powers to completely ban opioid treatment clinics, which are legal under state law, but may otherwise impose reasonable restrictions on them); 2013 Op. Va. Att'y Gen. 118 (zoning ordinance that provides as by-right accessory uses those uses specified by § 15.2-2288.3, but only after obtaining a zoning permit, violates Dillon Rule); Va. Code § 15.2-2292.1 (temporary family healthcare structures); and Va. Code § 15.2-2288.7 and 2022 Op. Va. 22 (solar facilities); see also Va. Code § 15.2-2208.1 (unconstitutional conditions).

1-3.01(a) Religious Freedom

The federal government tried and failed to limit localities' land use authority with the Religious Freedom Restoration Act (RFRA), which provided that a government could not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government could demonstrate the burden (1) was in furtherance of a compelling governmental interest; and (2) was the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb. The U.S. Supreme Court declared RFRA unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), a case in which a locality had denied a church a building permit for renovation and remodeling of an historic structure.⁸

Three years later Congress re-entered the fray and passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), codified at 42 U.S.C. § 2000cc et seq. It is the purpose and intent of this statute to impose impediments on the regulation of

⁷ The Fauquier County Circuit Court has held that this statute bars a locality from imposing a special exception requirement for the use of an "alternative" sewage treatment system necessary to construct a by-right home. *Bart v. Bd. of Sup'rs of Fauquier Cnty.*, No. 05-132 (Fauquier Cnty. Cir. Ct. July 26, 2006). In an unpublished opinion, the Virginia Supreme Court held that a locality may not require a special use permit for steep slope development on the ground that Va. Code § 15.2-2288.1 precludes a locality from "politicizing" a condition of development. *Town of Occoquan v. Elm Street Development*, Rec. No. 110075 (Va. Apr. 6, 2012) (unpubl.).

⁸ While the Supreme Court ruled that the Religious Freedom Restoration Act was unconstitutional as applied to state and local governments, the federal courts continue to hold it constitutional as applied to the federal government. See *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

religious uses by localities nationwide. RLUIPA shifts to the locality a substantial burden to demonstrate a “compelling state interest” for regulation of religious uses and requires that even when regulation is permissible, it must be accomplished by the least restrictive alternative.⁹ The law also mandates that religious uses be subject to equal terms as compared to secular uses. RLUIPA, and very occasionally Equal Protection analyses, are applied to religious uses because, in the trenchant words of Judge Posner:

[R]eligion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive. When government singles out churches for special regulation . . . the risk of discrimination, not against religion as such . . . but against particular sects, is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning.

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (Posner, J., dissenting).

RLUIPA attempts to address this in a serious way. The application of the “compelling governmental interest” test is the most stringent standard known to federal law and derives from a long line of Fourteenth Amendment cases involving the regulation of what are known as “suspect classifications,” such as race or nationality. Historically, governments have had a difficult time demonstrating a compelling state interest sufficient to sustain the challenged exercise of power. This remains a developing area of the law, however, and the cases can be quite fact dependent. The courts have not applied the “compelling governmental interest” test with the same rigidity in the RLUIPA context as in the Equal Protection arena, and most do not apply a strict scrutiny analysis to Equal Terms claims at all. It is also fair to say that the rationales given for the different tests that the courts have applied in this area can be difficult to follow, and often are so subtly distinguished as to test one’s analytical skills. But it remains true that the greater percentage of RLUIPA cases have been decided adversely to the government, whether the case be brought as a substantial burden claim or as one for failure to treat a religious use on equal terms.

1-3.01(b) Religious Land Use and Institutionalized Persons Act

The Act creates a “general rule” with respect to land use regulation of religious uses and establishes limitations on local regulation of such uses.

(a) Substantial burdens.

- (1) General Rule. No government shall impose or implement a land use regulation¹⁰ 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 that imposition of the burden on that person, assembly, or institution—

⁹ See the similar state provision, Va. Code § 57-2.02: “No government entity shall substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.”

¹⁰ In a suit subsequently dismissed as moot, a federal district court, stating that “land use regulation” is to be construed broadly, held that a septic permit should be considered a zoning law, not a public health law, for purposes of RLUIPA. *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758 (W.D. Va. 2017), *dismissed as moot* (Sept. 1, 2017).

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal Terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution, on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution, on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc. Congress has provided that the Act “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.” 42 U.S.C. § 2000cc-3(g). It further establishes that in any case in which it applies, the burden of persuasion in legal proceedings is shifted so that

[i]f a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 USC § 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of

persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

42 U.S.C. § 2000cc-2(b).

In order to avoid violation of the Act, localities are always permitted to take steps to alleviate the application of any rule that would burden religious exercise. Thus,

[a] government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C. § 2000cc-3(e).

RLUIPA is intended to overcome the constitutional defect that the Supreme Court found in RFRA,¹¹ and there have been a number of cases that have been decided by the federal courts. A review of those cases indicates both that the courts find the Act constitutional, and that localities have been unsuccessful in meeting the stringent standards that Congress has imposed on the regulation of religious uses, if the court concludes that a local land use action in fact imposes a substantial burden on free exercise. See, e.g., *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002); *Reaching Hearts, Int'l v. Prince George's Cnty.*, 584 F. Supp. 2d 766 (D. Md. 2008), *aff'd*, 368 Fed. Appx. 370 (4th Cir. 2010).¹² A federal district court in Virginia found, however, that no substantial burden was placed on a church when the city did not grant a special exception allowing the church to lease its property to a for-profit day care for mentally and emotionally disabled children. *Calvary Christian Ctr. v. City of Fredericksburg*, 800 F. Supp. 2d 760 (E.D. Va. 2011) (preliminary injunction denied) (suit dismissed, Nov. 21, 2011). The court stated that secular activities do not become acts of faith just because they occur on church property. See also *Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536 (4th Cir. 2013) (upholding denial of motion to amend complaint or extend time for appeal).

RLUIPA also is applicable to the free exercise of religion as to institutionalized persons. In *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005), the U.S. Supreme Court, in response to a facial challenge, held that the portion of RLUIPA that applies to

¹¹ The Supreme Court held in *Boerne* that it was for the courts, and not Congress, to define what constitutes a "burden on [the] free exercise of religion." *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). RLUIPA has avoided that problem by declining to define the limits of the constitutional language and by simply providing what is, in effect, a remedial standard and process for governmental regulation of religious uses that constitute such a burden. Congress did not define a "substantial burden" on free exercise, since that is a function of the courts. Likewise, a substantial burden is placed on religious freedom when government action "prevent[s] him or her from engaging in conduct or having a religious experience which the faith mandates." *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (quoting *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995)). Notwithstanding the Court's decision in *Thanh Van Tran v. Gwinn*, 262 Va. 572, 554 S.E.2d 63 (2001), other decisions have indicated that the prohibition of substantial burdens on free exercise extends to many activities found in a "large and multi-faceted church." *Cottonwood*, *supra*.

¹² The district court in *Freedom Baptist*, *supra*, held the Act to be constitutional against a wide variety of challenges from the locality. Because its judgment was dispositive of that crucial issue and was interlocutory in nature, it certified its ruling as to the constitutionality of RLUIPA to the Third Circuit Court of Appeals for a ruling. However, that appeal was ended in November 2002 when the parties reached a settlement. Thus, the case stands as precedent supporting the constitutionality of the Act.

institutionalized persons does not violate the Establishment Clause. The Court's opinion expressly did not apply to the land use provisions of the Act. Some of its reasoning, however, is applicable to determining if the land use provisions are also constitutional. The foremost reason the Court gave for upholding the Act was that it did not violate the Establishment Clause to alleviate exceptional government-created burdens on private religious exercise. The Court noted that the Act, properly construed, required neutral administration and a balancing of interests so that neither the burden the religious accommodation placed on non-beneficiaries, nor the elevation of religious interests over other interests, was too great. The Court did not address the federalism arguments raised, because they had not been considered by the court of appeals.

Prior to *Cutter, supra*, the Fourth Circuit had held that RLUIPA was constitutional in the prison context. "To hold otherwise," said the court, "and find an Establishment Clause violation would severely undermine the ability of our society to accommodate the most basic rights of conscience and belief in neutral yet constructive ways." *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003).¹³ Subsequent to *Cutter*, the Fourth Circuit held that RLUIPA was a valid exercise of Congress's power under the Spending and Commerce Clauses. *Madison v. Commonwealth*, 474 F.3d 118 (4th Cir. 2006).

While RLUIPA prison context opinions may be instructive, they are not determinative. In *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013), the court of appeals held that the district court erred in using a prison context standard for determining what was a substantial burden in the land use context.

RLUIPA federalizes what were formerly purely local land use requirements for the regulation of churches and church uses. According to the legislative history of the Act, the framers of RLUIPA targeted land use as it affects church uses in part because "zoning conflicts between churches and cities have become a leading church-state issue" and, in particular, because expansion of existing churches and attempts "to locate a new church in a residential neighborhood can often be an exercise in futility." 106 Cong. Rec. E1564 (daily ed. Sept. 21, 2000) (statement of Rep. Hyde) available at [Congress.gov](http://www.congress.gov) and 106 Cong. Rec. E1234 (daily ed. July 13, 2000) (statement of Rep. Canady). *Id.* As one court stated, "[b]y passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitution." *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).¹⁴

1-3.01(b)(1) Substantial Burden

The initial substantive effect of RLUIPA is to prohibit localities from placing substantial burdens upon the use and zoning of religious institutions,¹⁵ absent compelling governmental interest, and even when such interests exist, to achieve legitimate ends by the least restrictive means possible. See RLUIPA court cases available at the [Becket Case Database](#). In the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior. *Bethel*

¹³ The district court in *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), found that RLUIPA violated the Establishment Clause by elevating the protection for religious claims of inmates above that for other fundamental rights. This approach was rejected by the U.S. Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005).

¹⁴ The district court upheld a lower court ruling that the City of Cottonwood, California, had substantially burdened a church when it denied the Church's application for a conditional use permit that would have allowed the church to construct a new facility on its property in the City.

¹⁵ In *Andon LLC v. City of Newport News*, 63 F. Supp. 3d 630 (E.D. Va. 2014), a federal district court held that a property owner, who had contingently leased property to a church, had standing under RLUIPA to challenge as a substantial burden on religious exercise the city's denial of a variance that would allow the property to be used by a church. This ruling was not challenged on appeal. See *Andon LLC v. City of Newport News*, 813 F.3d 510 (4th Cir. 2016).

World Outreach Ministries v. Montgomery Cnty. Council, 706 F.3d 548 (4th Cir. 2013); *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758 (W.D. Va. 2017), *dismissed as moot* (Sept. 1, 2017). The court of appeals also held that the substantial burden provision protects against non-discriminatory, as well as discriminatory, conduct that imposes a substantial burden on religion. Accordingly, a religious organization asserting that a land use regulation has imposed a substantial burden on its religious exercise need not show that the land use regulation targeted it.

On the merits, the court in *Bethel* noted that when a religious organization buys property reasonably expecting to build a church, governmental action impeding the building of that church may impose a substantial burden even if other suitable properties are available. It found that the county's water and sewer restrictions and zoning restrictions, imposed after the church bought the property, prohibited the building of a church and that the county failed to show that these measures were the least restrictive means of meeting the assumed compelling governmental interest of preserving agricultural land, water quality, and open space and managing traffic and noise in the rural density transfer zone. The court accordingly reversed summary judgment for the county and remanded.¹⁶

The Fourth Circuit distinguished *Bethel* in *Andon LLC v. City of Newport News*, 813 F.3d 510 (4th Cir. 2016), in which the plaintiffs had entered into a lease for property for a church and then sought a variance to the setback restrictions. The court held that no RLUIPA violation had been stated as the government action did not alter any pre-existing expectation that the plaintiffs would be able to use the property for a church facility or cause them to suffer delay and uncertainty in locating a place of worship. The court also held that the absence of affordable and available properties within a geographic area will not by itself support a substantial burden claim under RLUIPA. It noted that were it to hold otherwise, it effectively would be granting an automatic exemption to religious organizations from generally applicable land use regulations. Such a holding would usurp the role of local governments in zoning matters when a religious group is seeking a variance, and impermissibly would favor religious uses over secular uses. The court further stated that Congress did not intend for RLUIPA to undermine the legitimate role of local governments in enacting and implementing land use regulations.

In *Jesus Christ is the Answer Ministries, Inc. v. Baltimore County*, 915 F.3d 256 (4th Cir. 2019), the property owner's first site plan, which did not comply with setback and buffer requirements, was denied and the second plan, which substantially complied, was also denied by the local government on the grounds of res judicata and collateral estoppel. The Fourth Circuit found that a RLUIPA claim had been stated because a church use was permitted by right if site plans complied "to the extent possible with applicable zoning requirements" and could "otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises." Moreover, the church's expectation to use the property for church services was reasonable given the realtor's assurances to that effect.

See also *Redeemed Christian Church of God (Victory Temple) Bowie v. Prince George's Cnty.*, 17 F.4th 497 (2021) (county violated RLUIPA when it denied church's application for change in water and sewer category, citing traffic safety concerns, because it did not consider less restrictive means to address traffic safety before denying application); *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012) (prison context; government must consider and reject other means before it can conclude that the policy chosen is the least

¹⁶ Note that in a RLUIPA prison case, the U.S. Supreme Court held that the availability of alternative means of practicing religion is a not a relevant consideration under RLUIPA as it provides greater protection than the First Amendment. RLUIPA's "substantial burden" inquiry asks whether the government has substantially burdened religious exercise, not whether the RLUIPA claimant is able to engage in other forms of religious exercise. *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853 (2015).

restrictive means); *Chase v. City of Portsmouth*, No. 2:05cv446 (E.D. Va. Nov. 16, 2005) (allowing RLUIPA claim to go forward). The court in *Chase* also held it is proper to name individual members of the governing body in their official capacities, even though this cannot affect the damages that would be paid by the city: it furthers public accountability and it gives the members of the governing body the ability to participate fully in defense of their actions as parties to the litigation. *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487 (E.D. Va. 2006).

One of the principal areas of congressional and judicial concern underlying the passage of the Act is the attempted restriction of church growth by local zoning regulation. Thus, as a result of RLUIPA, a locality may have to demonstrate that it has a compelling state interest in denying a religious institution the right to construct, expand, remodel, or demolish structures. Likewise, under RLUIPA, it is questionable whether local historic district ordinances can be enforced in the same manner in which they may be enforced against non-religious users, since RLUIPA applies in any case involving a land use regulation wherein any instrumentality of a municipality makes an individualized assessment, such as a special exception or special permit.

RLUIPA does not repeal local land use regulation (see *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004)). Rather, the legislative history of the statute merely confirms that congressional intent is to require “regulators to more fully justify substantial burdens on religious exercise.” 146 Cong. Rec. S 7775. Therefore, RLUIPA does not exempt religious users from seeking local permits, but it does require localities to justify a denial of such permits on the federal grounds established by Congress. Moreover, even if a regulation meets the compelling state interest test, which no locality has so far done, a locality must show that the impact—or burden—that is imposed from its action has been done in the least restrictive manner possible.¹⁷

In *Thanh Van Tran v. Gwinn*, 262 Va. 572, 554 S.E.2d 63 (2001), the Virginia Supreme Court held that a county ordinance that required a special use permit for a place of worship in a residential district did not unconstitutionally burden the right of free exercise of religion and was a neutral, generally applicable regulatory law. The validity of the ordinance under RLUIPA was not an issue, however, and at that time there was no Virginia religious land use act, raising substantial question whether *Tran* remains good law.

Conversely, a locality’s exemption of a religious organization from the requirements of a special exception zoning ordinance does not violate the Establishment Clause. *Ehlers-Renzi v. Connelly Sch. of the Holy Child*, 224 F.3d 283 (4th Cir. 2000). In *Harvest Christian Center v. Zoning Appeals Bd. of King George County*, 55 Va. Cir. 279 (King George Cnty. 2001), the court held that day-care centers operated by churches were permitted in districts zoned for churches, but not day-care centers. See also *Trinity Assembly of God v. People’s Counsel for Baltimore Cnty.*, 962 A.2d 404 (Md. 2008) (upholding denial of a church’s request for variances from sign size requirements); *Bethel World Outreach Church v. Montgomery Cnty.*, 967 A.2d 232 (Md. 2009) (upholding the County’s denial of the church’s request to change its “water and sewer category designation”).

In the prison context, but with reasoning that might be applicable to the land use context, the Supreme Court held that governments are not liable for monetary damages under RLUIPA. States, in accepting federal funding, do not consent to waive their sovereign

¹⁷ For an excellent analysis of the impact of RLUIPA on local regulation of religious uses by Virginia local government practitioners, see “The Religious Land Use and Institutionalized Persons Act of 2000: A Sea Change in Land Use?” by Cynthia A. Bailey and T. David Stoner, *Journal of Local Government Law*, Vol. XII, No. 4, June 2002. The reader must be cautious and keep abreast of developments in RLUIPA; it is probable that its ultimate fate in the land use area will be decided by the United States Supreme Court.

immunity to private suits for money damages under the Act. *Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651 (2011).

1-3.01(b)(2) Equal Treatment

In addition to the line of cases involving substantial burden claims, RLUIPA also prohibits governments from imposing or implementing a land use regulation in a manner that treats a religious assembly or institution on “less than equal terms” with a nonreligious assembly or institution. This is a separate ground for complaint and relief and turns on whether similar uses are being treated similarly. It is important to note that the equal terms provisions of the Act do not incorporate a substantial burden requirement and are therefore analyzed differently from cases under the substantial burden elements of the statute. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3rd Cir. 2007); see also *Konikov v. Orange Cnty.*, 410 F.3d 1317 (11th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004); *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (upholding a requirement for a special use permit for churches in the city’s commercial zones and rezonings in all industrial zones).

There is no judicial consensus as to what a plaintiff must show to prevail on an equal terms claim, and how such evidence is to be analyzed. The Fourth Circuit, however, addressed the equal terms issue in *Alive Church of the Nazarene v. Prince William Cnty.*, 59 F.4th 92 (4th Cir. 2023). To state an equal terms claim under the Act, a plaintiff must allege that: (1) it is a religious assembly or institution, (2) subject to a land use ordinance, and (3) the land use ordinance treats the plaintiff on less than equal terms with (4) a nonreligious assembly or institution. If a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof. Accordingly, to present an equal terms claim, a plaintiff must propose a comparator that is similarly situated with regard to the ordinance at issue. The nonreligious comparator must be an entity that has the same effect on the ordinance’s purpose as a religious assembly or institution.

In the *Alive Church* case, the church had purchased seventeen acres of agriculturally zoned land in the County because a previously issued special use permit authorized a 40,000 square foot religious institution. However, the costs of building that structure would have exceeded what the church could afford. It therefore met at other locations before deciding to relocate to its site. The church asked the zoning administrator if it could conduct its services on that property and was told that it could do so if it became a licensed farm winery or brewery. The church told the County that it planned to use its property to grow and harvest Christmas trees, fruit trees, and pumpkins, and to sell those products on site, and that it had obtained a zoning verification that it could do so. The verification, however, also stated that the church could not use the property for any other purpose, or build any structures not associated with the approved special use. Additionally, it made it clear that events such as weddings, wedding receptions, corporate parties/meetings, conferences, banquets, dinners, and private parties would not be permitted to occur on the property or in any building or structure unless the church was issued a farm winery or limited brewery license by the ABC Board, or the church received a temporary activity permit from the County. The church concluded that obtaining such a license would violate its sincerely held religious beliefs against the sale or promotion of alcohol. It insisted that it could, however, continue to conduct its services. Because the church had no farm winery or limited brewery license, and had not complied with the SUP, the County took the position that the church was unable to hold religious gatherings on its property, whereupon the church filed suit.

As to the equal terms question, the Fourth Circuit said:

[i]f a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed

to meet its initial burden of proof. Accordingly, to present an equal terms claim, a plaintiff must propose a comparator that is "similarly situated with regard to the ordinance at issue." Put differently, the nonreligious comparator must be an entity that has the same effect on the ordinance's purpose as a religious assembly or institution.

Alive Church, supra (internal citations omitted). The court rejected the church's claim that the County's failure to treat it identically with a farm winery or licensed brewery stated an equal terms claim, since its religious purpose was not agricultural by definition and therefore required affirmative approval to operate in an agricultural district. *Id.*

In *Lighthouse, supra*, the Third Circuit held that a religious plaintiff need not identify a "secular comparator" that proposes precisely the same mix of uses as the religious plaintiff for purposes of determining whether the religious plaintiff and the secular use are in fact similarly situated. Thus, it is not necessary for a church to show that there are other users that wish to perform the same functions within a given zone. That plaintiff must, however, show that there is a secular comparator that is "similarly situated as to the regulatory purpose of the regulation in question" without regard to the particular uses that may be at issue. A regulation does not automatically cease being neutral and generally applicable simply because it allows certain secular behaviors, but not certain religious behaviors. The impact of the allowed and forbidden behaviors must be examined in light of the purpose of the regulation in question. In addition, when a government permits secular *exemptions* to an otherwise generally applicable government regulation, then the government must accord treatment to religion-based claims for exemptions on an equal basis, when they would have a similar impact on protected interests. According to the Third Circuit, the relevant comparison is between a regulation's treatment of religious conduct compared to analogous secular conduct with a similar impact on the regulation's aims. A regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose involved*, and not viewed more abstractly. The Third Circuit also holds that RLUIPA's Equal Terms provisions operate on a strict liability standard, but that strict scrutiny is not applicable. *Id.*

In *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667 (2d Cir. 2010), the Second Circuit affirmed a lower court decision that the city's prohibition on church use of property for private, catered, events was a violation of the equal terms provision. It found that the city permitted secular institutions in the church's neighborhood to conduct the same type of events. The church had commenced such catered dinners in order to raise money to keep its eighty-year-old building useable. It contracted with a catering company to use the building, to restore it and provide operating money for the church. In exchange, the caterer had the right to hold private functions in the building. Neighbors complained and the city issued a notice of revocation of a previously issued permit. The church sued, claiming a violation of the Equal Terms provision. It produced evidence of two key comparators, a cooperation apartment building, and a hotel, both located in the same R-10 zone applicable to the church. The city subsequently issued notices of violation to those two comparators, asserting that they were acting outside their permitted zoning. The court of appeals found that the other uses were indeed appropriate comparators. Interestingly, the court found that the two were similarly situated, because the city contended that each was allegedly equally illegal. The court said that technical differences between the uses were not critical to RLUIPA because the question was whether, in practical terms, secular and religious institutions were treated equally, not whether the secular comparator's use was identical to the religious entity's.

In *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011), the Fifth Circuit found all of the existing tests for an equal terms claim wanting. In holding that the city had violated RLUIPA when it eliminated the possibility of a special use permit for churches in the city's B-2 commercial zone, and placed them exclusively in its B-3 zone, in

order to preserve a “commercial corridor” along its principal street, the court stated that the ordinance violated RLUIPA because it treated the church on terms that were less than equal to the terms on which it treated similarly situated nonreligious institutions.

The Seventh Circuit weighed in on the issue in *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010). There, the court of appeals held that a plaintiff must plausibly assert that religious and secular land uses were treated the same from the standpoint of an accepted zoning criterion. Thus, if a church and community center, though different in many respects, do not differ with respect to an accepted zoning criterion (such as traffic and parking), then an ordinance that allows one and forbids the other denies equality and violates the equal terms provision. Following *River of Life*, in *Irshad Learning Center v. County of DuPage*, 804 F. Supp. 2d 697 (N.D. Ill. 2011), a Muslim group unsuccessfully sought a conditional use permit, and brought suit under RLUIPA. The court first rejected the county’s defense of an equal terms claim on the ground that the use of the property in question was not “integrally related” or “central” to their religious beliefs and practices, as being inconsistent with RLUIPA. Moreover, the plaintiff asserted that it had received less favorable treatment than another larger school, and the district court permitted the suit to continue on the basis of those allegations.

The Ninth Circuit, observing that six other circuits have already weighed in on the equal terms provision, noted that the cases divide into roughly two camps. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011). It observed that *Midrash Sephardi* focused on the facial differentiation between religious and nonreligious assemblies or institutions, and found that such differentiation may readily violate the Act. In *Lighthouse*, the Third Circuit focused on the treatment of uses with respect to the goal of the regulation. In *River of Life*, the Seventh Circuit adopted a variation on the Third Circuit approach, holding that there must be a similarly situated comparator with respect to an accepted “regulatory criteria” such as “commercial district,” “residential district,” or “industrial district,” and not the Third Circuit’s “regulatory purpose.” In *Elijah Group*, the Fifth Circuit did not explicitly adopt any of the foregoing tests, but instead stated that a church must show “more than simply that its religious use is forbidden and some other nonreligious uses permitted,” because the equal terms provision “must be measured by the ordinance itself and the criteria by which it treats petitions differently.”

After analyzing the other circuits, the *Centro Familiar* court held that with respect to “membership organizations” such as churches, “[i]t is hard to see how an express exclusion of ‘religious organizations’ from uses permitted as of right by other ‘membership organizations’ could be other than ‘less than equal terms’ for religious organizations.” *Id.* Because the statute shifts the usual burden of persuasion to the government, and not the religious institution, if a plaintiff produces a prima facie case of a violation of the equal terms provision, then the government must produce evidence by which to overcome that case. *Id.* The burden is not on the religious institution to show a similarly situated secular assembly, but rather on the government to show that the treatment received by the religious institution should not be deemed unequal, where it appears to be so on the face of the ordinance in question. *Id.* The Ninth Circuit also rejected a strict scrutiny standard for analysis.¹⁸

The Eleventh Circuit has provided a much more expansive reading of the statute, holding that all assemblies and institutions “travel” together under RLUIPA; if a zoning

¹⁸ It is important to note that by the time the Ninth Circuit decided *Centro Familiar*, the church had lost the property to foreclosure. The court held that while declaratory and injunctive relief was no longer possible, the church was entitled to money damages for the cost the church incurred as a result of the city’s denial of its right to use its property for its religious purposes. It remanded the case to the district court for a hearing on such damages. *But see Sossamon, supra* (no monetary damages under RLUIPA in the prison context). *Centro Familiar* was decided three months after *Sossamon*, and the point does not appear to have been raised to the court of appeals.

regulation allows a secular assembly, then all religious assemblies must be permitted. *Midrash Sephardi, supra*; see also *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006). The Eleventh Circuit has further held that while a violation of the equal terms provision is not necessarily fatal to a land use regulation, it must undergo a strict scrutiny analysis. *Primera Iglesia Bautista Hispana de Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006).

1-3.01(b)(3) Discrimination

The nondiscrimination provision of RLUIPA provides that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). In *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013), a church claimed that a county's zoning restrictions were adopted because of hostility to large churches. The court found that while there was evidence that the restrictions were adopted to prevent the building of the church, the church did not sufficiently show that the restrictions were imposed because it was a religious institution, and not because of its large size.

In *Jesus Christ is the Answer Ministries, Inc. v. Baltimore County*, 915 F.3d 256 (4th Cir. 2019), the Fourth Circuit found that a claim for discrimination was stated when the plaintiff alleged that a church's neighbors had publicly expressed animus toward a religious practice tied to an ethnicity (in this case, a predominantly African American congregation). The court stated that "a government decision influenced by community members' religious bias is unlawful, even if the government decision makers display no bias themselves." *Id.* The court also found "the fact that the Board disagreed with a County official who has relevant expertise and a formal role as the Board's advisor is enough to raise a plausible suspicion of improper motive." *Id.*

In *Alive Church of the Nazarene v. Prince William Cnty.*, 59 F.4th 92 (4th Cir. 2023), the church alleged that the County acted with discriminatory intent by refusing to let it conduct religious services on agriculturally zoned land without proper permits. RLUIPA's nondiscrimination provision states that "[n]o government shall impose or implement a land use ordinance that discriminates against any assembly or institution on the basis of religion or religious denomination." Unlike the equal terms or substantial burden provisions of RLUIPA, this provision requires evidence. A plaintiff demonstrates a prima facie case when it alleges facts sufficient to show that the challenged government decision was "motivated at least in part by discriminatory intent." See *Jesus Christ is the Answer, supra*.

Probing discriminatory intent involves a "sensitive inquiry" that must take into account both direct and circumstantial evidence. *Arlington Heights v. Metro. Housing Development*, 429 U.S. 252, 97 S. Ct. 555 (1977). See *Jesus Christ is the Answer, supra*. In that inquiry, a court can consider contemporary statements by decisionmakers indicating bias, derisive comments made to lawmakers by members of the community, the historical background of the decision, and any deviations from the standard decisionmaking process implying a decisionmaker's discriminatory intent. See *Arlington Heights, supra*. To establish a prima facie case of discrimination, that evidence must demonstrate at least some religious animus. See *Jesus Christ is the Answer, supra* (concluding that community member's disapproving remarks at administrative hearing regarding church, followed by denial of church's land use petition, established prima facie claim of religious animus); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548 (4th Cir. 2013) (ruling that community opposition to size of two proposed church buildings implied no religious animus, only objections to large buildings in rural zone).

In *Alive Church*, the church alleged that the County discriminated against it in two ways: (1) the County's regulatory differentiation between religious institutions and agricultural operations, and (2) the County's requirement that the church obtain a license

from the ABC Board in order to hold religious gatherings on its land. The church argued that "intent may be inferred from the treatment itself," pointing to the verification letter indicating that the church must qualify as a farm winery or limited-license brewery to conduct worship services on its land without an SUP.

However, the Fourth Circuit concluded that the purported differential treatment—requiring religious institutions to obtain a special use permit to operate within the Agricultural District while not requiring farm wineries to do the same—did not illustrate the County's discriminatory intent, because the church did not properly allege that it had been subjected to differential treatment. *Id.* In the court's view, the verification letter did nothing more than spell out the law.

While the church argued that it presented a prima facie case for discrimination, the court noted that its complaint did not "allege that the County either passed the Agricultural Zoning Ordinance with discriminatory intent or enforced it in a discriminatory manner." *Id.* The court further noted that the church had not "asserted facts sufficient to establish a prima facie claim of religious animus by the County." *Id.* Citing *Bethel Outreach Ministries, supra*, the court explained that "[t]here is no evidence that any of the decisionmakers or community members expressed any animosity toward the Church in particular, or religious institutions in general." *Id.* Finally, the court observed that the verification letter did not "represent a deviation from the existing law or express any opinion about the Church's proposed religious activities." *Id.*

1-3.01(b)(4) Limitations

RLUIPA's unreasonable limitation provision provides that government shall not impose or implement a land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). In *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013), the Fourth Circuit stated that while a religious institution may succeed on a substantial burden claim when a government defeats its reasonable expectation of being able to build on a particular property, RLUIPA's unreasonable limitation provision prevents government from adopting policies that make it difficult for religious institutions to locate anywhere within the jurisdiction. However, the church in *Bethel* failed to produce any evidence suggesting that religious organizations were left without a reasonable opportunity to build elsewhere. See also *Alive Church of the Nazarene, supra*.

1-3.01(c) Production Agriculture, Silviculture, and Viticulture Activities

The Right to Farm Act, Va. Code §§ 3.2-300 to 3.2-302, see also Va. Code § 15.2-2288¹⁹, 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. 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. The Attorney General has opined as to what localities can regulate under these statutes. See 2013 Op. Va. Att'y Gen. 35 (allowing agriculture "by right" in areas zoned rural residential does not constitute a zoning classification); 2013 Op. Va. Att'y Gen. 121 (nonagricultural excavation material is not protected by Va. Code § 15.2-2288 even if eventual use is agricultural); 2001 Op. Va. Att'y Gen. 11 (role of private airplane in agricultural production); 1999 Op. Va. Att'y Gen. 116 (Department of Health has primary authority over sewage sludge storage, and its regulations would override conflicting local restrictions); 1998 Op. Va. Att'y Gen. 12 (county has no express or implied authority to enact a moratorium on

¹⁹ This section defines agricultural products to include livestock, aquaculture, poultry, horticultural, floricultural, viticulture, silvicultural, or other farm crops.

intensive corporate and contract swine production); 1998 Op. Va. Att’y Gen. 13; 1997 Op. Va. Att’y Gen. 4 (Act does not prohibit all regulation of large-scale swine production; such regulation must bear a relationship to the health, safety, and welfare of the public and apply uniformly throughout the district).

Even though the Right to Farm Act expressly does not apply to the aboveground application of biosolids, the Supreme Court struck down a county ordinance banning the application of biosolids, holding such a ban was inconsistent with state law and regulations that provided for such application with an approved state permit. *Blanton v. Amelia Cnty.*, 261 Va. 55, 540 S.E.2d 869 (2001). The Court did acknowledge that localities may enact ordinances that affect the land application of biosolids, but left uncertain how far such regulation can go. It would appear, however, that localities may not regulate in areas covered by the State Water Control Board’s Biosolids Use Regulations, 9 VAC 25-31-505 et seq. The Attorney General opined that a locality may adopt ordinances that pertain only to the testing and monitoring of land application of biosolids within its political boundaries pursuant to Va. Code § 62.1-44.19:3(C). Accordingly, a locality could not require that a conditional use permit be obtained prior to applying or storing biosolids. 2002 Op. Va. Att’y Gen. 67; *Recyc Sys., Inc. v. Spotsylvania Cnty.*, 64 Va. Cir. 68 (Spotsylvania Cnty. 2004). Virginia federal district courts have reached a similar conclusion, see *O’Brien v. Appomattox Cnty.*, 213 F. Supp. 2d 627 (W.D. Va. 2002) (preliminary injunction), *aff’d*, 71 Fed. Appx. 176 (4th Cir. 2003); 293 F. Supp. 2d 660 (W.D. Va. 2003) (summary judgment); *Synagro-WWT, Inc. v. Louisa Cnty.*, No. 3:01cv00060 (W.D. Va. July 17, 2001). However, Va. Code § 62.1-44.19:3(R) allows localities to require a special use permit to begin the storage of sewage sludge.

Silvicultural activity is also protected by Va. Code § 10.1-1126.1, which prohibits a locality through its zoning power from prohibiting or unreasonably limiting 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 not conflict with the purposes of promoting the growth, continuation, and beneficial use of the Commonwealth’s privately owned forest resources. *Buckley v. Zoning Appeals Bd. of Loudoun Cnty.*, 59 Va. Cir. 150 (Loudoun Cnty. 2002) (forestry use not limited to trees that are planted, grown, and harvested in situ; log yard forestry use). Prior to the adoption of 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, however, a review by the zoning administrator to determine whether a proposed silvicultural activity complies with applicable local zoning requirements. In *Dail v. York County*, 259 Va. 577, 528 S.E.2d 447 (2000), however, the Supreme Court was very lenient in upholding a locality’s restrictions on a forestry plan that was in compliance with the state’s best management practices but not the locality’s zoning requirements.

The General Assembly has also limited local regulation of farm wineries, breweries, and distilleries. Va. Code §§ 15.2-2288.3, 15.2-2288.3:1, and 15.2-2288.3:2. “Agritourism activities” such as “ranching, horseback riding, historical, cultural, [and] harvest-your-own activities,” and short-term rental accommodations related to such activities, are also protected from local regulation. Va. Code § 3.2-6400; 2023 Op. Va. Att’y Gen. S-1. The statutes require that local restrictions on activities at such facilities be reasonable. Certain activities are allowed by right. The Attorney General opined that a zoning ordinance violates the Dillon Rule²⁰ when it requires the obtaining of a zoning permit prior to the exercise of

²⁰ For a comprehensive analysis of the Dillon Rule (in the context of an emergency curfew order), see *Commonwealth v. Brown*, CR20-745, Letter Opinion (Fredericksburg Cir. Ct. Sept. 14, 2020), available on the LGA website (Conferences -> Conference Session Materials -> 2020 Fall Webinar -> [Dillon’s Rule](#)).

the by-right accessory uses specified in Va. Code § 15.2-2288.3. 2013 Op. Va. Att’y Gen. 118. For other restrictions on activities, localities must consider the economic impact of the restriction, whether such activities and events are usual and customary for such facilities, and whether such activities pose a substantial impact on health, safety, and welfare. Note, however, that the General Assembly has specified that farm wineries and breweries with limited licenses must be located on land zoned “agricultural” and that term does not include land zoned as “residential conservation.” Va. Code §§ 4.1-100, 4.1-208.

In response to several court decisions that led to the demise of self-distribution by farm wineries and the end of the practice by state ABC stores to carry only Virginia wines, the legislature was again prevailed upon to limit further local regulation of farm wineries. Virginia Code § 4.1-128(A) provides that no locality shall adopt an ordinance or resolution that prohibits or regulates the storage, warehousing, or wholesaling of wine by a licensed farm winery.

1-3.01(d) Telecommunications

1-3.01(d)(1) *The Telecommunications Act of 1996*

The federal government has been active in the telecommunications area. The Telecommunications Act of 1996 places restrictions on the ability of a locality to limit the provision of telecommunications service through zoning regulation. Section 704(c)(7) of the Act, titled “Preservation of local zoning authority,” provides in relevant part:

A) General Authority. Except 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.

(B) Limitations.

(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.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government . . . may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

The FCC determined that a “reasonable period of time” within which a locality must act on a wireless provider’s request for authorization pursuant to subsection (B)(II)(ii) is presumptively (but rebuttably) ninety days to process an application to place a new antenna

on an existing tower and 150 days to process all other applications. In *City of Arlington v. FCC*, 569 U.S. 290, 133 S. Ct. 1863 (2013), the Supreme Court upheld the FCC's power to make such a ruling by holding that an agency's interpretation of a statutory ambiguity that concerns the scope of its own jurisdiction is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

In *T-Mobile South, LLC v. City of Roswell*, 574 U.S. 293, 135 S. Ct. 808 (2015), the Supreme Court held that, while localities are not required to provide their reasons for denying siting applications in the denial notice itself, they must state those reasons with sufficient clarity in some other written record (which may be written minutes) issued essentially contemporaneously with the denial. The Court found that written minutes released twenty-six days after a denial letter (and only four days before expiration of the time to seek judicial review) was not sufficiently contemporaneous. Thus, the portion of the Fourth Circuit's decision in *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998), which held that the decision denying the permit need not be supported by written findings of facts and explanation is no longer good law. Other portions of the decision which had upheld a city's denial of a conditional use permit for installation of two towers in a residential neighborhood (that there had been no unreasonable discrimination between functionally equivalent providers, that there was no effective prohibition, and that widespread opposition of residents was "substantial evidence") should remain valid precedent as long as written documentation is contemporaneously provided with the denial. Note, however, that the *Roswell* Court implied that the term "substantial evidence" is intended to invoke administrative law principles, so other such principles may apply in addition to a sufficient and timely written record.

In *T-Mobile Northeast v. Fairfax County Board of Supervisors*, 672 F.3d 259 (4th Cir. 2012), the court of appeals addressed in detail when service is effectively prohibited so as to violate the Act. A plaintiff can prevail on a violation of subsection (B)(i)(II) by showing that a local governing body has a general policy that essentially guarantees rejection of all wireless facility applications. Alternatively, a plaintiff can prevail by demonstrating that the denial of an application for one particular site is tantamount to a general prohibition of service. In asserting a claim under this alternative theory, a plaintiff may prevail upon showing both an effective absence of coverage²¹ and a lack of reasonable alternative sites to provide coverage. One viable alternative site is sufficient to defeat a claim under this theory. *Id.* Viable alternative sites in the aggregate can also defeat a claim. *T-Mobile Ne. LLC v. Loudoun Cnty. Bd. of Sup'rs*, 748 F.3d 185 (4th Cir. 2014).

Only unreasonable discrimination is prohibited under the statute; a locality may discriminate among providers based on traditional zoning principles, including aesthetic impact. *T-Mobile Ne. v. Fairfax Cnty. Bd. of Sup'rs*, 672 F.3d 259 (4th Cir. 2012).

See also *New Cingular Wireless v. Fairfax Cnty. Bd. of Sup'rs*, 674 F.3d 270 (4th Cir. 2012) (substantial evidence that wireless facility would not be in harmony with the zoning objectives and the comprehensive plan for the geographical area); *Cellco P'ship v. Bd. of Sup'rs of Fairfax Cnty.*, 140 F. Supp. 3d 548 (E.D. Va. 2015) (substantial evidence of proposed structure's adverse visual impact on surrounding neighborhood); *Cellco P'ship v. Bd. of Sup'rs of Roanoke Cnty.*, No. 7:04cv00029 (E.D. Va. July 2, 2004) (denial objectively reasonable given concerns regarding aesthetics, property values, and fit within community); *Va. Metronet, Inc. v. Bd. of Sup'rs of James City Cnty.*, 984 F. Supp. 966 (E.D. Va. 1998) (discussing the blanket prohibition provision of the Act; holding requiring specific written findings not valid after *AT&T Wireless*) and *Am. PCS. L.P. v. Fairfax Cnty. Zoning Appeals Bd.*, 40 Va. Cir. 211 (Fairfax Cnty. 1996) (denial of special use permit for "monopole" not a

²¹ Parts IV.C.1 and IV.C.2 of the decision in *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*, 748 F.3d 185 (4th Cir. 2014), addressed what "absence of coverage" means but as two members of the panel declined to join, those parts of the opinion are advisory only.

violation of Telecommunications Act). *But see T-Mobile Ne. LLC v. City Council of Newport News*, 674 F.3d 380 (4th Cir. 2012) (lack of widespread opposition and speculative concerns about property values did not constitute substantial evidence) and *Petersburg Cellular P'ship v. Bd. of Sup'rs of Nottoway Cnty.*, 205 F.3d 688 (4th Cir. 2000) (speculative safety concerns and minimal citizen opposition were insufficient as a matter of law to justify denial).

Petersburg Cellular 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 § 704(a) of the Telecommunications Act did not violate the Tenth Amendment. In *Montgomery County, Md., v. FCC*, 811 F.3d 121 (4th Cir. 2015), the Fourth Circuit rejected a similar challenge to the Spectrum Act, see section 1-3.01(d)(2), holding that requiring localities to approve modifications to wireless towers was not an unconstitutional required state implementation of a federal program.

In *T-Mobile Center v. Unified Government of Wyandotte County/Kansas City*, 546 F.3d 1299 (10th Cir. 2008), T-Mobile challenged the decision of the Unified Government of Wyandotte County/Kansas City, Kansas to deny its application for a special use permit to construct a wireless telecommunications facility. T-Mobile sought declaratory, injunctive, and mandamus relief. The district court granted T-Mobile's motion. In a memorandum and order, that court held that the Unified Government's denial of the application violated the Federal Telecommunications Act of 1996 "because the denial was not supported by substantial evidence and has the effect of prohibiting the provision of personal wireless services." The court of appeals affirmed solely on the basis that the Unified Government's decision was not supported by substantial evidence and did not reach the issue whether the decision had the effect of prohibiting the provision of personal wireless services.

In *360° Communications Co. v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), the Fourth Circuit rejected other circuits' tougher standards regarding whether a single tower denial has the effect of denying service, holding the alternative towers could still be reasonable even if significantly more were required to cover the area at a significantly higher cost. See also *USCOC of Va. v. Montgomery Cnty. Bd. of Sup'rs*, 343 F.3d 262 (4th Cir. 2003) (willingness to approve alternative shows no denial of service); *New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. of Supervisors*, 674 F.3d 270 (4th Cir. 2012) (extensive discussion and holding reasonable denial).

In determining whether substantial evidence supports the denial of a tower, courts should not compare the reasons for accepting the alternative tower over the one denied. In *USCOC of Virginia v. Montgomery County Board of Supervisors*, 343 F.3d 262 (4th Cir. 2003) (amicus brief filed by LGA), the board of supervisors denied a special use permit for a 240-foot tower but approved a special use permit for a 195-foot tower. The Fourth Circuit held that the district court erred in comparing the justification for one over the other; only the reasons for denying the special use permit for a particular tower should be evaluated. The court further held that the proposed tower's failure to adhere to the applicable zoning requirements alone provided substantial evidence to justify the denial.

The "environmental effects" of the radio frequency emissions of a cellular tower include "health concerns" regarding such emissions, and the denial of a special use permit cannot be based on such health concerns. *T-Mobile Ne. LLC v. City Council of Newport News*, 674 F.3d 380 (4th Cir. 2012) (citizens did not want tower constructed at an elementary school). In *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*, 748 F.3d 185 (4th Cir. 2014), the court ordered the county to allow the installation of a tower after it found that the board of supervisors had based its denial in part on an impermissible concern

about RF emissions, even though the other stated reasons given were sufficient to support a denial. The court stated that valid reasons did not immunize the board from its violation of the statutory limitation.

Section 704(c)(7)(v) of the Act allows anyone “adversely affected” by a final governmental decision to bring suit. A federal district court held that while this provision establishes a cause of action, Article III constitutional standing must also be achieved. In *Cellco Partnership v. Board of Supervisors of Fairfax County*, 140 F. Supp. 3d 548 (E.D. Va. 2015), the court found that Verizon, which was not a party to the special use permit application, had no constitutional standing to challenge the application denial despite a letter of intent to co-locate on the proposed tower. The infrastructure developer, however, did have constitutional standing despite a lack of property interest in the proposed site as it had a contract with the landholder and expended substantial time and money with regard to the proposed project. *Id.* (construing *T-Mobile Ne. LLC v. Loudoun Cnty. Bd. of Sup’rs*, 748 F.3d 185 (4th Cir. 2014)).

Note that the rights created by the Telecommunications Act are not enforceable under § 1983. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453 (2005).

The state also has its own telecommunications statute. On any application for § 15.2-2232 review of a telecommunications facility, the planning commission must act within ninety days, (unless the governing body extends the period for no more than sixty days or the applicant agrees to an extension) or the application is deemed approved. Va. Code § 15.2-2232(F). *But see* 2002 Op. Va. Att’y Gen. 91 (opining that Va. Code § 15.2-2232 does not permit a planning commission to review for compliance with the comprehensive plan existing locations of telecommunications towers). A telecommunications tower or facility built by an electrical cooperative is deemed, without more, to be in accordance with a comprehensive plan if it is located in a zoning district that allows such structures by right. Va. Code § 15.2-2232(G).

1-3.01(d)(2) Spectrum Act

The Spectrum Act limits local authority to bar collocation or other modification efforts on existing wireless towers or other structures. 47 U.S.C. § 1455(a). The Act provides that localities “shall approve” providers’ requests to modify wireless equipment, so long as the proposed modifications do not “substantially change the physical dimensions” of a facility. The statute does not define what kinds of modifications would qualify as substantial. FCC rules state that localities shall approve applications by a “deemed granted remedy,” which provides that approval is granted if the locality does not act otherwise within sixty days. FCC rules also define what constitutes a “substantial” modification and what type of structures can be modified. 47 C.F.R. § 1.40001. In *Montgomery County, Md. v. FCC*, 811 F.3d 121 (4th Cir. 2015), the Fourth Circuit rejected a Tenth Amendment challenge to the FCC “deemed granted” rule, see discussion [above](#), and held that the FCC had reasonably interpreted the Act in light of *Chevron* deference.

1-3.01(d)(3) Wireless Communications Infrastructure

Virginia Code § 15.2-2316.3 et seq. provides that a locality may not require a special use permit or variance for any small cell facility (e.g., an antenna in an enclosure smaller than six cubic feet) installed on an existing structure with the permission of the owner. Administrative review and other zoning permits are allowed. Disapproval of the proposed location or installation is limited to reasons specified in the statute. An “existing structure” is one that is installed or approved for installation at the time a wireless services or infrastructure provider provides notice to a locality or the Department of Transportation of an agreement with the owner to co-locate equipment on that structure. It includes any structure that is currently supporting, designed to support, or capable of supporting the attachment of wireless facilities, including towers, buildings, utility poles, light poles, flag

poles, signs, and water towers. See also Va. Code § 56-484.26 et seq., which places restrictions on local approval of the use of public rights-of-way and co-location for small cell and micro facilities.

In general, for wireless communications infrastructure less than fifty feet above ground level or co-located on an existing structure that is not a small cell facility, an administrative review process rather than a standard permitting process must be followed. Va. Code § 15.2-2316.4. Special exceptions or variances cannot be required. The review process is specified in the statute and disapprovals must be in writing with “substantial” record evidence supporting it. Va. Code § 15.2-2316.4:1.

Whether through a standard permitting process or administrative review process, disapproval cannot be based on the nature of the service from the site; perceived need for the project; or the technology being used. The locality may not require proprietary information to justify the need for the project; require removal of existing facilities; impose surety requirements for the removal of abandoned infrastructure, unless such requirements are otherwise imposed on commercial development, unreasonable aesthetic conditions, and other limitations itemized in the statute. Va. Code § 15.2-2316.4:2. The locality may disapprove an application for wireless infrastructure if the applicant has not given written notice to adjacent landowners at least fifteen days before it applies to locate a new structure in the area. *Id.*

Easements for electric and communications facilities may be used to provide or expand broadband or other communications services, and such use and the related installation costs are deemed to be in the public interest. Va. Code § 55.1-306.1(B). The use of such easements for the purpose of expanding broadband access is not considered a change in the physical use of the easement but, rather, is merely a change “in the manner, purpose, or degree of the granted use as appropriate to accommodate a new technology.” *Id.* Moreover, such use does not interfere with or impair any right of the owner or occupant of the servient estate. *Id.* Absent an express prohibition in a deed or other instrument granting an easement, the installation and operation of broadband within any easement shall be deemed to be a permitted use, and an incumbent utility or communications provider need not pay additional compensation to the owner of the servient estate to use the easement to install or modify any of its communications equipment, as long as no additional utility poles are installed. *Id.*

In 2021, a federal court dismissed a couple’s § 1983 claim against the regional electric company for installing a pair of two-inch, underground conduits along an existing route on the couple’s property where the company held an easement for electrical lines, presumably in anticipation of exercising rights under Va. Code § 55.1-306.1(B). *Grano v. Rappahannock Elec. Coop.*, 552 F. Supp. 3d 563 (W.D. Va. 2021). When negotiations for a new easement stalled, the company selected an alternate route for its fiber optic cable. The court held that under the circumstances, a § 1983 claim could not be supported because although the plaintiffs alleged the company had acted *in anticipation* of exercising its rights under Va. Code § 55.1-306.1(B), it had not actually taken any such action. However, the property owners’ Contracts Clause claim survived a motion to dismiss because the electric company had objected to the claim only in terms of subject matter jurisdiction, which the court denied because there were no problems with ripeness, standing, or the existence of an “actual controversy.” Thus, although the Contracts Clause claim was allowed to proceed, the court did not address the claim on its merits.

1-3.01(e) Other Governmental Agencies

State agencies are not subject to local land use controls. See 1979-80 Op. Att’y Gen. 404. However, any state agency that is responsible for the construction, operation, or maintenance of public facilities within any locality shall, upon the request of the local planning commission having authority to prepare a comprehensive plan, furnish reasonable

information requested by the commission relative to the master plans of the state agency that may affect the locality's comprehensive plan. Each state agency shall collaborate and cooperate with the commission, when requested, in the preparation of the comprehensive plan to the end that the plan will coordinate the interests and responsibilities of all concerned. Va. Code § 15.2-2202(B). Additionally, for any capital project involving new construction costing at least \$500,000, a state agency or institution of higher education must notify the locality's chief administrative officer of the project at the initiation of the environmental impact report process and provide further notice during the planning phase of the project and prior to preparation of construction and site plans. Notification prior to acquisition of property is not required, however. Va. Code § 15.2-2202(C) and (D). If the locality requests it, the state agency must transmit a copy of the preliminary construction and site plans for comment or conduct at least one public meeting in the locality to solicit public input during the planning phase of the project. Va. Code § 15.2-2202(C). Failure of any state agency to strictly comply will justify entry of an injunction on behalf of the locality. Va. Code § 15.2-2202(G).

Facilities constructed by private entities, however, are subject to local land use control even if they are on state-owned or -controlled property. *Jennings v. Bd. of Sup'rs of Northumberland Cnty.*, 281 Va. 511, 708 S.E.2d 841 (2011); *Bd. of Sup'rs of Fairfax Cnty. v. Washington, D.C. SMSA, L.P.*, 258 Va. 558, 522 S.E.2d 876 (1999). *But see* 2010 Op. Va. Att'y Gen. 25 (localities do not have the authority to extend the application of their land use ordinances to state-owned submerged lands).

Absent explicit statutory authority, extraterritorial property of local government units, including school boards, must comply with zoning requirements. *City of Richmond v. Bd. of Sup'rs of Henrico Cnty.*, 199 Va. 679, 101 S.E.2d 641 (1958); *Bd. of Sup'rs v. City of Roanoke*, 220 Va. 195, 257 S.E.2d 781 (1979); 1997 Op. Va. Att'y Gen. 48 (county must obtain permission of town's architectural review board before erecting temporary courthouse facilities at the county courthouse located in the town's historic district); 1982-83 Op. Va. Att'y Gen. 458 (school board property subject to zoning requirements); 1971-72 Op. Va. Att'y Gen. 103 (county must follow zoning law of other localities).

There is some authority that a locality need not follow its own zoning ordinance when using its property for public purposes. See 1983-84 Op. Va. Att'y Gen. 80 (county not required to get use permit for landfill despite zoning requirement); 1971-72 Op. Va. Att'y Gen. 103 (county may operate landfill in zoning district in which it is not permitted); 1975-76 Op. Va. Att'y Gen. 400A (It is a well-established rule of common law that the sovereign is not bound by any statute unless the same is in express terms made to extend to the sovereign).

At least thirty days prior to the hearing, localities must give written notice to the commander of any military base, installation, or airport within 3,000 feet of land subject to a proposed comprehensive plan or zoning change. Va. Code § 15.2-2204(D). Similar notice must be given to the owner of a public-use airport. *Id.* Additionally, the planning commission must "consult" with the commander of any military installation that will be affected by potential development to protect the installation from any adverse effects that might be caused by the development. Va. Code § 15.2-2211.

1-3.01(f) Signage and Content Regulation

The United States Supreme Court has weighed in on the regulation of sign ordinances, at least with respect to their content and the discriminatory effect of those ordinances based on that content. In *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218 (2015), the Court considered whether a restriction on directional signs for a church was constitutional. Arizona's Sign Code prohibited the display of outdoor signs without a permit, but exempted twenty-three categories of signs. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, could be up to twenty

square feet and were not subject to any placement or time restrictions. "Political Signs," defined as signs "designed to influence the outcome of an election," could be up to thirty-two square feet and could only be displayed during an election season. "Temporary Directional Signs" were subject to even greater restrictions; no more than four of the signs, limited to six square feet, could be on a single property at any time; the signs could be displayed no more than twelve hours before the "qualifying event" for which such signs could be obtained; and the signs had to be removed within one hour after the qualifying event ended.

Good News Community Church held Sunday church services at various temporary locations in and near the Town, posting signs early each Saturday bearing the church's name and the time and location of the next service. The church removed the signs around midday each Sunday. Naturally, the church was cited for violations of the Sign Code. The district court denied its motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny applied to content-neutral regulations of speech.

However, the U.S. Supreme Court reversed, holding that the ordinance was essentially content-based regulation of speech that did not survive the strict scrutiny standard that applies to all such content-based speech. This was because the Town did not demonstrate that the Sign Code's differentiation between temporary directional signs and other types of signs furthered a compelling governmental interest and was narrowly tailored to that end. Even assuming the Town had a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions were highly underinclusive. The Town could not claim that placing strict limits on temporary directional signs was necessary for beautification, when other types of signs create the same problem. Nor did it show that that temporary directional signs pose a greater threat to public safety than ideological or political signs.

Then, in *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. ___, 142 S. Ct. 1464 (2022), the Court analyzed a City ordinance that distinguished between outdoor advertising on-premises and off-premises signs (the distinction being between signs that advertise things that are located on the same premises as the sign, and those that advertise things that are not, as well as signs that direct people to offsite locations), finding the ordinance to be content neutral. However, the Court then observed that a determination that the City's on-/off-premises distinction is facially content neutral does not end the First Amendment inquiry. "Evidence that an impermissible purpose or justification underpins a facially content-neutral restriction may mean that the restriction is nevertheless content based. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest.'" Because the Court of Appeals had not addressed these issues, the Court remanded them with no view on the answers. *Id.*

In another signage case closer to home, involving the question of whether the Richmond Transit Company could refuse to sell advertising space on its trains to an animal rights organization, the Fourth Circuit took no time to conclude that the transit company was an arm of the state, and that its advertising policy was fatally flawed insofar as it barred "[a]ll political ads." *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179 (4th Cir. 2022). Richmond Transit's policy declared its "intent not to allow any of its transit vehicles or property to become a public forum for dissemination, debate, or discussion of public issues." However, the policy failed to define what could constitute "political ads" or "public issues," and this led to internal determinations regarding how to apply it. While recognizing that the government has some authority to restrict speech and speakers, those restrictions must be reasonable and understandable. The court concluded that Richmond Transit's policy violated the First Amendment as an unreasonable nonpublic-forum speech restraint and struck it down. It emphasized, however, that the holding is limited to the

specific policy prohibiting political advertising, and it passed no judgment on whether better-defined political-advertising prohibitions or policies allowing only commercial advertising might pass constitutional muster. *Id.*

For a discussion of the regulation of outdoor advertising under the Outdoor Advertising in Sight of Public Highways Act, Va. Code §§ 33.2-1200 et seq., the Alcoholic Beverage Control Act, Va. Code §§ 4.1-100 et seq., and the Cannabis Control Act, Va. Code §§ 4.1-600 et seq., see Chapter 28, Blight and Nuisance, section [28-2.02\(c\)](#).

1-3.02 The Legislative and Non-Delegable Nature of Zoning

The enactment of zoning ordinances and amendment of text or zoning classification are purely legislative functions that must be exercised by the board of supervisors in a county and by the council in a city or town, and that cannot be delegated to any other entity or to private citizens. *Mumpower v. Housing Auth. of Bristol*, 176 Va. 426, 11 S.E.2d 732 (1940); *Fairfax Cnty. v. Fleet Indus. Park*, 242 Va. 426, 410 S.E.2d 669 (1991); *Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983); see also *Eubank v. City of Richmond*, 226 U.S. 137, 33 S. Ct. 76 (1912). One exception to the general rule that legislative power cannot be delegated involves special permits, the approval or denial of which has been deemed a legislative act. *Bd. of Zoning Appeals of Fairfax Cnty. v. Cedar Knoll, Inc.*, 217 Va. 740, 232 S.E.2d 767 (1977); see also *Bd. of Sup'rs of Fairfax Cnty. v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). Boards of zoning appeals can be given the authority to act on special permits, and in most jurisdictions, boards of zoning appeals are appointed as quasi-judicial bodies by the circuit court. See, e.g., *Byrum v. Bd. of Sup'rs of Orange Cnty.*, 217 Va. 37, 225 S.E.2d 369 (1976). In addition, in *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997), the court effectively held that the legislative authority to vacate recorded subdivision plats may be delegated to an unelected employee of the locality, whose decision would be tested against the fairly debatable standard.

The Virginia Supreme Court held that a site development waiver authorized by a zoning ordinance to be granted by a planning commission was a legislative function and thus was beyond the powers granted by the General Assembly to a planning commission. *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 727 S.E.2d 40 (2012). The zoning ordinance allowed development on steep slopes, but only with a waiver from the planning commission which was required to make specified findings concerning environmental and public safety concerns. The planning commission could grant the waiver with conditions, and while the property owner could appeal the planning commission decision, there was no provision for appeals by aggrieved third parties. After first holding that the waiver provision was neither a variance nor a zoning modification, the Court held that such a delegation of legislative authority was a violation of the Dillon Rule. It distinguished *Ours Properties, Inc. v. Ley*, 198 Va. 848, 96 S.E.2d 754 (1957), which appeared to approve of such delegation as administrative in nature, on the ground that the ordinance at issue in *Ours Properties* contained clearly defined factors that had to be considered, did not authorize the imposition of conditions, and provided for third party appeals. While local governing bodies can, in some cases, delegate legislative power, the Court held that they can do so only if explicitly authorized by statute, and it found no such statute authorized the power granted to the planning commission by the ordinance in *Sinclair*.

1-3.03 Statutes Extending the Validity of Certain Approvals

Beginning in 2009, the General Assembly initiated a series of statutes that were codified as Va. Code § 15.2-2209.1 to address the dislocation in the building industry caused by the Great Recession that commenced in 2008. The statute, renewed in 2011, 2012, and 2017, extended the validity of subdivision plats valid under Va. Code § 15.2-2260, any recorded plat or final site plan valid under § 15.2-2261, any special exception, special or conditional use permit, or any deadline in such a permit or in the local zoning ordinance that required a developer to commence a project or incur significant expenses related to improvements for a project within a certain time, provided these approvals had been valid

(originally) as of January 1, 2009, to a future date set in the legislation. Any other plan or permit associated with such plat or site plan extended by this statute was likewise extended for the same time. There were certain exceptions to the general rule.

The effect of the statute was to keep alive these approvals for many years. The last extension finally expired on July 1, 2020, or such later date as provided for by the terms of the locality's approval, local ordinance, resolution, or regulation, or for a longer period as agreed to by the locality.

It was not, however, the last such legislation, for the 2020 Special Session enacted Va. Code § 15.2-2209.1:1 as an "[e]xtension of approvals to address the COVID-19 pandemic." It was effectively identical to the previous statute and extended the validity of those approvals above for any such approval valid and outstanding as of July 1, 2020, to July 1, 2022. The date was subsequently extended to July 1, 2023, and then extended again to July 1, 2025.

1-4 CONDITIONAL ZONING

1-4.01 Generally

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

Since 1987, every Virginia jurisdiction has been authorized to employ some form of conditional zoning as part of its land use regulation. See Va. Code §§ 15.2-2296 to 15.2-2302.3.²² 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 the Virginia Eastern Shore. See Va. Code § 15.2-2303, formerly Va. Code § 15.1-491(a).

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 district. 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 the property until it is "rezoned."²³ See section 1-4.04.

1-4.02 Rowland and Proffers as the Zoning Ordinance for a Given Parcel

There had been a question whether proffered conditions can only be "in addition" to the underlying zoning district regulations applicable to a parcel of land, or whether they could perform other duties. Sections 15.2-2286, 15.2-2297, and 15.2-2298 of the Code of Virginia all provide that the locality may accept proffers "in addition to" the underlying provisions of a zoning classification, whereas the definitional provisions of Va. Code § 15.2-2201 say that "conditional zoning" permits reasonable conditions "in addition to, *or modification of*" those regulations (emphasis added). In *Rowland v. Town Council of Warrenton*, 298 Va. 703, 842 S.E.2d 398 (2020) (LGA filed [amicus brief](#)), the Virginia Supreme Court resolved this question decisively, citing the General Assembly's stated purpose for proffers to serve as a means to "provide a more flexible and adaptable zoning method." The Court held that a

²² Virginia Code § 15.2-2303.1 deals with development agreements in certain counties, and not with conditional zoning. At present, only New Kent County may enter into development agreements.

²³ Traditional zoning need not be found inadequate before conditional zoning can be employed. The grant of authority to use conditional zoning, once enacted by the locality as part of the local ordinance, 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 Op. Va. Att'y Gen. 66. Conditional zoning proffers may only be accepted, of course, at the time of a rezoning action on a particular parcel of property.

zoning applicant may make, or the locality may suggest, *any* proffer that alters the zoning ordinance requirements for a particular property, and not merely those that would additionally restrict a land use, observing:

Because the acceptance of proffers by a locality has the force of law, the acceptance of a proffer which alters the rezoning requirements of a particular property is the functional equivalent of an amendment to the zoning ordinance. This intent by the General Assembly is clearly stated in Code § 15.2-2296 which provides that the proffers “are not generally applicable to land similarly zoned.” Moreover, express language in Code §§ 15.2-2297 and 15.2-2298 makes clear that such proffers are “accepted as part of an amendment to the zoning ordinance” or “as a part of a rezoning or amendment to a zoning map.” Accordingly, we conclude that the General Assembly intended for these statutes to grant localities the authority to permit deviations from the requirements of a zoning ordinance by accepting voluntary proffers as part of a rezoning application.

Id.

1-4.03 The Three Distinct Types of Conditional Zoning

There are three distinct types of conditional zoning authorized by the General Assembly: referred to as (1) old conditional zoning; (2) new conditional zoning; and (3) new/old conditional zoning. These several forms of conditional zoning have been enacted and modified over the years to reflect, in part, the fact that conditional zoning has become inextricably linked to the Virginia zoning process. The names that have been given in this chapter are not technical terms, but rather are offered for convenience in distinguishing between the forms. It is also true that for “high growth” jurisdictions, the statutory authority now granted to adopt “old conditional zoning” has potentially blurred the distinction between the two forms discussed below.

The distinction that was formerly drawn between these forms of conditional zoning is much less significant today than it was during the evolution of the statutory structure. Since many more localities may elect to be treated as “old” conditional zoning jurisdictions, as set out below, the broad authority granted in Va. Code § 15.2-2303 is increasingly employed in high growth localities. See the text in sections [1-4.03\(a\)](#) and [1-4.03\(b\)](#) regarding “new/old” conditional zoning.

1-4.03(a) “Old” Conditional Zoning (Va. Code § 15.2-2303)

This form of conditional zoning, authorized by Va. Code § 15.2-2303, formerly Va. Code §15.1-491(a), is sometimes referred to as “old” conditional zoning. It is available in the cities of Alexandria, Fairfax, and Manassas; Arlington, Fairfax, Prince William, and Loudoun counties; their included towns; and the counties on the Eastern Shore of Virginia, Accomack and Northampton.

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. In *Jefferson Green Unit Owners Ass’n v. Gwinn*, 262 Va. 449, 551 S.E.2d 339 (2001), the Supreme Court held that (1) localities with this form of conditional zoning are not subject to the restrictions on other forms of conditional zoning unless specifically adopted; (2) a conditional proffer requiring membership in a private recreation association is not unconstitutional as a law granting a special privilege to a private association (Va. Const. art. IV, § 14(18)) or as a violation of the freedom of association; and (3) proffers are legislative enactments entitled to the presumption of constitutional validity.

Zoning conditions cannot include the creation of a property owners' association that requires an assessment of its members to pay for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in Va. Code § 15.2-2241. Excepted are sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation.

1-4.03(b) "New" Conditional Zoning (Va. Code § 15.2-2296 et seq.)

Before 1978, the only form of conditional zoning was the foregoing "old" conditional zoning limited to only a handful of jurisdictions. In 1978, however, the General Assembly adopted a form of conditional zoning that is available to all other localities. Va. Code § 15.2-2297.

Because of concerns that conditional zoning might have been abused, however, the General Assembly placed specific and important limitations on the conditions that may be accepted under "new" conditional zoning. The governing body can accept proffers only if (1) the rezoning itself gives rise for the need for the conditions; (2) the conditions have a reasonable relation to the rezoning; (3) the conditions do not include a cash contribution to the locality; (4) the conditions do not include "mandatory dedication" of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in Va. Code § 15.2-2241; (5) the conditions do not include the requirement that the applicant create a property owners' association under Chapter 18 (Va. Code § 55.1-1801 et seq.) of Title 55.1 under the same circumstances noted above; (6) the conditions do not include payment for or construction of off-site improvements except those provided for in Va. Code § 15.2-2241; (7) no condition is proffered that is not related to the physical development or physical operation of the property; and (8) all such conditions must be in conformity with the comprehensive plan.

As with other forms of conditional zoning, the governing body may accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

As noted above, no such limitations apply to an "old" conditional zoning jurisdiction. These restrictions have somewhat 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 just such conditions as those that are forbidden under the new conditional zoning statutes. Where new conditional zoning exists, therefore, it would appear that a willing landowner could not 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 denial of the proposal. See *Riverview Farm Assocs. v. Bd. of Supervisors of Charles City Cnty.*, 259 Va. 419, 528 S.E.2d 99 (2000) (addressing conformance with comprehensive plan and off-site proffers issues on demurrer).

1-4.03(c) "New/Old" Conditional Zoning (Va. Code § 15.2-2298 et seq.)

In 1989, a form of "old" conditional zoning was extended to those jurisdictions that have experienced population growth of 10 percent or more since 1980. The statute has been amended to apply to localities with 5 percent growth or greater from the last decennial census year, any city adjoining a qualifying jurisdiction, towns within qualifying counties, and any counties that are contiguous to three such qualifying counties and towns within *that* jurisdiction. Va. Code § 15.2-2298.

Perhaps most importantly, any locality that qualifies for this form of conditional zoning may choose to use the authority granted under Va. Code § 15.2-2303, and thereby employ “old” conditional zoning.

“New/old” conditional zoning is somewhat different from “true” old-style conditional zoning, in that local authority is not as unrestricted as in old conditional zoning localities. Proffers may be accepted in jurisdictions enacting proper ordinances, provided (1) the zoning itself gives rise to the need for the condition, (2) such conditions have a reasonable relation to the rezoning, and (3) all such conditions are in conformity with the comprehensive plan as defined in Va. Code § 15.2-2223.

Reasonable conditions may include the cash proffers for any off-site road improvement or any off-site transportation improvement that is adopted as an amendment to the required comprehensive plan and incorporated into the locality’s capital improvement program, although the statute does not prevent a locality from accepting proffered conditions that are “not normally included in a capital improvement program.” “Road improvement” and “transportation improvement” are defined here as they are in Va. Code § 15.2-2303.2, discussed above.

A governing body may also accept amended proffers after the public hearing has begun, if the amended proffers do not materially affect the overall proposal. Va. Code § 15.2-2298(A); *Arogas, Inc. v. Frederick Cnty. Bd. of Zoning Appeals*, 280 Va. 221, 698 S.E.2d 908 (2010) (the Court permitted amendments to proffers several days after the public hearing had been closed, largely because doing so amounted to legislative “markup” after public hearing and input).

No proffers in a new/old jurisdiction may be accepted unless the locality has a capital improvement program. More specifically, in order to accept proffers or dedications of real property, the local government must also adopt such program pursuant to Va. Code § 15.2-2239 or the local charter, and proffers of public improvements must be consistent with the provisions of the comprehensive plan.

Provisions must be made in the proffers for the ultimate disposition of proffered property or cash, in the event the improvements that are the subject of the proffer are not completed. The conditions cannot include the creation of a property owners’ association that requires an assessment of its members to pay for such public facilities. Va. Code § 15.2-2298.

In new and new/old conditional zoning jurisdictions, the Code requires that a proffered condition be in “conformance” with the local comprehensive plan. Claims that the locality has accepted proffers that are either not authorized by the enabling legislation or that are found to be inconsistent with the comprehensive plan are actionable. In *Riverview Farm*, the Court said that:

Code § 15.2-2297(A) imposes several requirements that must be met before proffered conditions may be incorporated as part of a rezoning amendment. Included among these requirements are provisions that “the conditions shall have a reasonable relation to the rezoning,” and that “all such conditions shall be in conformity with the [local governing body’s] comprehensive plan.” *Id.* The plaintiffs were entitled to present evidence supporting their allegations that the proffered conditions concerning truck traffic were not in conformity with the County’s comprehensive plan and rendered the zoning unreasonable because they permitted heavy truck traffic to proceed near the plaintiff’s property over property designated for agricultural use. The plaintiffs also were entitled to present evidence to support their allegation that the proffered condition concerning the hours of operation of the port facility

rendered the zoning unreasonable and was not in conformity with the County's comprehensive plan that designated the neighboring properties for agricultural use.

We also conclude that the plaintiffs stated a cause of action in Count I, based on the facts set forth in their pleading, by alleging that the rezoning was "not consistent with the . . . comprehensive plan, and was arbitrary and capricious, unreasonable, and incompatible with surrounding land uses." Although the 1998 Comprehensive Plan designated the . . . property for industrial use, an issue remained whether this particular rezoning action, because of its proffered conditions, was a reasonable exercise of the Board's authority. This portion of the claim could not be resolved as a matter of law, but could only be determined after consideration of evidence presented by the parties.

Riverview Farm Assocs. v. Bd. of Supervisors of Charles City Cnty., 259 Va. 419, 528 S.E.2d 99 (2000).

In the event of a successful challenge on either of these grounds (likely to arise only in third-party litigation—citizen challenges—over a land use decision), the court may invalidate a rezoning in its totality if it finds some noncompliance with the conditional zoning enabling legislation, though it has not done so and may not, given the rise of the "oyer-demurrer remedy." See *Byrne v. City of Alexandria*, 298 Va. 694, 842 S.E.2d 409 (2020) (grant of motion craving oyer of legislative record was appropriate and the record demonstrated that the City's land use decision was lawful). There may be circumstances, however, in which it would be 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. In a related context, in *Clark v. Town of Middleburg*, 26 Va. Cir. 472 (Loudoun Cnty. 1990), the court ruled (on demurrer) that if the town council's acceptance of proffers would violate the town's zoning ordinance, it 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 dismissal of the complaint, and an unsuccessful appeal. Given the Supreme Court's decision in *Rowland*, however, *Clark* likely has no further persuasive importance since a proffer cannot violate the local zoning ordinance. It *becomes* the zoning ordinance for the property in question.

This focuses attention on what it means to be in compliance with a comprehensive plan, since such plans are written to give "general or approximate" guidance to the locality in individual decisions and are not "ordinances" or "codes." In view of the imprecision often found in comprehensive plans, which are rarely written as if they were ordinances, the courts may find it difficult to delve into them as a substantial source of authority for answers to such broad-brush questions as whether a particular proffer is "in conformity with" a plan. They would presumably give some leeway to localities in determinations (implicit in the acceptance of conditions) that a proffered condition advances the ends of the plan, but this is not a necessary result. In a case involving a special exception, and not a proffer, *Rohr v. Fauquier Board of Supervisors*, No. CL07-676 (Fauquier Cnty. Cir. Ct. Jan. 9, 2009), the court was faced with the fact that the Fauquier Zoning Ordinance provided that all special exceptions were to be "in accordance with the applicable zoning district regulations and the applicable provisions of the adopted Comprehensive Plan." The plaintiff had asserted that the comprehensive plan precluded the approval of a "big box" store on the property involved, and the court observed that because a locality must comply with its own ordinance

(citing *Renkey v. Cnty. Bd. of Arlington Cnty.*, 272 Va. 369, 634 S.E.2d 352 (2006)),²⁴ the “sole issue . . . is compliance by the [Board] with the zoning ordinance as it relates to the Fauquier County Comprehensive Plan.” Letter Op., p. 2. It then conducted a detailed analysis of the comprehensive plan and found that the special exception was valid. The court’s analysis suggests that where conformity between a proffer and a comprehensive plan is involved, it will apply a fairly rigorous inquiry.

1-4.04 The Nature of Proffers

Proffers are legally required to be voluntary, and once executed and accepted, they bind the use of the property to which they are applicable, and “run with the land.”²⁵ In *Jefferson Green Unit Owners Ass’n v. Gwinn*, 262 Va. 449, 551 S.E.2d 339 (2001), the Virginia Supreme Court held in part that proffers are legislative enactments entitled to the presumption of constitutional validity. It has also said clearly that “[p]roffers are voluntary commitments made by landowners in order to facilitate approval of conditional zoning and rezoning requests by ameliorating the impact of development of their property on the local infrastructure and the character and environment of adjoining land.” *Hale v. Bd. of Zoning Appeals of Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009).

The actual voluntariness of the process has been questioned but has not been found wanting in any case. As the Federal Circuit noted in *Board of County Supervisors v. United States*, 48 F.3d 520 (Fed. Cir. 1995):

Efforts by local governments to control land development blossomed in the 1920’s 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, nonresidential) 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 initially to install at the developer’s own cost the roads and sewers needed to serve the development, to dedicating land for public recreation facilities and other public needs, to making cash payments to local schools as recompense for the additional students generated by the development.

Id. (internal citations omitted).

In the interesting case of *D.R. Horton, Inc. v. Board of Supervisors for Warren County*, 285 Va. 467, 737 S.E.2d 886 (2013), a property owner paid fees under protest to a county, which a trial court subsequently found had not been paid pursuant to a lawful proffer agreement. The owner sought restitution from the county. The Supreme Court ruled the property owner was barred from reimbursement of the unquestionably unlawful fees because they were paid “voluntarily” within the meaning of the “voluntary payment doctrine.” This doctrine provides, with limited exceptions, that where a party pays an illegal

²⁴ This case is also interesting because of the manner in which the trial court concluded that a locality could elevate its comprehensive plan into an ordinance by the adoption of language similar to that found in Fauquier’s Ordinance. Although the Supreme Court has said that such a plan is not a land use ordinance by itself, the trial court concluded that the county’s reference to it made it something more and analyzed the evidence accordingly. Moreover, the requirement of plan conformity found in Va. Code §§ 15.2-2297 and 15.2-2298 would by itself elevate a comprehensive plan beyond its status as a “guide.”

²⁵ For an extensive look at proffer issues, see the pertinent [handouts](#) from the 2014 LGA Spring Conference and the 2016 Fall Conference, available in the members’ only section of the LGA website.

demand with full knowledge of all the facts which render the demand illegal, the payment is deemed voluntarily made and cannot be recovered. The property owner could not have obtained building permits without payment of the fees and the lower court had not yet found the fees unlawful. The owner was, in effect, compelled to pay the fees or cease building. He would have had to refuse to pay and to litigate in order to avoid the effect of the doctrine. The Court itself described the rule as "somewhat 'harsh.'" *Id.*

Proffers are, of course, 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. Compare *Gregory v. Bd. of Sup'rs of Chesterfield Cnty.*, 257 Va. 530, 514 S.E.2d 350 (1999) with *Bd. of Sup'rs v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995). However, they are used in Virginia in a similar manner, as described by the Federal Circuit.

1-4.05 Proffer Amendments

A landowner subject to proffered conditions may apply at any time to the governing body for amendments to or variations of such proffered conditions. Va. Code § 15.2-2302.²⁶ Written notice must be given via direct mail to landowners as specified in Va. Code § 15.2-2302(B). The governing body may waive the written notice requirement in order to reduce, suspend, or eliminate outstanding cash proffer payments for residential construction calculated on a per-dwelling-unit or per-home basis. A public hearing is required if the amendment affects conditions of use or density; otherwise, a hearing is optional.

Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

The Virginia Supreme Court has also held that once proffers are properly submitted to the governing body, they may be amended *during or after* the public hearing at which a rezoning is considered, without the need for a further public hearing, provided that the landowner consents to such amendment (the amendment in this case came six days after the public hearing). *Arogas, Inc. v. Frederick Cnty. Bd. of Zoning Appeals*, 280 Va. 221, 698 S.E.2d 908 (2010). This decision relied on both the provisions of Va. Code § 15.2-2298(A) and the general authority of Va. Code § 15.2-2285(C) to markup zoning ordinances after a public hearing, but there is no suggestion that such changes must be made at any particular time after the hearing has been completed and markup occurs.

1-4.06 Provisions Relating to Cash Proffers

Virginia Code § 15.2-2303.2 governs certain uses and reporting requirements for cash proffers. For any cash proffer accepted by any locality pursuant to Va. Code §§ 15.2-2303 or 15.2-2298²⁷ made after July 1, 2005, the locality must have begun the improvements for which the cash was proffered within seven years of receiving full payment of all cash proffered. Specifically, the locality must have begun or caused to have begun (i)

²⁶ Virginia Code § 15.2-2302 was amended to negate *Long Lane Associates v. Town of Leesburg*, No. CL00062077-00 (Loudoun Cnty. Cir. Ct. May 19, 2011) (unpubl.), in which the trial court held that the consent of each landowner subject to a unitary proffer statement is required prior to an amendment of those proffers. The amendment was passed shortly before the Supreme Court reversed the lower court in *Town of Leesburg v. Long Lane Associates Limited Partnership*, 284 Va. 127, 726 S.E.2d 27 (2012). The statute goes beyond the Court decision, however, to ensure that notice is provided, and property owners subject to the unitary proffers may be heard on any such amendment.

²⁷ The requirements of Va. Code § 15.2-2303.2 also apply to development agreements entered into pursuant to Va. Code § 15.2-2303.1, which by its terms is applicable to New Kent County only.

construction, (ii) site work, (iii) engineering, (iv) right-of-way acquisition, (v) surveying, or (vi) utility relocation on the improvements for which the cash payments were proffered. A locality that does not comply, or does not begin alternative improvements as described below, must forward the amount of the proffered cash payments to the Commonwealth Transportation Board no later than December 31 following the fiscal year in which such forfeiture occurred for direct allocation to the secondary system construction program or the urban system construction program for the locality in which the proffered cash payments were collected. The funds to which any locality may be entitled under the provisions of Title 33.2 for construction, improvement, or maintenance of primary, secondary, or urban roads shall not be diminished by reason of any funds remitted pursuant to this subsection by such locality, regardless of whether such contributions are matched by state or federal funds. Va. Code § 15.2-2303.2(A).

Also, unless prohibited by the proffer agreement itself, a locality that employs conditional zoning under Va. Code §§ 15.2-2303, 15.2-2298, or 15.2-2303.1, may spend the funds proffered for any road or transportation improvement that has been incorporated into its capital improvements plan, as its matching contribution under Va. Code § 33.2-357. For purposes of this section, "road improvement" includes construction of new roads or the improvement or expansion of existing roads as required by applicable VDOT construction standards to meet increased demand attributable to new development. "Transportation improvements" mean any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any (i) public mass transit system or (ii) highway, or portion or interchange thereof, including parking facilities located within a district created pursuant to this title. Such improvements shall include, without limitation, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals, and all related equipment and fixtures. Va. Code § 15.2-2303.2(C).

Regardless of when proffers were accepted, unless prohibited by the proffers themselves, localities employing the aforesaid sections of the Code may use any cash payments proffered for capital improvements or alternative improvements "of the same category" within the locality in the vicinity of the improvements for which the proffers were made. Before it can use these funds for alternative improvements, the locality must give at least thirty days' written notice to the "entity who paid such cash payment" addressed to the last known address of such entity. If proffer payment records no longer exist, then the notice shall be to the original zoning applicant. The locality must conduct a public hearing on such proposal, advertised as provided in Va. Code § 15.2-1427(F). Before it can use such cash payments for alternative improvements and following the public hearing, the governing body must find: (i) the improvements for which the cash payments were proffered cannot occur in a timely manner or the functional purpose for which the cash payment was made no longer exists; (ii) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest. Notwithstanding the provisions of the Virginia Public Procurement Act, the governing body may negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a proffered zoning condition or special exception condition in order to expand the scope of the road improvements by utilizing cash proffers of others or other available locally generated funds. The local governing body shall adopt a resolution stating the basis for awarding the construction contract to extend the scope of the road improvements. All road improvements to be included in the state primary or secondary system of highways must conform to the adopted standards of the Virginia Department of Transportation. Va. Code § 15.2-2303.2(C).

The cash proffers, however, may not be used for any capital improvement to an existing facility, such as a renovation or technology upgrade, that does not expand the

capacity of such facility, or for any operating expense of any existing facility such as ordinary maintenance or repair. Va. Code § 15.2-2303.2(D).

Any locality eligible to accept cash proffers under Va. Code §§ 15.2-2298, 15.2-2303, or 15.2-2303.1 must (i) include in its capital improvements program or as an appendix to it, the amount of all proffered cash payments received during the most recent fiscal year for which a report has been filed pursuant to Va. Code § 15.2-2303.1(D), and (ii) include in its annual capital budget the amount of proffered cash payments projected to be used for expenditures or appropriated for capital improvements in the ensuing year. Va. Code § 15.2-2303.2(B).

All localities with populations in excess of 3,500 accepting a cash proffer payment must annually report to the Commission on Local Government whether cash proffers were collected by the locality, the amount of cash proffers collected, the amount of such payments expended by the locality, and a list of the public improvements on which the amount was expended. Va. Code § 15.2-2303.2(E). A listing of such reports must be included in the Conditional Zoning Index. Va. Code § 15.2-2300.

No locality may require payment of a cash proffer prior to payment of any fees for the issuance of a building permit for construction on property that is the subject of a rezoning. However, a landowner petitioning for a zoning change may voluntarily agree to an earlier payment, pursuant to Va. Code §§ 15.2-2298 and 15.2-2303. If the landowner voluntarily agrees to an earlier payment, the proffered condition may be enforced as to the landowner and any successor in interest according to its terms as part of an approved rezoning.²⁸ No cash proffer amount can be scheduled to increase annually from the time of proffer until tender of payment by a percentage greater than the annual rate of inflation as calculated by reference to the CPI-U, 1982-1984=100 (not seasonally adjusted) as reported by the Department of Labor, or the Marshall and Swift Building Cost Index. Va. Code § 15.2-2303.3.

No cash proffer can purport to waive future legal rights against the locality or its agents. Any such proffer provision contained in a proffer entered into after January 1, 2012, is severable from the remainder of the proffer and void. However, any rezoning related to the proffer is not affected by such a void provision. Va. Code § 15.2-2303.3(C).

In addition to the specific requirements of these statutes, they reflect that the General Assembly has now legislatively recognized the use of cash proffers. The Supreme Court had previously spoken with two voices regarding their use as an effective means of obtaining impact fees. *Compare Bd. of Sup'rs of Powhatan Cnty. v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995) (conditioning a zoning on payment of proffers in accordance with a formula is an invalid impact fee system) *with Gregory v. Bd. of Sup'rs of Chesterfield Cnty.*, 257 Va. 530, 514 S.E.2d 350 (1999) (cash proffers in accordance with a formula do not invalidate a denial of a rezoning where other factors are present).

²⁸ A locality may not accept a cash proffer for residential construction on a per-dwelling unit or per-home basis until the final inspection. Va. Code § 15.2-2303.1:1. This restriction applies to proffer agreements made before the statute's effective date (July 1, 2010), notwithstanding contrary provisions in the proffer agreement. *Bd. of Sup'rs of James City Cnty. v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014) (also awarding, pursuant to Va. Code § 15.2-2303.1:1(C), attorney's fees to developers in declaratory judgment action instituted by the county).

Note the provisions of Va. Code § 15.2-2208.1, discussed in section 1-17.07, regarding takings law. Proffers may, under some circumstances, form the basis of a claim for unconstitutional conditions.²⁹

1-4.07 Proffers Relating to Residential Rezoning

Virginia Code § 15.2-2303.4 was enacted to prohibit unreasonable proffers in residential cases. It applies³⁰ to residential rezoning and residential components of mixed-used rezoning. It applies to onsite and offsite proffers. Offsite proffers are defined as those addressing an impact outside the boundaries of the property to be developed and “shall include all cash proffers.” Onsite proffers, defined as proffers addressing an impact within the boundaries of the property to be developed, “shall not” include any cash proffers.

All proffers, including proffer condition amendments, made in connection with applicable rezoning or amendments, must address an impact that is “specifically attributable” to a proposed new development or new residential use. Anything else is deemed “unreasonable.” Va. Code § 15.2-2303.4(C).

Offsite proffers are further restricted. They must have a “specifically attributable” impact to an offsite public facility, defined as public transportation facilities, public safety facilities, public school facilities, or public parks.³¹ To “impact” a public facility, the new residential development or use must create the need, or an identifiable portion of the need, for public facility improvements in excess of the facility’s existing capacity. Moreover, the new residential development or use must receive a “direct and material” benefit from the proffer. An offsite proffer that does not meet these criteria is unreasonable. *Id.* A locality may base its assessment of public facility capacity on the projected impacts specifically attributable to the new residential development or new residential use. *Id.*

Subsection D, however, intentionally waters down the requirements of subsection C:

Notwithstanding the provisions of subsection C . . . [a]n applicant or owner may, at the time of filing an application pursuant to this section or during the development review process, submit any onsite or offsite proffer that the owner and applicant deem reasonable and appropriate, as conclusively evidenced by the signed proffers.

Va. Code § 15.2-2303.4(D)(1). Failure to submit a proffer deemed “reasonable and appropriate” by the applicant cannot be a basis for denying a rezoning or proffer condition amendment application. Va. Code § 15.2-2303.4(D)(2).

²⁹ Virginia Code § 15.2-2208.1 provides a remedy for the imposition of an unconstitutional condition on a land use permit or approval (or denial for refusal to agree to such a condition), if the procedural requirements of that statute are followed. Although the statute identifies proffers as being one of the land use actions to which the doctrine of unconstitutional conditions, and the statute applies, it is likely that a voluntary proffer that includes provisions that could qualify as an unconstitutional condition may not be challenged since the voluntariness of a proffer, once accepted by the locality, would constitute a waiver of any such claim.

³⁰ The statute applies to applications for rezonings or proffer condition amendments submitted after July 1, 2016. The General Assembly included in the statute an enactment clause that provides “this act is prospective only and shall not be construed to apply to any application for rezoning filed prior to July 1, 2016, or to any application for a proffer condition amendment amending a rezoning for which the application was filed prior to that date.” Although no court has yet so held, the provisions of Va. Code § 15.2-2303.4 almost certainly do not apply to any amendment of a residential rezoning proffer that was approved prior to July 1, 2016.

³¹ Note that public libraries are not included in the definition of public facilities.

The public facility improvement cannot include operating expenses or capital improvements, such as a renovation or technology upgrade, that do not expand the capacity of the facility. Va. Code § 15.2-2303.4(A).

A locality is prohibited from requiring an unreasonable proffer or denying a rezoning based in whole or in part on an applicant's failure to submit an unreasonable proffer. Va. Code § 15.2-2303.4(B).

If the applicant for a residential rezoning or a proffer amendment objected in writing to a proposed condition before the governing body acted, and the applicant is denied the rezoning or proffer condition amendment, and the applicant proves, by a preponderance of the evidence, that the locality requested in writing an "unreasonable" proffer, then the failure to provide the proffer is presumed the controlling basis for the rezoning or amendment denial, absent clear and convincing evidence to the contrary. Va. Code § 15.2-2303.4(E).

An applicant successful in an action brought under Va. Code § 15.2-2303.4 "may be entitled to" attorney fees and a remand to the governing body with a court direction to approve or amend the rezoning or proffer amendment without the inclusion of the unreasonable proffer. If the governing body fails to act within ninety days of the court's order, the locality will be enjoined from interfering with the use of the property as applied for without the unreasonable proffer. *Id.*

The statute does not apply to a "small area comprehensive plan," defined as a portion of a comprehensive plan that is "specifically applicable to a delineated area within a locality rather than the locality as a whole," in which the delineated area is (1) designated as a revitalization area, encompasses mass transit, includes mixed use development, and allows some high density, (2) is a Metrorail area that allows additional density, or (3) is a service district that encompasses an existing or planned Metrorail station. Va. Code § 15.2-2303.4(F).

Because the proffer conditions as originally enacted stifled communication between applicants and planning staff, the General Assembly added subsection H:

Notwithstanding any provision in this section to the contrary, nothing contained herein shall be deemed or interpreted to prohibit or to require communications between an applicant or owner and the locality. The applicant, owner, and locality may engage in pre-filing and post-filing discussions regarding the potential impacts of a proposed new residential development or new residential use on public facilities as defined in subsection A and on other public facilities of the locality, and potential voluntary onsite or offsite proffers, permitted under subsections C and D, that might address those impacts. Such verbal discussions shall not be used as the basis that an unreasonable proffer or proffer condition amendment was required by the locality. Furthermore, notwithstanding any provision in this section to the contrary, nothing contained herein shall be deemed or interpreted to prohibit or to require presentation, analysis, or discussion of the potential impacts of new residential development or new residential use on the locality's public facilities.

Va. Code § 15.2-2303.4(H).

1-4.08 The Rationale Underlying Conditional Zoning**1-4.08(a) Conditional Zoning as a Flexible and Useful Means of Mitigating Project-Specific Impacts and of Committing the Landowner to a Course of Development**

Proffered conditions permit applicants to tailor proposals to meet site-specific needs that simply cannot otherwise be addressed by general regulations in a manner that has come to be accepted as valid and binding. Conditional zoning has in fact proved essential to modern 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. Many zoning disputes have been resolved by means of proffers that mitigate community concerns, in a manner that is acceptable to the landowner, the locality, and the public.

Conditional zoning has also proved invaluable because of its capacity to bind a landowner legally to what was promised during the legislative 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, if it is not incorporated into a proffer. Truths, half-truths, and outright falsehoods can pepper the legislative record in a battle for governing body approval and may even have constituted the basis upon 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 legislature to grant a rezoning application. Land zoned to a category permitting a variety of uses, some perhaps desirable in a given location and some not, may be put to use for any of those permitted uses barring the limitations possible in conditional zoning, since it is the zoning classification which controls, and not the representations of an applicant.

Because the minutes of governing bodies are not admissible in evidence over objection in a contest over a legislative enactment, there can be little “legislative history” that illuminates the meaning of an adopted enactment. Much like a court that speaks through its orders, a locality speaks through its formally adopted ordinances, resolutions, and policies, which are customarily analyzed within their four corners. The Virginia Supreme Court has said that

The trial court properly excluded the proffered evidence of the Board’s minutes [of legislative proceedings with respect to the enactment of building permit fees]. Generally, evidence of the Board’s intent or motive in enacting ordinances is irrelevant to our consideration whether they are valid laws. As this Court stated in *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948), [c]ourts are not concerned with the motives which actuate members of a legislative body in enacting a law, but in the results of their action. Bad motives might inspire a law which appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and sometimes is, passed with good intent and the best of motives. *Id.* at 105, 49 S.E.2d at 325 (citations omitted).

W.S. Carnes, Inc. v. Bd. of Sup’rs of Chesterfield Cnty., 252 Va. 377, 478 S.E.2d 295 (1996).

The Supreme Court has subsequently observed that the plain language of the conditional zoning statutes (Va. Code §§ 15.2-2297 and 15.2-2298) demonstrates that “the General Assembly intended for local governments to have authority to accept proffers that depart from the requirements of the zoning ordinance for a specific property as part of a conditional rezoning process.” *Rowland v. Town Council of Warrenton*, 298 Va. 703, 842 S.E.2d 398 (2020) (LGA filed [amicus brief](#)).

1-4.08(b) Use as a Supplement to the General Fund

Conditional zoning was intended as a source of revenue to offset the perceived public costs caused by development. In some jurisdictions, however, it had grown to include sizeable non-development specific infrastructure improvements and cash contributions for purposes that were difficult to distinguish from impact fees or tax alternatives. This use of the proffer system evolved from its earlier role as a means of tailoring on-site impacts of a given proposal or of creating greater certainty with respect to it. The enactment of Va. Code § 15.2-2303.4 was the General Assembly's effort to require localities to tailor proffers to identifiable impact.

In *Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995), one of the earliest Virginia decisions dealing specifically with the use of the proffer system, the Supreme 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. 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.³²

Reed's Landing was for a short while the only case involving the use of proffers. Then, in 1999, the Court decided *Gregory v. Board of Supervisors*, 257 Va. 530, 514 S.E.2d 350 (1999). There, 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." *Id.* 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 Chesterfield policy had met their obligations by other means than the payment of money. Thus, *Reed's Landing* is confined to the specific finding that refusal to pay what was demanded was the only reason for the rejection. As noted, *Reed's Landing* did not invalidate either conditional zoning or the use of cash proffers. In fact, just three-and-a-half weeks after that decision, in *National Association of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (table), Judge Merhige held that Chesterfield's adopted policy identifying a "maximum" anticipated proffer in zoning cases was not a taking and that conditional zoning substantially advances a legitimate state interest. *But see Bd. of Sup'rs of Albemarle Cnty. v. Route 29, LLC*, 301 Va. 134, 872 S.E.2d 872 (2022).

1-4.09 Conditional Zoning and the Planned Zoning District

As more and more complex proposals dot the landscape, the efficacy of traditional Euclidean zoning to meet the demands placed on the locality can be diminished. The General Assembly has authorized the use of planned unit development districts that by their very nature are not Euclidean, but rather more fluid in concept and application. It is probable under Virginia's system of land use controls, however, and given the proposition above regarding the uselessness of hortatory statements made during the rezoning process, that despite specific authorization for planned districts they cannot be successfully implemented without the use of the proffer system. It is through conditional zoning that specific planning components—such as use mixes and phasing of development—can be made legally binding.

The Supreme Court has not ruled on the validity of planned unit development district zoning in Virginia. If it is to survive, there must be some means of fleshing out the bare

³² The Court considered Powhatan's actions to have constituted an illegal imposition of an impact fee, since it noted that the General Assembly had, at that time, refused to grant localities the power to impose impact fees and thus to do directly what Powhatan had attempted to do by indirection.

bones of the typical planned district ordinance, which can conceivably give sufficient discretion to planning officials to impose design and use requirements *after* a planned district rezoning has been granted, as to be constitutionally infirm because those requirements may be standardless. See *Bd. of Sup'rs of Fairfax Cnty. v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *Bd. of Sup'rs of Fairfax Cnty. v. Lukinson*, 214 Va. 239, 198 S.E.2d 603 (1973). It is probable, however, that the courts would find the enabling authority to enact ordinance provisions for "areas and districts designated for mixed use or 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. Va. Code § 15.2-2286(A)(9).

Despite its defects, conditional zoning remains an excellent, and perhaps irreplaceable, tool for minimizing the impact of development and tailoring case decisions.

1-5 IMPACT FEES

1-5.01 In General

Impact fees are available to localities to offset the cost of development. Impact fees are charges assessed or imposed on new construction to fund or recover the costs of reasonable infrastructure improvements benefiting such new development, whether or not a rezoning application is involved. Changes made by the 2007 session of the General Assembly, however, effected a significant change in the law with respect to impact fees. See 2007 Va. Acts ch. 896; Va. Code §§ 15.2-2317 et seq. and 15.2-2328 et seq.

Prior to 1990, the only such fee authorized by the legislature pertained to 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." Va. Code § 15.2-2243.

In 1989, however, the General Assembly enacted Va. Code § 15.2-2317 et seq., 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. Under these statutes, the applicable localities may pass ordinances to assess and impose reasonable but *mandatory* fees on new development, to pay all or part of the cost of reasonable road improvements attributable in substantial part to such development.

Developers are no longer exempt from any impact fees simply because their projects are subject to proffers committing them to provide off-site road improvements; instead, the locality is to treat as a credit any off-site transportation dedication, contribution, or construction, whether it is a condition of a rezoning or otherwise committed to the locality. See Va. Code §§ 15.2-2323 and 15.2-2324.

1-5.02 Impact Fee Requirements

Impact fees are imposed against new development to fund costs of road improvements "benefiting" new development; the fees need not to be necessitated by and attributable to new development. Va. Code § 15.2-2318. The comprehensive plan must address the following:

- Impact Fee Service Areas must be established with clearly defined boundaries that would be subject to assessment of impact fees as well as the road improvement plan for the service area. Va. Code § 15.2-2320.
- The locality must develop a Road Improvements Plan, which must provide an analysis of existing capacity, current usage and existing commitments within each impact fee service area. Va. Code § 15.2-2321.

- The governing body of the locality must appoint an Impact Fee Advisory Committee, which must include five to ten members.
- Forty percent of the membership must be from the development, building, or real estate industry.
- Public hearings are required, and the locality must provide documentation for all assessments.

Va. Code § 15.2-2319.

The Road Improvements Plan is used to determine impact fee amounts and must include analysis of current and projected service levels, current valid building permits and approved and pending site plans and subdivision plats. The locality must determine what current usage and commitments exceed existing capacity of present roads and, if they are exceeded, what costs there will be to improve roads to meet current demands. It must also consider what additional new needs for and costs of construction of new or improved roads will be required to meet new development within a twenty-year period. Indeed, the statute prohibits assessing and imposing impact fees "to meet demand which existed prior to the new development." Va. Code § 15.2-2318. Impact fees must be assessed before or at time of site or subdivision approval and collected at time of building permit issuance.

Appeals of calculated amounts may be made to the governing body, but there is no explicit provision for judicial appeals. Va. Code § 15.2-2323.

The locality must credit against impact fees for transportation improvements benefiting the impact fee service area (including proffers), any other developer/builder contributions to costs of road improvements benefiting the development, the extent to which the 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. The locality may elect to provide credit for approved on-site transportation improvements in excess of those required by a development. Va. Code § 15.2-2324.

The locality must refund any impact fee amount for which construction of the project is not completed within a reasonable period not to exceed fifteen years. If fees are not committed to road improvements benefiting a service area within seven years from date of collection, the locality may then commit those fees to its secondary or urban system construction program for road improvements that benefit impact fee service areas. Upon completion of the project, if the impact fees paid exceed actual cost by more than 15 percent, then the developer is to obtain a refund of the difference. Va. Code § 15.2-2327.

See also section [1-17.07](#), which addresses regulatory takings law and unconstitutional conditions, which can apply to impact fees.

1-5.03 Urban Development Areas

The creation of an Urban Development Area (UDA) is optional for all localities. Va. Code § 15.2-2223.1. A UDA is an area designated for high-density development because of its proximity to transportation facilities, the availability of a public or community water and sewer system, or proximity to a city, town, or other developed area. *Id.* The UDA as contained in the comprehensive plan must incorporate principles of traditional neighborhood design, which may include principles of mixed-use development and greater flexibility in road design. A locality choosing to create a UDA is to plan for at least four single-family residences, six townhouses, or twelve 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. *Id.*

Localities so choosing must designate one or more UDAs to meet projected residential and commercial growth in the locality for an ensuing period of ten to twenty years. The boundaries and size shall be re-examined every five years with the comprehensive plan update. See 2010 Op. Va. Att’y Gen. 80.

Urban development areas, if designated, shall incorporate principles of traditional neighborhood design, which may include but need not be limited to (i) pedestrian-friendly road design, (ii) interconnection of new local streets with existing local streets and roads, (iii) connectivity of road and pedestrian networks, (iv) preservation of natural areas, (v) mixed-use neighborhoods, including mixed housing types, with affordable housing to meet the projected family income distributions of future residential growth, (vi) reduction of front and side yard building setbacks, and (vii) reduction of subdivision street widths and turning radii at subdivision street intersections. Va. Code § 15.2-2223.1(B)(5).

Any county that amends its comprehensive plan may designate one or more urban development areas in any incorporated town within such county, if the council of the town has also amended its comprehensive plan to designate the same areas as urban development areas with at least the same density designated by the county. Va. Code § 15.2-2223.1(E). However, if a town has established an urban development area within its corporate boundaries, the county within which the town is located shall not include the town’s projected population and commercial growth when initially determining or reexamining the size and boundary of any other urban development area within the county. *Id.*

To the extent possible, federal, state, and local transportation, housing, water and sewer facility, economic development, and other public infrastructure funding for new and expanded facilities shall be directed to designated urban development areas or to such similar areas that accommodate growth in a manner consistent with this section. Va. Code § 15.2-2223.1(F). A portion of one or more urban development areas may be designated as a receiving area for any transfer of development rights program (Va. Code § 15.2-2316.2) established by the locality.

No locality shall limit or prohibit development pursuant to existing zoning or shall refuse to consider any application for rezoning based solely on the fact that the property is located outside a UDA.

1-5.04 Urban Transportation Service District and Associated Cash Impact Fees

Under Va. Code § 15.2-2403.1, an urban county (any county with population over 90,000) that does not currently maintain its own roads may create an Urban Transportation Service District (“UTSD”). The local governing body of the urban county and the Commonwealth Transportation Board shall establish the boundaries of the UTSD. Overall density within a UTSD must be one residential unit per gross acre or greater. The county must maintain public roads within the UTSD, but it is to receive a per-lane-mile maintenance payment from the state. A new form of impact fees may also be imposed if an eligible jurisdiction creates such a district.

These impact fees may be applied only by those localities that have established a UTSD; however, the locality cannot impose those fees *within* a UTSD. If, however, it establishes a UTSD, it is authorized to impose impact fees outside the UTSD on parcels that are zoned agricultural and are being subdivided for by-right residential development. These impact fees will be assessed for all public facilities that are impacted by residential development. If a locality had not established a UTSD and adopted an impact fee ordinance

by December 31, 2008, it lost the right to do so. Cash proffers must be credited against impact fees assessed.

1-5.05 Tidewater Association of Homebuilders (TAB)

Tidewater Association of Homebuilders, Inc. v. City of Virginia Beach, 241 Va. 114, 400 S.E.2d 523 (1991) ("TAB"), is useful to an assessment of how the Court might treat impact fee legislation. As noted above, the General Assembly has enacted specific enabling legislation for impact fees in certain circumstances. In *TAB*, however, the Court upheld the city's imposition of a "Water Resource Recovery Fee" on connections made to the city's water system after January 6, 1986, and on modifications to existing connections resulting in an increase in "DFUs" or drainage fixture units, attributable thereto. It was conceded that the city had the authority to provide a water system for its residents, but *TAB* challenged the fee on several grounds, one of which was that it constituted an unauthorized impact fee. Pointing to Va. Code § 15.2-2317 et seq., *TAB* argued that if localities already possessed the authority to levy charges such as the Water Resource Recovery Fee (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 the provision of utility service on the city's lines. The Court adopted the definition of impact fees contained in Va. Code § 15.2-2318, but it concluded in part that because *TAB*'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 above. According to the Court, the "'passage of time between collection of an impact fee and payment of the cost that [the] impact fee is designed to defray,' belies the proposition that the need for the facilities . . . was generated by those required to pay the impact fee." *Id.*

This conclusion is perplexing, for later in the same opinion the Court expressly states 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.*" *Id.* (emphasis added). Thus, it would appear that the WRRF could have been imposed only 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, something the Court expressly held that it was not.

The case is important for its demonstration that the Court sees a distinction with a difference between impact fees, taxes, and proprietary fees. It is also of importance not only because it constitutes one of the very few occasions upon which the Court has ever found the existence of an implied power, but because *it marks the first and only time that the Court has found an implied power to raise money.* Earlier, the Court held that the authority to process subdivision plats did not carry with it the implied power to charge a fee for such processing. *Nat'l Realty Corp. v. Va. Beach*, 209 Va. 172, 163 S.E.2d 154 (1968) (result negated by subsequent statute).

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 necessary constitutional underpinnings of any involuntary exaction of property. See [section 1-17](#) regarding regulatory takings.

1-6 HISTORIC DISTRICT ORDINANCES

In addition to the other matters addressed specifically in the enabling legislation, the General Assembly has expressly authorized counties and municipalities to enact ordinances for the preservation of historical sites and areas. Va. Code § 15.2-2306.

This statute authorizes localities to 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, archaeological or cultural interest” or any historic area (defined in Va. Code § 15.2-2201 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”) and “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 as zoning overlays including land either adjacent to the identified historic landmark contiguous to arterial streets or highways (as designated by the Virginia Department of Transportation) found by the governing body to be significant routes of tourist access either to the locality or to a particular landmark in the locality or in a neighboring jurisdiction. *See generally Worley v. Town of Washington*, 65 Va. Cir. 14 (Rappahannock Cnty. 2004) (the statutory requirements for enacting a historic district ordinance were not met by the board’s designation of entire town as historic district without designating structures of important interest; court allowed evidence on whether entire town at time of ordinance adoption warranted conservation and preservation and thus met one of the statute’s alternative requirements). Construing the prior enabling statute, Va. Code § 15.1-503.2, the Virginia Supreme Court held that a locality could create a historic district even if it contained no buildings or structures. *Covel v. Town of Vienna*, 280 Va. 151, 694 S.E.2d 609 (2010).

Before any locality designates any building, structure, district, object, or site as part of a local historic district, the owners of the property proposed for such designation must be given written notice of the public hearing on the ordinance. A locality must identify and inventory all structures being considered for inclusion in such a district after having established written criteria to be used in making such determinations.

The locality may also provide for a “review board” to administer such an ordinance. 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 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.” 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 may 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.” While a helpful tool for local governments, it can be a two-edged sword, *see* 1997 Op. Va. Att’y Gen. 48 (county must obtain permission of town’s architectural review board before erecting temporary courthouse facilities at the county courthouse located in the town’s historic district). Variances granted by a review board from historic district restrictions, however, are not subject to the same limitations as zoning ordinances. *Owens v. City Council of Norfolk*, 78 Va. Cir. 436 (City of Norfolk 2009).

The Attorney General has opined 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 Va. Code § 36-97. 1996 Op. Va. Att’y Gen. 139.

This opinion is of interest, since many of the disputes that arise have to do precisely with the material used in construction or restoration of structures, and nothing else. See *also* Va. Code § 36-98 (2001 amendments proscribe zoning control of certain building practices, including the use of specific building material or finishes, but expressly exclude criteria established by historic districts from such proscription); 2001 Op. Va. Att’y Gen. 141 (ordinance requiring certain finishes for single-family construction invalid as inconsistent with Va. Code § 36-98); *Worley v. Town of Washington*, 65 Va. Cir. 14 (Rappahannock Cnty. 2004) (court must hear expert evidence on whether building materials can create architectural incompatibility); 2001 Op. Va. Att’y Gen. 65 (absence of objective standards for use by an architectural review board in determining historical significance did not constitute an invalid delegation of authority by a city council).

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.” (This would suggest that the locality can define who has standing, though it is improbable that the courts would permit a locality to eliminate the standing of 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.) But see *Owens v. City Council of Norfolk*, 78 Va. Cir. 436 (City of Norfolk 2009) (suggesting that a citizen opposed to the granting of a historic district variance does not have appellate rights). These appeals must set forth the alleged illegality of the local action and must be filed within thirty days after final decision is rendered. See *West Lewinsville Heights Citizens Ass’n v. Bd. of Sup’rs of Fairfax Cnty.*, 270 Va. 259, 618 S.E.2d 311 (2005) (final decision is rendered date vote is taken); see *also Historic Alexandria Found. v. City of Alexandria*, 299 Va. 694, 858 S.E.2d 199 (2021) (interpreting city’s zoning ordinance, providing that “aggrieved” petitioners may appeal, to preclude Foundation’s right to appeal because it did not show particularized harm).

When an appeal to the circuit 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 (ensuring that the landowner may not destroy the historic structure pending the resolution of such an appeal under the protection of the stay). Va. Code § 15.2-2306(A)(3). The circuit court may reverse or modify the decision below if it finds that the decision was contrary to law or was arbitrary and constituted an abuse of discretion. It may also, of course, affirm the decision of the governing body. *Id.*

As with an appeal of a decision of a board of zoning appeals, a party seeking judicial review of a decision of an architectural review board, as upheld by the city council, may not challenge the validity or constitutionality of the underlying legislation. *Covel v. Town of Vienna*, 280 Va. 151, 694 S.E.2d 609 (2010); *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004). To raise an ultra vires or Dillon Rule challenge, the owner must bring a direct action against the governing body. *Id.* The Supreme Court in *Norton* held that the customary “fairly debatable” standard applied to judicial review of the final decision, see section 1-8.02(b), but went on to find that the city council had failed to produce *any evidence* to rebut the owner’s evidence that the council’s denial of the modification to the house was unreasonable.

Although these provisions are intended to assist in the preservation of historic landmarks, the General Assembly has precluded localities from forbidding 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 some such action in any event. Thus, in addition to appeal, the landowner actually possesses an absolute right to raze or demolish an 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 assurance³³ 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.

Va. Code § 15.2-2306(A)(3).

1-7 COMPREHENSIVE PLANNING

1-7.01 The Importance of Comprehensive Planning and Some Cautionary Notes

All localities are required to develop a comprehensive plan regarding the development of their communities. Indeed, a zoning ordinance adopted since 1980 without one was held to be void ab initio. *Town of Jonesville v. Powell Valley Vill. L.P.*, 254 Va. 70, 487 S.E.2d 207 (1997). There has proved over the years to be increased importance in land use decision-making of close adherence to a good comprehensive plan and for the adequate development of a sound factual basis for individual decisions.

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

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.

1-7.02 The Nature of the Plan Itself and Its Implementation

Comprehensive plans must take into consideration present and future land uses, existing and planned public utilities and facilities, facilities for the elderly and the disabled,

³³ In one of the few published cases dealing with this statute, *Suthanthiran v. Board of Zoning Appeals*, Civil Action No. CL06003160 (Alexandria Cir. Ct. May 31, 2007), Judge Kemler of the Alexandria Circuit Court observed that "reasonable assurances" is an undefined term and that the statute does not indicate what form they must take. The locality has discretion in determining what suffices. Moreover, the purchaser does not have to state in detail what it will do to preserve and restore the property, only that it is "willing" to do so.

This case went to the court on appeal from a Board of Zoning Appeals because Mr. Suthanthiran sought the right to demolish apartment buildings and contested the sufficiency of a contract for the purchase of the land. He declined to sign the contract, and a zoning administrator's determination was sought as to the sufficiency of the offer under the statute. Mr. Suthanthiran did not want to accept the purchase price proposed by the Alexandria Housing Development Corporation, but the court found that his refusal to do so meant that he was not entitled to a demolition permit.

The lesson from this case is that if a purchaser appears to be able to meet the general language of the statute with respect to reasonable assurances and willingness to preserve and restore, then one rejects that offer at risk.

transportation infrastructure needs, broadband infrastructure needs, and the purposes for which land use ordinances are adopted. In addition, the comprehensive plan is encouraged to consider strategies to address resilience, which is defined by statute as “the capability to anticipate, prepare for, respond to, and recover from significant multi-hazard threats with minimum damage to social well-being, health, the economy, and the environment.” Va. Code § 15.2-2223. Comprehensive plans have been mandatory in Virginia for all jurisdictions since 1980. *Id.* Certain jurisdictions are required to incorporate additional planning, see e.g., Va. Code §§ 15.2-2223.2 (coastal management) and 15.2-2223.3 (sea-level rise and recurrent flooding), and larger localities are encouraged to consider transit-oriented development for the purposes of reducing greenhouse gas emissions (Va. Code § 15.2-2223.4). Comprehensive plans must be reviewed by each jurisdiction at least once every five years. Va. Code § 15.2-2230.³⁴

Comprehensive plans are general in nature, designating “the general or approximate location, character, and extent of each feature . . . shown on the plan, and shall indicate where the existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.” Va. Code § 15.2-2223. 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.³⁵

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, or some combination of any or all of the above. Va. Code § 15.2-2224(B).

After certification of the comprehensive plan by the local planning commission, the plan must be posted online and a public hearing with notice must be held consistent with Va. Code §§ 15.2-2204 and 15.2-2226. The governing body shall then approve and adopt, amend and adopt, or disapprove the plan. *Id.* The governing body has ninety days from the planning commission’s recommending resolution to act, or 150 days for an amendment initiated by the locality for more than twenty-five parcels. *Id.*; Va. Code § 15.2-2229.

1-7.03 Limitations on the Usefulness of the Plan

A comprehensive plan is not a land use ordinance, and it is generally not, of itself, self-effectuating. Indeed, the Virginia Supreme Court has often referred to the comprehensive plan as naught but an advisory “guide” that does not bind the locality. *Bd. of Sup’rs of Loudoun Cnty. v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980); *Bd. of Sup’rs of Fairfax Cnty. v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *Bd. of Sup’rs v. Safeco Ins. Co.*, 226 Va. 329, 310 S.E.2d 445 (1983); *Bd. of Sup’rs of Fairfax Cnty. v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974); *Merrick Land Trust I v. Louisa Cnty. Bd. of Sup’rs*, 54 Va. Cir. 378 (Louisa Cnty. 2001); *Guest v. King George Cnty. Bd. of Sup’rs*, 42 Va. Cir. 348 (King George Cnty. 1997). *But see Broad Run Vill. v. Bd. of Sup’rs of Loudoun Cnty.* 60 Va. Cir. 391 (Loudoun Cnty. 2002) (landowner may bring declaratory judgment action seeking invalidation of portion of comprehensive plan addressing public utilities as *ultra vires*).

³⁴ Effective with reviews from 2013 on, the comprehensive plans of Tidewater localities must reflect coastal resource management practices. Va. Code § 15.2-2223.2.

³⁵ The Attorney General has opined that a locality may adopt, as part of its comprehensive plan, a proffer policy that has an adequate public facilities requirement before applications for rezoning may be approved. 2002 Op. Va. Att’y Gen. 85. The Attorney General also opined, however, that statutory authorization is required to permit a local governing body to deny a rezoning request based *solely* on the lack of adequate public facilities to serve any development of rezoned property. 2003 Op. Va. Att’y Gen. 42. No court decision or other Attorney General’s opinion has gone so far.

The Supreme Court once treated the plan as something more by effectively requiring the locality to upzone to its plan. *Allman, supra*; *Bd. of Sup'rs v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975). The Court ruled against localities even when the action taken was indeed consistent with the plan, but such considerations were seen to be trumped by other concerns. In *Matthews v. Greene County Board of Zoning Appeals*, 218 Va. 270, 237 S.E.2d 128 (1977), 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, it 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. *See also Bd. of Cnty. Sup'rs v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959); *Williams, supra*.

1-7.04 The Significance of § 15.2-2232 Review

There is a significant exception to the proposition that plans have only advisory effect that can properly direct land use decisions. In one area the plan has a binding effect and becomes the "Zoning Ordinance" for *public* uses. According to Va. Code § 15.2-2232, once approved, the comprehensive plan controls the general or approximate location, character, and extent of each public facility or utility feature shown thereon. Thereafter, unless such 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 proposed feature is in substantial accord with the plan even if not expressly identified, then no street or connection to an existing street, public building, public structure, public utility facility, or public service corporation facility other than a railroad facility, an underground natural gas or underground electric distribution, whether publicly or privately owned, can be constructed, established, or authorized unless approved by the local commission as being substantially in accord with the plan.³⁶ Va. Code § 15.2-2232(A) and (D). 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. Va. Code § 15.2-2232(C). The plan thus becomes the means by which the governing body controls the general location, character and extent of public infrastructure.³⁷

In *Board of Supervisors of Loudoun County v. Town of Purcellville*, 276 Va. 419, 666 S.E.2d 512 (2008), the Court held that the proposed location of a high school in a different part of the planning area from where it was specifically mentioned (two miles) was the "functional equivalent of no feature at all" and a consistency review was required. The town and the county had entered into an annexation agreement giving the town annexation rights to an urban growth area and the localities also agreed to create a joint comprehensive plan for the area. The trial court agreed with the town that the annexation agreement and joint comprehensive plan authorized both the town and the county to make Va. Code § 15.2-2232 consistency reviews. Reversing, the Virginia Supreme Court held that the right to review was not inherent in a right to participate in the planning process pursuant to the joint comprehensive plan. Because the planning process is distinct from zoning determinations, pursuant to Va. Code §§ 15.2-2232 and 15.2-2223, zoning authority remained exclusively with the commission that has the territory within its jurisdiction. *Id.*; *see also Stafford Cnty. v. D.R. Horton, Inc.*, 299 Va. 567, 856 S.E.2d 197 (2021) (because "[i]t is the governing body of the locality, not the planning commission, that must approve

³⁶ A circuit court held that a "2232" review is not required prior to rezoning and conditional use permit application approval. Such review is only required before a particular element of public infrastructure is actually located on the ground. *Merrick Land Trust I v. Bd. of Sup'rs of Louisa Cnty.*, No. 6158 (Louisa Cnty. Cir. Ct. Nov. 20, 2001).

³⁷ 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 public service companies or quasi-independent authorities. Since all entities are subject to Va. Code § 15.2-2232, it is evident that the comprehensive plan is a valuable means of assuring at least that capital infrastructure does not go beyond what the governing body has planned.

the comprehensive plan and any changes to that plan," the commission's previous approval of subdivision plans did not amend the comprehensive plan, and reconfigured subdivision plans were subject to § 15.2-2232 review).

The decisions of the planning commission can be reversed by the local governing body, for 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.

Va. Code § 15.2-2232(B). See *Concerned Taxpayers v. Cnty. of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995) (§ 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 Sup'rs*, 42 Va. Cir. 348 (King George Cnty. 1997) (neither a formal "2232 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).

As noted above, there are exceptions to "2232" review for those items determined by appropriate procedures to be already in the plan, to constitute normal 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. There are certain special cases even here, however, for high-power transmission lines. For construction of any transmission line of 138 kilovolts and associated facilities, a public utility may forgo SCC review if it obtains approval, pursuant to § 15.2-2232 and any applicable local zoning ordinances, from any locality in which the transmission line will be located. However, if SCC approval for the lines and facilities is obtained, Va. Code § 15.2-2232 is deemed satisfied. Va. Code § 56-265.2(A)(2). The Supreme Court held in *BASF Corp. v. SCC*, 289 Va. 375, 770 S.E.2d 458 (2015), that Va. Code § 56-41.1(F), which applies to transmission lines of 138 kilovolts or more, exempted transmission lines, but not a switching station, from local zoning regulations if approved by the SCC. While the term "associated facilities" was added to § 56-265.2 post-*BASF*, § 56-41.1 was not so amended. Thus, *BASF* remains good law with regard to transmission lines higher than 138 kilovolts: With SCC approval, the transmission lines are exempt from local approval but not their associated facilities. On any application for § 15.2-2232 review of a telecommunications facility, the planning commission must act within ninety days, (unless the governing body extends the period for no more than sixty days or the applicant agrees to an extension) or the application is deemed approved. Va. Code § 15.2-2232(F).

Similarly, Va. Code § 56-265.2:1(F) provides that whenever a certificate is required from the State Corporation Commission pursuant to § 56-265.2 for the construction of a pipeline for the transmission or distribution of manufactured or natural gas,

[a]pproval of a pipeline pursuant to this section shall be deemed to satisfy and supersede the requirements of § 15.2-2232 and local zoning ordinances with respect to such pipeline and related facilities; however, the Commission shall not approve the construction of a natural gas compressor station in an

area zoned exclusively for residential use unless the public utility provides certification from the local governing body that the natural gas compressor station is consistent with the zoning ordinance. The certification required by this subsection shall be deemed to have been waived unless the local governing body informs the Commission and the public utility of the natural gas compressor station's compliance or noncompliance within 45 days of the public utility's written request.

However, in *Myers v. Prince William County Board of Zoning Appeals*, 21 Va. Cir. 547 (Prince William Cnty. 1988), the circuit 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 such sewer, on a run of several thousand feet to property zoned to require public sewer, was not subject to § 15.2-2232 review since the line was not a public utility facility, and, alternatively, was a "normal service extension." But there can be little doubt that compliance with a local comprehensive plan will serve as a significant source of local authority over public facilities to the extent authorized in the enabling legislation.

In *Board of Supervisors of Fairfax County v. Washington D.C. SMSA, L.P.*, 258 Va. 558, 522 S.E.2d 876 (1999), the Virginia Supreme Court reversed a trial court and stated that telecommunications facilities constructed by a private commercial owner on its leasehold on land within the rights of way of the Virginia Department of Transportation were not exempt from the zoning authority of the locality in which that land was located, pursuant to its powers under § 15.2-2232.

Finally, the Supreme Court has held that there is no third-party right of action to challenge a planning commission determination that a use is in "substantial accord" with the local comprehensive plan, since no such action is authorized in Va. Code § 15.2-2232. *Miller v. Highland Cnty.*, 274 Va. 355, 650 S.E.2d 532 (2007).

1-8 UPZONINGS

1-8.01 General Considerations

After a comprehensive plan has been established and a zoning ordinance adopted to provide the primary means for the implementation of the policies of the Plan, focus shifts to the proper classification of individual parcels of land. Although it is probably the case that the majority of Virginia localities still maintain a fairly simple zoning classification system, an increasing number use numerous sub-classifications of major use groups, incorporating detailed regulations for development in those classifications. The Fairfax County zoning ordinance, for example, is fully as voluminous by itself as the entire remainder of the county code. Many uses are frequently permitted only by special use permit or special exception.

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.

1-8.02 The Presumption of Validity

1-8.02(a) The Presumption Attaches to All Legislative Land Use Actions

A discussion of the presumption of validity and the fairly debatable standard for review of legislative actions would be appropriate at many points in this chapter, since those concepts are so completely fundamental to any analysis of the validity of legislative action. It is perhaps most useful, however, to mention them specifically in connection with the process of upzoning, which for many years has been the principal arena in which both landowners and localities have been concerned.

The basic structure of the upzoning case is deceptively straightforward. When an upzoning application has been denied by the locality and a lawsuit filed, it is a matter of

surpassing importance to the parties how the courts will treat the issues. Land use decisions by local governing bodies are legislative actions enjoying a presumption of validity; the court will not lightly overturn them. Although certain aspects of this process have been simplified or clarified over the past twenty years, the rules of litigation in a land use case have been reiterated in decisions reaching back for decades. The Virginia Supreme Court has stated that

[t]he legislative branch of a local government in the exercise of its police power 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.

* * *

[T]he 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.

Bd. of Sup'rs of Fairfax Cnty. v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889 (1974) (quoting *Bd. of Sup'rs of Fairfax Cnty v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959)). It is not only the legislature's but also the trial court's findings with regard to a land use decision that 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 its presumption of legislative validity in [its] review." *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982); see also *Bd. of Sup'rs of Roanoke Cnty. v. Int'l Funeral Servs., Inc.*, 221 Va. 840, 275 S.E.2d 586 (1981); *Bd. of Sup'rs of Fairfax Cnty. v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980); *Bd. of Sup'rs of Loudoun Cnty. v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980); *Bd. of Sup'rs 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). The landowner must thus, in any challenge to legislative action, face down the presumption at every level.

However, a local governing body acts arbitrarily and capriciously when it acts outside the scope of the authority conferred by the zoning ordinance, and the resulting action is void. *Renkey v. Cnty. Bd. of Arlington Cnty.*, 272 Va. 369, 634 S.E.2d 352 (2006) (county upzoned in violation of its ordinance's eligibility requirements).

1-8.02(b) The "Fairly Debatable" Standard and the Merits of Legislative Action

If the landowner produces evidence that the denial of a rezoning request was indeed arbitrary, capricious, or unreasonable, the locality must respond with countervailing evidence that its decision was in fact reasonable, and 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. See, e.g., *Newberry Station HOA v. Bd. of Sup'rs of Fairfax Cnty.*, 285 Va. 604, 740 S.E.2d 548 (2013) (record must establish that landowner met its burden of adducing evidence of unreasonableness sufficient to rebut the presumption of reasonableness and that the locality failed to meet the landowner's evidence with some evidence of reasonableness); *Bd. of Sup'rs of Fairfax Cnty. v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991); see also *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990) (Once the presumption of reasonableness has been thrown into doubt, however,

"[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."); *Bd. of Sup'rs of Fairfax Cnty. v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). A board of supervisors, however, need not "debate" the issue or make findings of fact for the decision to be upheld as "fairly debatable." *Freezeland Orchard Co. v. Warren Cnty. Bd. of Sup'rs*, 61 Va. Cir. 548 (Warren Cnty. 2001).

In a frequently cited formulation, the Virginia Supreme 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." *Cnty. Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989) (quoting *Loudoun Cnty. Bd. of Sup'rs v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980) (citations omitted)); see also *Bd. of Sup'rs of Fairfax Cnty. v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Guest v. King George Cnty. Bd. of Sup'rs*, 42 Va. Cir. 348 (King George Cnty. 1997).

This must be contrasted with *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004), which involved a ruling by the city council on an appeal from the city's architectural review commission. The Court addressed what to do when the locality fails to meet its burden. The owner had installed a glass-paned door in his historic home that did not meet the commission's approval. The council affirmed the commission's decision. On appeal, the Virginia Supreme Court held that the city provided "no evidence" to support the denial and reversed. In *Board of Supervisors of Fairfax Cnty. v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), the Court employed an "any evidence" standard. Read together, these cases suggest the Court's view as to the inner and outer parameters of the already generous "fairly debatable" standard: The locality prevails in a fairly debatable case when it produces "any [credible and probative] evidence," but fails only when it produces none. The Court has further made it plain that land use cases involving the fairly debatable standard are not swearing contests between experts. In *Robertson*, the Court stated

As we said in [*Bd. of Sup'rs of Rockingham Cnty. v.*] *Stickley*, the question is not "who won the battle of the experts." The relevant inquiry is "whether there [was] any evidence in the record sufficiently probative to make a fairly debatable issue of the . . . decision to deny" Robertson's application for a deviation from the setback requirement. *Id.* (emphasis added). Having examined the record, we find sufficient evidence of reasonableness to make the Board's rejection of Robertson's request for a deviation a fairly debatable issue, i.e. the evidence "would lead objective and reasonable persons to reach different conclusions." Thus, we hold that the circuit court erred in finding that the Board's denial was arbitrary, capricious, and unreasonable.

Board of Supervisors of Fairfax Cnty. v. Robertson, 266 Va. 525, 587 S.E.2d 570 (2003) (citations omitted). Thus, the standard for evaluation of a fairly debatable decision seems to fall between "any" and "no" evidence, indicating that the inquiry is not a subtle one.

1-8.02(c) The "Underlying Zoning" Inquiry

While the Virginia Supreme Court has continued to articulate the "fairly debatable" standard in the foregoing terms, in 1988 it actually added a consequential gloss to the applicable test by refocusing judicial inquiry from the reasonableness vel non of the governing body's denial of an upzoning to the prima facie question 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. *City Council of Va. Beach v. Harrell*, 236 Va. 99, 372 S.E.2d 139 (1988) (a decision involving a special use permit, but which is applicable to rezoning decisions); *Bd. of Sup'rs of Fairfax Cnty. v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991). In *Miller & Smith*, 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. *See also Bd. of Sup’rs v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983). In *Miller & Smith*, 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 that both R-5 and R-8 zoning were reasonable on the evidence, and forbade the board from refusing a rezoning application to either classification. The 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.” *Id.* This is true even if the classification that the board ultimately chooses is not the *most* appropriate. *Id.* If the reasonableness of the underlying zoning is, at the very least, “fairly debatable,” then it does not matter whether the landowner’s application was profoundly reasonable or even the best use of the property.

Because a rezoning denial will be upheld if the existing zoning provides for a reasonable use of the property, it has become an essential 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.³⁸ This is not a hypothetical effort. In *City Council of Salem v. Wendy’s of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996), Wendy’s had sought commercial rezoning of a parcel in a forty-acre residentially zoned subdivision. The property was located on a major road, and although there were 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 city 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 city 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 applied for, “when, as here, the existing zoning and the proposed zoning area 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.”

While it had seemed that the “underlying zoning” inquiry was applicable to special use permit cases as well, that may not now be the case. *See* section 1-10.04.

1-8.03 Judicial Treatment of Various Bases for 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 which may help (or hurt) the matter, and those factors that have been identified by the Virginia Supreme Court over the years.

In the three decades following World War II, the Virginia Supreme Court was plainly unwilling to support denials of rezonings on the grounds that public facilities (i.e., roads,

³⁸ In *Board of Supervisors v. Reed’s Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995), neither the trial court nor the Supreme Court so much as mentions the validity of the underlying zoning as they reached past that question to strike down illegal proffer exactions. *See* the further discussion of this case in section 1-4.08(a).

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 of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), where the Court noted explicitly in reversing a Fairfax zoning denial that “[a]s a practical matter, and because of the ever-existing problem of finance, the construction and installation of necessary public facilities usually follow property development and the demand by people for services.” See also the similarly consequential case of *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975). *Lerner* and the other cases addressed below significantly weakened the impact of *Allman* but have not been overruled.

Other cases indicate that the Virginia Supreme Court will not support denials of rezonings where it appears that the purpose of the denial is to favor one economic interest over another. See *Fairfax Cnty. v. DeGoff Enters., Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973); *Bd. of Zoning Appeals of Fairfax Cnty. v. Columbia Pike, Ltd.*, 213 Va. 437, 192 S.E.2d 778 (1972); *Bd. of Cnty. Sup’rs v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958). Cf. *Lerner* and discussion of timed development in section 1-8.05.

While the zoning of neighboring or adjacent land is significant to upzoning determinations, it is not dispositive. The Supreme Court has looked closely at surrounding classifications when it appears that an applicant has been subject to discriminatory zoning decisions. See, e.g., *Bd. of Sup’rs of Fairfax Cnty. v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *Bd. of Sup’rs v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); *Vienna Town Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978). 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. *Bd. of Sup’rs v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983).

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 with regard to one or more of the statutory purposes of zoning ordinances. The Supreme Court has expressly stated “while the views of persons owning neighboring property should be considered, property owners have no *vested right* to continuity of zoning of the general area in which they reside, and the mere purchase of land does not create a right to rely on existing zoning.” *Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978) (emphasis in the original, footnote omitted).

Even if citizen opposition 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 Supreme Court has upheld a provision of the Chesapeake Charter that authorized a referendum on a zoning (or indeed any) ordinance. *R.G. Moore Bldg. Corp. v. Comm. for Repeal of Ordinance*, 239 Va. 484, 391 S.E.2d 587 (1990). The Court has left unclear how an aggrieved landowner might challenge an adverse result in such a referendum, but it would appear that challenge would be made in the same circumstances and in the same manner as if the governing body had made the decision. It would seem unlikely, however, that the courts would lightly interfere with such a direct expression of the will of the people. In *Committee of the Petitioners v. City of Norfolk*, 90 Va. Cir. 18 (City of Norfolk 2015), a circuit court extended the rationale of *R.G. Moore* and held that a referendum could be held to repeal a rezoning ordinance already in effect as long as the petition for the referendum was filed within thirty days of enactment (the time period allowed by charter for a referendum). It further concluded that the petitioners were not required to petition four separate times (one for each ordinance intended to be sent to referendum). The petitioners and landowners subsequently reached a settlement so the referendum was never held.

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 property resulting from a good

faith denial of rezoning will not alone constitute basis for reversal. See, e.g., *Gayton Triangle Land Co. v. Henrico Cnty.*, 216 Va. 764, 222 S.E.2d 570 (1976); *City of Virginia Beach v. Va. Land Inv. Ass'n. No. 1 (VLIA)*, 239 Va. 412, 389 S.E.2d 312 (1990).

Zoning ordinances cannot be “exclusionary” in their effect, freezing out low- and middle-income residents in the interests of more affluent citizens. *Bd. of Cnty. Sup'rs v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). A circuit court has held that there is no standalone claim for exclusionary zoning, but rather it is an aspect of the fundamental claim that a denial of a rezoning is arbitrary, capricious, and unreasonable. *Catlett Farm, LLC v. Bd. of Sup'rs of Fauquier Cnty.*, CL 1200004-00 (Fauquier Cnty. Cir. Ct. Jul. 14, 2014).

The protection of purely aesthetic values does not, by itself, appear a permissible basis for denial of rezonings, though it can presumably be added with other factors to create fair debate about a particular decision. *Bd. of Sup'rs 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). Finally, the Attorney General has opined that statutory authorization is required to permit a local governing body to deny a rezoning request based solely on the lack of adequate public facilities to serve any development of rezoned property. 2003 Op. Va. Att'y Gen. 42.

1-8.04 What is “Spot Zoning”

Lawsuits challenging a zoning action may decry such action as “spot zoning.” The term is generally used to describe a zoning that is simply different from surrounding classifications. However, the Supreme Court has upheld what might look awfully like spot zonings as a valid exercise of legislative discretion where the action also serves some identifiable public interest. Illegal spot zoning is deemed to exist where a court can find that it has no public benefit and hence is effected “solely to serve the private interests of one or more landowners . . . [rather than] to further the welfare of the entire county [which simultaneously benefits private interests.]” *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967); *Runion v. Roanoke Cnty. Sup'rs*, 65 Va. Cir. 41 (Roanoke Cnty. 2004) (not spot zoning because residential zoning proffers protect county’s interests). In *Barrick v. Board of Supervisors*, 239 Va. 628, 391 S.E.2d 318 (1990), the Court held that failure to comply with the comprehensive plan, in and of itself, does not 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 the point. It would appear to be difficult to do so in all but the most extraordinary circumstances. See also *Riverview Farm Assocs. v. Bd. of Sup'rs of Charles City Cnty.*, 259 Va. 419, 528 S.E.2d 99 (2000) (trial court properly dismissed spot zoning claim as complaint alleged the purpose of rezoning was to benefit the interests of the county, as well as the interests of a private landowner); *Guest v. King George Cnty. Bd. of Sup'rs*, 42 Va. Cir. 348 (King George Cnty. 1997).

In practice, most Virginia zoning actions take place for the benefit of the particular applicant, and because most localities employ 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. It will only be the exceptional case in which there is no arguable public purpose or benefit in which the spot zoning argument will have much chance of success.

“Contract zoning” is similarly illegal. In *Pima Gro Systems v. Board of Supervisors of King George County*, 52 Va. Cir. 241 (King George Cnty. 2000), the circuit court held that a consent decree to which the county was a party and which allowed activity that violated a valid ordinance was void ab initio. It did so despite the fact that the activity was permitted by an otherwise unchallenged and unappealed order by another judge.

1-8.05 Board of Supervisors of Loudoun County v. Lerner

Perhaps the principal concern expressed by local governments in growing areas was once their difficulty in financing the cost of infrastructure required to support the growth that has generated the need for it. The Supreme Court had historically taken the view that the locality must find the means of raising the necessary revenue notwithstanding and that it must do so largely from resources other than the developer himself.

Thus, as has been noted above, it once seemed settled that localities could not time or phase development to coincide with the availability of public facilities. *Bd. of Sup'rs of Fairfax Cnty. v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *Bd. of Sup'rs of Fairfax Cnty. v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975). The Supreme Court's decision in *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980), however, was a major shift in its treatment of this and other land use issues.

It is important to recall that in *Allman*, the Court reversed a rezoning denial in large part because the Fairfax County Board of Supervisors had attempted to time or 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. *Id.* The Court then added that these facilities follow, and do not precede, development. Denial, therefore, constituted an unjustifiable refusal to increase the permissible development density of certain property to the category established by a duly adopted comprehensive or master land use plan. *Id.* This result was consequential because of the extent to which the Court went to find the existence of public facilities adequate to support the Allman proposal.

Lerner appeared to be on all fours with *Allman*, and indeed the trial court specifically thought so and considered it dispositive. The landowner had applied to rezone a large tract 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 comprehensive plan indeed expressly anticipated that a shopping center would be feasible for the Lerner site but only on the condition that certain population densities first be reached in the surrounding market area. On appeal the parties interestingly 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 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 almost never mentioned.

Lerner is primarily a timed development case that seems to stand in direct contrast to *Allman* and *Williams*. There are, however, enough differences to appear 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, (but see *Bd. of Sup'rs of Fairfax Cnty. v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975), where such expression was insufficient),

and it 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 *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 anticipate 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." See *Bd. of Sup'rs of Fairfax Cnty. v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

One last point may be noted. Contrary to the Supreme Court's increasing emphasis on the significance of the underlying zoning of the land, there was absolutely no discussion in *Lerner* as to 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 soon thereafter developed in *Jackson* and *IFS*, discussed in section 1-8.06, then the rest of its reasoning with respect to the significance of the comprehensive plan would have been surplusage. The case is very valuable to the local government attorney precisely because the Court chose a broader basis for its ruling.

Lerner does not stand alone. In *City Council of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996), the Court cited the case 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.

1-8.06 Jackson, IFS, and their Progeny

Since *Lerner*, the Virginia Supreme 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 Supreme 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. *City Council v. Harrell*, 236 Va. 99, 372 S.E.2d 139 (1988). This shift more clearly forces the landowner to assume the burden of proving the unreasonableness of the existing zoning than was once thought to be the case. In *Board of Supervisors of Roanoke County v. International Funeral Services, Inc. (IFS)*, 221 Va. 840, 275 S.E.2d 586 (1981) and *Board of Supervisors of Fairfax County v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980), the Court held that an applicant for rezoning bears a threshold burden in litigation of demonstrating 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 in earlier cases by the Court, these cases vividly 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. See also *City of Covington v. APB Whiting, Inc.*, 234 Va. 155, 360 S.E.2d 206 (1987); *Bd. of Sup'rs of Fairfax Cnty. v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991) (presented with two uses, 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).

See, however, section 1-10.04. The Court's decision in *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), did not address the underlying use issue, where it might have seemed necessary to do so.

1-8.07 Treatment of Claims that a Land Use Decision was Arbitrary, Capricious, or Unreasonable on Demurrer

It is generally thought that an allegation that a rezoning decision was arbitrary, capricious, or unreasonable is essentially non-demurrable, because it is so thoroughly a fact-dependent inquiry. This rule, while generally correct, is not without exception. Demurrer is appropriate if the pleadings themselves fail to allege facts that would demonstrate the unreasonableness of the legislative decision, or the ground asserted for the unreasonableness is simply insufficient as a matter of law. For example, in *Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995), the Court affirmed dismissal on demurrer of a zoning challenge based upon the locality's asserted failure to comply with the provisions of Va. Code § 15.2-2223 requiring the location of recycling centers be shown on a comprehensive plan and § 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 such grounds, the Court reversed the lower court's dismissal because "[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.'" *Id.*

While not a land use decision, *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603, 628 S.E.2d 298 (2006), concerned the granting of a demurrer when the legal standard for the legislative decision was "fairly debatable." In that case, the plaintiffs, by attaching a county report to the complaint, in effect provided both sides of the evidentiary issue through their filing, thus making a legal determination that the issue was fairly debatable an appropriate decision on demurrer.

According to at least one circuit court, where the complainant does allege facts sufficient to put reasonableness in question, the locality must "allege facts showing evidence of reasonableness in [its] answer." See *Clark v. Town of Middleburg*, 26 Va. Cir. 472 (Loudoun Cnty. 1990).

1-8.08 Treatment of Cases Upon a Determination That the Locality Has Erred

When the locality loses, circuit courts do not have the authority to rezone property.³⁹ Therefore, if a court finds for the plaintiff and strikes down the local decision, it must then determine what zoning classifications the evidence has shown to be reasonable, and then remand the case to the governing body with instructions to reconsider rezoning the property to one or the other of those zones within a period of time, generally ninety days. Should the governing body fail to act within that period, the court is then to issue a final injunction prohibiting the locality 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. See, e.g., *City Council of Fairfax v. Swart*, 216 Va. 170, 217 S.E.2d 803 (1975).

1-8.09 Residential Cluster Development

A locality may provide for increased residential density through a cluster development of single-family dwellings and an open space preservation ordinance. Virginia Code § 15.2-2286(A)(12)(b) provides that a cluster development zoning or subdivision ordinance may provide for a greater density than would otherwise be permitted by applicable land use

³⁹ *Allman* established that a court is powerless to rezone property. It must remand the matter to the governing body for reconsideration. *Bd. of Sup'rs of Fairfax Cnty. v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975). See also *Boggs v. Bd. of Sup'rs of Fairfax Cnty.*, 211 Va. 488, 178 S.E.2d 508 (1971).

ordinances. If such a provision is adopted, the ordinance shall provide either (i) that the development is allowed as of right and approved administratively without a public hearing, or (ii) that a greater density than is otherwise permitted is only allowable upon approval of a special exception, special use permit, conditional use permit, or rezoning.

A cluster development ordinance can also provide that density shall be only as otherwise allowable. If the cluster development ordinance does not allow increased density, the development must be allowed of right and approved administratively without a public hearing. However, any such ordinance may exempt developments of two acres or less. Va. Code § 15.2-2286(A)(12)(a).

If a locality already had a cluster development ordinance that required discretionary approval, the ordinance had to comply with Va. Code § 15.2-2286(A)(12) by July 1, 2004. Ordinances that provided for cluster development by right are grandfathered. Va. Code § 15.2-2286(A)(12)(c).

The zoning ordinance provision regarding the clustering of single-family residences to preserve open spaces is mandatory for counties and cities with a population growth rate of 10 percent or more from the next-to-latest to latest decennial census year. Va. Code § 15.2-2286.1.

1-9 DOWNZONINGS

1-9.01 Overview

Downzoning is a reduction in formerly permitted land use intensity, as when a commercially zoned property is downzoned to permit only low-intensity residential use. It is not downzoning if the property is rezoned from a more economically desirable classification to a less desirable one. In *Board of Supervisors of Culpeper County v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006), the Court held that it is the use of the land, rather than the profit expectation, that is determinative of whether a rezoning is a downzoning.

1-9.02 Is It Piecemeal or Comprehensive?

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 set out above apply to its consideration of the matter, and the locality will usually prevail if the issue is indeed fairly debatable.

In the case of a “piecemeal” downzoning, however, the “normal” standard is substantially modified to the material detriment of the locality. 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 governing body” to demonstrate fraud, mistake, or changed circumstances justifying its course. *Turner v. Bd. of Sup’rs of Prince William Cnty.*, 263 Va. 283, 559 S.E.2d 683 (2002); see also *Henrico Cnty. v. Fralin & Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981); *Bd. of Sup’rs of Fairfax Cnty. v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974); *City of Virginia Beach v. Va. Land Inv. Ass’n No. 1 (VLIA)*, 239 Va. 412, 389 S.E.2d 312 (1990).

In *Snell*, 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.” Piecemeal downzonings, however, do not satisfy this predictability test because they may be adopted “suddenly, arbitrarily, or capriciously.” *Id.* The Court found the downzoning to have been piecemeal where the ordinance was (1) initiated by the zoning authority on its own motion, (2) addressed to a single parcel and an adjacent parcel, and (3) reduced the permissible residential density below that recommended in the master plan. *Id.*; see also *Bd. of Sup’rs of Culpeper Cnty. v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006); *Turner v. Bd. of Sup’rs of Prince William Cnty.*, 263 Va. 283, 559 S.E.2d 683 (2002).

The factors with respect to the analysis of the nature of the downzoning enunciated in *Snell* are not exhaustive of the defects the Court would find in a piecemeal downzoning, and most efforts to downzone will be found piecemeal. See *Turner v. Bd. of Sup'rs of Prince William Cnty.*, 263 Va. 283, 559 S.E.2d 683 (2002); see also Justice Lacy's concurrence in *VLIA*, 239 Va. 412, 389 S.E.2d 312 (1990).

In *VLIA*, the Virginia Beach "Green Line" downzoning, the Virginia Supreme Court held that a downzoning of approximately 3,500 acres of Virginia Beach was piecemeal and not comprehensive, where the downzoned parcels 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 marshlands, and the entire area rezoned constituted no more than 2 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 Supreme Court, indecipherable and smacked of discriminatory purpose or effect. In *Aldre Properties, Inc. v. Board of Supervisors*, Chancery No. 78463-A (Fairfax Cnty. Cir. Ct. Mar. 22, 1984) (commonly referred to as the Occoquan Downzoning Cases), the circuit court ruled that the downzoning of one-third of that county, consistent with an amended comprehensive plan, was a *piecemeal* legislative decision, albeit the court upheld the downzoning.

In *Turner, supra*, the Court ruled that although the downzoning ordinance specified a development density that was in accordance with the comprehensive plan, the county's other land use regulations negatively affected the ability to develop at that density, so the downzoning was piecemeal.

Turner clarified what zoning ordinance qualifies as the "prior" ordinance from which enactment the substantial changes in circumstances that justify the rezoning have taken place. The county had argued that the prior ordinance was the zoning ordinance from 1958 that established the original density. The Court ruled that the relevant prior ordinance was the last ordinance adopted prior to the downzoning ordinance, even though the county argued that it was merely a recodification that did not specifically consider the property.

Lastly, the Court in *Turner* ruled that evidence of a change in circumstance cannot be based on the anticipated traffic impact of future development.

1-9.03 What Suffices to Sustain a Piecemeal Downzoning

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

A mistake requires proof that "material facts or assumptions relied upon by the legislative body at the time of the previous rezoning were erroneous." *Henrico Cnty. v. Fralin & Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981). Because the local governing body is presumed to know all that it knew or could have known at the time of legislative action, this will be 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. *Id.*; see also 2004 Op. Va. Att'y Gen. 224.

Thus, "changed circumstances" must generally be shown if the locality is to prevail in a piecemeal downzoning case. This means a changed condition, as shown by objectively verifiable evidence, which substantially affects the character of the neighborhood insofar as the public health, safety, or welfare is concerned. *Id.*; see *Seabrooke Partners v. City of Chesapeake*, 240 Va. 102, 393 S.E.2d 191 (1990) (application of the principle of changed circumstances).

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*, Chancery No. 78463-A (Fairfax Cnty. Cir. Ct. Mar. 22, 1984) (the Occoquan Downzoning Cases), however, the circuit 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 limited in its effect to Fairfax County. Then, in 1990, the Supreme Court itself upheld a piecemeal downzoning for the first time in *Seabrooke Partners, supra*. In *Seabrooke Partners*, the Chesapeake City Council had rezoned a thirty-four-acre tract to multi-family uses almost twenty years earlier. The tract was never so developed, and the property owner later submitted a subdivision plat for approximately half of the tract to be developed as single-family housing, which was approved. A plat was subsequently submitted and approved for the remainder to be developed as a single-family residential housing. 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 to another corporation. This approximately ten-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 planning commission had decided upon the site plan application, however, the city council downzoned the ten 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 twenty years ago 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 since the original zoning, since the original thirty-four-acre tract had been developed as single-family housing, not the multi-family dwellings that had concededly been approved, and 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 deference to the city's definition of the appropriate "neighborhood" boundaries for purposes of downzoning analysis and for the fact that the Court actually agreed that circumstances had changed.

1-9.04 Downzoning Legislation

1-9.04(a) The "Quillen Bill" and the Multi-County Transportation Improvement District Act

In the wake of Fairfax County's effort to downzone its commercial and industrial zoning districts in the late 1980s, the General Assembly demonstrated in the 1990 session its resistance to the elimination of zoning approvals that had been earlier granted. This was initially true with respect to "proffered" zonings wherein the landowner has made significant promises in return for zoning authorization. The legislature passed several amendments to the conditional zoning provisions of Va. Code § 15.2-2303(B), and the similar provisions of the other forms of conditional zoning that provide in almost identical language that

In 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 with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.⁴⁰

A second unique form of statutory “vesting” was also created in connection with the use of a multi-county transportation improvement district. Va. Code § 15.2-4600 et seq. These districts are created for the general purpose of funding major transportation improvements through the sale of bonds and their repayment through, inter alia, special levies on properties within the districts. After Fairfax downzoned the commercial and industrial properties in the Route 28 special taxing district, created under the authority of this statute, the General Assembly was prevailed upon to provide protections for property owners who might be included within such districts from the adverse effects on land values accompanying downzonings. Now, when a district is created, Va. Code § 15.2-4603(C) requires that the creating resolution

provide a description with specific terms and conditions of all commercial and industrial zoning classifications which shall be in force in the district upon its creation, together with any related criteria, and a term of years, not to exceed twenty years, as to which each such zoning classification and each related criterion set forth therein shall not be eliminated, reduced or restricted if a special tax is imposed However, this commitment shall not limit the legislative prerogative of the board of supervisors in any county in which a district is wholly or partly located with respect to land-use approvals of any kind arising from requests initiated by any owner of property therein, or as specifically required to comply with the provisions of the Chesapeake Bay Preservation Act . . . or the regulations adopted pursuant thereto, or other state law, or the requirements of the federal Clean Water Act . . . and regulations promulgated thereunder by the federal Environmental Protection Agency or applicable state regulations.

Specific further protections exist for properties in districts created prior to July 1, 1992, regarding uses, densities, setbacks, building heights, required parking, and open space. See *also* Va. Code § 15.2-4700 (similar provisions apply in transportation improvement districts created in individual counties).

Although it is common to refer to these statutes as “vesting” legislation, it is actually more accurate to identify them as examples of *grandfathering*, since they do not necessarily constitute property rights obtained by virtue of development activity, as is the case when vested rights arise, but rather rights granted by the legislature, thus deriving exclusively from statutory exceptions to the general powers of the local government. See section 1-15.11.

1-9.04(b) Voluntary Downzoning

A locality may 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 equal to the amount of excess real estate taxes that the landowner has paid because of the higher zoning classification. The locality may establish reasonable guidelines

⁴⁰ This legislation is generally known as “Quillen Vesting,” after its chief sponsor, former Gate City Delegate (and retired Circuit Court Judge) Ford Quillen.

for determining the amount of excess real estate tax collected and the method and duration for applying the tax credit. Va. Code § 15.2-2286(A)(11).

1-10 SPECIAL USE PERMITS

1-10.01 The Nature of the 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. These terms have been deemed to be interchangeable in Virginia. *Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989); *Fairfax Cnty. v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). There is no difference between these terms and the similar term, conditional use permit.

In *Blakeley v. Board of Supervisors of Fairfax County*, No. CL-2010-0005765 (Fairfax Cnty. Cir. Ct. Apr. 12, 2011), the Fairfax County Circuit Court, construing Virginia Code §§ 15.2-2286(A)(1) and 15.2-2201 (definition section), held that localities do not have authority to use the special use process to allow deviations in lot size and area. Under the Dillon Rule, special use ordinances may only address uses of property, and variations are the sole means of addressing deviations in lot size and area.

The grant or denial of these permits may be handled by the board of zoning appeals or directly by the governing body itself. Va. Code §§ 15.2-2286(A)(3) and 15.2-2309(6).⁴¹ Revocation of special use permits, however, must be by the body that originally granted the permit. Va. Code § 15.2-2309(7).

The grant of a special use permit is, moreover, an affirmative legislative, and not administrative, action. *Byrum v. Bd. of Sup'rs of Orange Cnty.*, 217 Va. 37, 225 S.E.2d 369 (1976); *Bollinger v. Bd. of Sup'rs of Roanoke Cnty.*, 217 Va. 185, 227 S.E.2d 682 (1976); *Cnty. Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989); *Bd. of Sup'rs of Fairfax Cnty. v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). See also *Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983), which held that the power to zone is a legislative power that a local government body cannot delegate. See also *Friends of Clark Mountain Found., Inc. v. Bd. of Sup'rs of Orange Cnty.*, 242 Va. 16, 406 S.E.2d 19 (1991). The Virginia Supreme Court has treated the granting or denial of special use permits as it would any other rezoning decisions. *Bratic, supra*; see also *City of Richmond v. Randall*, 215 Va. 506, 211 S.E.2d 56 (1975). See discussion [below](#) regarding the different standards of review for a decision of the board of zoning appeals (BZA) versus that of the governing body.

If a business owner has a business license for a nonconforming use, has been operating in the same location for fifteen years, and has paid all local taxes related to such use, then the owner may apply for rezoning or a special use permit without charge. Va. Code § 15.2-2307(C).

1-10.02 The Need for Express Standards in an Ordinance for the Guidance of the Legislative Will in Issuing Special Use Permits

From time to time, courts have danced around the question of whether the issuance of special use permits must be done pursuant to some standards contained in the zoning ordinance to guide and restrain the exercise of legislative discretion. The answer with regard to a decision by a locality is "no," but it is strongly suggested in two Supreme Court opinions that standards must exist for consideration by the board of zoning appeals. In *Jennings v.*

⁴¹ Note that a condemnor may not condition or delay the timely consideration of any application, permit grant, or other approval for any real property for the purpose, expressed or implied, of allowing the locality to condemn or consider condemning or otherwise acquiring the property. Va. Code § 15.2-1901(C).

Board of Supervisors of Northumberland County, 281 Va. 511, 708 S.E.2d 841 (2011), the Supreme Court cited *Bollinger v. Board of Supervisors of Roanoke County*, 217 Va. 185, 227 S.E.2d 682 (1976) and *Cole v. City Council of Waynesboro*, 218 Va. 827, 241 S.E.2d 765 (1978) in support of its holding that, as localities are acting in a legislative manner when they grant or deny a special use permit, zoning ordinances need not include express standards as long as the decision is guided by general zoning principles. The Court, however, also suggested that for the delegation of legislative authority, at least to a board of zoning appeals, there must be specific policies and definite standards to guide the official, agency, or board in the exercise of power, citing *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990). The Court in *Newberry Station HOA v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013), stated in dicta that “when the local governing body delegates the power to approve or deny a special exception . . . standards *must* be articulated in the zoning ordinance.” (emphasis in original). The case of *Byrum v. Board of Supervisors of Orange County*, 217 Va. 37, 225 S.E.2d 369 (1976) may also be read for such a proposition. “Neither do we agree . . . that the Board of Supervisors of Orange County is wholly without standards to guide it in the granting or denying of use permits. Had the Board delegated to an administrator or an administrative agency the power to issue or to deny conditional use permits the law would have required adequate guidelines and standards.” *Id.* See also discussion of *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 727 S.E.2d 40 (2012), in section 1-3.02.

The presumption of validity applies in reviewing whether the local governing body, or the body to which the power to grant a special use permit is delegated, adequately considered the standards set forth in the zoning ordinance when it approved or denied a special use application. *Newberry Station HOA v. Bd. Of Sup’rs of Fairfax Cnty.*, 285 Va. 604, 740 S.E.2d 548 (2013). For a discussion of the presumption of validity, see section 1-8.02.

A board of supervisors may consider a comprehensive plan when granting special exceptions, but it is not bound by the plan. *Rohr v. Bd. Of Sup’rs of Fauquier Cnty.*, 75 Va. Cir. 167 (Fauquier Cnty. 2008).

The local governing body need not make written findings of fact to reverse a decision by its planning commission when it considers a special use permit for a public use that is subject to review under Va. Code § 15.2-2232. *Concerned Taxpayers v. Cnty. Of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995).

Finally, note that in reviewing North Carolina law, which has very specific standards of review and conditions that could be imposed regarding a special use permit, the Fourth Circuit upheld the denial of a preliminary injunction that sought the mandated issuance of a special permit for a topless bar on First Amendment grounds. The court held that to survive a First Amendment challenge, a special use permit scheme must limit the decision-maker’s discretion and provide for prompt administrative determination and prompt judicial review. *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999) (relying on *11126 Baltimore Blvd., Inc. v. Prince George’s Cnty.*, 58 F.3d 988 (4th Cir. 1995) (en banc)). The United States Supreme Court clarified that when land use ordinances (an adult business licensing ordinance in this case) implicate First Amendment rights, a prompt judicial decision is required, not just speedy access to a court. The Court found, however, that a state’s normal judicial procedures should allow for such a prompt decision and that special judicial time limitations are not required. *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219 (2004).

1-10.03 The Imposition of Conditions on the Grant of a 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.” Va. Code § 15.2-2286(A)(3). This phrase is uniformly

understood to mean that the locality may unilaterally impose reasonable conditions on the issuance of such permits or exceptions, in contrast to proffers that must come voluntarily from the applicant.

Once issued, the locality may revoke a permit only for failure to comply with these conditions. *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984); *Bd. of Zoning Appeals of Fairfax Cnty. v. Cedar Knoll, Inc.*, 217 Va. 740, 232 S.E.2d 767 (1977). It may, as well, seek affirmative compliance with the conditions through equity. How one revokes a permit is not made clear in any case, but it may presumably be done in the same fashion as granted and not otherwise. The Supreme Court has held that when a special use permit contains a condition authorizing its revocation for the holder's failure to comply with "any law," the law upon which such revocation is based must have a direct nexus to the purpose of the special use permit. *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007).

Virginia courts have occasionally suggested that there are reasonably narrow boundaries on the authority to impose conditions on a special use permit in the very few cases that address the substance of such conditions. It seems, for example, that the locality can impose conditions that address on-site access to public roads (*Bd. of Sup'rs v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982)) but it cannot lawfully address matters solely within the purview of the Department of Transportation, such as entrance design, sight distances, and the like. More recent decisions, however, suggest a broader power. In *County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 559 S.E.2d 627 (2002) (amicus brief filed by LGA), the Court found that a condition that prohibited the sale of alcohol was legitimate and not in conflict with the authority of the ABC Board. See also *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981) (special use permit requirement for establishments serving alcohol located in residential areas within 1,000 feet of each other is valid and does not conflict with authority conferred upon the ABC Commission). In *Merrick Land Trust I v. Louisa County Board of Supervisors*, 54 Va. Cir. 378 (Louisa Cnty. 2001), the court held that because Va. Code § 15.2-2286(A)(3) grants plenary authority to the locality to impose reasonable conditions, there is no requirement that specific enabling authority be identified for particular conditions and there are no express restrictions on what conditions may be imposed. See also 2010 Op. Va. Att'y Gen. 79 (a local governing body has the authority to classify payday loan businesses as a special use permit); *Fuentes v. Bd. of Sup'rs of Fairfax Cnty.*, No. 186364 (Fairfax Cnty. Cir. Ct. July 27, 2000) (conditions can provide for sewage system approval and groundwater monitoring by the Department of Health); cf. 2010 Op. Va. Att'y Gen. 53 (locality cannot require an owner to obtain a special exception in order to install an alternative onsite sewage system if the conditions set forth in § 15.2-2157 exist). 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. *Cupp v. Bd. of Sup'rs of Fairfax Cnty.*, 227 Va. 580, 318 S.E.2d 407 (1984). In *Wilson v. Henry County Board of Zoning Appeals*, 69 Va. Cir. 255 (Henry Cnty. 2005), the court held that a BZA could not impose as a condition the installation of a traffic light on a public road, holding it impaired the property rights of those foreign to the application.

United States Supreme Court decisions may also be read to suggest that there is a federal constitutional basis to these limitations and that the relationship required between involuntary development conditions and the demands generated by the subject development must meet the requirements of the Fifth and Fourteenth Amendments. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987). And, as noted above, limitations imposed on the locality's power to impose conditions may not be restricted to constitutional problems. Even under state law, the conditions must be "suitable," Va. Code § 15.2-2286(A)(3), and a court may therefore inquire into the reasonableness as well as the constitutional validity of any involuntarily imposed condition.

Arlington County, apparently uniquely, combined the special exception and site plan approval process (see section 1-11) to address affordable housing concerns. In order to obtain the higher-density development specified in the comprehensive plan but not allowed by-right by the applicable zoning district, developers were required to use the site plan process to obtain the special exception. Part of that process included compliance with “guidelines” regarding contributions of money to the county’s affordable housing fund or including a certain number of affordable housing units in the development. In *Kansas-Lincoln, L.C. v. County Board of Arlington*, 66 Va. Cir. 274 (Arlington Cnty. 2004), the circuit court, after first finding that the contributions were not voluntary but mandatory in fact, held that these guidelines exceeded the county’s statutory authority in part because the policy was generally applicable instead of based on the needs and impact of each individual proposed development project. Soon thereafter, the Code of Virginia was amended to give Arlington County the statutory authority to require affordable housing units or contributions to an affordable housing fund as a special exception condition. Va. Code § 15.2-735.1. Indeed, all localities are now permitted to amend their zoning ordinances to provide for affordable housing programs, with various incentives and restrictions. Va. Code §§ 15.2-2304, 15.2-2305, 15.2-2305.1.⁴² Moreover, localities are *required* to incorporate “strategies to promote manufactured housing as a source of affordable housing” in any amendment after July 1, 2021, of a comprehensive plan. Va. Code § 15.2-2223.5.

See section 1-3 regarding affirmative limitations on the authority of local governments to require special use permits for certain uses.

1-10.04 Standard of Review on Judicial Appeal

An aggrieved applicant for a special use permit may file a declaratory judgment to challenge the denial of such a permit or the imposition of a condition that the applicant asserts is unreasonable. If the action is taken by a board of zoning appeals, as with the review of other BZA decisions, the appeal is by writ of certiorari to the circuit court. As in such cases, the issuance of a writ to review the actions of a BZA regarding special use permits is not discretionary but rather is a matter of right as long as specified requirements are satisfied. *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Bd. of Sup’rs of Fairfax Cnty. v. Bd. of Zoning Appeals*, 225 Va. 235, 302 S.E.2d 19 (1983). It remains imperative that when the board of zoning appeals acts on a special use permit application, however, it makes 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.” *Ames, supra*. However, any party may introduce evidence on appeal. Va. Code § 15.2-2314.

The certiorari process does not authorize a trial court to rule on the validity or constitutionality of legislation underlying a board of zoning appeals decision. *City of Emporia Bd. of Zoning Appeals v. Mangum*, 263 Va. 38, 556 S.E.2d 779 (2002); *Bd. of Zoning Appeals v. Univ. Square Assocs.*, 246 Va. 290, 435 S.E.2d 385 (1993); *Kebabs v. Bd. of Zoning Appeals of Fairfax Cnty.*, No. L193641 (Fairfax Cnty. Cir. Ct. Feb. 27, 2004) (no authority to determine constitutionality of Religious Land Use & Institutionalized Persons Act). Such challenges must be presented by an appropriate further action, generally for declaratory judgment.

⁴² Virginia Code § 15.2-2305.1 provides that any local ordinance may authorize the governing body to (i) establish qualifying jurisdiction-wide affordable dwelling unit sales prices based on local market conditions, (ii) establish jurisdiction-wide affordable housing dwelling unit qualifying income guidelines, and (iii) offer incentives other than density increases, such as reductions or waivers of permit, development, and infrastructure fees, as the governing body deems appropriate to encourage the provision of affordable housing.

Prior to the enactment of amendments to Va. Code § 15.2-2314, there was no difference in the standard of review applied by courts to decisions regarding special use permits issued by BZAs or the governing body, for they each acted legislatively when they granted or refused such permits. In 2003, however, the General Assembly statutorily set the standard of review of a BZA decision for variances and special use permits. The Supreme Court subsequently held in *Lamar Co. v. City of Richmond*, 287 Va. 322, 757 S.E.2d 15 (2014), that a variance decision by a BZA is not to be evaluated under the “fairly debatable” standard but rather by the specific terms of Va. Code § 15.2-2314, raising the question of whether “fairly debatable” applied to the special use permits, which had the same statutory standard of review as variances. In response to *Lamar*, the General Assembly again amended Va. Code § 15.2-2314, which now provides that the party appealing a special use decision must show to the satisfaction of the court that the BZA applied erroneous principles of law, or, where the discretion of the BZA is involved, that the decision of the board was plainly wrong, was in violation of the purpose and intent of the zoning ordinance, *and is not fairly debatable*. The inclusion of the “fairly debatable” language was intended to remove the uncertainty caused by the Virginia Supreme Court’s decision in *Lamar* and the fairly debatable standard is applicable to both the decisions of the governing body and the BZA, although an appellant also must show for BZA decisions that the exercise of BZA discretion was plainly wrong and in violation of the purposes of the zoning ordinance.

In *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), the Court considered a request for a “deviation” from the otherwise applicable setback requirements from the Dulles Airport Access Road in Fairfax County. Holding that such a “deviation” was a legislative action that “did not involve a challenge to the reasonableness of the current zoning classification,” the Court then held that the action was “analogous to an application like the application for a conditional use permit in *Cowardin*, 239 Va. at 523, 391 S.E.2d at 268, and the use permit in *Bratic*, 237 Va. at 222, 377 S.E.2d at 368.” In its footnote 4, however, the Court went out of its way to observe that *Robertson* did not involve a rezoning, and thus *Robertson*

did not have to produce evidence showing that the use of his property for one single-family dwelling was unreasonable. *Contra City Council of Virginia Beach v. Harrell*, 236 Va. 99, 102, 372 S.E.2d 139, 141 (1988). “When a landowner has been denied *rezoning* and he challenges the denial, his threshold burden of proof requires a clear demonstration that ‘the existing zoning classification is no longer reasonable or appropriate.’” *Board of Supervisors v. International Funeral Serv., Inc.*, 221 Va. 840, 843, 275 S.E.2d 586, 588 (1981).

In *Harrell*, the city council had denied a special use permit for the addition of gasoline pumps to an existing convenience store. The Supreme Court affirmed that denial and held that because the underlying use permitted was reasonable (the convenience store without the pumps), that existing use was reasonable and the decision to deny could not be other than fairly debatable. In *Bratic*, the Court had sustained a decision to deny a special use permit, because the underlying use of the property was reasonable and the denial thus inherently fairly debatable.⁴³

The *Robertson* decision is confusing, for it appears to eliminate the *IFS/Harrell* test set out [above](#) as it had been applied to all legislative denials including special use permits:

⁴³ In *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996), the Virginia Supreme Court applied the fairly debatable standard to the statutory construction of a conditional use permit ordinance. Rather than construe the ordinance itself (at issue was the associated words doctrine), the Court held that the City’s construction was sufficiently reasonable to justify the granting of the conditional use permit. See also *Board of Supervisors of Rockingham Cnty. v. Stickley*, 263 Va. 1, 556 S.E.2d 748 (2002), distinguished by the Court in *Robertson*.

to wit, the initial inquiry in all zoning cases, including special use permit cases, had been whether the existing zoning remained reasonable. If so, then the legislative denial would ordinarily have been sustained without more. Before *Robertson*, it appeared that because *some* by-right use of the property would generally exist in every zoning district, then denials would almost always be fairly debatable and the “existing” zoning defensible. *Robertson* suggests that at least in those special use permit cases in which there is no request to rezone land to a different classification (and thus essentially all special use permit cases), the inquiry is whether the denial of the permit itself was fairly debatable—without consideration of the reasonableness of the underlying zoning. The *IFS/Harrell* test would therefore be limited to upzoning cases.

The Court’s citation to *Harrell* is perplexing, however, for its employment of the “contra” form of citation recognizes that *Harrell* indeed stands for the contrary proposition to that expressed in the *Robertson* opinion. However, *Robertson* does not expressly overrule *Harrell*, leaving a question whether there are some special use permit cases in which the *Harrell* approach remains valid.

As a practical matter, it would seem that little remains of *Harrell*. If this is a change in the law, however, it would be one of little significance, for the Court reiterated in *Robertson* that a locality’s denial of such a legislative action will be deemed fairly debatable if the locality produces *any sufficiently probative evidence to support it*.

The Court did not resolve the conflict between *Harrell* and *Robertson* in its decision in *EMAC, L.L.C. v. County of Hanover*, 291 Va. 13, 781 S.E.2d 181 (2016). The Court did not cite to *Robertson*; it did cite to *Harrell*, but distinguished its holding. In *EMAC*, in anticipation of the development of a proposed outlet mall, a landowner of much of the proposed outlet mall property requested a conditional use permit for two electronic billboards that would be used to advertise the mall. One sign site was located on the applicant’s property (the northern site) and the second was located on property owned by EMAC (the southern site). EMAC had signed a non-binding letter of intent to sell the property to the outlet mall developer, who also planned to buy the applicant’s property. Ultimately, however, the deal between EMAC and the outlet mall developer fell through. Two years later, when the original landowner applicant applied for a second extension of the conditional use permit for the northern site, EMAC requested an extension for the conditional use permit for the southern site located on its property. The county extended the permit for the northern site but denied the extension for EMAC’s southern site.

EMAC sued, alleging impermissible discrimination between similarly situated landowners. Relying on *Harrell* and *IFS*, the circuit court held that EMAC had failed to prove that its underlying zoning ordinance (the zoning with which it was left after the denial) was itself unreasonable. The county asserted that this was an essential predicate to the challenge to the reasonableness of the conditional use permit. The Supreme Court held that applying this standard was error, as impermissibly discriminatory action is unreasonable regardless of whether the underlying zoning remains reasonable. The Court did not address the broader question of whether the reasonableness of the underlying zoning is *ever* an issue in a conditional use case. It did uphold the county’s denial, however, by finding that there had been no impermissible discrimination, as discussed below.

The Supreme Court has previously recognized that a land use decision resulting in impermissible discrimination would not be fairly debatable. *Bd. of Sup’rs of Fairfax Cnty. v. McDonald’s Corp.*, 261 Va. 583, 544 S.E.2d 334 (2001).⁴⁴ To sustain a claim of impermissible discrimination, however, the party contesting the zoning action must show

⁴⁴ Although the Court expressed this as a general legal proposition, it found no discrimination in the *McDonald’s* case itself. There does not, in fact, appear to be any decision of the Court that does so, even as it continues to articulate the proposition.

that a land use permitted to one landowner is forbidden to another similarly situated. *Bd. of Sup'rs of James City Cnty. v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). The locality may defend by showing that there is a rational basis for the action alleged to be discriminatory, thereby establishing the decision as fairly debatable. *EMAC, L.L.C. v. Cnty. of Hanover*, 291 Va. 13, 781 S.E.2d 181 (2016); *Cnty. Bd. of Arlington Cnty. v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989). That the properties in question are adjacent to one another is by itself insufficient to establish a zoning discrimination claim. *Bd. of Sup'rs of Fairfax Cnty. v. McDonald's Corp.*, 261 Va. 583, 544 S.E.2d 334 (2001) (finding comparable properties not similarly situated and therefore decision not discriminatory); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997).

In *EMAC*, the Court first found that the original grant of the conditional use permit for the EMAC southern site was void ab initio, as the permit had not been sought by an owner, its attorney-in-fact, or a tenant of the EMAC property as required by the county ordinance.⁴⁵ It then held that the two competing landowners were not similarly situated, first because of the void permit, and second because the grant of the signs was tied to the development of the outlet mall, a circumstance that only applied to the northern site when the conditional use permits extensions were requested. The Court held this distinction consistent with the public interest, fairly debatable, and accordingly not impermissible discrimination.

It is notable that *EMAC* was decided on demurrer and motion to dismiss. The complaint had been amplified by grant of oyer to include exhibits of the original conditional use permit, the application with accompanying documents showing the proposed locations and renditions of the proposed signs, the application for the permit extension, and other related application documents. The Court found this evidence, incorporated into the plaintiff's complaint, to be sufficient to decide on the written record and without an evidentiary hearing that the decision to deny EMAC's application was fairly debatable even assuming that a proper party had filed the application. Justice Powell in dissent takes the Court to task of each of these issues.

This is consistent, however, with the growing number of cases in which the courts have decided land use cases on the demurrer, where the legislative record was made part of the initial pleadings through oyer. See *Eagle Harbor, L.L.C. v. Isle of Wight Cnty.*, 271 Va. 603, 628 S.E.2d 298 (2006); *Friends of the Rappahannock v. Caroline Cnty.*, 286 Va. 38, 743 S.E.2d 132 (2013); *Rowland v. Town Council of Warrenton*, 298 Va. 703, 842 S.E.2d 398 (2020) (LGA filed [amicus brief](#));⁴⁶ *I.G.S. LLC v. Bd. of Sup'rs of Fairfax Cnty.*, CL 2017-00197 (Sept. 8, 2017) ("The court can determine on demurrer whether a legislative action is fairly debatable when the pleadings incorporate documents that evidence reasonableness" (citing *Eagle Harbor*)); *Ferro v. Arlington Cnty. Bd. Sup'rs*, CL 17-2822 (Jan. 22, 2018).

This has become all the more important in the wake of *Byrne v. City of Alexandria*, 298 Va. 694, 842 S.E.2d 409 (2020), which held that oyer lay to the legislative record upon which the city council's decision in a legislative land use case had been made. Thus, any doubt as to whether oyer may be made in land use cases has effectively been laid to rest, and the legislative record may be compelled to be added to the plaintiff's complaint in

⁴⁵ This is the first time that the Supreme Court has held that a legislative act in the zoning context was void ab initio because an application had not been signed by an appropriate party, and it is not evident from the decision whether this point was briefed or argued. However, it would appear that such an error is not cured by failure to raise the issue within thirty days under either Va. Code § 15.2-2285(F) or § 15.2-2204(E).

⁴⁶ In *Rowland*, the trial court permitted the plaintiffs to amend their complaint three times before granting the Town's demurrer with prejudice on the ground that the legislative record, which had been brought into their complaint by oyer, contained sufficient facts to demonstrate the reasonableness of the Council's actions.

virtually every challenge. In fact, the Court referred to ups and downs of “the development of the over-demurrer remedy” over the years and observed that the use of the remedy “would serve the salutary purpose of avoiding the delay, expense and consumption of judicial resources attendant on trial preparation, trial and appeal in a case that was ill-founded in law.” *Id.*

1-11 SITE PLANS

The enabling legislation authorizes the submission of “plans of development” prior to the issuance of building permits “to assure compliance with regulations contained in [the] zoning ordinance.” Va. Code § 15.2-2286(A)(8). This is universally understood to mean that the locality can require “site plans,” which are themselves defined as “proposal[s] for 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.” Va. Code § 15.2-2201. “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 purpose 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.” *Id.*

Localities thus require the submission of such plans in advance of most projects to permit an evaluation of the proposal against the requirements of the zoning ordinance and the design requirements customarily incorporated within such ordinances. Site plans or plans of development required to be submitted and approved in accordance with Va. Code § 15.2-2286(A)(8) are subject to the mandatorily required provisions of a subdivision ordinance. Va. Code § 15.2-2246.

Site plans are significant events in the development process, and their approval is a ministerial function. When a landowner has submitted a site plan that complies with the requirements of the ordinance, then its approval can be by an action brought pursuant to Va. Code § 15.2-2259 or § 15.2-2260.⁴⁷ The detailed statutory process for appeal of the denial of site (and subdivision) plans, both preliminary and final, is set out in these statutes and provides means by which the landowner may first compel consideration of an improperly delayed site plan, and, if the locality denies the plan, to obtain judicial review of that action. The circuit court is expressly empowered, if it finds that the denial was wrongful, to “enter such order with respect thereto as it deems proper, which may include directing approval of the plat.” *Id.*

There was a time when mandamus was considered the correct form of action. That is no longer the case. *See Ancient Art Tattoo Studio, Ltd. v. City of Virginia Beach*, 263 Va. 593, 561 S.E.2d 690 (2002) (because a decision regarding the classification of a tattoo business was discretionary, mandamus was not the appropriate remedy; it was immaterial that the purpose of delayed decision was so that the zoning ordinance could be amended). In *Umstattd v. Centex Homes*, 274 Va. 541, 650 S.E.2d 527 (2007), the Court also held that mandamus does not lie to compel the acceptance of a subdivision application, because of the discretionary nature of the decision that local officials must make as to whether the

⁴⁷ Before the enabling statutes were amended to permit site plans to be contested through the same statutory appeal process applicable to subdivisions, the Supreme Court had held that mandamus lay to compel consideration of such plans. *Planning Commission of Falls Church v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971) (site plan 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).

application is “complete.” As in *Ancient Art*, the proper complaint is for declaratory judgment.⁴⁸

1-12 PROCEDURAL ISSUES

1-12.01 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 variance applications presented to boards of zoning appeals and all other matters that are taken to a BZA on appeal. The Code sets out in detail the procedural requirements for notice at Va. Code § 15.2-2204.⁴⁹

Construing the pre-2023 version of Va. Code § 15.2-2204(A), the Supreme Court held that published notice of a zoning ordinance text amendment must include a sufficient “descriptive summary” of the action proposed. *Glazebrook v. Bd. of Sup’rs of Spotsylvania Cnty.*, 266 Va. 550, 587 S.E.2d 589 (2003). The *Glazebrook* Court held that such a descriptive summary must cover the main points of the proposed amendment and accurately describe them. Mere notice that the board would “amend development standards” in particular districts, and a direction to the location of the full text, was inadequate notice and thus the adopted amendments were void ab initio. Similarly, in *Gas Mart Corp. v. Board of Supervisors of Loudoun County*, 269 Va. 334, 611 S.E.2d 340 (2005), the Court held that notice that stated that the ordinance addressed “[p]rovisions to implement the Conservation Design policies in the Revised General Plan” was insufficiently descriptive of the zoning ordinance. The Court in *Gas Mart* also held that stating that certain rezoning would affect “the western portion of the County” was also insufficiently descriptive, suggesting that specific geographic boundaries or landmarks of the affected areas must be included in the descriptive summary. See also *McLean Hamlet Citizens, Inc. v. Fairfax Cnty. Bd. of Sup’rs*, 40 Va. Cir. 69 (Fairfax Cnty. 1995) (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).

However, the General Assembly deleted the statute’s “descriptive summary” requirement in 2023; it now requires only that the notice must identify the place within the locality where the proposed amendments may be examined and provide notice of the governing body’s intention to adopt the proposed amendments. Va. Code § 15.2-2204(A).⁵⁰

The planning commission cannot 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 some newspaper published or having general circulation in such locality; however, such notice for both the local commission and the governing body may be published concurrently. In *Gas Mart, supra*, the Court held that using the word “consider” instead of “adopt” in the notice of intention satisfied the requirements of the statute. Such notice must specify the time and place of hearing at which persons affected

⁴⁸ In *C. Givens Brothers, LLC v. Town of Blacksburg*, 273 Va. 281, 641 S.E.2d 113 (2007), the Supreme Court held that petitions for writs of mandamus against localities for equitable relief are subject to applicable statutes of limitations.

⁴⁹ The zoning amendment notice requirements are deemed satisfied and the provisions of the recorded plat or site plan shall control if a recorded plat or final site plat has been approved by the local governing body (not the planning commission or other designee) as in compliance with previously approved conditional zoning, and the plat provisions are then found to conflict with the underlying conditional zoning. Va. Code § 15.2-2261.1.

⁵⁰ When a proposed amendment involves a change in the zoning map classification of twenty-five or fewer parcels of land, the advertisement shall also include the street address or tax map parcel number of the parcels as well as the approximate acreage subject to the plan. For more than one hundred parcels, the advertisement may instead include a description of the area’s boundaries and a link to the map of the subject area. Va. Code § 15.2-2204(B).

may appear and present their views, not less than six days nor more than twenty-one days after the second advertisement appears in such newspaper. The commission and governing body may hold a joint public hearing after public notice as set forth herein above. If such joint hearing is held, only the public body need then give public notice as set forth above. The term "two successive weeks" means that notice shall be published at least twice in an appropriate newspaper with not less than six days elapsing between the first and second publication. See *Greene v. Fairfax Cnty. Bd. of Sup'rs*, 40 Va. Cir. 144 (Fairfax Cnty. 1996) (notice for hearing that was rescheduled adequate for subsequent hearing even though it was held more than twenty-one days after notice).

Virginia Code § 15.2-2204 establishes detailed requirements, too, for the written notice that is to be sent to adjacent property owners. When a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or fewer parcels of land, then, in addition to the advertising as above required, 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 which 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 such incorporated property owners' associations within the planned unit development that have members owning property located within 2,000 feet of the affected property as may be required by the commission or its agent.⁵¹ Notice sent by registered or certified mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records is adequate compliance with this requirement. If the hearing is continued, notice shall be remailed. Costs of any notice required under this chapter shall be taxed to the applicant.

When a proposed amendment of the zoning ordinance involves a change in the zoning map classification of more than twenty-five parcels of land or a change to the applicable zoning ordinance text regulations that decreases the allowed dwelling unit density of any parcel⁵², then, in addition to the advertising as above required, written notice shall be given by the local commission or its representative at least five days before the hearing to the owner, owners, or their agent of each parcel of land involved.⁵³ One notice sent by first-class mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed adequate compliance with this requirement, provided that a representative of the local commission shall make affidavit that such mailings have been made and file such affidavit with the papers in the case. Amendments or ordinances adopted without such notice because of the inadvertent failure by the representative of the local commission to give written notice do not invalidate the action.

⁵¹ However, when a proposed amendment involves a tract of land not less than 500 acres owned by the Commonwealth or the federal government, and when the proposed change affects only a portion of the larger tract, notice must be given only to the owners of those properties that are adjacent to the affected area of the larger tract.

⁵² Written notice of changes to zoning ordinance text regulations need not be mailed to the owner, owners, or their agent of lots shown on an approved and recorded subdivision plat where such lots are less than 11,500 square feet. Va. Code § 15.2-2204.

⁵³ The Attorney General has opined that this provision on amendments to the zoning ordinance also requires that individual notice be sent for an initial zoning ordinance that imposes regulations that decrease the allowed dwelling density. 2007 Op. Va. Att'y Gen. 50. The Attorney General has also opined that notice must be sent when a decrease in density is proposed even if the locality is simultaneously considering offsetting rezoning actions. 2013 Op. Va. Att'y Gen. 113.

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.

Whenever the notices required are sent by an agency, department or division of the local governing body, or their representative, such notices may be sent by first-class mail provided that a representative of such agency, department or division makes affidavit that such mailings have been made and file that affidavit with the papers in the case.

A circuit court held that a governing body can revisit a rezoning decision by a motion to reconsider at a subsequent meeting without the notice and re-advertisement requirements of Va. Code § 15.2-2204. *Centex Homes, G.P. v. Bd. of Sup'rs of Loudoun Cnty.*, 74 Va. Cir. 54 (Loudoun Cnty. 2007).

A party's actual notice of, or active participation in, the proceedings for which the written notice provided is required waives the right of that party to challenge the validity of the proceeding due to failure of the party to receive notice required by this section. *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013). 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 of the bulk or height of an existing or proposed building, but not including renewals of previously approved special exceptions, 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 ten days before the hearing to the chief administrative officer of that locality. Note that the "section" referred to incorporates all of Va. Code § 15.2-2204, and thus actual notice or active participation in a proceeding constitutes a waiver not only of written notice, but of defects in published notice as well.

If a request for an order, requirement, decision, or determination from the zoning administrator or the BZA that is subject to appeal is not from the property owner, then written notice must be given to the property owner within ten days of the receipt of the request by the zoning administrator or, if so directed by the zoning administrator, by the requester. Va. Code § 15.2-2204(H). This requirement does not apply to "inquiries" made by local governments "in the normal course of business," but presumably such inquiries would not be appealable. This provision does not state what the effect of failure to provide notice of the request will be on the binding nature of the ultimate decision, but the Code does provide that the property owner must have written notice of the decision of a governing body or BZA on an appeal of a zoning administrator's decision for it to be binding on the property owner. Va. Code §§ 15.2-2301 and 15.2-2311.

1-12.02 The Locality May Require that the Applicant Give These Notices

The governing body of any locality may require that a person applying for a zoning approval shall be responsible for all notices, and those notices must comply with Va. Code § 15.2-2204. Va. Code § 15.2-2206.

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. The applicant may rely upon records of the local real estate assessor's office to ascertain the names of persons entitled to notice.

A certification of notice and a listing of the persons to whom notice has been sent shall be supplied by the applicant as required by the local governing body at least five days prior to the first hearing.

The governing body shall allow any person entitled to notice to waive such right in writing.

1-12.03 Provision of Even Further Notice May Be Given

Pursuant to Va. Code § 15.2-2205, the governing body of any county, city, or town may give, in addition to any specific notice required by law, notice by direct mail or any other means of any planning or zoning matter it deems appropriate. It is this provision under which many jurisdictions have adopted extensive site posting requirements.

1-12.04 Notice Required for the Imposition of Fees and Levies

It is also useful to note that pursuant to Va. Code § 15.2-107, all levies and fees imposed or increased by a locality pursuant to the zoning enabling statutes must be adopted by an ordinance after advertisement in accordance with Va. Code §§ 15.2-1427(F) or 15.1-2204, as appropriate, except as modified by § 15.2-107, which requires that the advertisement contain specific information regarding such things as the time, date, and place of the public hearing; the actual dollar amount or percentage change, if any, of the proposed levy, fee, or increase; a specific reference to the Code section or other legal authority enabling the enactment of such proposed levy, fee, or increase; and a designation of a place where the complete ordinance is available for examination. No ordinance that imposes or increases levies and fees shall be adopted unless fourteen days have elapsed following the last required publication of intention to propose the same for passage.

1-12.05 Requirements for the Payment of Past-due Taxes, Charges, and Fees

The governing body may require that prior to “the initiation” of an application, any applicant for a special exception, special use permit, or other land use permit 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 properly assessed and owed to the county, city, or town have been paid. Va. Code § 15.2-2286(B).

1-12.06 The Non-Constitutional Nature of Notice and an Opportunity to Be Heard in the Zoning Context

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 such notice and hearing of zoning matters. *Cnty. of Fairfax v. S. Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991); *Merrick Land Tr. I v. Louisa Cnty. Bd. of Sup’rs*, 54 Va. Cir. 378 (Louisa Cnty. 2001).

1-12.07 Mandatory Nature of Notice of Commission and Governing Body Hearings, and the Controlling Nature of the Enabling Legislation

Conduct of the hearings before the local commission and the governing body is mandatory and must be procedurally correct in order for the ultimate decision to stand. With respect to the commission, 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.” *City Council of Alexandria v. Potomac Greens Assocs.*, 245 Va. 371, 429 S.E.2d 225 (1993) (citing Va. Code § 15.2-2285 and *Town of Vinton v. Falcun Corp.*, 226 Va. 62, 306 S.E.2d 867 (1983)). Failure of the commission to report one hundred days after the first meeting of the commission after the proposed amendment or reenactment has been referred to the commission, or such shorter period as may be prescribed by the governing body (which reduction requires a public hearing), shall be deemed approval, unless the proposed amendment or reenactment has been withdrawn by the applicant prior to the expiration of the time period. Va. Code § 15.2-2285(B). Neither the express procedural requirements nor the purposes and authorized provisions of zoning ordinances permit a governing body to insert additional steps that must be completed by

an applicant. 2003 Op. Va. Att’y Gen. 45 (locality required a second zoning permit application for new buildings for a by-right use).

In *Potomac Greens Associates*, the Court considered the relationship of a city charter—itsself silent as to any notice for a planning commission hearing—and an ordinance requiring but one such notice (as opposed to the two required by Va. Code § 15.2-2204). The Court held that although the General Assembly could have prescribed different notice for a planning commission hearing than set out in general law, had it expressly so specified in the City’s charter, the fact that it did not do so put the local ordinance into direct conflict with state law.⁵⁴

In *Gas Mart Corp. v. Board of Supervisors of Loudoun County*, 269 Va. 334, 611 S.E.2d 340 (2005) the Court held that notice pursuant to Va. Code § 15.2-1427 was not required in addition to the notice required pursuant to § 15.2-2204.

1-12.08 The Sufficiency of the Resolution by Which a Zoning Ordinance Amendment Is Initiated by the Planning Commission or Governing Body

There are occasions when a zoning action is not initiated by the landowner, but instead constitutes a textual amendment or government-initiated rezoning. The Code of Virginia states that localities may amend their zoning ordinances “[w]henever the public necessity, convenience, general welfare or good zoning practice require.” Va. Code § 15.2-2286(A)(7). Such amendments may be initiated by “resolution” of the governing body or on “motion” of the local planning commission (or, of course, by the petition of the landowner). *Id.* The General Assembly has provided further, however, that “[a]ny such resolution or motion . . . proposing the rezoning shall state the above purposes therefor[.]” plainly referring to the public necessity language contained in the statute. *Id.*

The Supreme Court has held that it is not necessary under this language for the locality to state the substantive bases for its decision to initiate a zoning amendment under the statute. Rather, it is sufficient simply to determine which of the four listed purposes necessitates local action, and to state for which of those purposes, or all of them, the locality is acting in the initiating resolution or motion. *Cnty. of Fairfax v. S. Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991).

This case also indicates that when a locality does wish to amend its zoning ordinance or a rezoning “on its own motion,” it is a prerequisite that it do so by appropriate resolution or motion as set out by Va. Code § 15.2-2286(7). While the initiating action need not be identical to the finally adopted enactment, or even contain text of such an enactment, the simple procedural step of reciting the statutory “mantra” is demanded. See *In re Zoning Ordinance Amendments Enacted by the Bd. of Sup’rs of Loudoun Cnty.* (Consolidated Cases), 67 Va. Cir. 462 (Loudoun Cnty. 2004) (not necessary for the initiating resolution to exactly track the language of Va. Code § 15.2-2286(A)(7)); text of the amendments need not be available at the time of the initiating resolution), *aff’d and rev’d on other grounds*, *Gas Mart Corp. v. Bd. of Sup’rs of Loudoun Cnty.*, 269 Va. 334, 611 S.E.2d 340 (2005).

While the locality need not have the text of a proposed amendment in hand before it initiates changes to its ordinances, a failure to state one or more of the four listed purposes in the initiating resolution or motion is a procedurally fatal defect that renders an enactment

⁵⁴ Since Alexandria contended that the Supreme 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*, 245 Va. 371, 429 S.E.2d 225 (1993). 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, 439 S.E.2d 405 (1994).

void ab initio. *Ace Temps., Inc. v. City Council of Alexandria*, 274 Va. 461, 649 S.E.2d 688 (2007). But see *Levine v. Town Council of Abingdon*, 94 Va. Cir. 556 (Washington Cnty. 2016) (distinguishing *Ace* and finding that discussion of public purposes of rezoning at public hearing was sufficient to overcome issue that motion did not comply with Va. Code § 15.2-2286(A)(7)).

1-12.09 The Form of Ordinances and Their Consideration by the Governing Body

As long as the procedural prerequisites to ordinance initiation and adoption by the locality have been satisfied, there is no particular form that an ordinance must take in order to be validly enacted. It is sufficient that the action of the locality is clear and that any material that is incorporated by reference be sufficiently identified and made part of the public record. *Cnty. of Fairfax v. S. Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991). The locality must, however, follow the requirements of § 15.2-1427 with respect to the enactment of ordinances, for zoning ordinances “shall be enacted in the same manner as all other ordinances.” Va. Code § 15.2-2285(C). The process for enactment of “all other ordinances” (except as otherwise provided in Va. Code §§ 15.2-2204 and 15.2-2285(C)), is set out in § 15.2-1427. *Gas Mart Corp. v. Bd. of Sup’rs of Loudoun Cnty.*, 269 Va. 334, 611 S.E.2d 340 (2005). Among other things, on final vote on any ordinance or resolution, the name of each member of the governing body voting and how he or she voted must be recorded. Once the governing body has performed its legislative duty of adopting an ordinance, then it is permissible for its staff to “codify” the ordinance, provided that it makes no changes, alterations, amendments, deletions, or additions of a substantive nature. *Id.*; *Fairfax Cnty. v. Fleet Indus. Park*, 242 Va. 426, 410 S.E.2d 669 (1991).

1-12.10 The Importance of Procedural Correctness

As previously noted, there does not seem to be any rule of “no harm, no foul” in procedural matters. Compliance with statutory requirements must be strict, or the action complained of will not stand. *Boasso Am. v. Zoning Adm’r of Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017) (failure to name a necessary party within the 30-day window required by statute, when timely raised, requires dismissal of the petition); *Parker v. Miller*, 250 Va. 175, 459 S.E.2d 904 (1995) (failure to give notice to an abutting property owner invalidates variance proceedings); *Lawrence Transfer & Storage Corp. v. of Augusta Cnty.*, 229 Va. 568, 331 S.E.2d 460 (1985) (notice must be given to abutting property owners of a larger parcel, when application for zoning approval is only for a portion of that larger parcel not physically abutting the neighbors); *Potomac Greens Assocs. P’ship v. City Council of the City of Alexandria*, 761 F. Supp. 416 (E.D. Va. 1991), *rev’d and vacated on other grounds*, 6 F.3d 173 (4th Cir. 1993). On remand from *Gas Mart*, *supra*, the circuit court held that the effect of insufficient notice was that the ordinances were void from the outset and all affected property returned to its previously zoned status. See *In re Zoning Ordinance Amendments Enacted by the Bd. of Sup’rs of Loudoun Cnty. (Consolidated Cases)*, 67 Va. Cir. 462 (Loudoun Cnty. 2005).

How critically the Court perceives procedural issues is emphasized by *Town of Madison v. Ford*, 255 Va. 429, 498 S.E.2d 235 (1998), where the Court held that minutes that reflected at the beginning that all members were present and that 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 the decision should operate prospectively only and that ordinances adopted prior to this decision with the same deficiencies were not affected. Because not all lower courts were adhering to that admonishment, Va. Code § 15.2-1427 was amended to provide that all ordinances and resolutions recorded as adopted unanimously prior to the date of the decision are deemed valid.

Further, the Court has held that when a challenge is made to a decision by a board of supervisors, it, and not the jurisdiction itself, is the necessary party defendant. Thus, a

third-party challenge to the grant of a permit for a wind farm that named only the county, and not the board, was defective. *Miller v. Highland Cnty.*, 274 Va. 355, 650 S.E.2d 532 (2007).

1-12.11 Limitations of Actions

1-12.11(a) Va. Code § 15.2-2285(F)

According to Va. Code § 15.2-2285(F), “[e]very action challenging 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 thirty days of the contested decision. In *Friends of Clark Mountain Foundation, Inc. v. Board of Supervisors of Orange County*, 242 Va. 16, 406 S.E.2d 19 (1991), the Supreme Court held that this thirty-day period is neither a statute of limitations nor a statute of repose, without saying what it might be. It would appear, therefore, that the provision is simply a statutory appeal period, identical to the thirty-day appeal period provided for final judicial orders. If this is so, then there is substantial question whether the reviver provisions of § 8.01-229(E)(3) apply and it is doubtful that it is possible to refile a land use case after a nonsuit. See *Ticonderoga Farms, Inc. v. Bd. of Sup’rs of Loudoun Cnty.*, 72 Va. Cir. 365 (Loudoun Cnty. 2006), where the court ruled pursuant to *Friends of Clark Mountain* that these tolling provisions do *not* apply to a nonsuited land use case as the thirty-day period is not a statute of limitations.

In *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 618 S.E.2d 311 (2005), the Supreme Court held that a BZA’s final decision was “the decision that resolves the merits of the action pending before that body or effects a dismissal of the case with prejudice” and thus the thirty days within which an appeal could be taken began from the date the vote was taken. See also *Orion Sporting Grp., LLC v. Bd. of Sup’rs of Nelson Cnty.*, 66 Va. Cir. 16 (Nelson Cnty. 2004) (thirty-day period began to run from the date the board made its decision, not the date of the letter of the zoning administrator informing the applicant of the board’s decision).

1-12.11(b) *Kole v. City of Chesapeake*

In *Kole v. City of Chesapeake*, 247 Va. 51, 439 S.E.2d 405 (1994), the Court addressed a procedural point that had not previously been addressed, being one of limited application to the City of Chesapeake.

Kole filed a declaratory judgment action challenging a downzoning of his property in the city, 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 thirty days after the Council had voted on the downzoning, provided by the predecessor to Va. Code § 15.2-2285(F). The landowners filed a response that questioned the factual assertions in the pleas, and demanded an evidentiary hearing, which the trial court refused, refused leave to amend, and dismissed the complaint.

The City’s pleas had been predicated on the undisputed 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 thirty days after council action. The Court held, however, that because of the unique provision of the city charter that authorized a referendum on any legislative matter (see *R.G. Moore Bldg. Corp. v. Comm. for Repeal of Ordinance*, 239 Va. 484, 391 S.E.2d 587 (1990)), no such matter—including a rezoning action—could be considered final until thirty days from the council’s vote. The thirty-day appeal period of what is now Va. Code § 15.2-2285(F) therefore did not commence until the expiration of that referendum period. The Court’s language in the *Kole* decision, however, left open the possibility that there was no limitation period on *procedural* claims that might arise from some defect in the land use process that could render the action void ab initio at some unknown time in the future.

In *Berry v. Board of Supervisors of Fairfax County*, 302 Va. 114, 884 S.E.2d 515 (2023), however, the Court found that the statutory requirement that a challenge be filed “within thirty days” of the disputed action does not mean a plaintiff must wait until *after* the decision is made to file suit. A complaint filed eighteen days *before* a board’s adoption of a modified zoning ordinance was not premature but was ripe for adjudication. *Berry* decided two things that throw the reach of *Kole* into question. First, the *Berry* plaintiffs grounded their complaint in a *procedural defect* that rendered the Board’s action void ab initio, and second, if a claim had to be filed within thirty days *before* legislative action to be timely, it would also have had to be filed within thirty days *after* that action or be forever barred. Were *Kole* controlling, it would seem that the procedural claim would not have had to meet the timeliness test at all.

1-12.11(c) Va. Code § 15.2-2204

The 1996 General Assembly amended Va. Code § 15.2-2204 of the Code regarding notice as it affects land use to do two things. First, it brought forward the procedural curative statute that had formerly “cleansed” notice actions taken prior to January 1, 1974, to July 1, 1996, with exceptions carved solely for cases filed before that date. Second, the legislature mandated that all actions “contesting a decision of a locality based on a failure to advertise or give notice as may be required by this chapter shall be filed within thirty days of such decision with the circuit court having jurisdiction of the land affected by the decision.” The statute, which is similar to Va. Code § 15.2-2285(F), applies not only to ordinances and amendments thereto, but also to plans that require notice.

In the 2023 Session, the General Assembly sought to rewrite many sections of the Code regarding notice, and among other things it removed the requirement of Paragraph (C) that “[i]n the case of a proposed amendment to the zoning map, the public notice shall state the general usage and density range of the proposed amendment and the general usage and density range, if any, set forth in the applicable part of the comprehensive plan.” It also amended that Paragraph to change the next sentence, to say that “no land may be zoned to a more intensive use classification *than was contained in the documentation made available for examination pursuant to subsection A of § 15.2-2204 without an additional public hearing after notice required by § 15.2-2204*. Zoning ordinances shall be enacted in the same manner as all other ordinances.” (emphasis added).

1-12.11(d) Vested Rights

Vested rights are property rights (see *Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 356 (1991)), and are thus subject to the five-year limitation period of Va. Code § 8.01-243(B).

1-12.11(e) Federal Actions

Federal actions, typically brought under 42 U.S.C. § 1983, are subject to the two-year limitation period of Va. Code § 8.01-243(A). See, e.g., *Van Horn v. Lukhard*, 392 F. Supp. 384 (E.D. Va. 1975).

1-12.12 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. *Vulcan Materials v. Bd. of Sup’rs of Chesterfield Cnty.*, 248 Va. 18, 445 S.E.2d 97 (1994); *Mirror Ridge Homeowners Ass’n v. Loudoun Cnty. Bd. of Sup’rs*, 51 Va. Cir. 406 (Loudoun Cnty. 2000). In *Vulcan*, the Court determined that the landowner had not been subject to a ruling by a zoning administrator that had to proceed to the BZA, because no application for a permit of any kind was pending at the time of informal discussions. See also *Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989). Exhaustion of administrative remedies is not required when the lawsuit challenges the validity of the zoning ordinance itself. *Town of Jonesville v. Powell Valley Vill. L.P.*, 254 Va. 70, 487 S.E.2d 207 (1997).

1-12.13 Who Must Be Sued Within the Thirty-Day Appeal Period?

In *Friends of Clark Mountain Foundation, Inc. v. Board of Supervisors of Orange County*, 242 Va. 16, 406 S.E.2d 19 (1991), the Supreme Court held that one who files a challenge to a land use action under Va. Code § 15.2-2285(F) within the thirty 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 court should not adjudicate the controversy until that party has intervened or has been brought into the proceeding.” The necessary parties are, of course, the applicants for the land use approval at issue and the owner of the land involved if they are not the applicants. Thus, if the contestant fails to name these necessary parties, the matter cannot proceed forward until the proper parties are all before the court. As explained in section 1-12.10, it is not sufficient to name the jurisdictional entity alone. At least insofar as counties are concerned, the board of supervisors must be the named defendant. *Miller v. Highland Cnty.*, 274 Va. 355, 650 S.E.2d 532 (2007).

1-12.14 Standing

Among the issues that constantly bedevil litigants is the question of who has “standing” to maintain a land use action. Historically, the Supreme 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.” *Cupp v. Bd. of Sup’rs of Fairfax Cnty.*, 227 Va. 580, 318 S.E.2d 407 (1984) (emphasis in original). The courts have drawn generally on the use of the term persons “aggrieved” in other statutes for definition of 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.

Va. Beach Beautification Comm’n v. Bd. of Zoning Appeals, 231 Va. 415, 344 S.E.2d 899 (1986) (citations omitted); *see also Historic Alexandria Found. v. City of Alexandria*, 299 Va. 694, 858 S.E.2d 199 (2021) (historic preservation association is not “aggrieved” party because it suffered no particularized harm); *Barnes v. Orange Cnty. Bd. of Sup’rs*, 78 Va. Cir. 392 (Orange Cnty. 2009) (no standing to challenge subdivision ordinance when claims based on general problems and future limitations); *McGhee v. Zoning Appeals Bd. of Roanoke*, 57 Va. Cir. 47 (City of Roanoke 2001); *Pearsall v. Virginia Racing Comm’n*, 26 Va. App. 376, 494 S.E.2d 879 (1998).

Because of the restricted concept of aggrievement, and justiciable interest that this notion bears, the Supreme Court has not recognized any more generalized concept of “public aggrievement”; the public at large does not have a general right to challenge a local government’s land use actions. *See, e.g., Nat’l Tr. for Historic Pres. v. Bd. of Sup’rs of Orange Cnty.*, 80 Va. Cir. 321 (Orange Cnty. 2010) (National Trust does not have standing to challenge Wal-Mart location near national battlefield; citizens with property in close

proximity have standing); *Huber v. Loudoun Cnty. Bd. of Sup'rs*, 55 Va. Cir. 318 (Loudoun Cnty. 2001).

In *Friends of the Rappahannock v. Caroline County*, 286 Va. 38, 743 S.E.2d 132 (2013), a case that clarifies and arguably tightens the rules of standing in land use cases, the Court held that a party that claims no ownership interest in the property that is the subject of an action has standing to file a declaratory judgment action challenging a land use decision only if it can satisfy a two-step test. First, as articulated in *Virginia Beach Beautification Commission, supra*, the complainant must own or occupy real property within or in close proximity to the property that is the subject of the land use determination, thus establishing that it has a direct, immediate, pecuniary, and substantial interest in the decision. Second, as articulated in *Virginia Marine Resources Commission v. Clark*, 281 Va. 679, 709 S.E.2d 150 (2011), *overruled on other grounds*, *Woolford v. Va. Dep't of Taxation*, 294 Va. 377, 806 S.E.2d 398 (2017), the complainant must allege facts demonstrating a particularized harm to 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. Complainants do not need to establish that the particularized harm has already occurred, but without this particularized harm, standing does not exist.

In *Friends of the Rappahannock*, the complainants alleged, in general, harms that included aesthetic injury and loss of property value, which the Court found insufficient to establish standing. While the Supreme Court phrased its holding in terms of a failure of the complainants to allege facts sufficient to support a conclusion that the conditions of the special use permit *would not have provided them protection from the harms alleged*, this suggests that the Court must have considered the substance of those conditions in finding a lack of standing. Regardless, this decision appears to heighten standing requirements in land use cases, if in no others. The Virginia Supreme Court applied the *Rappahannock* standard in *Historic Alexandria Foundation v. City of Alexandria*, 299 Va. 694, 858 S.E.2d 199 (2021) to find that a historic preservation association did not have standing to object to the proposed renovation of a nearby residence because it could not demonstrate any particularized harm that differed from the harm suffered by the general public. *See also In re: Nov. 20, 2013 Decision of Bd. of Zoning Appeals of Fairfax Cnty.*, 89 Va. Cir. 345 (Fairfax Cnty. 2014) (applying *Friends of the Rappahannock* and finding adjacent landowners had no standing to challenge zoning administrator's determination regarding proposed accessory use because their alleged harms were speculative or not cognizable personal or property rights).

However, in *Morgan v. Board of Supervisors of Hanover County*, 302 Va. 46, 883 S.E.2d 131 (2023) (LGA filed [amicus brief](#)), the Court reversed the lower court's finding that the petitioners lacked standing and seemed to somewhat minimize the breadth of the *Rappahannock* holding. In *Morgan*, several homeowners living near a proposed Wegman's distribution facility challenged the decision of the Hanover County Board of Supervisors to approve Wegman's rezoning and special-exception applications. The plaintiffs alleged the decision would result in a dramatic increase in traffic traveling through their neighborhood, flooding of one of the petitioner's property, chronic and excessive noise, and night-sky pollution. The circuit court dismissed all counts, finding that the homeowners lacked standing and that the alleged harms were speculative. The Supreme Court reversed, finding that the petitioners had alleged particularized harm *specific to Wegman's intended expansion*:

The homeowners do not generalize about industrial sites in the abstract or speculate about potential harms associated with a permitted use within the general zoning classification of the property. Instead, the homeowners assert harms specific to Wegman's intended expansion including tractor-trailer traffic on specific feeder roads surrounding the facility, the increased level of noise caused by back-up alarms from these trucks (allegedly in violation of

the local noise ordinance after a sound study by County staff), anticipated flooding caused by the topography of the project, and the night-sky light pollution from taller lighting poles in the parking areas.

Morgan v. Bd. of Sup'rs of Hanover Cnty., 302 Va. 46, 883 S.E.2d 131 (2023).

The Court emphasized that this was in contrast to the *Rappahannock* plaintiffs, who had failed to adequately tie their alleged harms to “the particular use of the property by the permittee authorized to use it.” *Id.* In *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 268 Va. 441, 604 S.E.2d 7 (2004), the Court held that the board of supervisors had standing to appeal a decision of its own BZA, finding that it was a “person aggrieved” within the meaning of Va. Code § 15.2-2314, and that it had a “strong interest in the valid implementation of its zoning authority,” and thus a right to challenge the grant of a variance it considered improper.⁵⁵ While Justice Kinser’s dissenting opinion suggests that the majority has opened the door for standing based on “public aggrievement” because the board could not show that it had suffered a denial of some personal or property right or imposition of a burden or obligation different from that suffered by the public generally, that would not seem necessarily to follow from the majority’s reasoning. Because the governing body of a locality is uniquely responsible for the administration and enforcement of its zoning ordinances,⁵⁶ it is difficult to see how granting it standing to seek review of decisions of a quasi-judicial body that may be at variance with how the governing body views its land use ordinances opens the door to the general public to bring actions in land use matters on something less than the standard that the Supreme Court long ago laid down, and has consistently followed.

In *Braddock, L.C. v. Board of Supervisors of Loudoun County*, 268 Va. 420, 601 S.E.2d 552 (2004), the Supreme Court held that a contract purchaser, who did not have an interest in the entire property that was subject to a rezoning denial, did not have standing to bring suit to challenge that denial. The Braddock I corporation was the contract purchaser for two separate parcels of land for which it sought rezoning for a single-phase development. Before submitting a revised plan, Braddock I sold the contract right of purchase to one parcel to another corporation, Braddock II. After the denial of the rezoning request, Braddock I filed suit challenging the denial. Subsequent to filing suit, Braddock I took title to the other parcel and conveyed title to a third corporation, Two Greens. The Court found that Braddock I had no agency relationship with the owner of the first parcel, Braddock II, and thus had no interest in that property. It also found that while Braddock I was still the contract purchaser for the second parcel, it had been given no authority to file suit by the second owner, Two Greens. This finding is confusing because Two Greens did not own the second parcel until after suit had been filed. The footnotes to the opinion and the concurrence, however, indicate that the real sticking point to Braddock I’s standing was that it did not have an interest in the entire parcel subject to the rezoning request, and to allow the contract purchaser of only a portion of the subject land to bring suit would implicate the rights of other landowners. Because Braddock I never had standing to bring suit, it could not avail itself of the *Friends of Clark Mountain* conclusion that necessary parties could be added after the thirty-day period. See section [1-12.13](#).

⁵⁵ See 2010 amendments to Va. Code § 15.2-2314 providing that the Board of Zoning Appeals is not a party to an action challenging its decision and that the locality, the landowner, and the applicant are necessary parties.

⁵⁶ In a closely related context, see *Shilling v. Jimenez*, 268 Va. 202, 597 S.E.2d 206 (2004), in which the Supreme Court held that the local governing body and its authorized agents have the sole right to enforce its subdivision ordinances, and that third parties cannot bring suit to do so. See *also* Va. Code §§ 15.2-1401, 15.2-2280; *Miller v. Highland Cnty.*, 274 Va. 355, 650 S.E.2d 532 (2007) (there is no third-party right of action to contest a planning commission’s determination that a use is in “substantial accord” with the local comprehensive plan).

Although the Supreme Court had appeared to recognize a broader concept of standing, where landowners in the “vicinity” of a rezoning had an asserted interest in a challenge to it (*Friends of Clark Mountain Found., Inc. v. Bd. of Sup’rs of Orange Cnty.*, 242 Va. 16, 406 S.E.2d 19 (1991); *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978)), the Court in *Friends of the Rappahannock*, discussed *supra*, held that any distinction between an “aggrieved party” and “justiciable interest” is a distinction without a difference in declaratory judgment actions challenging land use decisions.

In *Riverview Farm Associates v. Board of Supervisors of Charles City County*, 259 Va. 419, 528 S.E.2d 99 (2000), 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 be so felt as to give rise to such a justiciable interest. (“Count 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.”) *Id.* See also *Bd. of Sup’rs v. Fralin & Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981); *Nat’l Tr. for Historic Pres. v. Bd. of Sup’rs of Orange Cnty.*, 80 Va. Cir. 321 (Orange Cnty. 2010) (historic association with contractual-like interests in nearby property has standing); *cf. Ripol v. Westmoreland Cnty. Indus. Dev. Auth.*, 82 Va. Cir. 69 (Westmoreland Cnty. 2010) (no standing because neighbors failed to show injury, adverse impact, or impairment of enjoyment of their property).

See also *Deerfield v. City of Hampton*, 283 Va. 759, 724 S.E.2d 724 (2012) (citizen committee authorized by charter to file petition to repeal zoning ordinance does not have standing to challenge vested rights determination); *Fritts v. Carolinas Cement Co.*, 262 Va. 401, 551 S.E.2d 336 (2001) (when agreement to purchase land had been agreed to but not formalized, the purchaser had more than a mere expectation in acquiring the property and thus had standing to begin by right application process).

1-12.15 Nonsuiting a Land Use Challenge

In *Friends of Clark Mountain, Inc. v. Board of Supervisors of Orange County*, 242 Va. 16, 406 S.E.2d 19 (1991), the Supreme Court held that the thirty-day appeal period is not a statute of limitations or a statute of repose. Under Va. Code § 8.01-380, however, it is possible to revive a suit within six months of the expiration of the “statute of limitations.” From this, there would appear to be substantial question whether any zoning challenge subject to the appeal period may be reinstated within the six-month grace period, and that a suit properly filed must be continuously maintained or lost.

The Supreme Court has held that Va. Code § 15.2-2314 provides that a certiorari proceeding to contest a decision of a board of zoning appeals filed pursuant to that section has at least “the indicia of an appeal in which the circuit court acts as a reviewing tribunal, rather than as a trial court resolving an issue in the first instance.” Thus, a certiorari proceeding cannot be nonsuited and later refiled, and the appeal period is not tolled. See Va. Code § 8.01-380; *Bd. of Zoning Appeals of Fairfax Cnty. v. Fairfax Bd. of Sup’rs*, 275 Va. 452, 657 S.E.2d 147 (2008).

See also *Ticonderoga Farms, Inc. v. Board of Supervisors of Loudoun County*, 72 Va. Cir. 365 (Loudoun Cnty. 2006), where the court ruled that the tolling provisions of § 8.01-229(E)(3) do not apply to a nonsuited land use case as the thirty-day period is not a statute of limitations per *Friends of Clark Mountain*. See also *Parker v. Miller*, 250 Va. 175, 459 S.E.2d 904 (1995); *Riverview Farm Assocs. v. Bd. of Sup’rs of Charles City Cnty.*, 259 Va. 419, 528 S.E.2d 99 (2000) (non-necessary parties cannot be added to suit after expiration of thirty-day period).

1-12.16 Procedural Aspects of Federal Land Use Proceedings

There are a number of hurdles to the prosecution of a federal land use case. Such 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's fees are available to a prevailing party under 42 U.S.C. § 1988.

A preliminary, and major, difficulty in such 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*, 21 F.3d 1319 (4th Cir. 1994) (en banc), the court held that the *Burford* abstention doctrine (*Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943)) 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 "[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." *Id.* In state and local land use cases, the exercise of federal review would be highly disruptive to state efforts to establish a coherent policy with respect to a matter of substantial public concern, such that the federal courts must properly stay their participation. *See, e.g., Viridis Dev. Corp. v. Bd. of Sup'rs of Chesterfield Cnty.*, 92 F. Supp. 3d 418 (E.D. Va. 2015) (invoking *Burford* abstention to challenge regarding nexus between zoning condition and original purpose of building restriction, per *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 133 S. Ct. 2586 (2013)). While noting that zoning and land use cases usually warrant *Burford* abstention, the Fourth Circuit held that if the state law is clear and certain, abstention is not appropriate. *Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013).

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 not one decided by the type of abstention but by the type of relief sought. In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 116 S. Ct. 1712 (1996), 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,⁵⁷ 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 V*, viz. the instruction to the

⁵⁷ *See Johnson v. Collins Entm't, Co.*, 199 F.3d 710 (4th Cir. 1999).

district court to retain federal jurisdiction, remains supportable under current abstention jurisprudence.

Front Royal Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998).

When such claims are brought in federal court, 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 a zoning classification, making it difficult for the litigant to employ the Due Process Clause, at least in zoning challenges. See *Pulte Home Corp. v. Montgomery Cnty.*, 909 F.3d 685 (4th Cir. 2018) (class-of-one equal protection claim may survive in discretionary enforcement context, but considerable discretion afforded local governments in zoning plans); *Siena Corp. v. Mayor of Rockville MD*, 873 F.3d 456 (4th Cir. 2017) (property interest must be vested to be constitutionally protected by substantive due process; state action must “shock the conscience” and “lack any ‘conceivable rational relationship’” to the exercise of zoning power). As is noted above, the Virginia Supreme Court has expressly said there are no due process rights in zoning. *S. Iron Works, Inc.*, *supra*.

In a per curiam opinion, the United States Supreme Court held that the Equal Protection Clause could be invoked by a class of one. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000). 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 reach 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.⁵⁸ *Olech* also raises the concern that land use decisions may give rise to federal claims that had been effectively precluded in the Fourth Circuit. See section 1-12.16. *But see Dawson v. Loudoun Cnty. Bd. of Sup’rs.* 59 Va. Cir. 517 (Loudoun Cnty. 2001) (Equal Protection class of one claim dismissed), *aff’d in unpublished opinion*, Rec. No. 030019 (Va. Oct. 31, 2003). As a practical matter, *Olech* has not proved a fruitful area for landowner litigation, and there have been few, if any, cases in which a local land use decision has been found wanting under the notions expressed in that case.

In *Mendes v. Wendling*, No. 5:19-cv-00072 (W.D. Va. Mar. 23, 2021), the court found the landowner stated a class-of-one Equal Protection violation sufficient to survive a motion to dismiss. There, the plaintiff was the only property owner within the county’s Special Flood Hazard Area (SFHA) who was proactively inspected and cited for floodplain-related non-compliance issues, even though he identified thirteen other properties with similar, non-permitted structures located within the SFHA. The county’s Floodplain Manager also implicitly acknowledged trespassing on the plaintiff’s property to inspect the structure in question. Citing *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685 (4th Cir. 2018), the court held that the plaintiff had adequately pled similarity to support a class-of-one claim as well as a Fourth Amendment claim for an unreasonable search by the Floodplain Manager.

Federal courts have supplemental jurisdiction to conduct an on-the-record review of local administrative decisions. *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 118 S. Ct. 523 (1997) (denial of demolition permit). In that decision, however, the U.S. Supreme Court noted that while the deferential nature of a review of state administrative claims did not bar supplemental jurisdiction, the principles of abstention as expounded in *Quackenbush*, *supra*, may bar the state claims from being heard.

⁵⁸ *But see Va. Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894 (2019) (discussing problems with inquiring into legislative motive).

1-13 VARIANCES

1-13.01 In General

There are occasions when the literal enforcement of a zoning ordinance will result in an unreasonable restriction on the use of the property when no relief is otherwise made available to the landowner through a special use permit.⁵⁹ The Code of Virginia provides the variance as the sole mechanism for alleviating these hardships. Va. Code § 15.2-2309; see also *Blakeley v. Bd. of Sup'rs of Fairfax Cnty.*, No. CL-2010-0005765 (Fairfax Cnty. Cir. Ct. Apr. 12, 2011) (special exceptions may not be used to waive minimum lot width requirements, province of variances only; *Bell v. City Council of Charlottesville*, 224 Va. 490, 297 S.E.2d 810 (1982), overruled by statute to that extent).

Variances are defined by statute as being 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 utilization of the property, and such need for a variance would not be shared generally by other properties, and provided that such variance is not contrary to the purpose of the ordinance. It shall not include a change in use which change shall be accomplished by a rezoning or a conditional zoning.

Va. Code § 15.2-2201.

1-13.02 Standards for Granting a Variance

Notice and a hearing are required before a variance can be granted. Va. Code § 15.2-2309(2). The board must offer an equal amount of time in the hearing to the applicant, any appellant or other person aggrieved, and the staff of the local governing body. Va. Code § 15.2-2308(C). Non-legal staff of the governing body and the applicant, landowner, or his agent or attorney may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. If facts or law relative to a particular case are discussed nonetheless, the substance of the communication must be conveyed to the other parties. All parties must receive materials related to a particular case within three business days of provision to board members. Va. Code § 15.2-2308.1.

Virginia Code § 15.2-2309(2) provides that a BZA, upon appeal or original application, *must* grant a variance if the applicant proves by a preponderance of the evidence that:

1. the strict application of the terms of the ordinance would unreasonably restrict the use of the property *or* that the granting of the variance would alleviate a hardship due to a physical condition relating to the property at the time of the effective date of the ordinance, *and*
2. the following criteria are met:

⁵⁹ Before 2015, the variance statutes required a property owner to prove that the zoning restrictions created an unnecessary or unreasonable hardship that would effectively prohibit or unreasonably restrict the use of the property. The Supreme Court articulated the standard concisely: a BZA had authority to grant variances only to avoid an unconstitutional result. *Cochran v. Fairfax Cnty. Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Bd. of Sup'rs of Fairfax Cnty. v. Board of Zoning Appeals of Fairfax Cnty.*, 268 Va. 441, 604 S.E.2d 7 (2004). The 2015 amendments, however, significantly expanded the circumstances under which a variance can be granted. Accordingly, case law prior to this date should be relied on only to the extent it does not address that standard for granting or appealing a variance.

- a. the property was acquired in good faith;
- b. any hardship was not created by the property owner;
- c. a variance will not be of substantial detriment to nearby properties
- d. the condition or situation is not of such a general or recurring nature that it is more practical to amend the zoning ordinance;
- e. the variance will not result in (i) a use that is not otherwise permitted or (ii) a change in the zoning classification of the property; and
- f. the relief sought via a variance could not be sought through a special exception or a zoning amendment process.⁶⁰

Although it was the purpose of the General Assembly to loosen the requirements for a variance, the listed criteria are similar to prior statutory law, and prior case law regarding them may still be relevant to some extent. *See, e.g., Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (finding granted variance was in violation of city charter variance standards); *McGhee v. Zoning Appeals Bd. of Roanoke*, 57 Va. Cir. 47 (City of Roanoke 2001); *Bd. of Sup'rs of Fairfax Cnty. v. Bd. of Zoning Appeals*, No. 188771 (Fairfax Cnty. Cir. Ct. May 8 and July 3, 2001); *Prince William Cnty. Bd. of Zoning Appeals v. Bond*, 225 Va. 177, 300 S.E.2d 781 (1983); *Baum v. Lunsford*, 235 Va. 5, 365 S.E.2d 739 (1988); *Natrella v. Bd. of Zoning Appeals of Arlington Cnty.*, 231 Va. 451, 345 S.E.2d 295 (1986); *Corinthia Enters., Ltd., v. Zoning Appeals Bd.*, 22 Va. Cir. 545 (Loudoun Cnty. 1988).

The notion of good-faith acquisition of property does not mean that the applicant for a variance must have acquired the property without any prior knowledge of the restrictions upon it. In *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998), 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 with prior knowledge 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. *See also Amurrio v. Bd. of Zoning Appeals of Falls Church*, 59 Va. Cir. 170 (Arlington Cnty. 2002) (knowledge that variance was needed did not prove lack of good faith). The Court distinguished *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993), 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. *See also Riles v. Bd. of Zoning Appeals of City of Roanoke*, 246 Va. 48, 431 S.E.2d 282 (1993).

The Supreme Court ruled out the import of financial factors in *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004), and it is unknown how such factors apply under the current statutory scheme. However, case law that was discredited by *Cochran* may now be instructive: *Amurrio v. Bd. of Zoning Appeals of Falls Church*, 59 Va. Cir. 170 (Arlington Cnty. 2002) (financial difference between commercial and residential use hardship factor); *Brown v. Fairfax Cnty. Bd. of Zoning Appeals*, No. 188002 (Fairfax Cnty. Cir. Ct. Feb. 14, 2001) (financial impact on the property owner is a factor to be considered in determining undue hardship); *McCoy v. Fairfax Cnty. Bd. of Zoning*, 48 Va. Cir. 227 (Fairfax Cnty. 1999) (expense and aesthetic concerns regarding development of odd-sized property constitute an undue and unnecessary hardship).

⁶⁰ A variance must be granted if a person with a disability needs a reasonable modification and the (a)-(f) criteria are met. Any variance so granted expires when the person benefited by the modification no longer needs it. Va. Code § 15.2-2309(2).

The Court will not treat individual lots under one ownership or control as separate parcels for purposes of determining whether a variance should be granted. In *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670, 628 S.E.2d 324 (2006), the developer owned five lots, four of which were unbuildable because overlapping setback lines imposed by the zoning ordinance precluded the erection of any residential structures on those parcels. The Court held that the BZA properly denied the variances, finding the developer could have combined the five lots, built a residence on one, and enjoyed the other four as a valuable waterfront amenity appurtenant to that structure.

It is also plain that the board of zoning appeals cannot grant variances that are not specifically related to 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. *Adams Outdoor Adver., Inc. v. Bd. of Zoning Appeals of Va. Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (state law does not confer upon BZAs the power to grant a variance from ordinance provisions limiting the cost to repair nonconforming structures). Many BZAs presume they are authorized to issue variances from any provision of a zoning ordinance, such as the provisions of sign codes, parking requirements, and the like. These matters are more properly addressed through general code amendments by the governing body.

The board of zoning appeals is empowered to order case-specific relief for property affected and to impose conditions upon that relief, if necessary, once the predicate requirements for a variance have been met. See *Azalea Corp. v. City of Richmond*, 201 Va. 636, 112 S.E.2d 862 (1960). Some years ago, the Attorney General opined that boards of zoning appeals could grant a “use” variance authorizing use of a property for a purpose not otherwise contemplated by the district in which the property was located. 1980-81 Op. Att’y Gen. at 416. This opinion is incorrect, for such action would amount to rezoning, and boards of zoning appeals are not empowered to rezone property. *Prince William Cnty. Bd. of Zoning Appeals v. Bond*, 225 Va. 177, 300 S.E.2d 781 (1983). Indeed, the definitional provision at Va. Code § 15.2-2201 specifically states that no variance shall include a “change in use.”

Distinguishing from a change in use (see Va. Code § 15.2-2201), a circuit court held in *Tolman v. Richmond Board of Zoning Appeals*, 46 Va. Cir. 359 (City of Richmond 1998), that a variance can include an increase in the intensity of the use and thus a variance granted to allow a legal non-conforming use of three apartments to operate as seven was valid. The court also held that the unnecessary hardship need not arise from the physical conditions of the land, relying on the “other extraordinary or exceptional situation” language found in the charter. Similar language in Va. Code § 15.2-2309(2) was removed by the 2015 amendments so that a change in intensity of a use should not be accomplished by means of a variance.

Note that the Virginia Supreme Court held that a BZA, in issuing variances, is not operating in an adjudicative manner such that res judicata would apply to its decision. *Chilton-Belloni v. Angle*, 294 Va. 328, 806 S.E.2d 129 (2017). Thus, a landowner may reapply for a variance if the law or circumstances change.

1-13.03 Appeals

Decisions to grant or deny variances by a BZA are appealed to the circuit court by means of a writ of certiorari. Va. Code § 15.2-2314. 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.” Va. Code § 15.2-2314. Note that “aggrieved” is before “taxpayer” to assure that only litigants with traditionally recognized “standing” may appeal. While the governing body, the applicant, and the landowner are necessary parties in an appeal from the BZA to the circuit court, the landowner is not a necessary party in an appeal before the Supreme Court. *Lamar Co. v. City of Richmond*, 287 Va. 322, 757 S.E.2d 15 (2014). See section [1-16.06\(b\)](#) for a fuller discussion. Any party may introduce evidence. Va. Code § 15.2-2314.

On appeal, the decision of the board of zoning appeals is presumed correct. The appealing party must rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Va. Code § 15.2-2314. The statute specifically provides that any party may introduce evidence. A BZA's findings and conclusions on questions of fact are presumed correct, but its decisions on matters of law are considered de novo. The standard of review is based on the statute and any applicable charter provisions; the fairly debatable standard for reviewing legislative decisions is inapplicable to BZA variance appeals. *Lamar Co. v. City of Richmond*, 287 Va. 322, 757 S.E.2d 15 (2014). See discussion [above](#) regarding appeals of special use permit decisions; the General Assembly did not add the "fairly debatable" language to variances appeals as it did to special use permit appeals.

The Supreme Court has ruled that a decision from a board of zoning appeals can only be appealed to the Supreme Court and not the Court of Appeals. *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals of Va. Beach*, 231 Va. 415, 344 S.E.2d 899 (1986).

1-14 NONCONFORMING USES

1-14.01 In General

Virginia Code § 15.2-2307 requires 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."⁶¹ Nonconforming uses are those that were lawful at the time of adoption of a zoning ordinance or amendment thereto but which would be unlawful if subjected to the existing provisions of law. *Town of Front Royal v. Martin Media*, 261 Va. 287, 542 S.E.2d 373 (2001) (landowner has burden of proving initial lawfulness of use). The Supreme Court has specifically identified a nonconforming use as a species of "vested right." *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007); *Holland v. Bd. of Sup'rs*, 247 Va. 286, 441 S.E.2d 20 (1994).

Only existing or approved uses and structures may receive protection under this statute. Raw land acquires no rights to development, except to the extent the landowner can claim vested rights, discussed below. It also appears established 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. *Knowlton v. Browning-Ferris Indus.*, 220 Va. 571, 260 S.E.2d 232 (1979); see also *Hurd v. Zoning Appeals Bd. of Warren Cnty.*, 50 Va. Cir. 213 (Warren Cnty. 1999); *Seekford v. Town of New Market Bd. of Zoning Appeals*, 49 Va. Cir. 112 (Shenandoah Cnty. 1999).

A building constructed pursuant to its building permit and for which taxes have been paid for fifteen years may be declared nonconforming but not illegal. It may be required to conform to the building code, but that compliance does not affect its nonconforming status. If a local government has issued a permit, other than a building permit, that authorized construction of an improvement to real property and the improvement was constructed in accordance with the permit, an ordinance may provide that the improvements are nonconforming, but not illegal. If no permit is required and an authorized zoning official informed the property owner that the structure was in compliance, an ordinance may provide that the structure is nonconforming but not illegal. Va. Code § 15.2-2307(D).

In *Board of Supervisors of Fairfax County v. Cohn*, 296 Va. 465, 821 S.E.2d 693 (2018) (LGA filed an amicus), the Supreme Court held that Va. Code § 15.2-2307(D) applied only to the building or structure itself, and not to the structure's use. The Court noted that subsection C of Va. Code § 15.2-2307 applied to the uses of non-conforming buildings.

⁶¹ Note that Va. Code § 15.2-2307 is not "merely enabling" legislation such that an ordinance is required to implement it. *Lamar Co. v. City of Richmond*, 287 Va. 348, 756 S.E.2d 444 (2014).

1-14.02 Expansion or Alteration of Use

Perhaps the most commonly faced questions involve expansions of nonconforming uses. The 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 the zoning ordinance was designed to promote.” *Knowlton v. Browning-Ferris Indus.*, 220 Va. 571, 260 S.E.2d 232 (1979).

In *Knowlton*, 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 deemed a change in character. *Bd. of Zoning Appeals of Spotsylvania Cnty. 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 Cnty. 1997) (character of a legal nonconforming use that allows biosolids storage and application of biosolids on the same property would be impermissibly changed by the transport of biosolids from the storage facility to other properties).

In adopting the change of character test, the Supreme Court has specifically rejected the argument that the property owner retains the right to use his property for any other use permitted by the same zoning classification as would apply to the original nonconforming use. *McCalley, supra*. Rather, the changed use must be either “more restrictive” (and itself permitted in the District) or of substantially similar character to the original use. See also *Masterson v. Bd. of Zoning Appeals of Va. Beach*, 233 Va. 37, 353 S.E.2d 727 (1987).

In a case construing an ordinance that prohibited the “enlargement” of a nonconforming use, the Supreme Court held that the BZA was not plainly wrong in determining that the addition of an electronic message board to a nonconforming billboard, because it added depth and weight, constituted an enlargement. *Adams Outdoor Adver., Inc. v. Bd. of Zoning Appeals of Va. Beach*, 274 Va. 189, 645 S.E.2d 271 (2007).⁶²

While Va. Code § 15.2-2307 does not expressly address the construction of *additional* facilities to support a nonconforming use, the Virginia Supreme Court held that the power to prohibit such construction is necessarily or fairly implied from the powers expressly granted by the statute, whose general purpose is to allow the government to regulate changes to nonconforming uses. *City of Chesapeake v. Gardner Enters., Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997). *Masterson, supra*, 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.

In *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008), the Supreme Court held that a variance given to allow owners of a pre-existing nonconforming structure to enlarge that structure did not create new zoning regulations for the property and eliminate the nonconformity.

A use established in one part but not all of a building prior to enactment of a zoning ordinance does not create a grandfathered right to extend the nonconforming use throughout the building. Thus, in *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005),

⁶² This decision was based on a prior version of Va. Code § 15.2-2314 that provided for deference to the BZA’s legal decision. Questions of law are now reviewed de novo. *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013). See section 1-16.06.

the uncontroverted grandfathered right to maintain residential apartments on the second floor of a building did not extend the right to the first floor when the design of the building did not clearly indicate such a use of the first floor was intended at the time the zoning ordinance restricting such use was adopted.

1-14.03 Termination of Nonconforming Use

Substantial confusion often surrounds the future of a structure or use once it is determined to be non-conforming. 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 cannot be determined. See *Gray v. Zoning Appeals Bd. of Norfolk*, 65 Va. Cir. 281 (City of Norfolk 2004) (noting Code does not clearly distinguish between nonconforming uses and nonconforming lots and concluding they must be treated the same).

In *City of Emporia Board of Zoning Appeals v. Mangum*, 263 Va. 38, 556 S.E.2d 779 (2002), the Supreme Court held that each mobile home in a mobile home park constitutes a separate nonconforming use (as opposed to the park as a whole) and thus a home that was destroyed could not be replaced. This specific result was overturned by the General Assembly pursuant to Va. Code § 15.2-2307(H), which now provides that a replacement manufactured home retains the valid nonconforming status of the original.

In a case of first impression, a circuit court upheld as fairly debatable a zoning administrator's determination that a lawful nonconforming lot became conforming when the owner purchased adjoining property that, if considered merged with the original property, operated to bring the lot into conformity. Thus, the owner could not separately sell the two parcels as that would bring the original property back into nonconformance. The court reached this decision even though the parcels were always taxed separately and remained separate uses. *Gray v. Zoning Appeals Bd. of Norfolk*, 65 Va. Cir. 281 (City of Norfolk 2004).

The Supreme Court has also ruled that the amortization of a nonconforming use within seven years impairs the vested right and therefore violates Va. Code § 15.2-2307. This case arose in Alexandria, which has a provision in its charter authorizing such amortization. The Court held, however, that the city had not adequately advanced that argument to the trial court and did not consider it on appeal. *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007).

1-14.03(a) Cessation or Discontinuance of Use

In *Prince William Board of Supervisors v. Archie*, 296 Va. 1, 817 S.E.2d 323 (2018), three parcels of property were established as an automobile graveyard before a zoning ordinance was first enacted, thus becoming a non-conforming but legal use. After a zoning ordinance was enacted, however, the middle parcel was sold, and the owner judicially sought to have the property cleared. Despite several proceedings, the land was never cleared and ultimately the owner of the two parcels became the owner of all three. The county sought to have the middle parcel declared a non-conforming, illegal use. The Supreme Court found that despite the intervening ownership the land remained continually in use as an automobile graveyard and held that the intent to discontinue a particular use and who owns the property are not relevant to the analysis.

Without determining if the circuit court's interpretation of Va. Code § 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 a business after a fire failed to constitute a discontinuance of the business. *Bd. of Zoning Appeals of Norfolk v. Kahhal*, 255 Va. 476, 499 S.E.2d 519 (1998). 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 not to discontinue the use and held that inaction by owners does not indicate discontinuance. *Montgomery v. Zoning Appeals Bd. of Norfolk*, 45 Va. Cir. 126 (City of Norfolk 1998).

In *Town of Mt. Jackson v. Fawley*, 53 Va. Cir. 49 (Shenandoah Cnty. 2000), the circuit court held that a legal nonconforming use as a commercial garage could have remained a legal nonconforming use as a private vehicle maintenance facility supporting a transport business, had it not been used for more than two years as storage for carnival equipment.

By statute, a locality, after attempting to notify the property owner, may remove a nonconforming sign if the business for which the sign was erected has not been in business for more than two years. The cost of such removal is chargeable to the owner. Va. Code § 15.2-2307(G).

1-14.03(b) Compliance with Subsequent Regulation

The Supreme 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" from view within three years following the initiation of the nonconformity, when that ordinance failed expressly to provide that such failure would constitute a ground for termination of the nonconforming use. *Donovan v. Bd. of Zoning Appeals of Rockingham Cnty.*, 251 Va. 271, 467 S.E.2d 808 (1996). This was not, however, because the locality was powerless either to require compliance with the law or to effect a termination in that instance. 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 the use did not terminate the right of the owner to continue the use.

The case is of significantly greater interest than its holding, however, in its evident assumption that a locality *may in fact* authorize the termination of nonconforming uses on grounds other than those few that are expressly set out in Va. Code § 15.2-2307, which permits the termination of such uses if they are "discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition" They shall also "conform [to new regulations] whenever they are enlarged, extended, reconstructed or structurally altered and [local zoning ordinances may] further provide that no nonconforming building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such nonconforming use." *Id.* No other grounds for termination are set out in the enabling legislation, and yet the Court, albeit in dicta, concludes in *Donovan* that a jurisdiction may make failure to comply with the terms of a new ordinance imposing regulatory requirements on nonconforming uses (in this case screening of the use) "a circumstance which terminates the status of the use as a valid nonconforming use." *Id.* This is a striking opinion to the extent that (a) it authorizes termination of uses on grounds other than those in the enabling legislation, and (b) ignores the property rights implications of its previous decisions regarding nonconforming uses. As noted above, nonconforming uses are a species of "vested right," and, as noted below, vested rights are a form of property right that may be taken in only a constitutionally sufficient manner. From this it could well have flowed that once a use becomes nonconforming, the locality is precluded from further zoning regulation except to the limited extent that the enabling legislation addresses changes or discontinuance, unless it chooses to condemn the use (or is deemed to have condemned it in an inverse condemnation proceeding). This is not, however, the course that the Supreme Court has taken, implying, if not saying, that localities may regulate even nonconforming uses and require their termination for failure to comply with that regulation, and without regard to any limitations or authorizations in the zoning enabling statutes. In *Gwinn v. Herring*, No. 162484 (Fairfax Cnty. Cir. Ct. Aug. 16, 2000), the circuit court held that while a locality has the power to

terminate nonconforming uses for violation of a condition (such as increased intensity), the locality must have enacted a provision that specifies that failure to comply with the condition invalidate the use itself.

See also *Grigorovich-Barsky v. Board of Zoning Appeals of Northumberland County*, 43 Va. Cir. 24 (Northumberland Cnty. 1997), in which a circuit court held 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 Va. Code § 15.2-2307. *Cf. JBA One, L.L.C. v. Zoning Appeals Bd. of the City of Norfolk*, 84 Va. Cir. 394 (City of Norfolk 2012) (no termination of nonconforming use because of failure to obtain required business license).

By statute, a failed septic system that would be nonconforming may be replaced if there is no access to a public system; but the new septic system must be in compliance with Department of Health Regulations. Va. Code § 15.2-2307(F).

1-14.03(c) Natural Disasters and Non-Conforming Uses

Virginia Code § 15.2-2307(E) provides that a zoning ordinance shall permit the owner of a nonconforming residential or commercial building that is damaged or destroyed by a natural disaster to rebuild or repair the building to the extent possible to eliminate the nonconforming features, without the need to acquire a variance. If the building cannot be restored except to its original nonconforming state, the owner has the right to do so. The right to repair or rebuild exists for two years unless the damage or destruction occurred as a result of a declared federal disaster, in which case the owner has four years.

1-15 VESTED RIGHTS

1-15.01 In General

As localities find themselves seeking to deal with older zonings, or zonings that no longer comport with comprehensive planning, and as landowners are faced with ever changing regulations, questions of vested rights have become increasingly critical. 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.

Whether projects are large or small, the development approval process has become more protracted, and land use regulations have continued to change. 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.

1-15.02 Vested Rights Exist on a Continuum

Land development exists on a continuum from conceptual development of plans for the use or re-use of land, through formal plan submission, to plan approval, to initiation of construction, and finally completion and establishment of the use. Vested rights arise prior to and are distinct from “nonconforming uses” and require that plans have achieved a level of certainty and governmental approval.⁶³ Vested rights are, as described further in the text, property rights acquired by a landowner’s good-faith reliance on governmental actions of a sufficient kind, while a nonconforming use is a right to maintain a use, under certain restrictions and limitations, once it has been lawfully initiated.

1-15.03 The Nature of Vested Rights

Although it is not explicit in the decisions, it appears that the concept of vested rights is grounded in the Virginia and United States Constitutions, as well as in Va. Code § 15.2-

⁶³ It is important to contrast vested rights with “grandfathering,” for the two are conceptually quite different. See section 1-15.11 of this chapter.

2307. Indeed, in *Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 356 (1991), the Court specifically described a vested right as a “property right.” See also *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007). If a vested right is a *property right*, as opposed to a simple governmental license, then its deprivation can be more than unlawful and could in the rare case be a compensable event. See generally Hanes & Minchew, *On Vested Rights to Land Use and Development*, 46 Wash. & Lee L. Rev. 373 (1989); Delaney & 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).

Vested rights are sometimes seen as based on estoppel, and despite the theoretical differences between estoppel and vesting, most commentators have concluded that there are no practical distinctions between the doctrines. See D. Mandelker, *Land Use Law* § 6.12 (1988). In an unpublished decision, however, which may not be relied upon as precedent, the Supreme Court attempted to distinguish the two theories and stated in the context of a vested rights analysis that the estoppel theory does not exist in Virginia. *Harrison v. Bd. of Sup’rs* (unpublished memorandum opinion, Sept. 22, 1989). This is hardly news, for the Supreme Court has long and often held that neither laches nor estoppel work against a local governing body. See, e.g., *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138 (1981) (in Virginia, estoppel does not operate against the government); *Bd. of Sup’rs of Washington Cnty. v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987) (same); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 349 S.E.2d 351 (1986) (laches is no defense to governmental action or lack thereof).

In *Dick Kelly Enterprises v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992), the Supreme Court specifically held that estoppel does not apply against the government’s enforcement of a zoning ordinance and that the doctrine of vested rights (nonconforming use) cannot arise out of illegal 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 a motel use. See also *Wolfe v. Bd. of Zoning Appeals of Fairfax Cnty.*, 260 Va. 7, 532 S.E.2d 621 (2000).

In *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013), after first finding that two restaurants were physically located outside of a district for which a blanket special exception had been granted and thus the serving of alcoholic beverages for on-premises consumption was never a permissible use, the Supreme Court held that the restaurants had no vested rights under Va. Code § 15.2-2307, as the statute was not intended to permit the vesting of a right to an impermissible use under the applicable ordinance.

In Virginia, vested rights are not a question 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. The Supreme Court’s opinion in *Notestein v. Board of Supervisors of Appomattox County*, 240 Va. 146, 393 S.E.2d 205 (1990) makes it plain that it is possible for the locality to be demonstrably “unfair,” and yet prevail as to a vested rights claim.

1-15.04 When Do Rights Vest in Virginia?

Prior to 1998, the determination of when rights vested was a matter of common law. There remains an indeterminate body of common law vesting, but the General Assembly’s codification of vested rights expanded the circumstances under which rights vest from that established by case law. Va. Code § 15.2-2307.⁶⁴ The law now provides that a landowner’s

⁶⁴ Note that Va. Code § 15.2-2307 is not “merely enabling” legislation such that an ordinance is required to implement it. *Lamar Co. v. City of Richmond*, 287 Va. 348, 756 S.E.2d 444 (2014).

rights are deemed vested when he (1) obtains a significant affirmative governmental act (known universally as a "SAGA") that remains in effect allowing development of a specific project; (2) relies in good faith on such act; and (3) incurs extensive obligations or substantial expenses pursuing the project in reliance on the affirmative act. The nonexclusive list of significant affirmative governmental acts are: (a) acceptance of proffers; (b) approval of an application for rezoning for a specific use or density; (c) granting of a special use permit with conditions; (d) approval of a variance; (e) approval of a preliminary subdivision plat, site plan, or development plan with diligent pursuit of approval of the final plat or plan; (f) approval of a final subdivision plat, site plan or development plan; and (g) approval of a specific use or density of property. See 2005 Op. Va. Att'y Gen. 59. Note that additions to this list by the General Assembly do not apply retroactively. *Bd. of Sup'rs of Prince George Cnty. v. McQueen*, 287 Va. 122, 752 S.E.2d 851 (2014).

There is no vested property right in the continuation of a public road. Once the road is dedicated, only the locality has any property rights in it. *Loch Levan Land v. Bd. of Sup'rs of Henrico Cnty.*, 297 Va. 674, 831 S.E.2d 690 (2019).

While Va. Code § 15.2-2307 lists several governmental acts that had been recognized by the courts, it constitutes a rather significant expansion of Virginia's common law of vesting. To a great extent, the statute negates the holdings in *Town of Stephens City v. Russell*, 241 Va. 160, 399 S.E.2d 814 (1991) (preliminary subdivision plat); *Snow v. Amherst Cnty. Bd. of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994) (variance); and possibly *Town of Rocky Mount v. Southside Investors, Inc.*, 254 Va. 130, 487 S.E.2d 855 (1997) (if interpreted as a density rezoning), all of which found no significant governmental act had occurred.

In *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), the Virginia Supreme Court held that the issuance of a zoning certification letter by a zoning administrator is not a SAGA. In the decision's most important passage, the Court said that

[p]rior to the amendment of Code § 15.2-2307 by 1998 Acts ch. 801, a vested rights determination was made purely in reliance on this Court's developed body of jurisprudence. *Board of Zoning Appeals v. CaseLin Sys., Inc.*, 256 Va. 206, 210-11, 501 S.E.2d 397, 400 (1998). Code § 15.2-2307 sets forth six actions that, as a matter of law, constitute a significant affirmative governmental act. *When an act does not fall within one of the enumerated significant affirmative governmental acts in Code § 15.2-2307, we rely on this Court's case law to determine whether a particular act constitutes a significant affirmative governmental act.*

* * *

The rights that vest as a result of a significant affirmative governmental act are only those rights that the government affirmatively acts upon, and the evidence to support the claim to those rights must be clear, express, and unambiguous.

Id. (emphasis added).

Although the General Assembly rather plainly intended to broaden materially the circumstances in which a landowner can obtain vested rights, the Supreme Court's conclusion that it will refer to its previous, highly constrained, view of those rights prior to the amendment of § 15.2-2307 means, for all practical purposes, that only the listed governmental acts are likely to constitute SAGAs. See *Bd. of Sup'rs of Prince George Cnty. v. McQueen*, 287 Va. 122, 752 S.E.2d 851 (2014) (zoning administrator's "letter of

compliance" not a SAGA); *Bd. of Zoning Appeals of Bland Cnty. v. CaseLin Systems, Inc.*, 256 Va. 206, 501 S.E.2d 397 (1998) (board of supervisors' letter of support and certification of compliance with local ordinances not a SAGA); *Notestein v. Bd. of Sup'rs of Appomattox Cnty.*, 240 Va. 146, 393 S.E.2d 205 (1990) (statements by officials not a SAGA); *Holland v. Bd. of Sup'rs of Franklin Cnty.*, 247 Va. 286, 441 S.E.2d 20 (1994) (application for permits not a SAGA).⁶⁵ In *In re Zoning Ordinance Amendments*, 66 Va. Cir. 375 (Loudoun Cnty. 2005), obviously decided before *Crucible*, the circuit court held that well and drainfield approvals combined with a subdivision certification letter from the Health Department did not constitute a significant affirmative governmental act and noted that preliminary plat approval was the earliest point in the overall review process when vesting could occur. The Attorney General has also opined that the mere filing of a site plan of development does not create vested property interest in a land use classification and such filing does not preclude subsequent amendments to current zoning ordinance. Approval of the site is required before vesting occurs. 2006 Op. Va. Att'y Gen. 81.

In *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007), the Court held that a city ordinance that had the effect of requiring a power plant possessing a vested right to obtain a special use permit to continue operation was an invalid effort to terminate that vested right under Va. Code § 15.2-2307.⁶⁶

Finally, in *Board of Supervisors of Culpeper County v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006), the Court held that established vested rights do not preclude rezoning, they only preserve a right to develop under prior zoning standards. No vested right existed in *Greengael* because there had been no significant governmental act. The mere act of zoning classification is not a significant act when it is not requested by the developer. Further, there had been no regulatory taking. (The LGA was an amicus).

The Supreme Court has also clarified that a property owner subject to a unitary proffer statement may not acquire a vested right in the zoning classification or use of neighboring property subject to the same proffer statement. *Town of Leesburg v. Long Lane Assocs. Ltd. P'ship*, 284 Va. 127, 726 S.E.2d 27 (2012). See section 1-4.04.

1-15.05 Suffolk and Hale

The evolution of vested rights law has been notable since the days of *Board of Supervisors of Fairfax County v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972), and *Board of Supervisors of Fairfax County v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972). Following those decisions, the Supreme Court found no other common law vested rights to have been created in any decided case; rather, it found consistently to the contrary.

Following the adoption of amendments to Va. Code § 15.2-2307, however, the Supreme Court initially proved generous to the landowner in its first post-amendment interpretation of the statute in *City of Suffolk v. Board of Zoning Appeals for Suffolk*, 266 Va. 137, 580 S.E.2d 796 (2003). In 1988, the landowner had submitted a mixed use, mixed density master land use plan and the city in due course rezoned the property for a planned

⁶⁵ In *Island Grill v. Board of Zoning Appeals*, 34 Va. Cir. 492 (City of Richmond 1994), the City had a long-standing 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, supra*, that in the absence of any affirmative legislative policy, no vested rights can arise from the mere application of a building permit. See also *Moore v. Zoning Appeals Bd. of Spotsylvania Cnty.*, 49 Va. Cir. 428 (Spotsylvania Cnty. 1999) (no vested rights based on application for building permit).

⁶⁶ The Court did not reach the city's argument that its charter permits it to amortize nonconforming uses within a reasonable time, holding that the argument had not been adequately preserved. *Mirant, supra*.

housing development. For five years the landowner did essentially nothing. For the next six years, it took “regular though not constant” development steps, albeit mostly with respect to a tract of land that constituted only a portion of the property proposed to be developed. The Court held first that the submitted general development plans met the statutory requirement that the significant governmental act (the rezoning) allowed the development of a “specific project,” rejecting the dissent’s argument that a project must be more detailed than what was submitted before it can vest. Second, the Court held that the five-year delay in taking any action was immaterial to diligent pursuit, because the developer had taken intermittent action for six years prior to a 1999 rezoning that would have prohibited pursuit of the approved initial development plans. Finally, the Court held that the expense and effort expended in developing a portion of the property (for which there was no question whether that portion had vested) was sufficient to constitute diligent pursuit of the entire development since some of the plans and studies addressed the development of the property as a whole.

In 2009, however, the Supreme Court decided *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009). *Hale* is a more detailed inquiry into vested rights, conditional zoning, and the 1998 legislative amendments to Va. Code § 15.2-2307 than the Court had previously essayed. The Court took a decidedly different tack from that in *Suffolk*, one that warrants detailed attention.

In *Hale*, a developer obtained a rezoning for an approximately twenty-six acre portion of a larger parcel to the town’s General Commercial District, which then permitted “retail sales” without a restriction on the square footage of a retail structure. The Council approved the rezoning subject to a proffer statement that included increases in certain setback requirements above what would normally be required, a requirement to construct perimeter fences and landscape buffers in certain areas, the construction of a multi-use path though the property that would connect with a system of other greenways in the town, limitations on vehicular traffic, and the placement of private drives or private roads. The only restriction on building size was a limitation on building height in certain areas. The proffers also restricted the permissible uses of the property by excluding certain types of businesses that would otherwise be permitted as a matter of right in the General Commercial District. The proffers described the project as having a “‘Traditional Neighborhood’ design” and that its “[r]etail and commercial structures” would adhere to this design by varying the appearance of such structures in one or more of their architectural features at least every sixty feet. The proffers further described the entire project as

An exciting “main-street” retail destination that invites neighbors and guests to enjoy a host of offerings such as specialty shops, unique dining establishments, and entertainment—all within a short stroll. The architecture shall resemble the vernacular of Blacksburg with casual elegance and a pedestrian-friendly, tree-lined boulevard.

Similarly, the developers’ “vision statement” in their rezoning application described the project as

a mixed use town center with commercial, residential, office, retail, hotel, entertainment, public, and cultural facilities interconnected with open spaces in a cohesive development that provides a distinctive appearance and true sense of space. Pedestrian-scale storefronts, small-scale shopping, walkways, manicured landscaping, and open public areas compliment [sic] one another to create a social atmosphere. The development of the property adjacent to residential neighborhoods will be sensitive to the character and concerns therein.

A conceptual plan submitted with the rezoning application also described the project as a mixed-use retail, commercial, and residential development. A “preferred illustrative plan” showed the project as consisting of buildings of varying size surrounded by small parking areas with islands for landscaping and lighting. The proffers also described how “shops with colorful windowscapes will line the development’s ‘main street’ and unique residential dwellings can be nestled above.”

Specific proffers limited the residential density to 400 total bedrooms and permitted no more than forty-eight bedrooms per acre for that portion of the property so designated, if it were subdivided. Another illustrative design depicted how mixed-use buildings would include retail stores, restaurants, or other commercial uses on the ground floor, with residential condominiums and townhomes on the upper floors. No structure in the conceptual plan submitted with the rezoning application exceeded 80,000 square feet of gross floor space for a single retail sales use. Further, the staff report submitted to the Council noted that “the plan in the application is for illustration only.” Other than as limited by express proffers, rezoning the property “would allow any use that is permitted in the G[eneral] C[ommercial] [D]istrict.”

Following the rezoning, the developers submitted various plans to the town, and during that process provided a submittal showing for the first time a building on a portion of the property that comprised 176,000 square feet of retail space.

The upshot was that the town council initiated a “fast track” zoning ordinance text amendment to restrict the size of buildings in the General Commercial District—a “big box” ordinance, as such ordinances are familiarly known. It soon thereafter enacted an ordinance requiring a special use permit for any retail structure in excess of 80,000 square feet. There was then initiated a contest regarding whether the developers had obtained vested rights that immunized them from the ordinance. Following a zoning administrator’s ruling that no such rights had been acquired, the BZA reversed, and the trial court affirmed the BZA.

On appeal, the developers contended that all the requirements of Va. Code § 15.2-2307, including that the proffers accepted by a locality as a condition of rezoning should “specify use,” had been met. They contended that the statute did not require the proffers to expressly identify any specific use in order for the landowner to obtain vested rights but contended that so long as the proffers did not place limitations on otherwise permissible uses, the landowner became vested with the right to all such uses provided that the other requirements of the statute were met. Because the proffers had prohibited certain uses otherwise permissible in a General Commercial District, and also placed additional restrictions on other uses of the property, such as the increased setbacks and limitations on building height, the developers contended that they had acquired a vested right to the retail sales.

They also contended that Va. Code § 15.2-2298(B) supported the BZA’s decision overturning the Zoning Administrator’s determination.

The Supreme Court reversed, and held that because Va. Code § 15.2-2307 provides that a significant affirmative governmental act includes a circumstance when “the governing body has accepted proffers or proffered conditions which specify use (emphasis in original) related to a zoning amendment,” the plain meaning is that *proffers must affirmatively identify the use for which a vested right is sought*.

Similarly, the Court rejected the proposition that proffers that apply to any use of the property, such as increased setbacks, restrictions on building height, or the required inclusion of specific support improvements such as roads and landscaping, operate somehow to “specify use” of the property in order to create a vested right to any particular permissible use of the property. The developers conceded that the conceptual plans and the

description of the project in the rezoning application and the proffers were intended to provide for "flexibility" in the ultimate development of the property.

However, as was observed during oral argument of these appeals, flexibility is the opposite of specificity, and specificity is what Code § 15.2-2307 requires for a landowner to obtain a vested right through a locality's acceptance of development proffers in the context of adoption of a rezoning ordinance. In short, when vested rights accrue to a landowner as the result of a significant affirmative governmental act, the rights that vest are only those that the government affirmatively acts upon, and the evidence to support the claim to those rights must be clear, express, and unambiguous.

Id.

The Court further rejected the contention that the proffers possessed a SAGA under clause (ii) of the second paragraph of Va. Code § 15.2-2307, that the town "approved an application for a rezoning for a specific . . . density." The developers contended that the specific residential density limitations on the rezoning satisfied this requirement, entitling them to a vested right to any permissible use of the property under the General Commercial District. However, in the Court's view:

Nothing in the record supports the developers' contention that they were "induced" to proffer the limitations on residential density in expectation of receiving vested rights to unrestricted development of all commercial uses of the property. To the contrary, it is clear that the inclusion of residential density limitations was part of the overall scheme of the project to create a balanced, mixed use community. Accordingly, even if we were to assume as the developers contend that a voluntary proffer of a restriction on one type of use could be made as an inducement to assure that the landowner received a vested right to another type of use, this simply did not occur in this case.

Moreover, we do not agree with the broader premise that a landowner who is the beneficiary of a significant affirmative governmental act as the result of a proffer limiting density on a specific category of use is thereby entitled to claim a vested right to every use of the land that was permissible at the time of the act without regard to whether the proffer restricting density related to the use for which the right is asserted. There is no doubt that when a locality approves a request to rezone property based on a proffer that includes a limitation on the density of a particular use that is less than would normally be permitted under the new classification, this would constitute a significant affirmative governmental act. However, the only vested right that clearly would accrue to the landowner in that circumstance would be the right to use the property for the specific use and up to the density that the particular proffer specified. The locality would unlawfully interfere with such a right only if it were to attempt to enforce a subsequent change in the zoning classification that eliminated or restricted the ability to use the property consistent with the proffer limiting the density of the specified use. The May 29, 2007 amendment to the General Commercial District classification did not impair the ability of the developers in this case to use their property consistent with the proffered limitations on residential density thereon.

Id. (emphasis added). There is, in short, no such thing as a "proffer by implication," and the Court will recognize no vested right deriving from such implications. It is thus critical in analyzing vested rights claims under the statute to identify with clarity the "specific project" that is at issue.

The Court also addressed the developers' contention that Va. Code § 15.2-2298 barred the Town from enforcing its new big box ordinance. That statute provides, in part:

In 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 the property, shall be effective with respect to the property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

Va. Code § 15.2-2298.

The Court rejected the developers' claim that their proffered "donations" of real property and cash to the town triggered the statute. These "donations" consisted of the creation of a multi-use path to connect to the town's greenway system, and a payment of \$25,000 for improvement of a street intersection elsewhere in the town. The developers claimed that neither the need for construction of the path nor the cash payment for the improvement of the intersection was "generated solely by the rezoning itself."

The Court concluded, however, that proffer for the multi-use path was not a "requirement for the dedication of real property of substantial value." The developers would continue to own the property over which the path ran, would control the design of the path over their property, and would be responsible for its maintenance. This did not constitute a "dedication of real property" within the meaning of Va. Code § 15.2-2298(B). Similarly, it found that the record showed the \$25,000 cash contribution was needed for the improvement of the intersection and related to the rezoning and thus insufficient to create a vested right.

The *Hale* case is important on several levels. It marks the first time that the Supreme Court has extensively analyzed application materials submitted with a rezoning to ascertain what it was that, in effect, the town had been told it would get with the approval of the rezoning, and compared those materials with the proffer statement to identify the "specific project" that was contemplated by the approval and the proffers accepted in connection with it. It marks, too, the first time the Supreme Court has considered what is required to vest rights under Va. Code § 15.2-2298. Finally, of significance on parallel with the actual holding of the case, the Court noted in footnote 10 that even *Suffolk* might have been differently decided:

It should further be noted that *City of Suffolk*, in which we affirmed a judgment of the circuit court upholding a decision of a board of zoning appeals, was decided under the former version of Code § 15.2-2314 and, thus, the decisions of the board and the circuit court were entitled to a presumption of correctness as to the conclusions of law upon which they were based. *City of Suffolk*, 266 Va. at 142-43, 580 S.E.2d at 798. Accordingly, even if we were to find that the decision in *City of Suffolk* was directly applicable to this case, we would nonetheless be required to revisit the issues addressed therein in order to apply a de novo standard to the circuit court's application of Code § 15.2-2307 as required by Code § 15.2-2314 as amended.

Id.

1-15.06 The Extent of Landowner Vesting

Virginia Code § 15.2-2307(A) 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. The full reach of this language is unclear, but in 2003 the Loudoun County Circuit Court issued an opinion in consolidated litigation relating to sweeping amendments to the Loudoun County Zoning Ordinance that dealt directly with the extent of vested rights and the protection from legislative change that such rights provide. Complainants with undisputed vested rights challenged the county’s use of a “Vested Rights Matrix” wherein the county delineated what it believed were the rights that these complainants had obtained. Loudoun County had taken the position that “new laws are applicable [to a vested project] unless a project’s [specific] features [as shown on approved plans] are vested[,] in which case the project’s features may proceed as long as due diligence continues[,] but the new laws must be implemented to the extent possible.” The court rejected this position, however, and held that developers who have a vested right in a specific project “are entitled to develop that approved project in accordance with the governmental approval, and the ordinances and regulations, in effect at the time of approval, without regard to the application of the “Vested Rights Matrix” or subsequent zoning ordinance amendments.” Memorandum Opinion and Consolidated Decree Number 25, *In Re: Zoning Ordinance Amendments Enacted by the Bd. of Sup’rs of Loudoun Cnty. on Jan. 6, 2003 (Consolidated Cases)*, 67 Va. Cir. 462 (Loudoun Cnty. 2003). Thus, the court held that one’s rights vest to a “snapshot” of the ordinances and regulations that were applicable at the time of project vesting, and that one is therefore immune from zoning ordinance changes that would otherwise defeat a vested right.

1-15.07 Statutory Vesting as to Subdivision and Site Plans

Recorded subdivision plats and final site plans are valid for five years. Finality is achieved when the only thing remaining for the applicant to do is the posting of bonds or the submission of required administrative documents, agreements, deposits, or fees. Va. Code § 15.2-2261(A). During that period, no changes or amendments to any local zoning ordinance or regulation shall 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 a change in circumstances substantially affecting public health, safety, or welfare. Va. Code § 15.2-2261(C). Approved preliminary plats are valid for five years if the developer submits a final plat within one year (or within the period prescribed in the ordinance) and diligently pursues approval of the final plat. Va. Code § 15.2-2260(F). If there has been no diligent pursuit of approval of the final plat, the planning commission or other agent after three years may revoke approval of the preliminary plat after notice and with written findings of fact. *Id.*; see generally *Loch Levan Land v. Bd. of Sup’rs of Henrico Cnty.*, 297 Va. 674, 831 S.E.2d 690 (2019). An approved final subdivision plat that has been recorded, or a recorded plat dedicating property to the local jurisdiction or public body that has been accepted by the grantee, is valid for an infinite period of time unless and until the property is vacated pursuant to Va. Code §§ 15.2-2270 through 2278. Va. Code § 15.2-2261(F).

Although a town ordinance provided that a site plan was deemed approved if the planning commission did not act within sixty days, the planning commission’s denial of the final subdivision plat constituted denial of the final site plan as the site plan was dependent on the property lines established by the plat. *Commonwealth-Abingdon Partners v. Town of Abingdon*, 79 Va. Cir. 226 (Washington Cnty. 2009).

1-15.08 Forfeiture of Vested Rights

Both Va. Code § 15.2-2307 and case law recognize that failure to pursue the completion of the project can result in the forfeiture of vested rights. See *Snow v. Amherst Cnty. Bd. of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994); *Bd. of Sup’rs v. Trollingwood P’ship*,

248 Va. 112, 445 S.E.2d 151 (1994); see also *City of Suffolk v. Bd. of Zoning Appeals*, 266 Va. 137, 580 S.E.2d 796 (2003) (4-3), discussed in section 1-15.05. Prior to the 1998 amendments, and oddly without mentioning *Snow*, a circuit court held that vested rights can be forfeited, refusing to allow land bought in 1987 to be developed in accordance with a subdivision plat approved in 1946. *Robertson v. City of Alexandria*, 46 Va. Cir. 6 (City of Alexandria 1998).

1-15.09 Who Determines the Existence of Vested Rights

In *Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 356 (1991), the Supreme Court held that zoning administrators had no power to determine property rights, and that since vested rights are such property rights, they are powerless to make binding vested rights rulings—only a court could do so.

In 1993, the General Assembly legislatively addressed *Holland* by amending Va. Code § 15.2-2286(A)(4) to provide that a zoning administrator has the authority to make findings of fact and conclusions of law with regard to interpretations and rulings generally within the administrator's competence, so long as the administrator obtains the concurrence of the local government attorney to the findings and conclusions reached. It was an express purpose of this change to permit vested rights determinations by the administrator, without the necessity of judicial determination. Upon reflection, the legislature concluded that this language granted a broader authority than was originally intended, and in 1995 the section was amended to provide 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 Va. Code § 15.2-2307 [to wit, vested rights]."

Thus, it became *statutorily* permissible for the zoning administrator to make vested rights determinations, and the Supreme Court clarified the relationship between *Holland* and the authority granted by the statute in *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), where it held that the General Assembly has simply created an alternative means of obtaining a determination of vested rights—one may go either to the zoning administrator under the amended statute, or to the circuit court. In either case, judicial review is *de novo*.

In *Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 831 S.E.2d 483 (2019), the Court made clear that a landowner may not seek an administrative determination of vested rights and, subsequent to the time in which to appeal an administrative decision, seek a judicial determination as an alternative approach.

1-15.10 When Vested Rights Can Be Acquired in Void Permits

A long line of cases had held that building permits or other governmental approvals in conflict with an existing zoning ordinance are simply void ab initio and have been held to confer no vested rights even though issued in good faith. *Bd. of Sup'rs of Washington Cnty. v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987) (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, 266 S.E.2d 899 (1980); *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978); *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968); *Norfolk & W. Ry. Co. v. Carroll Cnty.*, 110 Va. 95, 65 S.E. 531 (1909); see also *EMAC, L.L.C. v. Cnty. of Hanover*, 291 Va. 13, 781 S.E.2d 181 (2016) (county code required special use permit applicant to be an owner, attorney-in-fact, or tenant; permit granted to third party was void ab initio).

The General Assembly has amended certain statutes, however, and the Supreme Court has indicated accordingly that this rule is no longer absolute.

Virginia Code § 15.2-2307(D) provides if the local government has issued a permit, other than a building permit, that authorized construction of an improvement to real property and the improvement was constructed in accordance with the permit, an ordinance may provide that the improvements are nonconforming, but not illegal. If no permit is required and an authorized zoning official informed the property owner that the structure was in compliance, an ordinance may provide that the structure is nonconforming but not illegal. See *also* section 1-14.

Virginia Code § 15.2-2311(C) provides that where a landowner has received an order, requirement, decision, or determination from the local zoning administrator, such a ruling is binding on the locality if not changed, modified, or reversed within sixty days of issuance. The statute no longer permits changes after that time based on “nondiscretionary errors” in the ruling. See section 1-16.04. A landowner acquires vested rights when he has received a final and unappealed determination from the local zoning administrator and has materially changed his position in good faith reliance upon that determination. *Bd. of Sup’rs of Richmond Cnty. v. Rhoads*, 294 Va. 43, 803 S.E.2d 329 (2017). In *Rhoads*, the parties admitted that a structure was in violation of the zoning ordinance and that the zoning administrator had signed a certificate of zoning compliance prior to construction. The county asserted that Va. Code § 15.2-2311(C) did not apply because (i) the zoning administrator lacked authority to approve a plain violation of the zoning ordinance, (ii) a certificate of zoning compliance was not a “determination,” and (iii) it only bars subsequent actions of the zoning administrator and not those of the board of supervisors or a court. The Supreme Court rejected the county’s arguments and held that Va. Code § 15.2-2311(C) manifestly creates a legislatively-mandated limited exception to the judicially-created general principle that a building permit issued in violation of applicable zoning ordinances is void. The Court held a certificate of zoning compliance clearly constitutes a determination that building plans complied with a zoning ordinance, contrasting that document with the “cash receipt” of *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013) and the zoning administrator’s “interpretation” in *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010), each discussed below. Finally, the Court held that, by its terms, Va. Code § 15.2-2311(C) and its vesting provisions must be considered and enforced by a BZA, a board of supervisors, or a court in making a zoning determination or reviewing its correctness, if the prerequisites for the application of the statute are satisfied.

In *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013), the Court indicated that in contrast to Va. Code § 15.2-2307, § 15.2-2311(C) does indeed provide for the creation of such rights to use property (as articulated in the unappealed action of the zoning administrator) in a manner that otherwise would not have been allowed. Such a ruling may, therefore, constitute a significant affirmative governmental approval, since Va. Code § 15.2-2307 lists as a form of governmental approval a zoning administrator’s or other administrative officer’s issuance of 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 § 15.2-2311(C). Va. Code § 15.2-2307.⁶⁷ However, the Court found in *Norfolk 102* that a document issued by the zoning administrator entitled “cash receipt” but also containing the inscriptions “zoning clearance certificate” and “license category” with “eating place” written in did not constitute a “determination” by the zoning administrator within the meaning of the statute.

⁶⁷ The provisions of Va. Code § 15.2-2307 relate only to those determinations specifically identified, to wit, a “written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner’s property.” A zoning administrator may well issue such decisions or determination as to things other than permissibility of a specific use or density, that do not rise to the level of a vested right under that statute, but that would create rights that continue to be protected under the provisions of Va. Code § 15.2-2311(C).

1-15.11 The Difference Between Vesting and Grandfathering

In *City Council of Alexandria v. Lindsey Trusts*, 258 Va. 424, 520 S.E.2d 181 (1999), the Court recognized the distinct difference between the notion of a vested right, discussed here, and "grandfathering." As has been stated at length above, vested rights are property rights created by sufficient compliance with existing law. Grandfathering is simply 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. *Fairfax Cnty. v. Fleet Indus. Park*, 242 Va. 426, 410 S.E.2d 669 (1991); see also *Parker v. Cnty. of Madison*, 244 Va. 39, 418 S.E.2d 855 (1992). In *Lindsey Trusts*, the Supreme Court held that because a city had the power to terminate a "grandfathered" use (ordinance specifically stated use was not considered a nonconforming 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 (relying on *Bd. of Zoning Appeals of Bland Cnty. v. CaseLin Sys., Inc.*, 256 Va. 206, 501 S.E.2d 397 (1998)).

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 large element of deference that would be 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 Supreme Court has 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. *Parker v. Cnty. of Madison*, 244 Va. 39, 418 S.E.2d 855 ("[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."). When there is an express grandfather provision, however, unwritten practices and procedures, which were consistently applied, can be considered part of the substantive requirements of the prior ordinance. *Bertozzi v. Hanover Cnty.*, 261 Va. 608, 544 S.E.2d 340 (2001). Although *Parker* and *Bertozzi* are technically subdivision cases, there is little doubt that their holdings are equally applicable in the zoning context.

1-16 ADMINISTRATION AND ENFORCEMENT

1-16.01 The Zoning Administrator

1-16.01(a) Zoning Administrator's Authority

Zoning ordinances are enforced by a number of participants in the process, of course, but without doubt the principal official is the zoning administrator, whose appointment is authorized by Va. Code § 15.2-2286(A)(4). This official shall have "all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance." The zoning administrator is thus the agent of the local governing body, and responsible to it, but he or she possesses significant statutory authority to administer and enforce the provisions of 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) ensuring compliance by means of legal actions including injunction, abatement, or other appropriate action or proceeding (subject to appeal to the Board of Zoning Appeals), and (iii) in specific cases "making

findings of fact, and, with concurrence of the attorney for the governing body, conclusions of law” regarding determinations of vested rights. *Id.*⁶⁸

In *Trustees of Christ & St. Luke’s Episcopal Church v. Board of Zoning Appeals of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007), the Court held that deference was due a zoning administrator’s interpretation, upheld by the BZA, that the term “adjacent,” used in an ordinance provision permitting a zoning lot to be comprised of multiple adjacent lots for purposes of determining maximum buildable area, did not apply to two of plaintiffs’ lots situated across from one another but separated by a public street. That interpretation was neither plainly wrong nor in violation of the purpose and intent of the ordinance as a whole, and correct principles of law were applied in adopting it.

If a request for an order, requirement, decision, or determination from the zoning administrator that is subject to appeal is not from the property owner, then written notice must be given to the property owner within ten days of the receipt of the request by the zoning administrator or, if so directed by the zoning administrator, by the requester. Va. Code § 15.2-2204. This requirement does not apply to “inquiries” made by local governments “in the normal course of business,” but presumably such inquiries would not be appealable.

The zoning administrator must make a decision or determination on zoning matters within ninety days of a request unless the requestor has agreed to a longer period. Va. Code § 15.2-2286(A)(4). The administrator may take the full ninety days, even if the purpose for delaying the decision is to allow zoning ordinance amendments that would prohibit the use for which approval has been applied. *Ancient Art Tattoo Studio v. City of Va. Beach*, 263 Va. 593, 561 S.E.2d 690 (2002). A circuit court has held that a zoning administrator may make determinations affecting property rights without a pending application for specific relief. *Greene v. Zoning Appeals Bd.*, 34 Va. Cir. 227 (Fairfax Cnty. 1994).

In *McLane v. Vereen*, 278 Va. 65, 677 S.E.2d 294 (2009), the Supreme Court held that it is error for a trial court to order the payment of fines in an amount less than the rate specified in a consent decree endorsed by the affected property owners and the locality.

1-16.01(b) Notice of Right to Appeal

Virginia Code § 15.2-2311 requires that the written order or notice of a zoning violation from a zoning administrator must include a statement that the aggrieved party has a right to appeal. A statement sent by registered or certified mail to the last known address of the property owner or its registered agent satisfies the notice requirements. The notice must contain any applicable appeal fee which cannot exceed the costs of advertising the appeal for public hearing and reasonable costs. Unless an appeal is taken within thirty days, the decision is final and unappealable.⁶⁹ *Voorhees v. Cnty. of Fairfax Bd. of Zoning Appeals*, No. CL-2007-9484 (Fairfax Cnty. Cir. Ct. Apr. 15, 2009) (thirty days runs from date of approval of plans, not issuance of permits); *Fairfax Cnty. Bd. of Sup’rs v. Zoning Appeals Bd.*, 46 Va. Cir. 20 (Fairfax Cnty. 1998) (written notification by the zoning administrator within thirty

⁶⁸*Cook v. Board of Zoning Appeals of City of Falls Church*, 244 Va. 107, 418 S.E.2d 879 (1992), contains a restatement of the useful proposition that “great weight is given the consistent construction of an ordinance by the officials charged with its enforcement.” See also *Trs. of Christ & St. Luke’s Episcopal Church v. Bd. of Zoning Appeals of City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007); *Donovan v. Bd. of Zoning Appeals of Rockingham Cnty.*, 251 Va. 271, 467 S.E.2d 808 (1996); *Belle-Haven Citizens Ass’n v. Schumann*, 201 Va. 36, 109 S.E.2d 139 (1959); *Masterson v. Bd. of Zoning Appeals of City of Va. Beach*, 233 Va. 37, 353 S.E.2d 727 (1987); *Rountree Corp. v. City of Richmond*, 188 Va. 701, 51 S.E.2d 256 (1949).

⁶⁹ A zoning ordinance may prescribe an appeal period of less than thirty days, but not less than ten 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.

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). This provision overrides contrary charter provisions.

The decision of the zoning administrator *need not be in writing*. *Lilly v. Caroline Cnty.*, 259 Va. 291, 526 S.E.2d 743 (2000) (oral ruling of administrator at board meeting final after thirty days and must be appealed within that time). This decision is difficult to square with other rulings regarding such decisions, but it has never been overruled or qualified by the Supreme Court. However, Va. Code §§ 15.2-2301 and 15.2-2311 provide that if written notice is not given, a decision by the governing body or the BZA of an appeal from a zoning administrator determination would not be binding on the property owner. In the case of the BZA, actual notice of the zoning administrator's decision or participation in the appeal hearing waives that right. Va. Code § 15.2-2311(A).

The courts are authorized to enjoin, restrain, correct, or abate violations of the ordinance, whether or not the ordinance itself expressly so provides. 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).

1-16.01(c) Zoning Administrator and Conditional Zoning Powers

Under conditional zoning ordinances, the zoning administrator has further enforcement powers with respect to proffered conditions. In addition to his customary authority to issue correction orders and bring civil suits, he may also require "proffer performance bonds" when the local ordinance authorizes it. These bonds are guarantees of satisfaction to the governing body, in an amount sufficient for and conditioned upon construction of any physical improvements required by those conditions or by a contract for their construction, together with a proper contractor's guarantee in the same amounts and so conditioned. These must be reduced or released upon submission of satisfactory evidence that construction of improvements has been properly completed in whole or in part.

Failure to meet all proffered conditions shall, moreover, constitute reason to deny issuance of any use, occupancy, or building permit. Va. Code § 15.2-2299. This is authority of importance to ensure that the landowner does not fail to comply with proffered conditions. *See, e.g., Miller v. State Bldg. Code Tech. Review Bd.*, No. 0365-03-2 (Va. Ct. App. July 22, 2003) (unpubl.) (failure to appeal zoning ordinance violation notice foreclosed an appeal of the subsequently voided building permit).

1-16.02 The Limited Responsibility of the Board of Zoning Appeals for Direct Enforcement

The board of zoning appeals itself, without the necessary intervention of the zoning administrator, is empowered to settle zoning district boundary disputes provided it merely interprets boundaries and does not purport to make wholesale rearrangements of them. Va. Code § 15.2-2309(4).

See also 2022 Op. Va. Att'y Gen. 58 (a BZA may not hear and vote upon a matter that the local body has reserved to itself under the zoning ordinance).

1-16.03 The Zoning Administrator and "Modifications"

Variance determinations are made exclusively by BZAs. *See* section 1-13. Virginia Code § 15.2-2286(A)(4), however, allows the zoning administrator to make "modifications" to zoning provisions that address the physical requirements on a lot or parcel of land, including but not limited to size, height, location, or features of or related to any building, structure, or improvements. The administrator must make findings that are identical to those required of a BZA in granting a variance pursuant to Va. Code § 15.2-2309. Prior to granting a modification, the 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 twenty-one days of the date of the notice. The administrator must issue a written decision that can be appealed to the BZA pursuant to Va. Code § 15.2-2311.

1-16.04 Finality of Zoning Administrator Determinations

In *Gwinn v. Collier*, 247 Va. 479, 443 S.E.2d 161 (1994), the Supreme Court held that a zoning administrator is not obligated to appeal her own decisions and that she is always at liberty to correct past mistakes and to cite violations, even where earlier decisions by herself or her predecessors had authorized or permitted a use later determined unlawful. *Collier* led directly to an amendment to Va. Code § 15.2-2311, which effectively reversed that case to the extent that written orders, requirements, decisions, or determinations made by a zoning administrator or other administrative officer shall no longer be subject to

change, modification or reversal . . . after sixty 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.

Va. Code § 15.2-2311(C). The limitation on the authority of the zoning administrator to change position after sixty days does not apply where the zoning administrator, with the concurrence of the local government attorney, determines that modification is required “to correct clerical errors.” *Id.*; see *McGhee v. Zoning Appeals Bd. of Roanoke*, 57 Va. Cir. 47 (City of Roanoke 2001) (zoning administrator could not issue stop work order more than sixty days after certifying project in compliance with granted variance); see also section [1-16.01\(b\)](#).

In 2012, the General Assembly eliminated the phrase “other nondiscretionary errors” from the statute as a basis for change, modification, or reversal of a previously issued opinion of a zoning administrator after sixty days. Historically, the Supreme Court has held that a zoning administrator may not amend a zoning ordinance by a binding ruling. See, e.g., *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138 (1981). While it remains the case that such a ruling cannot amend an ordinance, a zoning administrator’s ruling governs the rights of the recipient thereof. In *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013), the Court stated that Va. Code § 15.2-2311(C) provides for the potential creation of a vested right to use property in a manner that otherwise would not have been allowed. However, the Court further found that a document issued by the zoning administrator entitled “cash receipt” but also containing the inscriptions “zoning clearance certificate” and “license category” with “eating place” written in did not constitute a “determination” by the zoning administrator within the meaning of the statute. It also held that mere “acquiescence” of city officials in the impermissible business operations does not satisfy the specific requirements of Va. Code § 15.2-2311(C). See also *Bd. of Sup’rs of Prince George Cnty. v. McQueen*, 287 Va. 122, 752 S.E.2d 851 (2014) (zoning administrator’s “letter of compliance” not a SAGA). This statutory change may thus limit the line of cases beginning with *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968), insofar as a ruling creates rights in that recipient. See section [1-15.10](#).

In *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010), the Court held that a “zoning interpretation” does not bear sufficient indicia of finality as a “written order, requirement, decision or determination,” to have binding force such that the sixty-day finality provision of Va. Code § 15.2-2311(C) applies. (This may also mean that such an interpretation has no binding force of any kind, and therefore, not need be appealed. See also the [Crucible](#) discussion). In *James*, Columbia Baptist Church had sought an interpretation of a zoning ordinance provision in connection with its plan to consolidate several lots into a single lot. While acknowledging that consolidation was a function of the city’s planning commission, the zoning administrator gave it as his written “interpretation” that the consolidation would not violate the zoning ordinance. When the church filed its

consolidation application sometime later, a “senior planner” on the city staff disagreed with that interpretation and recommended denial of the application, with which the planning commission unanimously agreed. At the hearing before the trial court, the zoning administrator characterized his interpretation as a “determination” of the issue to be presented to the commission, but the Supreme Court held that the commission was not obligated to honor that “interpretation” as a “thing decided.” On the contrary, the commission has an independent right to interpret the local zoning ordinance in the performance of its duties with respect to subdivision applications, and it cannot be bound by the zoning administrator. It is not clear what the distinction between a zoning interpretation and a zoning determination may be except, perhaps, in the form of the words used, and it is similarly unclear whether this holding applies to anything other than an interpretation in the context of a subdivision approval. This decision takes on added importance, however, in light of the General Assembly’s amendment of Va. Code § 15.2-2307 to provide that a written order, requirement, decision or determination as to the use or density permitted on a property that is no longer subject to appeal and no longer subject to change, modification or reversal under Va. Code § 15.2-2311(C) is a SAGA that may serve to create a vested right. Mere “interpretations” issued by a zoning administrator are likely neither final and binding nor appealable.

1-16.05 Limitations on the Authority of the Zoning Administrator

It is important to remember that the zoning administrator must “work within the lines.” He or she must adhere to the provisions of the local ordinance, and the courts have not been generous when they have determined that the zoning administrator has, in effect, gone beyond interpretation into outright legislation. This is true of such matters as boundary interpretation as well as ordinance interpretation. A number of cases have involved a local zoning decision later overturned because the zoning administrator was acting outside the lines.

In *Krisnathevin v. Board of Zoning Appeals for Fairfax County*, 243 Va. 251, 414 S.E.2d 595 (1992), two parcels 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 administratively, without any public notice or public hearings, in order to switch the designations of the parcels. The zoning administrator viewed this as a minor modification and authorized the change. A subsequent owner of the land challenged the change and the Virginia Supreme Court held that a change in the permitted use of the land was a significant modification requiring legislative action. *See also Bd. of Zoning Appeals for the Cnty. of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999) (zoning administrator had gone beyond interpretation into legislation in attempting to “fairly” interpret a density ordinance); *Bd. of Sup’rs of Washington Cnty. v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987).

1-16.06 Appeals

With the exceptions noted below, the decisions and interpretations rendered by the zoning administrator, and indeed the interpretations of any official charged with any aspect of zoning ordinance administration, can be appealed by an aggrieved party to the local board of zoning appeals (Va. Code §§ 15.2-2309, 15.2-2311, and 15.2-2312), and thence, by certiorari, to the circuit court. Va. Code § 15.2-2314.

1-16.06(a) To the Board of Zoning Appeals

Appeals to the board are primarily governed by Va. Code §§ 15.2-2309 and 15.2-2311. Note that the BZA must offer an equal amount of time in a hearing on the case to the applicant, the appellant, any other person aggrieved, and the staff of the local governing body. Va. Code § 15.2-2308(C). Non-legal staff of the governing body and the applicant, landowner, or his agent or attorney may conduct ex parte communications with a member of the board prior to the hearing, but may not discuss the facts or law relative to a particular case. If facts or law relative to a particular case are nonetheless discussed, the substance

of the communication must be conveyed to the other parties. All parties must receive materials related to a particular case within three business days of provision to board members. Va. Code § 15.2-2308.1.

The determination of the administrative officer is presumed to be correct. At a hearing on an appeal, the administrative officer must explain the basis for his determination, after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. The board must consider any applicable ordinances, laws, and regulations in making its decision. Va. Code § 15.2-2309(1). One circuit court has held that a BZA's consideration of issues is not limited to reasons given in the zoning administrator's written decision. *Town of Madison v. Zoning Appeals Bd.*, 65 Va. Cir. 433 (Madison Cnty. 2004).

If there is a tie vote, the appellant may request that the matter be carried over to the next meeting. Va. Code § 15.2-2311(D).

The ninety-day period in which a BZA decision must be made (Va. Code § 15.2-2312) is directory, not mandatory. *Tran v. Bd. of Zoning Appeals of Fairfax Cnty.*, 260 Va. 654, 536 S.E.2d 913 (2000).

See also 2022 Op. Va. Att'y Gen. 58 (a BZA may not hear and vote upon a matter that the local body has reserved to itself under the zoning ordinance).

1-16.06(b) To the Circuit Court

The appeal to the circuit court must be taken within thirty days of the BZA's final decision⁷⁰, which the Supreme Court has defined as "the decision that resolves the merits of the action pending before that body or effects a dismissal of the case with prejudice." *W. Lewinsville Heights Citizens Ass'n v. Bd. of Sup'rs of Fairfax Cnty.*, 270 Va. 259, 618 S.E.2d 311 (2005) (finding date of BZA vote date of final decision, not date of letter sent by the clerk even if the BZA's bylaws provided otherwise); *Johnson v. Morgan*, 106 Va. Cir. 126 (Fairfax Cnty. 2020) (property owner may not collaterally attack BZA decision in post-adjudication enforcement action if he did not timely appeal BZA decision, though he may present evidence of correction of violation as affirmative defense); However, if the property owner has not been provided with written notice of the zoning administrator's notice of violation or written order, the decision of the BZA is not binding on the property owner unless the owner has actual notice or participates in the appeal hearing. Va. Code § 15.2-2311.

The appeal must be styled: "In Re: [date] Decision of the Board of Zoning Appeals of [locality name]" and the BZA is not a party to the appeal although it must be served and participate in the proceedings. The locality, the landowner, and the applicant before the BZA are necessary parties. Va. Code § 15.2-2314. To properly institute proceedings under Va. Code § 15.2-2314, an aggrieved person must give timely notice to the necessary parties identified by statute. *Frace v. Johnson*, 289 Va. 198, 768 S.E.2d 427 (2015). It is insufficient to name or serve the locality, rather than the governing body itself. A circuit court lacks discretion after the thirty-day period to allow the filing of an amended petition when a necessary party specified in the statute is not named. *Boasso Am. v. Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017). Additional necessary parties, beyond the necessary parties specifically identified in the statute, can be added after the filing of a proper petition under Va. Code § 15.2-2314. *Friends of Clark Mountain Found. v. Bd. of Sup'rs of Orange Cnty.*, 242 Va. 16, 406 S.E.2d 19 (1991); see also *In Re: Oct. 31, 2012 Decision of the Bd.*

⁷⁰ If a landowner fails to timely file an appeal of a BZA determination of vested rights, it may not subsequently seek a determination of vested rights from a circuit court. *Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 831 S.E.2d 483 (2019).

of *Zoning Appeals*, 88 Va. Cir. 114 (Fairfax Cnty. 2014). After the writ is served, the BZA has twenty-one days, or as ordered by the court, to respond. Va. Code § 15.2-2314.

If the appeal involves a modification of a zoning requirement or a requirement, decision, or order of the zoning administrator relating to the administration or enforcement of an ordinance or state law, the findings and conclusions of the board of zoning appeals on questions of fact are presumed correct. The appealing party must prove by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence. The court shall hear any arguments on questions of law de novo. Va. Code § 15.2-2314. *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013). Parties may also present new legal theories not raised before the BZA. *In re: Nov. 20, 2013 Decision of the Bd. of Zoning Appeals*, 89 Va. Cir. 345 (Fairfax Cnty. 2014). Likewise, on appeal the circuit court's findings of fact are presumed correct, and its conclusions of law are reviewed de novo. *Lovelace v. Orange Cnty. Bd. of Zoning Appeals*, 276 Va. 155, 661 S.E.2d 831 (2008) (trial court erred in applying an ambiguous restriction to the use of property designated on a subdivision plat only as "Remaining Land"); *Trustees of Christ & St. Luke's Episcopal Church v. Bd. of Zoning Appeals of City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007); *Lamar Cnty. v. Bd. of Zoning Appeals of Lynchburg*, 270 Va. 540, 620 S.E.2d 753 (2005); *Bd. of Sup'rs of Fairfax Cnty. v. Bd. of Zoning Appeals of Fairfax Cnty.*, 271 Va. 336, 626 S.E.2d 374 (2006) (BZA interpretation of ordinance plainly wrong). Compare to the review of the BZA in special use permits and variances cases, see sections [1-10.04](#) and [1-13.03](#). See also *Adams Outdoor Adver., Inc. v. Bd. of Zoning Appeals of Va. Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (entitlement to compensation for the alleged taking of or damage to property as a result of zoning actions is not among enumerated BZA powers); *Donovan v. Bd. of Zoning Appeals of Rockingham Cnty.*, 251 Va. 271, 467 S.E.2d 808 (1996); *Curzio Constr., Inc. v. Zoning Appeals Bd. of Front Royal*, 63 Va. Cir. 416 (Warren Cnty. 2003); *Pima Gro Sys., Inc. v. Zoning Appeals Bd. of King George Cnty.*, 47 Va. Cir. 356 (King George Cnty. 1998).

A zoning administrator does not have standing to file a petition for certiorari from a decision of a BZA when such filing is not on behalf of the local governing body. *Wolfe v. Bd. of Zoning Appeals of Fairfax Cnty.*, 260 Va. 7, 532 S.E.2d 621 (2000). The Court expressly did not hold that a zoning administrator must secure authorization from the board of supervisors each time she decides to petition for certiorari but did not clarify how such authorization is to be made known. In *Wolfe*, the zoning administrator had expressly stated she did not have authority to file suit on behalf of the board.

A board of zoning appeals does not have the authority to institute litigation against its own governing body or to require the governing body to employ counsel to act on the board of zoning appeals' behalf. *Bd. of Zoning Appeals of Fairfax Cnty. v. Bd. of Sup'rs of Fairfax Cnty.*, 276 Va. 550, 666 S.E.2d 315 (2008).

If a petition to appeal a decision of the BZA is withdrawn subsequent to the filing of the return, the BZA may request the circuit court to hear the matter on the question of whether the appeal was frivolous. Va. Code § 15.2-2314.

In *Board of Supervisors Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006), the Court held that the thirty-day filing requirement set forth in Va. Code § 15.2-2314 is not an aspect of a circuit court's subject matter jurisdiction to hear an appeal of a BZA decision. Thus, a county's failure to timely file its appeal cannot be raised by the BZA for the first time in the Supreme Court. The filing period is a statutory prerequisite that enables a circuit court to exercise its subject matter jurisdiction and thus can be waived if not timely raised. As noted in section [1-12.11\(a\)](#), a certiorari proceeding to the circuit court is not subject to the provisions of the nonsuit statute, Va. Code § 8.01-380.

1-16.06(c) Appeals of Zoning Administrator Rulings with Respect to 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 Va. Code §§ 15.2-2297, 15.2-2298, or 15.2-2303, a zoning administrator's interpretations in enforcement of proffers is appealable directly to the governing body. Va. Code § 15.2-2299. An aggrieved party may petition the circuit court for review of the decision of the governing body on such an appeal. Va. Code § 15.2-2301.

1-16.07 The "Thing Decided" Rule and Its Limitations

Unappealed decisions of the Zoning Administrator become a "thing decided" that are no longer subject to challenge because the failure to appeal is a failure to exhaust administrative remedies. *Vulcan Materials Co. v. Board of Supervisors*, 248 Va. 18, 445 S.E.2d 97 (1994); *Lilly v. Caroline Cnty.*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enters., Va. P'ship, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992).

However, this rule is limited to direct challenges to the Zoning Administrator's appealable decisions in the land use context and is not applicable in other contexts. In *Eubank v. Thomas*, 300 Va. 201, 861 S.E.2d 397 (2021), the Virginia Supreme Court held that it does not apply to a tort action for malicious prosecution. Mr. and Mrs. Eubank filed such an action against members of the Mathews County staff alleging that they had been prosecuted for zoning violations in an attempt to force them to tear down their house so that the County could obtain access to water in the area where the home was located. The County demurred on the grounds that the Eubanks had not appealed their zoning violations to the local BZA and that they could not therefore maintain their malicious prosecution action. The trial court agreed, but the Supreme Court reversed, saying, "[h]ere, the Eubanks are not pursuing an untimely challenge to a land use decision. Instead, they are alleging that the County Employees committed intentional torts against them. The 'thing decided' doctrine simply does not apply."

1-16.08 Criminal and Civil Penalties**1-16.08(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 more than \$1,000. Va. Code § 15.2-2286(A)(5).

In response to an opinion of the Virginia Court of Appeals that enabling legislation did not authorize a county's zoning ordinance to classify each day's violation as a separate misdemeanor, *Lawless v. County of Chesterfield*, 21 Va. App. 495, 465 S.E.2d 153 (1995), the General Assembly amended § 15.2-2286(A)(5) to provide that if the violation is uncorrected at the time of conviction, the court shall order abatement of the violation within a specified time and failure to so abate shall constitute a separate misdemeanor. Failure to abate within the first succeeding ten-day period constitutes a separate misdemeanor for punishable by a fine of not more than \$1500; succeeding ten-day periods of non-abatement are punishable by a fine of not more than \$2000. In *Epperly v. County of Montgomery*, 46 Va. App. 546, 620 S.E.2d 125 (2005), the court held the circuit court had the inherent power to enforce its holding of civil contempt for failure to abate a zoning violation with sanctions authorizing the county to enter upon the real property where the zoning violation occurred and conduct, with immunity, an operation to abate the zoning violation and to impose a lien upon that property for any costs and expenses incurred by the county.

There is no res judicata effect on a civil zoning matter from the results of any criminal enforcement action. *Toone v. Zoning Appeal Bd. of Fairfax Cnty.*, 54 Va. Cir. 33 (Fairfax Cnty. 2000).

1-16.08(b) Civil Penalties

A locality may provide for civil penalties for zoning violations. Va. Code § 15.2-2209. 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 fact within a ten-day period and that total charges may not exceed \$3,000. Zoning administrators are authorized themselves to issue civil summonses for scheduled zoning violations.

1-16.09 Litigation and Third-Party Actions**1-16.09(a) Standing**

Perhaps most zoning violations are concluded by simple discussions with violators or with the more consequential issuance of an administrative order to correct. Somewhat more rarely, of course, the zoning administrator must attempt resort to the courts. The power to do so is unquestionable.

However, the zoning administrator is not the only party who can seek to assure compliance with the ordinance. Individuals and groups dissatisfied with local zoning actions are turning to the courts to seek redress when they believe that the political process has failed them. Assuming that suit is filed within the thirty-day statutory period for land use challenges (Va. Code § 15.2-2285(F)), the issues are generally resolved upon a straightforward application of the customary rules of zoning litigation.

Standing is a matter of much significance in such litigation. See section [1-12.14](#).

1-16.09(b) Challenges to Building Permits

Under Va. Code § 15.2-2313, 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 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 constitutes a back-door means of challenging virtually all such actions, at an exceptionally late stage of the matter, and it is rarely employed. But if a properly aggrieved party files suit within fifteen days of start of construction, the court may hear and determine the issue and prescribe appropriate relief. *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978).

1-17 REGULATORY TAKINGS LAW**1-17.01 The Development of Takings Law as a Constraint on Land Use Regulation**

Historically, the United States Supreme Court has chosen to remain above the fray in local land use matters, perhaps in large part because land use regulation remained relatively benign throughout the better part of this century.⁷¹ After it established the constitutionality

⁷¹ For example, in *Kelo v. New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), the Court held that a locality could condemn non-blighted private property for the “public purpose” of economic development, emphasizing that to meet the Fifth Amendment baseline, public use is defined broadly, but states are free to place restrictions on their takings powers. In direct response to *Kelo*, the 2007 General Assembly enacted a number of substantive changes to Virginia’s eminent domain statutes to better define what constitutes a “public purpose,” and in 2012 passed a constitutional amendment (which was then ratified by voters) limiting

of zoning, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 47 S. Ct. 594 (1927), and *Gorieb v. Fox*, 274 U.S. 603, 47 S. Ct. 675 (1927), and the principle that zoning ordinances might be constitutional on their faces but unconstitutional as applied to a given fact situation, *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447 (1928), the Court gave little further attention to the federal aspects of the land use process.

Even before it had blessed zoning as constitutional, however, the Court had turned its attention to the proper balance between such regulation and the Takings Clause of the Fifth Amendment. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158 (1922), a case involving restrictions on coal mining and land subsidence following mining operations, Justice Holmes had 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 requiring the payment of just compensation. There must be a balance, said Holmes, between the public’s justification for the regulation and the diminution in value to the private landowner, which struck some “average reciprocity of advantage” between the two. The underpinning of the doctrine of regulatory taking 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.” *Id.*

While the general concept of “regulatory takings” (to distinguish them 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. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143 (1915); *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S. Ct. 987 (1962). Moreover, takings law was of little concern to the land use lawyer because 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.

However, the latter half of the twentieth 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. Eventually, the Supreme Court began to look at the matter with a more jaundiced eye, and the 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. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287 (1981) (Brennan, J., dissenting). This dissent became the law with the Court’s decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378 (1987), which held that a temporary taking was indeed compensable. That case did not, however, advance our understanding of what constituted a taking, since the Court assumed that there was no use permitted of the land in question

eminent domain authority. See [Chapter 4, Condemnation Procedure](#), for a discussion of these changes.

because of the procedural posture of the case, but it did make it plain that regulatory activity that goes “too far” could have a price tag.⁷²

What regulation may in fact constitute a taking has been 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. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978); *Eastern Enters. v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998) (Kennedy, J. concurring in 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 to maintain”).

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.*, 458 U.S. 419, 102 S. Ct. 3164 (1982), and occur when there is a physical taking or invasion of the property such that the government has possession and control. *Horne v. Dep’t of Agric.*, 576 U.S. 350, 135 S. Ct. 2419 (2015). Restrictions that limit the use of property are regulatory: “categorical” takings derive from *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), and “ad hoc” takings derive from *Penn Central*, *supra*.⁷³

1-17.01(a) Physical Invasions are Per Se Takings

Regulatory takings are involved when the impact of a regulatory structure goes “too far.” However, when the government assaurs a *physical invasion* of property in any manner, any such intrusion, regardless how minor, will constitute a compensable taking. See, e.g., *Horne v. Dep’t of Agric.*, 576 U.S. 350, 135 S. Ct. 2419 (2015) (*Horne* involved the physical taking of personal property (raisins), but the Court held that there is no distinction between the constitutional protection of personal and real property when the taking is physical); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383 (1979). Moreover, the physical invasion need not be permanent. In *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 133 S. Ct. 511 (2012), the Supreme Court held that government-induced flooding temporary in duration may be compensable under the Takings Clause. Relevant factors to the takings inquiry are the degree to which the invasion is intended or is the foreseeable result of authorized government action; the character of the land at issue; the owner’s

⁷² The United States Supreme Court has declined to state definitively the elements of a claim of temporary regulatory taking or even fully to explain the requirement that the regulation must substantially advance legitimate public interests. However, it stated that 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, 119 S. Ct. 1624 (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 *Del Monte Dunes* 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.

⁷³ It is worth noting that in the view of at least some members of the Supreme Court, the Takings Clause has historically been invoked only when regulation adversely affects a specific interest in physical or intellectual property. *E. Enters. v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998) (Breyer, J., dissenting). Notwithstanding this observation, a plurality of the Court found in *Apfel* 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. In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 133 S. Ct. 2586 (2013), however, the Court made clear that monetary exactions tied to a specific property interest can constitute a compensable taking if they meet the *Nollan/Dolan* requirements. See section 1-17.07.

reasonable investment-backed expectations regarding the land's use; and the severity of the interference.

1-17.01(b) Categorical Takings

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), Lucas 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. The Court held, however, that compensation is not required, even if a regulation deprives a landowner of all use of his property, if such 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." The Court then remanded the case to the South Carolina Supreme Court to determine if the principles of nuisance and property law in South Carolina prohibited the uses the owner intended.⁷⁴ See also *Quinn v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty.*, 862 F.3d 433 (4th Cir. 2017) (developer never had a property right to sewer service).

In *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232 (1987)), the Virginia Supreme Court held that the demolition of an unsafe structure is not a taking, but rather the abatement of a nuisance for which no compensation is due. The Fourth Circuit similarly held that declaring damaged beachfront property a nuisance was not a deprivation of a property right even if it rendered it valueless because the law of nuisance is inherent in the property title. *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013).

Addressing the issue left open by the U.S. Supreme Court in *Lucas* and in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001), the Court held in *Murr v. Wisconsin*, 582 U.S. 383, 137 S. Ct. 1933 (2017), that, in most cases, the effect of the challenged regulation must be assessed by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value. To determine what constitutes the "entire property," a court should evaluate whether the following factors would objectively lead a landowner to reasonably expect the land holdings to be treated as one parcel or separate tracts:

- a. the treatment of the land under state and local law;
- b. the physical characteristics of the land; and
- c. the prospective value of the regulated land.

Murr v. Wisconsin, 582 U.S. 383, 137 S. Ct. 1933 (2017).

These factors, while objective, do not establish a bright line rule. The Court emphasized that a "central dynamic" of regulatory takings jurisprudence is its "flexibility." In *Murr*, the Court rejected bright line rules proposed by both parties. The state had argued that whether property holdings should be considered as a single whole depends only on state law. The property owners had argued that lot lines should define the entirety of property affected by the regulation. The Court rejected both in favor of weighing the factors listed above. Applying those factors to the case at issue, the Court upheld the state's regulatory provisions that merged the property owners' two lots for purposes of development restrictions. The Court found the merger provision was "a common means of

⁷⁴ In *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001), the Court clarified that *Lucas* does not mean that any new regulation, once enacted, becomes a background principle of property law that cannot be challenged by those who acquire title after the enactment. A claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

balancing the legitimate goals of regulation with the reasonable expectations of landowners.” See also *Pulte Home Corp. v. Montgomery Cnty.*, 909 F.3d 685 (4th Cir. 2018) (when a due process claim is unsuccessful, it is unlikely that a Takings claim exists); *Quinn v. Bd. of Cnty. Comm’rs for Queen Anne’s Cnty.*, 862 F.3d 433 (4th Cir. 2017) (undeveloped lots rendered valueless because they cannot accommodate a septic system, not because of grandfather/merger provision of a sewer system ordinance that planned for sewer service only to streets with developed lots and prohibited future connections outside the initial service area).

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (6-3), the Supreme Court limited the scope of *Lucas* by holding that a temporary but total restriction on property development could not constitute a per se taking such that compensation was required regardless of the public justification for the restriction or the impact on the landowner. Although the lower federal district court had undertaken an ad hoc *Penn Central* balancing analysis, the plaintiffs chose not to appeal that issue, so only the per se issue was before the Court. Thus, whether a temporary but total restriction on property development constitutes a constitutional taking such that compensation is required is analyzed under the *Penn Central* ad hoc approach.

1-17.01(c) Ad Hoc Takings

If there is no categorical taking, then one must turn to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978), where the Court articulated three factors that it thought relevant to a determination whether a taking had occurred.⁷⁵ They were (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with the claimant’s legitimate investment-backed expectations. If some economically viable use continues, then a more complex factual analysis is required. *E. Enters. v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998); see also *Clayland Farm Enters., LLC v. Talbot Cnty.*, 987 F.3d 346 (4th Cir. 2021) (no taking where zoning regulations resulted in only 40 percent decrease in property value and did not divest landowners of expressly permitted uses of land).

In *Quinn v. Board of Commissioners for Queen Anne’s County*, 862 F.3d 433 (4th Cir. 2017), the Fourth Circuit held that no ad hoc taking had occurred because of the grandfather/merger provision that limited development because (1) the nature of the governmental action was to control development based on density and preserve surrounding land; (2) the economic harm was not severe because less dense development was still available, and (3) the developer’s investment in the land was highly speculative as the land was not suitable for septic systems and he had no property interest entitlement to a sewer system.

1-17.02 When Has the Taking Occurred

Regulatory takings occur when the government action complained of effectively prevents economic development of the property in question. *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554 (Fed. Cir. 1985); *Barnes v. United States*, 538 F.2d 865 (Ct. Cl. 1976). Ordinarily, where there is a permit system, no taking occurs until the permit has been applied for and denied. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S. Ct. 455 (1985). Similarly, fines must be collected, not just imposed, before a property owner’s money becomes a constitutionally cognizable property right. *Sansotta v. Town of*

⁷⁵ The Court in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138 (1980) had articulated what some courts and commentators considered to be a stand-alone takings test: that the regulation must “substantially advance legitimate state interests.” In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005), the Court acknowledged that *Agins* lent itself to such a construction but held that the “substantially advances” formula was not a valid takings test.

Nags Head, 724 F.3d 533 (4th Cir. 2013). This requirement for a determination of a “starting point” in takings cases is directly linked to the next topic, ripeness.

1-17.03 Takings Claims Must Be “Ripe”

There are a number of procedural hurdles over which a takings claim must clamber, perhaps the most important of which is the requirement that such a 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 regulation has, in fact, deprived it of all economically viable use of the property. *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138 (1980); *Williamson Cnty. Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985). In *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001), the Court attempted to delineate when finality occurs. It stated that a landowner may not establish a taking before a land use authority has the opportunity to decide and explain the reach of a challenged regulation. A takings claim based on a law or regulation that is alleged to go too far in burdening property depends upon the landowner’s first having allowed regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. Although a landowner must give a land use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

1-17.04 In What Forum Must a Takings Case Be Brought?

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), the U.S. Supreme Court ruled that a takings claim under § 1983 is not ripe until the claimant has sought compensation through state procedures and obtained a final decision regarding the application of local ordinances and regulations to his property. In *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491 (2005), the Court subsequently held that collateral estoppel and res judicata prevent relitigating state takings cases in federal court under Fifth Amendment. However, the Supreme Court noted in *Knick v. Township of Scott*, 588 U.S. ___, 139 S. Ct. 2162 (2019), that these two cases placed the takings plaintiff in a Catch-22—he could not go to federal court without going to state court first, but if he went to state court and lost his claim would be barred in federal court. Accordingly, the Court overruled *Williamson*, and held that a property owner simply has an actionable Fifth Amendment takings claim when the government takes his property without just compensation.

1-17.05 Is It a Temporary Taking?

Although *First English* established that a temporary taking could be compensable, not every regulatory action is such a taking, for the Court also said that the ordinary processes of land use approval do not constitute a taking. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002); *Friel v. Triangle Oil Co.*, 543 A.2d 863 (Md. App. 1988); see also *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970). A Virginia circuit court held a temporary inverse condemnation had occurred when an owner was notified a housing authority would not acquire the property twenty-four years after it publicly identified the property as “property to be acquired” for a redevelopment project. *Claytor v. Roanoke Redev. & Hous. Auth.*, CL02000186-00 (City of Roanoke Cir. Ct. Jan. 30, 2004) (subsequent jury award in the amount of \$282,000 plus interest and attorney’s fees). In *Close v. City of Norfolk*, No. CL 09-4055 (City of Norfolk Cir. Ct. Apr. 12, 2011, July 10, 2013), the court overruled a demurrer to a claim that the closure of a street due to construction for a public use caused the temporary damaging of a direct access easement of business property, but found on the merits that sidewalk obstructions were either reasonable or caused by third parties.

1-17.06 The Calculation of Takings Damages, Permanent and Temporary

When a taking has occurred, an owner is entitled to the fair market value of the land that has been taken. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S. Ct. 1854 (1979). This is hardly 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 potential uses. *Olson v. United States*, 292 U.S. 246, 54 S. Ct. 704 (1934). 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 indeed possess reasonable likelihood of approval. See *United States v. 62.50 Acres of Land*, 953 F.2d 886 (5th Cir. 1992). Similarly, the government may not speculate that the benefits of its regulatory activity would offset fair market value. *Horne v. Dep't of Agric.*, 576 U.S. 350, 135 S. Ct. 2419 (2015).

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 profits and other consequential damages. See *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577 (Fed. Cir. 1990). 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. An interesting line of cases involving such calculations are a series of decisions from the Eleventh Circuit. In *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) (*Wheeler III*), the court held that “[t]he 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.” In *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990) (*Wheeler IV*), the court returned to the issue and held 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 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.

Id. (record references omitted).

1-17.07 The Impact of Takings Law on Exactions Effected Through Imposed Conditions

While land use regulations can effect a taking, it is also true that takings will rarely be found. See e.g., *Henry v. Jefferson Cnty. Comm’n*, 637 F.3d 269 (4th Cir. 2011) (conditional use permit that granted lower density than requested could not constitute a taking).

A potentially more consequential line of takings cases has focused on the takings implications of property exactions. In Virginia, those exactions may arise in connection with

permits required for by-right development (including federal permits for such things as disturbances of waters of the United States and wetlands), impact fees or conditions applicable to special exceptions, and perhaps in the case of conditional zoning proffers. Recent developments in takings law likely mean that landowners will pursue exactions cases with renewed vigor.

At the heart of evolving exactions jurisprudence lays the doctrine of unconstitutional conditions. There are two fundamental elements to an analysis of such conditions—whether there is an “essential nexus” between the impact created by a development and the exaction imposed, and if there is such a nexus, whether the exaction is “roughly proportional” to the effects (impacts) created. If a government fails to demonstrate that these two elements have been sufficiently established—and the Supreme Court has now clearly said that the burden is on the government and not the landowner to do so in an exactions case—then the imposition of a condition on a land use permit constitutes a taking under the Fifth and Fourteenth Amendments. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 133 S. Ct. 2586 (2013).

The doctrine of unconstitutional conditions is not new, but its application to the land use context is of relatively recent vintage. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), the Court held that the involuntary exaction of a physical interest in land (a thirty-foot easement along a public beach) demanded as a precondition to issuance of a development permit, under circumstances in which the exaction was not rationally related to the asserted need for it, is indeed a taking requiring just compensation. The *Nollan* Court undertook a detailed, substantive analysis of the rational relationship between the development location in that case, and the assorted justifications for it, in a fashion it had not previously done. In so doing, the Court required a proper “fit” between a regulation or exaction and the public interest it purportedly serves. Thus, the Court established that there has to be a valid nexus between a legitimate governmental interest and the specific exaction that is sought to advance that interest, and that the burden is upon the government to show it.

Exactions jurisprudence was advanced by the Court’s decision in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), where the Court returned to the question of the sufficiency of the “fit” between an exaction and a land use regulation, holding again that it is *incumbent upon the locality* to demonstrate that there is a “rough proportionality” between the two.

Tigard had demanded of Florence Dolan that she dedicate an easement for open land for a greenway adjoining a floodplain on her property and to include in that dedication an area suitable for a bicycle/pedestrian pathway. The Court rejected the City’s contention that it need only establish a “reasonable relationship” between the need generated by the development of Dolan’s property and the exactions demanded, holding that while there was a sufficient nexus between legitimate public needs for floodplain protection and the alleviation of congestion on the public streets, the required connection between the need and the exaction had not been satisfactorily established, and the City’s demand constituted a taking of the easements. Although there need not be any “precise mathematical calculation” of the relationship, if it is not “roughly proportional,” then the exaction will constitute a constitutional violation. Given the requirement that the locality demonstrate the proportionality of its exaction under such circumstances, there must be evidence of that nexus.⁷⁶

⁷⁶ The “rough proportionality” test between exactions and impacts as required by *Dolan* does not apply to the decision simply to deny a development. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999). It may remain the case that a locality may outright deny a development in the case of discretionary permit approvals. *Koontz* contains at least a tacit

The lower courts had not been consistent in their treatment of exactions other than the dedication of actual interests in real property. In *Koontz*, however, the Court extended and clarified significantly the law of exactions. It is now constitutionally the case that (1) the affirmative imposition of an unconstitutional condition on a permit, (2) the denial of a permit for a landowner's refusal to accede to an unconstitutional condition, and (3) the exaction of money, when not adequately related to the impact of a development, constitute impermissible takings under the Fifth Amendment.

Before *Koontz*, the Court had not held that *denial* of a permit because the landowner would not agree to an unconstitutional condition proposed to be imposed on a development, or that an exaction of money as opposed to realty, could be a taking.⁷⁷

Because of the potential importance of this case, the facts warrant brief summary. Coy Koontz wished to develop a 3.7 acre section of a 14.9 acre property, and applied for permits to do so. He proposed to raise certain elevations to increase land suitable for a building, grade the remainder, and install a dry pond. To mitigate the environmental effects of this proposal, he offered to foreclose future development of approximately eleven acres by deeding a conservation easement. The River Management District, however, considered the eleven acre conservation easement inadequate, and told Koontz that it would approve construction only if he agreed to one of two concessions. First, he had to reduce the size of his development to one acre and grant a conservation easement on the remaining 13.9 acres. (To reduce the development area, it also suggested that he could eliminate the dry pond and instead install a costlier subsurface stormwater management system and suggested that he install retaining walls rather than grading the land.) Alternatively, the District said that that he could build on 3.7 acres and grant a conservation easement on the remainder of the property, but only if he also agreed to hire contractors to make improvements to District-owned wetlands several miles away. He could pay to replace culverts on one parcel or fill in ditches on another. Either alternative would have enhanced some fifty acres of District-owned wetlands. While the District's policy was not to require any particular offsite project, the staff said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent."

Koontz objected to these demands, claiming that they were excessive given the limited environmental effects that his building proposal would have caused, and refused to cooperate and to accept the conditions. The permit was denied. He sued and prevailed on the ground that the denial of the permits was based on his refusal to accept conditions that may have failed to meet the *Nollan* and *Dolan* tests.⁷⁸

The Supreme Court agreed that the District's demands, even though those conditions were never actually imposed since no permit had been issued, could effect a taking. The Court found that the "government may not deny a benefit to a person because he exercises a constitutional right." It observed:

land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far

acknowledgement that that may happen. What the locality cannot do is withhold a permit because someone refuses to accept what proves to be an unconstitutional condition.

⁷⁷ The Court said that its analysis applies to any requirement that a landowner dedicate money, services, labor, or any other type of personal property to a public use when the necessary nexus and proportionality are not demonstrated.

⁷⁸ Koontz sued under a Florida statute that he claimed allowed owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."

more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.⁷⁹

Id. (citations omitted).

Recognizing, however, and as noted above, that not all exactions are unconstitutional, the Court further said that

[a] second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement deed over the land needed to widen a public road Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.

Id.

A locality can, therefore, exact land and money, but it is important to recognize that it overreaches when it imposes or seeks to impose a condition requiring exaction of land or money from a developer that is not rationally related to, and is not "roughly proportional" to, the impact of a development. *See also Bd. of Sup'rs of Albemarle Cnty. v. Route 29, LLC*, 301 Va. 134, 872 S.E.2d 872 (2022) (complaint sufficiently alleged an unconstitutional condition where County cited owner of commercial retail property with zoning violation for failing to pay, pursuant to conditional proffer, \$50,000 for County's bus service that mainly served commuters and was not related to the landowner's project; conditional proffer was not void on its face, but bus service as then proposed did not trigger the proffer. This decision is significant not simply because it found that the attempted enforcement of a proffer was unconstitutional, but it did so many years after the proffer had been written. This means that any condition that imposes an exaction must be assessed against constitutional requirements).

The Court did not decide whether these rules apply when a landowner requires a legislative approval to do something other than by right, and the broad discretion afforded a locality to reject applications presents potential questions not resolved by the decision.⁸⁰ As noted elsewhere in this chapter, the Virginia Supreme Court is deferential to local legislative power in the land use arena, and even if a locality were to deny a rezoning or other discretionary permit because a landowner refused to accede to a condition on the ground that it was unconstitutional; there is no clear decision that holds such a denial to be

⁷⁹ The Court said that it was required to find that a denial of a permit for unconstitutional reasons was a taking, for "[a] contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval." *Id.*

⁸⁰ The Supreme Court's limited discussion of the potential application of its decision in *Koontz* to legislative decision-making focuses principally on *general* legislative/ordinance requirements, as opposed to case-specific decisions that are more adjudicative in nature. As discussed above, however, the focus of the decision is on conditions appended to, or threatened to be appended to, permits as to which a landowner would otherwise have had a right.

the same as the denial of a permit to which one would otherwise have a right. It did not even decide whether the conditions that were sought to be imposed on Koontz were unconstitutional, leaving this for the Florida courts. However, it did draw the substantive lines with a new marker.

The Court did not attempt to fashion a remedy for a taking under the facts of this case. While the unconstitutional conditions doctrine recognizes that the imposition of such a condition burdens a constitutional right, the Fifth Amendment mandates a particular remedy—just compensation—only for takings. It said that in cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because Koontz brought his claim pursuant to Florida law, which appeared to have provided him a state remedy in damages and the issuance of the contested permit,⁸¹ the Court had “no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.” *Id.*

In the context of exactions jurisprudence and its application in Virginia, it is important to recall that the Virginia Supreme Court held in *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984), that a county could not require a property owner to construct a deceleration/right turn lane for entrance to a plant nursery on Route 7, or to dedicate right-of-way to one hundred feet from the centerline of that highway for a third lane and a standard service drive, as a condition of a special exception application for a small expansion of that nursery. The board denied the application and the landowner challenged its authority to impose these conditions. The Supreme Court first rejected the county’s claim that there was no case because the landowner had actually requested that the special exception be denied (because, his lawyer had said, the imposition of the conditions would make the project infeasible). The Court said that the board had made clear that it believed it had the power to impose the land dedication and road construction conditions on the special exception, and was clear that it would have exercised that power. The landowner made equally clear that he disputed the board’s authority concerning the dedication and construction requirements, and so a case was stated. The Court said that the right to grant special exceptions with conditions “does not imply the power to require a citizen to turn land over to the county and build roads for the benefit of the public.” Moreover, even if the board had the authority in a proper case to impose such a condition it could not do so in this case “because the dedication and construction requirements were unrelated to any problem generated by the use of the subject property.” The nursery averaged twenty-five customers a day, on a road carrying even then almost 35,000 vehicles per day and many of its customers came in off-peak hours. Not only that, a witness for the board admitted that the dedication and construction requirements were not imposed because of any problem generated by the Cupp property, but because of general conditions prevailing along the highway.

Cupp was decided solely as a matter of state, not federal, law with respect to special use permits and special exceptions and predated almost all of the relevant federal decisions on takings exactions, but it is strikingly similar in result to current constitutional analysis. *Koontz* and other unconstitutional conditions cases have, however, focused on such conditions in the context of the issuance of permits as to which a landowner would otherwise have had a right including, or but for, such conditions. The doctrine may have limited federal application to case-by-case legislative decisions, but it is good to keep *Cupp*, which did involve just such a legislative decision, in mind. See, e.g., 2014 Op. Va. Att’y Gen. 175 (relying on *Cupp* and opining that a locality may require that a site plan provide for drainage

⁸¹ The Supreme Court never actually ruled on the merits of Koontz’s claims under the *Nollan/Dolan* tests, remanding the matter to the Florida courts for further proceedings. The permits were, in fact, ultimately issued without the offending conditions.

improvements and dedication of land for street widening only when the need for the improvements is generated by the proposed development).

Although, as noted above, the Supreme Court did not find it necessary to fashion a remedy for an unconstitutional condition in *Koontz*, the General Assembly enacted Va. Code § 15.2-2208.1⁸² in direct response to that decision, providing a statutory remedy for situations that the courts might find constitutionally defective as uncompensated takings. *But see Virdis Dev. Corp. v. Bd. of Sup'rs of Chesterfield Cnty.*, 92 F. Supp. 3d 418 (E.D. Va. 2015) (invoking *Burford* abstention to a *Koontz* nexus challenge that sought damages under Va. Code § 15.2-2208.1).

The statute is brief, but significant. If a locality *seeks to impose* an unconstitutional condition on essentially any kind of land use application or permit, or if the locality *denies* a land use application or permit for failure to consent to such a condition, a landowner may bring suit within the applicable appeal period. If the landowner successfully demonstrates that a condition demanded or imposed is unconstitutional, it can be compensated for the taking, and obtain a court order mandating approval of a permit without the unconstitutional condition. Moreover, if prior notice of objection to the condition has been given by the landowner, and if the court finds that that the unconstitutional condition was a “factor” in the grant or denial of a permit before governmental action, then the court must assume that it was the controlling factor. The locality must then prove that its proposed condition, or its denial of a permit, was valid by “clear and convincing evidence.” In these circumstances, the “fairly debatable” standard will not apply. Though this statute creates a Virginia mechanism for testing allegedly unconstitutional conditions, it is worth reiterating that that it creates no new standard for determining whether a condition is in fact unconstitutional.

Finally, it should be noted that this statute is a Virginia remedy that creates procedural and substantive rules, when invoked. Because what may constitute an unconstitutional condition is a matter of constitutional, and not statutory, law it would be possible to challenge such a condition as a taking—without invoking the statute—if the claim is that the condition constitutes an inverse condemnation.

The Virginia Supreme Court has held that there is a three-year statute of limitations on such claims. *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 594 S.E.2d 606 (2004).

1-17.08 The Virginia Takings Cases

The Virginia Supreme Court’s treatment of takings cases has expanded our understanding of the Court’s approach to them, perhaps most notably in the 1997 case *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997), discussed further below. In an older decision, the Court found that a denial of a zoning category that would have permitted the only “practically” viable use of property was invalid. *Boggs v. Bd. of Sup'rs*, 211 Va. 488, 178 S.E.2d 508 (1971). The Court said, moreover, that “if the application of a zoning ordinance has the effect of completely depriving the owner of the 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.” *Id.*

Despite this finding, the Court followed then-existing law and simply invalidated the ordinance. It seems evident that under current law, however, such a confiscatory zoning

⁸² The provisions of the statute apply only to approvals or permits that are granted or denied on or after July 1, 2014.

would implicate the Takings Clause and render the locality subject to compensation of the landowner for the temporary taking.

In *City of Virginia Beach v. Virginia Land Investment Association No. 1*, 239 Va. 412, 389 S.E.2d 312 (1990) (VLIA), 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 was no longer developable 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. See also *Wilson v. City of Salem*, 55 Va. Cir. 270 (City of Salem 2001) (depriving landowner of his "view" not a taking).

Justice Lacy, in her concurrence, elaborated on the takings issue slightly, writing that VLIA's reliance on *First English, supra*, failed to establish a claim. *First English* had assumed that all use of the church's property has been eliminated by regulation. VLIA had not, in fact, been denied "all use of its land." *Id.* (emphasis in original). The case was decided two years before *Lucas*, however, and we do not know whether, on the facts before the Court, it might have reached a different result.

Justice Lacy also concluded that the Green Line downzoning did not run afoul of Article I, § 11 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." *Id.*

In the important decision of *Omni Homes, supra*, a developer of property (property A) to which there was no road access informally agreed with the owner of the adjoining property (property B) to jointly share road and utility access. After the preliminary plat for property B was approved, the preliminary plat for property A was filed but not accepted because it did not show approved bonded road access through property B. Because of county regulations, the owner of property B filed an inverse condemnation suit. A settlement was reached that resulted in the county buying property B. The owner of property A then sued the county claiming that the acquisition of property B had, by precluding its ability to develop property A, effected a taking of that property. The trial court held that the county's purchase of property B was in fact a regulatory taking of property A because the developer could not afford to subdivide the property without road access and utility easements through property B.

The Virginia Supreme Court sidestepped the issue of whether a county's purchase of property by itself could be classified as regulatory action. The Court first held that the county action was not a categorical taking à la *Lucas* because the land continued to have economically viable uses, even if a particular owner could not afford to effectuate the 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 a partial regulatory taking is compensable and it is to be evaluated under the three-factor test outlined in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978). The Court held, however, that the county's action was not a partial taking because 1) gaining road access was always a risk, not an investment-backed expectation, and 2) the economic diminution was not significant because the impact analysis could not include a fair market value calculation that assumed road access—again because access was a contingency, not assured. See also *Bd. of Sup'rs of Culpeper Cnty. v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006) (no regulatory taking because reasonable investment-backed expectation would include understanding of risk of acquisition of water and sewer); *Front Royal Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) (no partial taking because mere diminution in value); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997) (owner not deprived of "all" economic use of land).

Again, construing *Lucas*, the Virginia Supreme Court held in *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414 (1998), that the denial of a permit under the Sand Dune Protection Act could not be found a categorical taking because the landowner acquired the property after the regulation was in effect. In other words, 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.

Under the Virginia State Constitution, the Court in *Omni Homes* declined to expand the concept of "damage" to include frustrated business development expectations that are unsecured by any sort of appurtenant property right. *See also* 1999 Op. Va. Att'y Gen. 116 (discussing the law concerning regulatory takings).

It is generally agreed that there is no significant difference between a taking under federal and state law, and thus the rapidly developing body of case law on regulatory takings on the federal front has been imported wholesale into Virginia law.