

ACQUIRING PERMISSION FOR THE PROJECT

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Fundamentals of Real Estate Development

III. ACQUIRING "PERMISSION" FOR THE PROJECT.

A. CONDITIONAL LAND USE AND REZONING.

1. Authority to Adopt Ordinances.
 - a. The Virginia Code confers authority on municipalities to adopt zoning ordinances, establish planning commissions and control the development and subdivision of land within its boundaries. Va. Code §§ 15.2-427 through 15.2-503.2.
 - b. Municipal zoning ordinances are subordinate to the laws of the Commonwealth. As such, if there is a conflict between an ordinance adopted by the locality and state law, the laws of the Commonwealth prevail.
2. Instrumentalities of the Localities.
 - a. Governing Body. The governing body (City Council or Board of Supervisors) has final authority over all matters referred to the Planning Commission with minor limitations. The governing body's duties include the following:
 - (1) Authority to legislate by ordinance in a particular locality.
 - (2) May retain the right to issue special permits or special exceptions. Va. Code § 15.2-2286(3).

- (3) Responsibility for the preparation and approval of an annual budget which may include a capital budget improvements program. Va. Code §§ 15.2-2503 and 15.2-2239.
 - (4) Responsibility for administration and enforcement of site plan and subdivision regulations pertaining to public infrastructure, such as streets, curbs, gutters, sidewalks, bike trails, water drainage systems and solid waste management. Va. Code §§ 15.2-2241 and 15.2-2255.
 - (5) Conducts appeals from decisions of the zoning administrator involving conditional zoning matters. Va. Code § 15.2-2301.
- b. Planning Commission. The duties of the Planning Commission are statutorily prescribed, including:
- (1) Preparation of a comprehensive plan and recommendation thereof to the governing body. Va. Code § 15.2-2223.
 - (2) Review of the comprehensive plan at least every 5 years and preparation and recommendation of amendments thereto. Va. Code § 15.2-2230.
 - (3) Confirmation that the location of streets, parks, public areas, public buildings or structures and public utility facilities or public service corporation facilities are consistent with the plan. Va. Code § 15.2-2232.
 - (4) Coordination by and between state agencies regarding state projects and request state agency

assistance in developing comprehensive plan revisions where state agency projects may be involved (i.e. VDOT road projects). Va. Code § 15.2-2202(B).

- (5) Preparation and recommendation of an official map. Va. Code § 15.2-2233.
- (6) Preparation and recommendation of an annual capital improvement program. Va. Code § 15.2-2239.
- (7) Preparation and recommendation of a subdivision ordinance. Va. Code § 15.2-2251.
- (8) Preparation and recommendation of a zoning ordinance and amendments thereto. The governing body may not enact either a zoning ordinance or any amendments thereto until the matter has first been referred to the commission for its review and recommendation. Va. Code § 15.2-2285.

c. Zoning Administrator. The locality may provide in its zoning ordinance for the appointment or designation of a zoning administrator. Va. Code § 15.2-2286(d).

- (1) The zoning administrator shall have all necessary authority to administer and enforce the zoning ordinance, including ordering in curative action for violations and institution of legal proceedings to enforce compliance. Va. Code § 15.2-2299.
- (2) The zoning administrator shall administer and enforce conditions related to conditional rezonings pursuant to Va. Code §§ 15.2-2296, *et seq.*

- (3) Virginia Code § 15.2-2311(C) provides that no written order, requirement, decision or determination made by a zoning administrator may be reversed after 60 days.
 - (4) Virginia Code § 15.2-2286(a)(4) provides that the zoning administrator shall respond within 90 days to a request for a decision or determination.
- d. Board of Zoning Appeals (BZA). BZA's are creatures of statute and possess only those powers expressly conferred upon them. Any locality which has enacted a zoning ordinance is required to create a BZA whose members shall be appointed by the local circuit court. Va. Code § 15.2-2309. The duties of the BZA include the following:
- (1) To entertain appeals from any person aggrieved or any officer or department of the locality from any decision of an administrative officer administering any provision of zoning or ordinance relating to zoning provided for in Article 8 of the Code. Va. Code §§ 15.2-2309(1) and 15.2-2311.
 - (2) The BZA may grant, on appeal or original application in specific cases, variances from the terms of the zoning ordinance "when, owing to special conditions, a literal enforcement or the provisions will result in unnecessary hardship." Va. Code § 15.2-2309(2). Specific standards for the granting of variances are set out in Virginia Code § 15.2-2309(2).

- (3) To entertain appeals from decisions of the zoning administrator. Va. Code § 15.2-2309(3).
- (4) To entertain applications for interpretation of zoning maps. Va. Code § 15.2-2309(4).
- (5) If authorized by the governing body, the BZA may hear and decide special exceptions and special permits. Va. Code § 15.2-2309(6). In such cases, the BZA is considered to be acting in a legislative, rather than quasi-judicial, capacity, and, upon judicial review, its decision is accorded the presumption of validity and evidence will be weighted using the fairly debatable rule. *Bd. of Supervisors of Fairfax County v. Southland Corp.* 224 Va. 514, 297 S.E. 2d 718 (1982).
- (6) Since July 1, 2006, non-legislative decisions of the BZA are presumed to be correct and will not be disturbed by the circuit court on review unless they are determined to be factually incorrect based upon a preponderance of the evidence. Questions of law are heard *de nova*. Va. Code § 15.2 – 2314.
- (7) Judicial review of a BZA decision on a writ of *certiorari* is limited to the scope of the BZA proceeding and the court may only consider the correctness of the BZA decision.
- (8) The 90 day time limit for BZA action on an appeal is directory, not mandatory, and its expiration does not cause the BZA to lose jurisdiction over an issue pending before it. *Tran v. Gwin*, 262 Va. 572, 554 S.E. 2d 63 (2001).

3. Relationship Between the Comprehensive Plan and Zoning Ordinances.
 - a. Planning commissions generally prepare comprehensive plans and official maps for adoption by the City Council. Va. Code § 15.2-2223.
 - b. The Virginia Code provides that upon the adoption of a comprehensive plan by the governing body, the plan shall dictate the approximate location, the design and character of each component of the plan.
 - c. The planning commission is vested with the preparation of zoning ordinances and amendments thereto for recommendation to City Council. City Council possesses the ultimate authority to adopt ordinances and amendments thereto.
 - d. At the discretion of City Council, local planning commissions are required to prepare and conduct annual capital improvement programs. Such annual reviews are to be based upon the comprehensive plan projected for a five year period. This review is submitted to the governing body in consideration of the municipalities' budget.
4. The Zoning Ordinance. Va. Code §§ 15.2-2280 through 15.2-2316.
 - a. Zoning is a legislative act.

Virginia Code § 15.2-2280 authorizes localities to divide their jurisdictions by lines into districts within which the locality may regulate the:

- (1) Use of land;
- (2) Size, height, location, construction, repair, maintenance, and removal of structures;
- (3) Areas and dimensions of land, water and air space to be occupied by buildings, structures and uses as well as yards and open spaces, and the size of lots based upon the availability of public utilities; and
- (4) The excavation and mining of soil and other resources.

b. Arbitrary, but legal.

Although lines must be drawn between districts resulting in arbitrary distinctions between what is permitted in one district and what is permitted in a neighboring district, Virginia courts have held that the drawing of such arbitrary distinctions is lawful. Virginia courts have held that the legislative function is more or less arbitrary.

In making zoning judgments, the governing body must consider the general boundary guidelines set forth in the comprehensive plan, the location of property lines, the physical characteristics of land, and other factors affecting optimum geographical alignment. *Bd. of Supervisors of*

Fairfax County v. Pyles, 224 Va. 629, 300 S.E. 2d 79 (1983).

A zoning authority may choose between two reasonable uses, even though one use might be more appropriate or even be the most appropriate use for the land in question and a trial court does not have authority to require a zoning board to grant one zoning category over another. *Bd. of Supervisors of Fairfax County v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E. 2d 648 (1991).

Virginia Code § 15.2-2282 restates the requirement of the equal protection clause of the Constitution *Bell v. City Council of the City of Chesapeake*, 244 Va. 490, 297 S.E. 2d 810 (1982) that regulations within a district shall be uniform (i.e., that similarly situated properties shall be similarly treated,) although the regulations of one district may differ from those of another.

"Adjacency alone is insufficient to establish a zoning discrimination claim." *Helmick v. Town of Warrenton*, 254 Va. 225, 231, 492 S.E. 2d 113, 116 (1997).

Refusing to allow a specific land use is discriminatory when a land use permitted to one landowner is restricted to another landowner similarly situated and, if the ordinance is not substantially related to public health, safety, or welfare, it constitutes a denial of equal protection. *Helmick Bd. of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E. 2d 199 (1975).

The drawing of zoning boundaries must depend upon some rational basis, e.g. guidelines of the plan, location of property lines, or physical characteristics. *Bd. of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E. 2d 33 (1975).

5. Authorized Objectives of Zoning. Virginia Code § 15.2-2283 sets forth the authorized objectives of zoning ordinances and mandates that reasonable consideration be given to each stated purpose, "where applicable."
 - a. Provide for adequate light, air, access, safety from fire, flood and other dangers;
 - b. Reduce and prevent traffic congestion in streets;
 - c. Facilitate creation of convenient, attractive and harmonious communities;
 - d. Facilitate public services, public safety and public facilities;
 - e. Protect and preserve historic areas;
 - f. Protect against the overcrowding of land with an undue density of population, in relationship to public facilities and infrastructure existing;
 - g. Encourage economic development, and expansion of the employment and tax bases;
 - h. Preserve agricultural lands, forests and other lands of significance for the protection of the natural environment;

- i. Protect airport safety;
 - j. Promote the creation and preservation of affordable housing 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;
 - k. Reasonable provisions for the protection of groundwater and surface water; and
 - l. A 2001 amendment to Virginia Code § 15.2-2286 authorizes tax credits for voluntary downzonings.
6. Proffered Zoning. Virginia Code §§ 15.2-2286, 15.2-2296, 15.2-2297 and 15.2-2298 authorize localities to accept proffers “voluntarily” offered as part of a rezoning application.
- a. Pursuant to Virginia Code § 15.2-2298, localities and adjacent localities may accept proffers of cash, real property, and the construction of off-site public improvements subject to the following conditions:
 - (1) The rezoning application must create the need for conditions;
 - (2) The conditions bear a reasonable relation to the rezoning;
 - (3) The conditions conform with the local comprehensive plan;
 - (4) The locality has an adopted capital improvement program pursuant to Virginia Code § 15.2-2239;

- (5) The proffers are voluntary.
 - b. A 2001 amendment to Va. Code § 15.2-2297(a)(v) and Va. Code § 15.2-2298(A) prohibit proffers which require establishment of a homeowners' association for the collections of contributions and payment to the local government for maintenance of public facilities.
 - c. The Virginia Supreme Court has ruled that where the only basis for the rejection by a locality of a proposed residential rezoning was refusal by the developer to make a cash proffer in an amount suggested by the locality to cover the cost of school related capital improvements the proffers were not voluntary and, the denial was therefore invalid. *Bd. of Supervisors of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E. 2d 668 (1995). However, if there are other valid reasons for the denial, it will be upheld. *Gregory v. Bd. of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E. 2d 350 (1999).
7. Unauthorized Objectives. Pursuant to Dillon's Rule, virtually anything not expressly provided for by state statutes may be ruled *ultra vires*. Some objectives which have been held not to be authorized are:
- a. Aesthetic zoning. Aesthetic objectives of zoning provisions are not illegal per se, but they must be supported by some otherwise legitimate zoning purpose. Aesthetic objectives cannot be the sole purpose of the regulation. *Bd. of Supervisors v. Rowe*, 216 Va. 128, 216 S.E. 2d 199 (1975).

- b. "Socioeconomic" zoning. The Virginia Supreme Court found a Fairfax ordinance increasing the minimum lot size from one-half to two acres in the western two-thirds of the locality to be socioeconomic zoning unlawfully designed to prevent the less affluent from occupying the territory. *Bd. of Supervisors of Fairfax County v. Carper*, 200 Va. 653, 107 S.E. 2d 390 (1959).
- c. Also considered "socioeconomic" zoning is mandatory "inclusionary" zoning where the landowner is required to include in his project a certain amount of low-cost or affordable housing. Such requirements also have been found to be an unconstitutional taking. *Bd. of Supervisors of Fairfax County v. DeGroff Enters., Inc.*, 214 Va. 235, 198 S.E. 2d 600 (1973).

However, Virginia Code § 15.2-2304 was enacted which generally enables counties using the "urban county executive" form of government to adopt zoning provisions designed to promote affordable housing by providing incentives for the construction of such housing through zoning density bonuses; in exchange for which the governing body is able to control the resale and rental prices of resulting affordable housing for up to 50 years. This statute also sanctions affordable housing ordinances based upon optional density bonuses already in existence in other localities. Subsequently thereto Va. Code § 15.2-2305 extended the authority to all other localities to enact local affordable housing ordinances using density bonuses

to offset the cost to developers of providing such housing as part of projects.

d. Off-site improvements.

Generally, the zoning enabling legislation has been held not to allow localities to exact dedication of land, payment for or construction of roads or other public facilities.

In *Alexandria v. The Texas Company*, 172 Va. 209. 1 S.E. 2d 296 (1939) the Virginia Supreme Court held:

The principle is well settled that a State cannot grant a privilege subject to the agreement that the grantee will surrender a constitutional right, even in those cases where the State has the unqualified power to withhold the grant altogether. Where such a condition is imposed upon the grantee, he may ignore or enjoin the enforcement of the condition without thereby losing the grant.

If a State, possessing the power to deny a grant altogether, cannot grant a privilege subject to the condition that the grantee will surrender a constitutional right, certainly it cannot constitutionally exact this price of the grantee where, as in the instant case, it has no lawful power to decline the grant. 172 Va. 217, 1 S.E. 2d at 299.

This is particularly true where the need for the public improvement is not substantially generated by the development itself. *Rowe; Cuppv. Bd. Of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E. 2d 407 (1984).

The Virginia Supreme Court has a more stringent rule in subdivision cases. Even though the evidence showed that the development would generate substantial new demand on an existing public road, the local government could not condition subdivision approval upon improvement to the existing public road. *Hylton Enters., Inc. v. Bd. of Supervisors of Prince William County*, 220 Va. 435, 258 S.E. 2d 577 (1979).

In the case of *Bd. of County Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E. 2d 542 (1985), a bond release contest, the Virginia Supreme Court ruled that where there was no evidence of protest by a developer of a locality's requirement to provide off-site improvements as a condition of subdivision approval, the contract for the improvements could be enforced by the locality.

However, the provisions of Virginia Code §§ 15.2-2296 *et seq.*, discussed *infra*, authorize a substantial number of localities to accept "proffers" of land, and payments for or construction of public facilities as part of a conditional zoning approval.

In addition, Virginia Code §§ 15.2-4800 *et seq.* and 15.2-460.3 *et seq.* authorize certain localities to create

transportation districts wherein special assessments may be levied for the construction of transportation improvements. *Va. Code* § 15.2-2317 *et seq.*, authorize the assessment of road impact fees in a few large localities and their contiguous neighbors. Virginia Code § 15.2-2242(4) authorizes acceptance of voluntary payments for off site road improvements as part of the subdivision process.

- e. "Timed phase zoning. This technique has been declared *ultra vires* in Virginia. *Bd. of Supervisors v. Williams*. This is a technique, whereby a locality maintains low density zoning in an area pending extension of public facilities although the plan indicates that higher density is the ultimately appropriate land-use.
- f. There is no specific statutory authority for interim zoning, i.e., zoning adopted as a temporary measure pending completion of the drafting, study and formal adoption of a "permanent" zoning ordinance.

B. PRELIMINARY PLANNING APPROVALS.

- 1. Preparation. Know your ordinance and comprehensive plan. Successful rezoning applications are the product of careful consideration and planning.

- a. Understanding.

A thorough understanding of the intended use of the property is essential, including, but not limited to, the hours of operation, the number of employees, the projected number of customers/visitors and the like. The client may

have planned for accessory uses which may require special use permits.

b. Site Development Matters.

(1) The input of your engineer is critical in issues related to site development. Professional input at an early stage avoids unnecessary costs and delays later in the process. The engineer offers great insight as to issues, including:

- (a) Ingress/egress issues;
- (b) Stormwater management issues;
- (c) Wetlands delineation;
- (d) Chesapeake Bay Act issues;
- (e) Location of structure and parking matters;
- (f) Relationship to development standards and to adjacent properties;
- (g) Traffic impact issues;
- (h) Survey matters;
- (i) Easements and restrictions.

(2) In order to identify potential issues, carefully review your intended use and preliminary review of the site plan including the following:

- (a) Comprehensive plan;

- (b) Zoning ordinance;
 - (c) Applicable development standards;
 - (d) Historical applications for rezoning of this property;
 - (e) Historical applications of similarly situated properties;
 - (f) Potential historic or environmental issues;
 - (g) Master transportation plan;
 - (h) Utilities plan;
 - (i) Projected highway expansion.
- (3) Coordinate title examination findings with engineer and surveyor.
- (4) Determine the need for other consultants, such as the following:
- (a) Land Planner;
 - (b) Economic or Market Analyst;
 - (c) Environmental Consultant;
 - (d) Architect;
 - (e) Engineer;
 - (f) Surveyor;

(g) Traffic Engineer;

(h) Landscape Architect.

2. Meetings with Planning Staff.

A pre-application meeting with a member of staff is critical in two respects – it permits the thorough explanation of the goals and objectives of your request, and, most importantly, it affords the opportunity for feedback, education and identification of any weaknesses in the projects. More importantly, it creates an opportunity to mitigate before the issues are publicly identified.

3. Application.

a. Understand what you need to achieve your intended goal.

(1) Rezoning;

(2) Use Permit;

(3) Special Exception;

(4) Conditional Use Planned Development; or

(5) Variance.

b. Complete your application, including the following:

(1) Zoning Powers of Attorney;

(2) Proffers;

(3) Disclosure Affidavit;

(4) Legal Description;

(5) Exhibits;

(6) Miscellaneous Information.

4. Contacts with Neighbors.

Meetings with adjacent property owners, civic associations and any special interest groups allows the applicant the opportunity to address concerns, avoid opposition, and fine tune any modifications.

5. Significance of Proffered Conditions.

- a. Conditional zoning versus straight zoning;
- b. Allowable proffers – cash and other categories;
- c. Roadway improvements and traffic signals;
- d. Utilities issues;
- e. Phasing of project;
- f. Buffers and screening;
- g. Elevations and setbacks;
- h. Access limitations;
- i. Site coverage, size and density;
- j. Architecture materials, signage and lighting;
- k. Dedication of land for public purposes;
- l. Height and use restrictions;

- m. Recreational amenities.
6. Quasi-Judicial or Administrative Actions.
- a. Variances.
 - (1) A Board of Zoning Appeals ("BZA") may grant a variance to depart from the literal requirements of a zoning ordinance if such a grant is not contrary to the public interest. *Spence v. Bd. of Zoning Appeals for the City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).
 - (2) The applicant must demonstrate that the property was acquired in "good faith." The purchase of property at a low price or with knowledge of the prior owners' unsuccessful attempt to obtain a variance has been interpreted by the Supreme Court not to be a self-inflicted hardship which would constitute a lack of good faith so as to bar an applicant from obtaining a variance. *Id.*
 - (3) Variances are appropriate in situations in which strict enforcement of a zoning ordinance creates unique hardships to the property in question, not to other property owned by the applicant or his neighbors. A BZA must make three findings, as specified in Virginia Code § 15.1-495, namely:
 - (a) That the strict application of the ordinance would result in undue hardship;

- (b) That such hardship is not shared generally by other properties within the same zoning classifications or in near proximity thereto; and
 - (c) That the grant of a variance will not be substantially detrimental to the adjacent property and that the issuance of the variance will not result in a change in the neighborhood or vicinity's character.
- (4) The applicant must show the existence of at least one of several special conditions. Upon the determination of the special condition demonstrating an unnecessary hardship, the BZA is mandated that each of the requirements are satisfied.
- (5) The Virginia Code lists the "special conditions" which give rise to an "unnecessary hardship" as one wherein the strict application of the ordinance would effectively prohibit or unreasonably restrict the use of the applicant's property or create or clearly demonstrate a hardship akin to confiscation. Stated differently, a BZA is not empowered with the authority to grant a special convenience sought by the landowner.
- (6) The specific findings of the BZA are essential to the judicial review of a BZA's decision by the circuit courts.

b. Special Exceptions and Use Permits.

- (1) Special exceptions and special permits ("Permits") may be granted by the governing body (or in some instances by the BZA). Actions must be consistent with good zoning practices. Applications for Permits must be evaluated within the context of applicable state statutes and ordinances enacted by the locality.
- (2) Permits provide options for creating a mechanism to provide relief from practical problems and hardships from a literal enforcement of zoning ordinances. At the same time, the ability to grant Permits protects zoning ordinances from allegations of unreasonable intervention with private land rights.
- (3) Permits should be granted pursuant to the terms of the applicable ordinance and with prudent safeguards and protection.
- (4) Consideration is limited to the specific facts and circumstances of the particular case. The governing body is permitted discretionary power, which may not be arbitrarily applied.
- (5) Self-inflicted hardship affords no basis for the issuance of a Permit.

C. OTHER PERMITTING AND APPROVAL ISSUES

1. Judicial Rezoning and Land Use

a. Dillon's Rule.

- (1) Dillon's Rule is paramount in Virginia. Dillon's Rule was first recognized by the Virginia Supreme Court in *City of Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896) and is applied by Virginia courts to resolve any ambiguities in enabling authority against the localities.
- (2) Localities have only those powers (1) expressly granted, (2) necessarily or fairly implied from express grants, and (3) those that are essential and indispensable. Any doubt about the existence of authority is construed against the locality. See also *Hylton Enters. v. Bd. of Supervisors*, 220 Va. 435, 258 S.E. 2d 5787 (1979).
- (3) Dillon's Rule is strictly applied. Unless the legislature has provided an express grant of the power in question, the Supreme Court rarely upholds local authority to exercise that power.
- (4) A corollary to Dillon's Rule is codified in Virginia Code § 1-13.17, which prohibits the enactment of ordinances that are inconsistent with the laws of the United States or the Commonwealth. *Blanton v. Amelia County* 261 Va. 55, 540 S.E. 2d 869 (2001).

- (5) Another corollary to Dillon's Rule is the "reasonable selection of method rule" which permits localities to exercise reasonable discretion in the implementation of expressly granted authority where the enabling act fails to specify any method of implementation.

Implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits. The test in application of the doctrine is always reasonableness, in which concern for what is necessary to promote the public interest is a key element.

- (6) The Supreme Court of Virginia will usually imply local power only when an expressly granted power would be rendered ineffective without such an implication.

The Court looks to the purpose and objective of statutes in considering whether authority is necessarily implied from powers expressly granted. *See Gordon v. Bd. of Supervisors of Fairfax County*, 207 Va. 827, 153 S.E. 2d 270 (1967).

Moreover, a statute must be given a rational interpretation consistent with its purposes and not one which will substantially defeat its objectives. *Mayor and Members of City Council of City of Lexington v. Indus. Dev. Auth. of Rockbridge County*, 221 Va. 865, 275 S.E. 2d 888 (1981).

- (7) If there is a reasonable doubt as to whether legislative power exists, the doubt must be resolved against the existence of the asserted authority. *City of Richmond v. Confrere Club of Richmond*, 239 Va. 77, 387 S.E. 2d 471 (1990). However, when an enabling statute is clear and unambiguous, its intent is determined from the plain meaning of the words used, and, in that event, neither rules of construction nor extrinsic may be employed. *Id.*; *Marsh v. City of Richmond*, 234 Va. 4, 11, 3560 S.E. 2d 163 (1987).

b. Presumption of Legislative Validity.

- (1) Virginia follows the rule that legislative decisions by localities are presumed to be valid. A legislative action that is presumed to be valid “will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary and bears no reasonable relation to the public health, safety, morals or general welfare.” *City Council of City of Va. Beach v. Harrell*, 236 Va. 99, 101, 372 S.E. 2d 139 (1988). *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E. 2d 512 (1996).
- (2) A legislative act involves the “balancing of the consequences of private conduct against the interests of public welfare, health and safety.” *Bd. of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 522, 297 S.E. 2d 718, 722 (1982).

- (3) Administrative actions involve implementation of existing laws while legislative actions create new ones.

Legislative acts include the adoption of a comprehensive plan and amendments thereto, adoption of a zoning ordinance (both text and map) and amendments thereto and the issuance of special permits, special exceptions or conditional use permits.

- (4) The consequence of the presumption of validity is that a plaintiff attacking the validity of a local legislative decision must establish a *prima facie* case of invalidity to shift the burden of proof to the locality. *City of Covington v. APB Whiting, Inc.*, 234 Va. 155, 360 S.E. 2d 206 (1987). A plaintiff must show that the existing zoning is unreasonable and the zoning requested is reasonable. *City Council of the City of Virginia Beach v. Harrell* 236 Va. 99, 372 S.E. 2d 139. In considering whether a legislative act is reasonable, the motives of the governing body in undertaking the act are immaterial.

- (5) The presumption of validity survives a determination of invalidity by the trial court upon review by an appellate court. The appellate court also gives the usual presumption of correctness to the findings of the lower court, and then, meshing the presumptions, it examines the record to

determine whether the evidence sustains the lower court's finding. *Bd. of Supervisors of Fairfax County v. McDonald's Corp.*, 261 Va. 583, 544 S.E. 2d 334 (2001).

c. Fairly Debatable Rule.

- (1) The fairly debatable rule is utilized by the courts to decide a case involving a local legislative decision when the plaintiff has made out a *prima facie* case of invalidity and the locality has responded with evidence of validity.
- (2) The fairly debatable rule does not require that the locality introduce sufficient evidence to comprise a "preponderance" of the evidence, only enough to make the issue of validity one over which reasonable men could differ. The evidence required to raise a question to the fairly debatable level must be "not only substantial but relevant and material as well." Until it has heard evidence in a case, the trial court cannot determine whether a locality's decision is "fairly debatable."
- (3) In a classic case of the fairly debatable issue, it is not the property owner, or the courts, but the legislative body which has the prerogative to choose the applicable classification. Stated differently, the locality has the legislative prerogative to choose between those reasonable zoning classifications.

Bd. of Supervisors v. Miller & Smith 242 Va. 382, 410 S.E. 2d 648.

- (4) There are a number of exceptions to the presumption of validity and fairly debatable rule.
 - (a) Cases where allegations that a violation of free speech or exclusionary zoning exist. The locality must clearly demonstrate, among other things, that there are no less drastic means available to achieve the public purpose which is the stated objective of the regulation.
 - (b) The fairly debatable rule is not applicable to non-legislative decisions or cases where the issue is whether the locality is acting *ultra vires* its authority under the terms of the enabling legislation.
- (5) Administrative decisions are not governed by the presumption of validity and fairly debatable rule.

Although great weight is given to consistent construction of zoning ordinance by the officials charged with its enforcement, administrative duties, such as the issuance of a building permit when the conditions of applicable ordinances have been met, or the approval of properly prepared site plans or subdivision plats may be compelled by mandamus from the circuit court directing the appropriate government official to grant the requested approval

or issue the requested permit. *Bd. of Supervisors of Fairfax County v. Horne* 216 Va. 113, 215 S.E. 2d 453 (1975).

d. Vested Rights.

"Vested rights" is a constitutional doctrine that defines the circumstances in which a landowner has so relied upon a local government approval that the locality may not thereafter deny the landowner's right to proceed with the project even though land use regulations may have changed.

Until 1999 vested rights in Virginia was a doctrine developed through case law. The 1998 session of the General Assembly adopted a legislative definition of vested rights by amending Virginia Code § 15.2-2307.

In addition to the new vesting law in recent years the legislature has created several statutory grandfathering or "safe harbors" provisions for landowners which go beyond the scope of the common law doctrine of vesting.

The following discussion is divided into three sections, one dealing with the new law, one with vesting rules which existed prior to enactment of the new law, and the several statutory safe harbors.

(1) The new law.

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 landowner 1) obtains or is the
beneficiary of a significant governmental approval
(as later defined) which remains in effect allowing
development of a specific project; 2) relies in good
faith on the significant affirmative governmental
act; and 3) incurs extensive obligations or
substantial expenses in diligent pursuit of the
specific project in reliance on the significant
affirmative governmental act.

e. Standing to Sue.

(1) Most challenges to local planning ordinances seek
declaratory judgments.

(a) A plaintiff seeking a declaratory judgment
has standing if she has a "justiciable
interest" in the subject matter of the
litigation.

(b) The statutes related to declaratory judgment
are liberally interpreted and administered.
Va. Code § 8.01-184.

(2) A person has a sufficient interest in the subject
matter of the case if the parties will be actual
adversaries and the issues will be fully and
faithfully developed.

(3) A plaintiff must also be "aggrieved," that is one
who has suffered a denial of some personal or

property right, legal or equitable, or imposition of a burden or obligation different from that suffered by the public generally. *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals of Va. Beach*, 231 Va. 415, 419-20, 344 S.E. 2d 899, 902-03 (1986).

- (4) However, there is no private right to enforce zoning laws. *Fields v. Elkins* 52 Va. Cir. 206 (Alexandria 2000).

f. Ambiguities.

Where ambiguities exist in local ordinance the courts have traditionally construed them against the locality and in favor of the property owner. This reflects two common law principles: (1) language is construed against the drafter of the language and (2) statutes and ordinances in derogation of common law property rights will be strictly construed in favor of the property owner. *Town of Mount Jackson v. Fawley* 53 Va. Cir. 49 (Shenandoah County 2000) (citing *Young v. Town of Vienna*, 203 Va. 265, 123 S.E. 2d 288 (1962)). See E. C. Yokley, *Zoning Law and Practice*, 4th ed. Michie 1989.

"Language is ambiguous if it admits of being understood in more than one way or refers to two or more things simultaneously. An ambiguity exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness." *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E. 2d 84, 87(1985) (citations omitted).

**D. ADOPTION AND AMENDMENT OF ZONING ORDINANCES
AND MAP.**

1. Relationship Between the Comprehensive Plan and Zoning Ordinance.

- a. Pursuant to Virginia Code § 15.2-2223, all localities are required to have adopted a comprehensive plan. The comprehensive plan is a prerequisite to the enactment of a zoning ordinance. Va. Code § 15.2-2223.
- b. The purpose of the comprehensive plan is to guide a locality in coordinating a harmonious development incorporating the present and projected needs and resources to best promote the health, safety, morals, order, convenience, prosperity and general welfare of the community. Id.
- c. The plan may include, "but need not be limited to...": Id.
 - (1) The designation of the various present and proposed land uses in the territory.
 - (2) The designation of a transportation system, including streets, highways, railways, waterways, airports, etc.
 - (3) The designation of a system of community service facilities, such as parks, schools, forests, hospitals, waterworks, sewage disposals, public buildings, etc.

- (4) The designation of historical areas and urban renewal areas.
 - (5) The designation of areas for implementation of reasonable groundwater protection measures.
 - (6) An official map, capital improvements program, subdivision ordinance, zoning ordinance and zoning map.
- d. The plan should be general in nature.
- (1) The plan is to remain general in nature, designating only the general or approximate location of the features shown. *Id.*
 - (2) The plan is advisory only. It does not substitute for a zoning ordinance.
- e. The comprehensive plan specifically dictates the location of public facilities.

The plan shall control the location of each feature shown on the plan and specifies that no "street or connection to an existing street, park or other public area, public building or public structure, public utility facility or public service corporation facility other than railroad facility, whether publicly or privately owned, shall be constructed, established or authorized..." until its location has been approved by the commission as being substantially in accordance with the plan. Va. Code § 15.2-2232.

- f. Plan amendments.

- (1) The plan must be reviewed at least once every five years. Va. Code § 15.2-2230. Amendments to the plan may be initiated by either the planning commission on its own motion, or by the commission at the direction of the governing body. Va. Code § 15.2-2229.
- (2) No specific authority exists for individual landowners to initiate plan amendments, although some localities have provided for such initiation on the ground that to deny a landowner the right to petition for such a change would violate the provision of Article 1, § 12 of the Constitution of Virginia.
- (3) Landowners seeking changes in land use regulations applicable to their property generally seek an amendment to the plan if their proposal would be inconsistent with the provisions of the plan.

E. QUESTIONS AND ANSWERS