Land Use 2007

Revisiting the Ever-Changing Law of Land Use Planning and Regulation

Virginia CLE®

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Hot Issues in Land Use Regulation: What Localities Are Doing Now

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I. WHAT LOCALITIES ARE DOING NOW

A. Residential Cluster Zoning

1. Conventional zoning and subdivision ordinances typically require that an entire parcel of property be divided into lots conforming to rigid minimum lot size requirements. Erection of structures on subdivided lots are further regulated by rigorous set-back, height and other dimensional mandates of the respective ordinances.

2. A locality may use cluster zoning ordinances to encourage the placement development on a specific portion of the property, allowing the remaining land to continue as undeveloped green or open space. Additional positive features of cluster ordinances include the following:

   a. Greater flexibility in the developmental design of residential projects;

   b. Ability to preserve environmental features of the site;

   c. Discourage sprawling development;

   d. Provide the opportunity for diversity in development;

   e. Permit an economic and cost efficient manner of delivery of public services;

   f. Reduce the cost of housing; and

   g. Preserve open usable space, agricultural land, recreational features and the natural beauty of a site.

B. Overlay Zoning

1. Overlay zoning allows a locality to either encourage or discourage development in certain areas. Overlay zoning maps are designed to apply to an existing zoning area. In effect, the overlay district subjects a parcel to both requirements of the underlying zoning district and the overlay district.

2. Overlay mapping may accomplish many beneficial purposes including the following:

   a. Conservation of environmental resources;

   b. Rehabilitation or redevelopment of deteriorated neighborhoods or contaminated land;

c. Preservation of historic properties;

d. Promote affordable or workforce housing development; and

e. Encourage economic development.

C. New Urbanism

1. New urbanists are sometimes referred to as "neo-traditionalists". New urbanism allows the creation of mixed use developments which may replicate the traditional urban neighborhoods. Such developments stand in stark contrast to sprawling subdivision developments of recent years. A new urban development may contain varied housing styles, retail, offices and services located within walking distance. Other features include green space, recreational amenities, sidewalks and bike trails. The new urban development permits a resident to live, work and play within the neighborhood.

2. New urbanism continues to gain popularity within the Commonwealth within specific localities and regionally new urban developments are sprouting up as in-fill development as well.

3. Roanoke successfully initiated a constitutional amendment in the 2006 election authorizing localities to adopt ordinances providing for partial real estate tax exemptions for in-fill construction in redevelopment areas. The enabling legislation is contained in Va. Code § 58.1-3219.4. The City Council passed an ordinance which became effective on January 1, 2007.

4. An example of a successful new urban development is Each Beach in the City of Norfolk. East Beach in Norfolk has arisen from an area of deteriorated residences and rundown bars in the City's Ocean View area. East Beach is a unique joint venture by and between the developer, the City and Norfolk Redevelopment and Housing Authority. East Beach enlisted local builders and renowned architects to create a nationally recognized new urban development. The project has recreated Norfolk's elegant beachfront houses.

5. Many new urban developments within the Commonwealth have garnered awards and accolades, including, but certainly not limited to, the following:

a. Town Center - Virginia Beach.

b. Chesdin Landing - Chesterfield County.

c. Grayson Hill - Henrico County.

d. Kendal at Lexington – Lexington.

e. Rocketts Landing – Richmond.

f. Soundings on the Nansemond – Suffolk.

g. The Spectrum at Willoughby Point – Norfolk.

h. The Sanctuary at False Cape - Virginia Beach.

i. Windsormeade of Williamsburg – Williamsburg.

j. Woodsedge – Blacksburg.

k. Homestead Preserve - Bath County.

D. Public Private Partnerships

1. Public-Private Partnerships ("PPP") provide the public sector with a tool for smart, controlled, and financially rewarding growth and development. Although PPP have been and continue to be the subject of public debate, PPP have been the genesis of great success stories.

2. Generally, a PPP is described as a contractual agreement between a governmental entity and a for-profit business entity. The PPP Agreement establishes a partnership in which the skills and assets of both the public and private sectors are shared in creation of a project or facility for the use of the community at large. A significant component of a PPP is that the financial risks and rewards of a project are borne by both the public and private sectors.

3. The public entity and its constituency clearly benefit from the private investment of talent and resources. Additionally, the locality is afforded with the ability to clearly focus and effectively control the creation of projects, which it believes to be in the long-term interests of the community. As such, the locality insures a prudent use of its financial resources for projects it believes bring a higher quality of development with a significant likelihood of success.

4. The private sector is encouraged to actively participate in large projects which, absent the availability of shared risk and reward, would not get "off the ground". PPP leverage the strengths and financial power of both parties and, as such, projects can be undertaken, which would not be financially feasible without the combined resources of both private and public entities. Such enhanced projects raise the quality of development in the community and serve as the catalyst for other development. The locality and the community mutually benefit through expansion of the tax base including the creation of additional jobs, revenue, and profit.

5. PPP provide effective tools for the development of projects, which are not only beneficial to the public and private sectors, but to the community. PPP are not one size fits all. Various programs provide the potential of ventures and development, including the birth of new major projects; construction of infrastructure within a development; construction of public facilities; and even improved transportation alternatives.

6. An excellent example of a successful PPP is The Public Private Transportation Act of 1995 ("PPTA"), which serves as the current mechanism for the development of transportation projects such as Route 28 in Northern Virginia, the Coalfields Expressway (Bristol, Virginia), and Route 58 (Salem, Virginia). The potential also exists for additional projects, such as the Dulles rail system, the I-81 widening, the expansion of I-95/395 HOT lanes, the Powhite Parkway Western Extension, and perhaps a third crossing for the Hampton Roads Tunnel.

7. Tax Increment Financing ("TIF") is another effective PPP tool. A TIF permits taxes within an established TIF generated by the increase in assessed value emanating from new development to be applied to cover the debt service on the infrastructure development costs. The public entity may receive less tax revenue than it would normally receive if the new development was not included in a TIF; however, the locality receives more than it would receive if the development did not occur.

8. Another vehicle for Virginia localities is a Community Development Authority ("CDA"), which is a governmental body created with regard to a specific delineated district, for the express purpose of financing infrastructure. A CDA has the ability to issue tax-exempt bonds in order to complete infrastructure development. The CDA may then impose special assessments within the earmarked district to repay those bonds. Another feature of a CDA is the ability to provide special assessments, which may be levied in an amount directly related to the relative benefit received by each property owner within the district.

9. Certainly, the public sector must consider the use of PPP in a prudent manner. The guiding principles for the public sector in endeavoring to use Public-Private Partnerships should be to provide enhancement of its goals and long-range vision, including but not limited to, increasing the tax base, the generation of new jobs, a framework for future smart growth, and the ability to augment its public image and/or provide a unique product with branding appeal for locality.

10. Bold political leadership, defining a parameter of success, understanding the market, the degree of public sector involvement, the selection of a solid private partner, effective communication with all of the stakeholders, including the members of the community, provide the unique opportunity

for a high quality project, timely developed using smart growth policies for the benefit of the locality and the residents of the community.

E. Planned Unit Development Zoning

1. Planned unit development ("PUD") zoning permits large parcels of real estate to be developed in a more flexible manner than its existing zoning classification.

2. PUD ordinances vary from locality to locality. PUD ordinances may allow the following:

   a. A mixture of residential, commercial, and mixed uses;

   b. May permit increased density;

   c. Preserve open space;

   d. Encourage quality development; and

   e. Mandate that the developer compensate the locality for the cost of infrastructure or community facilities.

3. Most PUD ordinances do not disturb the underlying zoning classification and offer the PUD development as an alternative to the existing zoning.

F. Transfer of Development Rights

1. The Transfer of Development Rights ("TDR") is a technique wherein a locality may allow the transfer of the right to develop a parcel under current zoning classification from one part of the community to another.

2. TDR has been used throughout the country to protect environmental resources, farms, forests or open spaces.

3. TDR legislation is comprised of three elements - the sending district, the receiving district and the TDR credits. TDRs actually are marketed for purchase and sale.

4. Virginia enacted enabling legislation became effect on July 1, 2006. Va. Code § 15.2-2316.1, *et seq.*

5. Localities have begun the arduous process of drafting local ordinances.

G. Exclusionary Zoning

1. Zoning classifications are exclusionary as zoning ordinances separate land uses by excluding all uses outside the defined permissible uses.

2. The concept of *exclusionary zoning* has been generally referred to as those ordinances designed to exclude classifications of persons within a certain district.

3. The Virginia Supreme Court has historically struck down discriminatory exclusionary zoning ordinances. In 1959, the Supreme Court struck down an ordinance in Fairfax County which zoned the Western two-thirds of the county to agricultural with development limited to lots no smaller than two (2) acres. The Court reasoned that the ordinance has no reasonable relationship to the health, safety or general welfare of the County, but, instead was designed to exclude residents with low incomes. By dividing the County in such a manner, the effect would have insured that all low income residents would be forced to reside in the Eastern third of the County. *Board of Supervisors v. Carper,* 200 Va. 653, 107 S.E. 2d 390 (1959).

4. Virginia Code §15.2-2282 mandates that "[a] zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district. "

5. Query: Do uses such as single family large lot zoning, and minimum building size constitute exclusionary zoning?

H. Affordable Housing Ordinances

1. Permissible inclusionary zoning enabling legislation was enacted by the General Assembly permitting counties using the "urban county executive" form of government to adopt zoning provisions designed to promote affordable housing. These localities may provide 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 sanctions affordable housing ordinances based upon optional density bonuses previously enacted by the localities. Va. Code § 15.2-2304.

2. Va. Code § 15.2-2305 extends 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.

I. Transportation Districts

1. In addition, Va. 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 handful of larger localities and their contiguous neighbors.

2. Va. Code § 15.2-2242 (4) authorizes acceptance of voluntary payments for off site road improvements as part of the subdivision process.

J. Proffered Zoning

1. Va. 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.

2. Proffers can be used to tailor the uses allowed as part of the rezoning to those specifically desired by the rezoning applicant, thus ruling out other uses which may be allowed by right in the zoning category for which the rezoning is sought but which may be objectionable to the locality. Authority to accept this type of proffer is available to all localities.

3. Counties using the urban county executive form of government and localities adjacent to such counties may accept proffers of cash, real property, and construction of off site public improvements so long as such proffers are voluntary and reasonable. Va. Code § 15.2-2303 (A) through (F).

4. Localities, other than those described in the preceding paragraph, which have experienced population growth of more than 10% as defined in the statute, and adjacent localities, may accept proffers of cash, real property, and the construction of off-site public improvements subject to the following conditions:

   a. The rezoning must give rise to the need for conditions;

   b. The conditions have a reasonable relation to the rezoning;

   c. If the governing body produces sufficient evidence to establish that the reasonableness of the piecemeal downzoning is fairly debatable, the validity of the ordinance will be sustained;

   d. The conditions are in conformance with the local comprehensive plan;

   e. The locality has an adopted capital improvement program pursuant to Va. Code § 15.2-2239; and

   f. The proffers are voluntary. Va. Code § 15.2-2298.

5. Proffers may include off site improvements to land not included in the zoning district of the subject property.

6. 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.

7. 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 collection of contributions and payment to the local government for maintenance of public facilities.

8. 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).

K. Involuntary Proffers

1. As discussed earlier, a significant proportion of localities expect to receive concessions from a developer in the form of proffers. Many local governments also expect to receive a cash proffer, generally for the purpose of offsetting the cost of public facilities and infrastructure.

2. By State statute, the cash donations associated with a proffer are to be "voluntary".

3. Chesterfield County enacted a policy, specifying a $5,083 per residential lot maximum cash proffer that the County would accept, which was challenged as a taking. The judicial challenge was not made from the application of the statute to a specific rezoning matter but on its face. The Court held that the policy, on its face, did not violate the U.S. Constitution because the policy itself did not *require* the donation, but simply specified a maximum acceptable amount. *National Association of Home Builders v. Chesterfield County,* 907 F. Supp. 166 (E.D. Va. 1995).

4. A local governing body may not deny a rezoning *solely* because the applicant fails to make a cash proffer. In such an instance, the desired proffer ceases to be voluntary. *Board of Supervisors v. Reed's Landing Corp.,* 250 Va. 397, 400, 463 S.E. 2d 668, 670 (1995).

5. The locality must base its decision to grant or deny a rezoning application upon the merits of the entire application, including the proffers. However, where the absence of the maximum cash proffer is a key factor in a locality's denial of a zoning application, but the denial is also based on other health, safety, and welfare concerns, the denial will not be

overturned. *Gregory v. Board of Supervisors,* 257 Va. 530, 537, 514 S.E. 2d 350, 354 (1999).

L. Downzoning

1. Downzoning is a legislative action taken by the locality to reduce the density or decrease the intensity of permitted uses within a zoning district by zoning text amendment, or by modification of the designation of one or more parcels on the zoning map to a less intensive use. Downzoning may be effectuated by amendment to the zoning ordinance, zoning map and/or a comprehensive plan.

2. "Comprehensive" downzoning and a "piecemeal" downzoning are distinguished as follows:

   a. A locality may always undertake a downzoning as part of a comprehensive revision of its zoning ordinance. *Board of Supervisors of Fiarfax County v. Snell Const. Corp.,* 214 Va. 655, 202 S.E. 2d 889 (1974). The Court set forth the elements of a piecemeal downzoning as follows:

      (i) It is initiated by the locality on its own motion;

      (ii) It selectively addresses a single parcel and/or an adjacent parcel; and

      (iii) It reduces the permissible residential density below the limitations imposed by the comprehensive plan.

   b. If a *prima facie* case is made that the downzoning is a piecemeal action, the Virginia Supreme Court has held that the locality must defend its action that the former zoning was the product of fraud or mistake, or that there has been a change in circumstances substantially affecting the public health, safety, or welfare. *Board of Supervisors of Henrico County v. Fralin & Waldron,* 222 Va. 218, 278 S.E. 2d 859 (1981). The election of a new governing body does not constitute change in circumstances substantially affecting the public health, safety, or welfare. *Snell, supra.*

   c. No straightforward test exists to determine whether a downzoning action is comprehensive or piecemeal in nature.

   d. Real estate devoted to *open space* is real property used to preserve park and recreational areas, conserve land or other natural resources, or preserve floodways and land of historic or scenic value.

3. No straightforward test exists to determine whether a downzoning action is comprehensive or piecemeal in nature.

   a. By definition, a zoning action impacting all land within a local jurisdiction is comprehensive. However, a sizeable amount of property affected does not necessarily amount to a comprehensive action. In *Aldre Properties, Inc. v. Board of Supervisors of Fairfax County,* Fairfax County Circuit Court Chancery No. 78463-A (1985) (unpublished), the court ruled that a downzoning affecting over 40,000 acres was a piecemeal action.

   b. In contrast, the Virginia Supreme Court examined various criteria in determining that the challenged downzoning was piecemeal rather than comprehensive, including: that only a small percentage of the jurisdiction's total area was affected (3,500 acres or 2% of the City's total area); 50% of the area downzoned consisted of one parcel; certain parcels in the impacted area were downzoned while other were not; and there were no measurable reasons for the varied treatment of these parcels. *City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1,* 239 Va. 412, 389 S.E. 2d 312 (1990).

   c. 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).

   d. Virginia Code §15.2-2282 restates the requirement of the equal protection clause of the Constitution 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. *Bell v. City Council of the City of Chesapeake,* 244 Va. 490, 297 S.E. 2d 810 (1982).

   e. "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).

   f. 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. *Bd. of Supervisors v. Rowe,* 216 Va. 128, 216 S.E. 2d 199 (1975).

M. Preservation of Agricultural, Horticultural, Forestal and Open Space

1. Special Assessment may be enacted by local ordinance pursuant to Va. Code § 58.1-3230, *et seq.*

   a. Real estate devoted to *agricultural use* must be used for the "production for sale of plants and animals useful to man" or otherwise meet the requirements for payments or other compensation pursuant to a soil conservation program;

   b. *Horticultural use* requires that the land be devoted to the production for sale of fruits, vegetables, or nursery and floral products, or otherwise meet the requirements for payments or other compensation pursuant to a soil conservation program;

   c. Real estate devoted to *forestal use* is land devoted to tree growth in such quantity and so spaced as to constitute a forest area; and

   d. Real estate devoted to *open space* is real property used to preserve park and recreational areas, conserve land or other natural resources, or preserve floodways and land of historic or scenic value.

2. Each type of use has minimum acreage requirements. Inclusion of land in this program provides incentives for the preservation of natural resources.

3. Localities may also adopt ordinances providing for the creation of agricultural and forestal districts pursuant to the Agricultural and Forestal Districts Act § 15.2-4300, *et seq.*, and the Local Agricultural and Forestal Districts Act, § 15.2-4400, *et seq.* without special assessments. These generally are for larger tracts of 200 acres or more, although there are certain provisions permitting smaller ones to qualify.

4. The Virginia Open-Space Land Act, § 10.1-1700, *et seq.*, and the Virginia Conservation Easement Act, § 10.1-1009, *et seq.*, are other tools used by localities to preserve land for agricultural, forestal, recreational, or open-space uses. The definitions of "open-space easement" and "conservation easement" are the same, but open-space easements are typically held by a public body (such as the Virginia Outdoors Foundation or a locality), while conservation easements are typically held by a nonprofit organization.

5. The state and federal governments provide tax credits to landowners donating open space easements.

6. Enabling legislation allows localities to adopt a variety of tree protection ordinances. Va. Code §§ 10.1-1127.1; 15.2-960; 15.2-961.

N. Offsite Improvements and Impact Fees

1. Va. Code §15.2-2243 provides that a locality may provide in its subdivision ordinance for the payment of an applicant's pro rata share of the cost of providing reasonable and necessary sewage, water and drainage facilities located outside the land sought to be developed but at least partially necessitated by the proposed subdivision.

2. There is no enabling legislation which would permit localities to require payment for the construction of road improvements.

3. Generally, zoning enabling legislation has been held not to allow localities to extract dedication of land, or 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. *id.*

4. This is particularly true where the need for the public improvement is not substantially generated by the development itself. *Cupp v. Bd. of Supervisors,* 227 Va. 580, 318 S.E. 2d 407 (1984).

5. 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 existing public roads, the local government could not condition subdivision approval upon improvement to the existing public roads. *Hylton Enters., Inc. v. Bd. of Supervisors of Prince William County,* 220 Va. 435, 258 S.E. 2d 577 (1979).

6. 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.

7. However, the provisions of Virginia Code §§15.2-2296 *at 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.

8. 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.

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