Key Legal Concepts

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Zoning and Land Use in Virginia

I. Key Legal Concepts

A. Dillon Rule.

1. Dillon's Rule is applied by Virginia courts to strictly construe any ambiguities in enabling authority against localities. Specifically, the Rule establishes that the powers of local governments are fixed by the state enabling statutes and are limited to: (1) those powers expressly conferred, and (2) those powers necessarily implied from the powers expressly granted. *Commonwealth v. County Board of Arlington*, 217 Va. 558, 232 S.E. 2d 30 (1977).

2. A locality only has authority to take a particular planning, zoning, or subdivision action if the state enabling statutes provide that authority to the locality. *Board of Supervisors v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999).

3. Any doubt as to the existence of authority with the locality is resolved against the locality. *City of Richmond v. Confrere Club*, 239 Va. 77, 79-80, 387 S.E.2d 471, 473 (1990). The Virginia Court of Appeals elaborated on the rule as applied to a local land use regulation stating "We will not imply a grant of power from the legislature's silence." *Lawless v. County of Chesterfield*, 21 Va. App. 495, 502, 465 S.E. 2d 153 (1995).

4. The courts look to the purpose of the specific statute in assessing whether authority is necessarily implied from expressly granted powers. *Gordon v. Board of Supervisors of Fairfax County,* 207 Va. 827, 153 S.E. 2d 270 (1967).

5. Consistent with the necessity to uphold legislative intent, the doctrine of 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 the application of the doctrine by the courts is necessary reasonableness, what promotes the public welfare. *National Linen Service v. City of Norfolk,* 196 Va. 277, 281, 83 S.E. 2d 401 (1954).

6. A statute must be given a rational interpretation consistent with its purposes and not one which will substantially defeat its objectives. *Mayor v. Industrial Dev. Auth.,* 221 Va. 865, 275 S.E. 2d 888 (1981). As previously stated herein, 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, Id.* 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 evidence may be deployed. *Id.; Marsh v. City of Richmond,* 234 Va. 4, 11, 360 S.E. 2d 163 (1987).

7. In determining whether powers are necessarily implied, Virginia courts look at the purpose of the enabling statute and will not construe it in a way that substantially defeats that purpose. The courts tend to imply additional local powers when a specifically endowed authority may be effectively negated without such an implication. *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 247, 482 S.E.2d 812, 815 (1997) (the authority to regulate existing structures associated with non-conforming uses

must be implied from the authority to prohibit the construction of new structures in support of the non-conforming use otherwise the purpose behind granting the authority to regulate existing structures would be thwarted).

a. Ordinances may not be enacted that are inconsistent with the laws of the United States or the Commonwealth. *Blanton v. Amelia County, et al.*, 261 Va. 55, 540 S.E. 2d 869 (2001).

b. The "reasonable selection of method rule" permits localities to exercise reasonable discretion in the implementation of expressly granted authority where the enabling act fails to specify any method of implementation. This rule is premised upon the proposition that because a grant of power is general in its terms, the necessary means for carrying into execution the power granted must be implied before the authority may be exercised. *Marsh, supra.* Stated differently, the locality is compelled to select the method of implementation. *Commonwealth of Virginia v. County Board,* 217 Va. 558, 574-75, 232 S.E.2d 30, 31-33 (1977). Unlike Dillon's Rule, under the "reasonable selection of method" rule, any doubt is resolved in favor of the method selected by the locality to exercise the power. *Id.*

B. The Presumption of Legislative Validity and the "Fairly Debatable" Standard.

1. Zoning is a legislative act.

a. *Va. 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. Although inherently arbitrary, zoning is legal.

(1) 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. *City of Covington v. APB Whiting, Inc.,* 234 Va. 155, 360 S.E. 2d 206 (1987).

(2) Fixing the specific locations of boundaries between zoning districts is a legislative function that is, by nature, more or less arbitrary. *Board of Supervisors of Fairfax County v. Pyles,* 224 Va. 629, 300 S.E. 2d 79 (1983).

(3) 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. *Id.*

(4) The drawing of zoning boundaries must depend upon some rational basis, e.g. guidelines of the plan, location of property lines, or physical characteristics. *Board of Supervisors v. Williams,* 216 Va. 49, 216 S.E. 2d 33 (1975); *Board of Supervisors of Fairfax County v. Pyles, supra.* 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. *Board of Supervisors of Fairfax County v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E. 2d 648 (1991).

(5) Nevertheless, *Va. Code* § 15.2-2282 restates the requirement of the equal protection clause 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. *Board of Supervisors v. Carper,* 200 Va. 653, 107 S.E. 2d 390 (1959) *(see also Bell v. City Council,* 224 Va. 490, 297 S.E. 2d 810 (1982)).

(6) A zoning ordinance must not arbitrarily discriminate either in its terms or its application. *City of Manassas v. Rosson,* 224 Va. 12, 294 S.E. 2d 799 (1982). "Adjacency alone is insufficient to establish a zoning discrimination claim." *Helmick, et al. v. Town of Warrenton,* 254 Va. 225, 492 S.E. 2d 113 (1997). However, 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, supra; Board of Supervisors of James City County v. Rowe,* 216 Va. 128, 216 S.E. 2d 199 (1975).

2. Authorized objectives of zoning. *Va. Code* § 15.2-2283 sets forth authorized purposes of zoning and directs that zoning ordinances shall give reasonable consideration to each stated purpose "where applicable." The purposes are to:

a. Provide for adequate light, air, access, safety from fire, flood and other dangers;

b. Reduce and prevent congestion in streets;

c. Facilitate creation of convenient, attractive and harmonious communities;

d. Facilitate public services, public safety and public facilities;

e. Protect historic areas;

f. Protect against the overcrowding of land, and undue density of population in relation to existing public facilities;

g. Encourage economic development and expansion of the employment and tax bases;

h. Preserve agricultural and forestal land and other lands of significance for the protection of the natural environment;

i. Protect airport approach slopes, etc.;

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; and

k. Provide reasonable protection against encroachment upon military bases, installations, and airports.

l. A zoning ordinance may also make reasonable provisions for the protection of groundwater and surface water. A 2001 amendment to *Va. Code* § 15.2-2286 authorizes tax credits for voluntary downzonings.

3. The judiciary exercises self restraint in reviewing decisions by the legislative bodies of localities. The localities have broad discretion, under their police powers, to enact and amend zoning ordinances. *City Council of the City of Virginia Beach v. Harrell.* 236 Va. 99, 372 S. E. 2d 139 (1988).

4. 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 the City of Virginia Beach v. Harrell, id at* 101. *See also County of Lancaster v. Cowardin,* 239 Va. 522, 391 S.E. 2d 267 (1990); *Richardson v. City of Suffolk,* 252 Va. 336, 477 S.E. 2d 512 (1996).

5. The courts distinguish between legislative and administrative acts. A legislative act is the "balancing of the consequences of private conduct against the interests of public welfare, health, and safety." *Board of Supervisors of Fairfax County v. Southland Corp.,* 224 Va. 514, 522, 297 S.E. 2d 718 (1982). Administrative actions are the implementation of existing laws while legislative actions create new ones. *Helmick et al v. Town of Warrenton, supra.*

6. 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. *Board of Supervisors of Fairfax County v. Southland Corp., supra.*

7. 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. *Covington v. APB Whiting, Inc., supra.*

8. In order to make out a *prima facie* case that denial of a rezoning request is invalid, the 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, III, supra.*

9. In considering whether a legislative act is reasonable, the motives of the governing body in undertaking the act are immaterial. *Helmick et al. v. Town of Warrenton, supra.*

10. The Fairly Debatable Standard.

a. The fairly debatable rule is used by the courts in cases involving a legislative decision wherein plaintiff has made out a *prima facie* case of invalidity and the defendant locality has responded with evidence of validity.

> "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." *Loudoun County v. Lerner,* 221 Va. 30, 267 S.E. 2d 100 (1980). *See also Fairfax County v. Snell Corporation,* 214 Va. 655, 659, 202 S.E. 2d 889 (1974); *County of Lancaster v. Cowardin, supra.*

b. The fairly debatable rule does not require that the locality introduce sufficient evidence to constitute a "preponderance" of the evidence, only sufficient to create a set of facts upon which reasonable men may differ. *Board of Supervisors v. Southland Corporation, supra*; *Bell v. City Council, supra*.

c. If, in an appeal following denial of a rezoning request, the court finds that the underlying zoning and the requested zoning are both appropriate for the lot in question, a classic case of the fairly debatable issue is presented. Under such circumstances, it is not the property owner, or the courts, but the legislative body which has the prerogative to choose the applicable classification. *Board of Supervisors of Fairfax County v. Jackson,* 221 Va. 328, 335, 269 S.E. 2d 381 (1980); *Board of Supervisors of Fairfax County v. Miller & Smith, Inc., supra.*

d. If the zoning ordinance clearly allows a proposed use, the denial of use permits may be probative evidence of unreasonableness satisfying the plaintiff's burden to make a *prima facia* showing of unreasonableness. *County of Lancaster v. Cowardin, supra*; *County Board of Arlington v. Bratic,* 237 Va. 221, 228, 377 S.E. 2d 368 (1989); *Board of Supervisors of Fairfax County v. Jackson, supra at* 334.

11. Exceptions to the Rules.

a. Free speech: For example, situations such as may arise in a case challenging the validity of a sign ordinance, are exempted. In such cases where a *prima facie* case has been made out against a locality, the courts will require the locality to establish that "a compelling public interest exists to support the

regulation. " This test requires the locality to show, among other things, that there are no less drastic means available to achieve the public purpose which is the stated objective of the regulation. *See United States v. City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied.* 422 U.S. 1042 (1975).

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. *See Confrere Club, supra.*

c. Administrative decisions are not governed by the presumption of validity and fairly debatable rule.

(1) Administrative decisions (sometimes characterized as "adjudicative" or "ministerial" decisions) include subdivision plat approval, site plan approval and the issuance of building permits, soil erosion permits and certificates of occupancy.

(2) The essence of an administrative decision is the application of a previously adopted legislative policy to a specific development proposal. For this reason, some states (not including Virginia) consider the adoption of zoning map amendments and the issuance of special permits to be administrative because they are supposed to implement the comprehensive plan. *See Fasano v. Board of County Commissioners of Washington County,* 264 Or. 574, 507 P.2d 23 (1973).

(3) Where an administrative decision results in the denial of a subdivision plat or site plan (normally decisions made by the planning commission or a staff person acting as agent for the governing body), the locality must notify the applicant of the specific reasons (in terms of the standards

contained in the zoning ordinance or subdivision ordinance) for which the plat or plan was rejected. *Va. Code* § 15.2-2259(A).

(4) 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. *Board of Supervisors v. Horne,* 216 Va. 113, 215 S.E. 2d 453 (1975).

(5) Great weight is given to consistent construction of a zoning ordinance by the officials charged with its enforcement. *Cook v. Board of Zoning Appeals of the City of Falls Church,* 244 Va. 107, 418 S.E. 2d 879 (1992).

C. Downzoning.

1. Downzoning is the legislative action of reducing the density or decreasing the intensity of permitted uses within a zoning district by a zoning text amendment, or by changing the designation of one or more parcels on the zoning map to a less intensive category.

2. Downzoning is accomplished by amendment to the zoning ordinance, zoning map and/or a comprehensive plan. "Comprehensive" downzoning and a "piecemeal" downzoning are distinguished.

a. A locality may always undertake a downzoning as part of a comprehensive revision of its zoning ordinance. *Board of Supervisors of Fairfax County v. Snell Const. Corp., supra.*

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. Id.; *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 is not a change in circumstances substantially affecting the public health, safety, or welfare. *Snell, supra.*

3. There is not a straightforward test as to whether an 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, in *City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1,* 239 Va. 412, 389 S.E. 2d 312 (1990), 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 others were not; and there were no measurable reasons for the varied treatment of these parcels.

D. Takings.

1. Federal Constitutional Principles: Three constitutional principles are impacted by land use regulations.

a. Amendments V and XIV of the U.S. Constitution, and Article I, § 11 of the Constitution of Virginia prohibit the governmental taking of private property for public use without the payment of just compensation.

2. Important Federal Cases Set Forth the Guiding Principles.

a. *Penn Central Transportation Company v. New York City,* 438 U.S. 104 (1978). The U.S. Supreme Court established three criteria for evaluating the existence of a taking:

(1) The nature of the government's action.

(2) The economic impact of the regulation on the claimant.

(3) The extent to which the regulation interferes with the claimant's distinct investment-backed expectations.

b. In *Agins v. Tiburon,* 447 U.S. 255 (1980), the Court established a two-prong test to determine whether the regulation constitutes a taking.

(1) Does the regulation substantially advance a legitimate state interest?

(2) Does the regulation allow the landowner an economically viable use of his land?

c. In 1992, the U.S. Supreme Court further opined that a regulation which deprives a landowner of all economically viable use of his land has firmly established a "categorical taking". No further judicial examination is warranted. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

The *Lucas* case provides for two exceptions to the "categorical taking" principle (i) where the regulated use is not recognized as real property under common law, and (ii) where the regulated use is considered a nuisance.

d. In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Supreme Court ruled that in order for an exaction (an appropriation of private property for public use in exchange for a development approval; e.g. subdivision conditions requiring right of way dedication or road construction) to avoid the characterization of "taking" the exaction had to be "roughly proportional" to the impact of the development approval. The roughly proportional standard requires that a locality make an "individualized determination that the required dedication" is related both in nature and extent to the impact of the proposed development. *Id.* 2317-2319.

The roughly proportional test of Dolan was limited by the facts (as well as the language of the ruling) to governmental exactions and is not applied more generally to police power regulations such as zoning. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 686 (1999).

e. When a regulatory taking (whether permanent or temporary) does occur, compensation is the mandatory remedy. *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987).

3. Virginia Constitutional Principles.

a. The Virginia Supreme Court held in 1990 that no taking will be found unless a regulation denies the landowner all economically viable use of his property. *Lucas* and *Palazzolo* suggest that this holding is too narrow. *City of Virginia Beach v. Virginia Land Investment Association No. 1, supra.*

b. Subsequent to the *Lucas* decision, the Virginia Supreme Court, in *Omni Homes, Inc. v. Prince William County,* 253 Va. 59, 481 S.E. 2d 460 (1997), provided an analysis of the application of the takings doctrine in Virginia. In this case, Omni Homes claimed that the County's acquisition of property adjoining Omni's planned Doves Landing development and the County's subsequent refusal to grant Omni access through the County's parcel to public roads and utilities constituted a taking. The Virginia Supreme Court applied both the three prong test of *Penn Central, supra,* and the categorical test from *Lucas, supra,* in deciding this case. *Omni, supra at* 66-67.

c. The Court also interpreted Article I, § 11 of the Constitution of Virginia (which prohibits taking or ***damaging*** private property for public purposes), to require a showing of (i) a deprivation of all economically viable use (a taking), or (ii) the "... dislocation of a specific right contained in the property owner's bundle of property rights" (a damaging). *Omni Homes, supra at* 72. The Court ruled that Omni had neither lost the right to develop its property nor acquired the rights necessary to realize its "preferred" method of development, and therefore no taking or damaging within the meaning of the Virginia Constitution had occurred.

d. In *City of Virginia Beach v. Bell, Trustee,* 255 Va. 395, 498 S.E. 2d 414 (1998) the Virginia Supreme Court ruled that a land use regulation did not constitute a categorical taking under the rule of *Lucas* where the regulation was already in place at the time the claimant acquired the property. The Court ruled that under such circumstances the use regulated was not part of the landowner's bundle of rights. However, the U.S. Supreme Court thoroughly rejected this analysis in *Palazzolo.* In a case with facts quite similar to *Bell, Trustee,* the U.S. Supreme Court, citing its earlier holding in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) held that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle... Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."

e. In response to *County of Fairfax v. Southern Iron Works,* 242 Va. 435, 410 S.E. 2d 674 (1991), the General Assembly amended what is now § 15.2-2204 to require local governments to include a descriptive summary of the proposed action in the advertisement. This requirement was applied by our Supreme Court in *Glazebrook v. Board of Supervisors of Spotsylvania County,* 266 Va. 550, 587 S.E. 2d 589 (2003). Spotsylvania County had undertaken a major downzoning of the County but the notice referenced only changes to "development standards." In an opinion written by Justice Lemon, the Court found that the notice did not satisfy the descriptive summary requirement of § 15.2-2204.

f. *Va. Code* § 15.2-2204 was amended in 1996 to require that notice of any zoning map amendment be mailed to all affected property owners, although

inadvertent failure to do so will not be grounds for the invalidation of an ordinance. Formerly, notice by mail was not required if the rezoning affected more than 500 parcels. *Va. Code* § 15.2-2204 was further amended in 2002 to require notice to landowners whose property was the subject to some potential zoning text amendments.

g. The owners of all parcels adjoining a parcel subject to a special permit application are entitled to notice by *Va. Code* § 15.2-2204, even though only 10 acres in the interior of a 205 acre parcel was subject to the proposed permit. *Lawrence Transfer & Storage Corp. v. Board of Zoning Appeals of Augusta County,* 229 Va. 568, 331 S.E. 2d 460 (1985).

h. Substantive due process requires that:

(1) There be a valid public purpose for a regulation;

(2) The means adopted to achieve that purpose be substantially related to it;

(3) The impact of the regulation upon the individual not be unduly harsh.

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

4. Affordable Housing, Inclusionary Zoning. Any legislation not expressly provided for by code may be deemed to be *ultra vires*, such as:

a. "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. *Board of Supervisors v. Carper, supra.*

b. A form of "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. *Board of Supervisors v. DeGroff Enterprises, Inc.*, 214 Va. 235, 198 S.E. 2d 600 (1973).

c. Permissible inclusionary zoning under *Va. 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 are 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.

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.

d. Aesthetic zoning. Aesthetic objectives of zoning provisions are not illegal per se, but they must be supported by some otherwise legitimate zoning purpose. *Board of Supervisors v. Rowe, supra.*

e. Off-site improvements.

(1) 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.

(2) In *Alexandria v. The Texas Company*, 172 Va. 209, 1 S.E. 2d 296 (1939) the Virginia Supreme Court held that a state may not grant a privilege subject to an agreement that the grantee will surrender a constitutional right, even when the state has the unqualified authority to withhold the grant of privilege. This is particularly true where the need for the public improvement is not substantially generated by the development itself. *Rowe and Cupp, supra.*

(3) The Virginia Supreme Court has a more stringent rule in a subdivision case. 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 Enterprises, Inc. v. Board of Supervisors,* 220 Va. 435, 258 S.E. 2d 577 (1979).

(4) In the case of *Board 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.

(5) However, the provisions of *Va. Code* §§ 15.2-2296, *et seq.*, discussed *supra*, 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.

(6) 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. Land located within a transportation district established pursuant to *Va. Code* §§ 15.2-4802, 15.2-4603, or 15.2-4702 is protected from changes in zoning and "related criteria." These statutes require that regulations shall remain in force without change except as initiated by the landowner for a period of years not to exceed *20* as established by the local governing body.

(7) *Va. Code* §§ 15.2-2317 *et seq.* authorize the assessment of road impact fees in a few large localities and their contiguous neighbors. *Va. Code* § *15.2-2242(4)* authorizes acceptance of voluntary payments for off site road improvements as part of the subdivision process.

f. "Timed phase zoning". This technique has been declared *ultra vires* in Virginia. *Board of Supervisors v. Williams, supra.* 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.

g. Interim zoning. 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.

h. Permissible Extractions: A local government may not condition approval of a rezoning or special exception upon dedication or construction of a public improvement when the need for the dedication or improvement is not substantially generated by the proposed development. *James City County v. Rowe, supra*; *Cupp v. Board of Supervisors of Fairfax County,* 227 Va. 580, 318 S.E. 2d 407 (1984). A local government may not condition site plan or subdivision approval on improvements to existing public roads even where the need for the dedication or improvement is substantially generated by the proposed development. *Hylton v. Prince William County, supra. Alexandria v. Texas Co., supra.* See below for further discussion.

5. The guarantee of due process. Amendments V and XIV of the U.S. Constitution, and Article I, § 11 of the Constitution of Virginia provide that no person shall be deprived of life, liberty or property without due process of law.

a. Procedural due process requires that a person have reasonable notice of regulatory action and a reasonable opportunity to be heard by an impartial tribunal. *Ward Lumber Co., v. Henderson-White Mfg. Co.,* 107 Va. 626, 59 S.E. 476 (1907).

However, the Virginia Supreme Court has ruled that procedural due process requirements only apply in adjudicative or quasi judicial settings, and are not applicable to legislative actions such as zoning which is covered by statutory

notice and hearing requirements. *County of Fairfax v. Southern Iron Works, supra.*

Va. Code § 15.2-2204 sets forth the requirements for notice and hearing pertaining to the adoption of any local plan, ordinance, or amendment thereof *Town of Vinton v. Falcun Corporation and Fralin and Waldron, Inc.,* 222 Va. 218, 278 S.E. 2d 859 (1981); *City Council of the City of Alexandria v. Potomac Greens Association Partnership,* 245 Va. 371, 429 S.E. 2d 225 (1993).

E. Extractions/Involuntary Cash Proffers.

1. Proffered zoning. *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.

a. 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.

b. 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).

c. Localities, other than those described in the preceding paragraph, which have experienced population growth of more than 10% population growth

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:

(1) The rezoning must give rise to the need for conditions;

(2) The conditions have a reasonable relation to the rezoning;

(3) The conditions are in conformance with the local comprehensive plan;

(4) The locality has an adopted capital improvement program pursuant to Va. Code § 15.2-2239;

(5) The proffers are voluntary. *Va. Code* § 15.2-2298.

d. Proffers can include off-site improvements to land not included in the zoning district of the subject property. *Riverview Farm Associates v. Board of Supervisors of Charles City County,* 259 Va. 419, 528 S.E. 2d 99 (2000).

e. 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.

f. 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. *Board of Supervisors of Powhatan County v. Reed's Landing Corp.,* 250 Va. 397, 463 S.E. 2d 668 (1995). But even if the

lack of full cash "played a key factor" in the denial of a rezoning, if there are other valid reasons for the denial, it will be upheld. *Gregory v. Board of Supervisors of Chesterfield County,* 257 Va. 530, 514 S.E. 2d 350 (1999).

2. Unauthorized objectives. Due to the vigor of "Dillon's Rule" in Virginia, virtually anything not expressly provided for in the statutes may be ruled.

F. Nonconforming Uses.

1. A use is nonconforming if it was lawful and in existence prior to the adoption of or revision to a zoning ordinance restricting the use. *Virginia Code* § 15.2-2307.

a. Localities are authorized to permit the continuance of 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, and so long as the buildings and structures are maintained in their then structural condition. *Id.*

b. Nonconforming uses may continue only so long as the then existing or a more restricted use continues and such use is not discontinued for more than 2 years, and so long as the buildings or structures are maintained in their then structural condition, and that the uses of such buildings or structures conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered. *Va. Code* § 15.2-2307.

(c) A nonconforming use will be lost through non-use for more than 2 years.

d. Most nonconforming use ordinances provide that nonconforming uses may not be enlarged or expanded without legislative approval.

e. Courts will consider whether the "character" of a particular use has changed. Recognizing that a nonconforming use need not remain static, the court may consider whether the character of the nonconforming use in existence when the zoning restriction was imposed has been continued or changed. *Knowlton v. Browning-Ferris* 220 Va. 571,576 (1979).

G. Vested Rights.

1. The Virginia rule of vested rights was established by two cases decided in 1972. These cases provide that property rights vest where:

a. There has been an affirmative governmental action allowing the development with respect to which the vested right is sought;

b. Substantial expense has been incurred by the property owner;

c. There is "in good faith" reliance upon the affirmative governmental action; and

d. The landowner has diligently pursued the use authorized by the affirmative governmental action. *Fairfax County v. Medical Structures,* 213 Va. 355, 358, 192 S.E. 2d 799 (1972); *Fairfax County v. Cities Service,* 213 Va. 359, 193 S.E. 2d 1 (1972). *See also Board of Zoning Appeals of Bland County v. Caselin Systems, Inc.,* 256 Va. 206, 501 S.E. 2d 397 (1998); *Snow v. Amherst County Bd. of Zoning Appeals,* 248 Va. 404, 448 S.E. 2d 606 (1994).

2. In the *Medical Structures* and *Cities Service* cases the affirmative governmental action relied upon was the approval of a special use permit (a site specific, project specific decision) followed by the filing of a site plan for development in accordance with the special permit.

3. A "significant official act" is a prerequisite to establishing a vested right; *Town of Rocky Mount v. Southside Investors, Inc.,* 254 Va. 130, 487 S.E. 2d 855 (1997); *Holland v. Board of Supervisors of Franklin County,* 247 Va. 286, 441 S.E. 2d 20 (1994); *Notestein v. Board of Supervisors of Appomattox County,* 240 Va. 146, 393 S.E. 2d 205 (1990).

The requirement of a significant, governmental act creates a bright line test that enables the landowner to determine the point at which it has acquired the vested right. *Southside Investors, Inc., supra; Holland, supra.*

The scope of approval required to constitute a significant governmental act "is limited to an official response to a detailed request for a use of a particular property that would not otherwise be allowed under the law." *Caselin Systems, Inc., supra.*

4. The filing of a site plan or subdivision plat with the locality will not give rise to a vested right because there has been no "significant official act." *Town of Stephens City v. Russell,* 241 Va. 160, 399 S.E. 2d 814 (1991).

5. A vested right cannot arise from improperly issued permits. *Town of Blacksburg v. Price,* 221 Va. 168, 266 S.E. 2d 899 (1980); *Hurt v. Caldwell,* 222 Va. 91, 279 S.E. 2d 138 (1981).

6. A variance does not constitute a "significant official act" and cannot give rise to a vested right. *Snow v. Amherst County Board of Zoning Appeals, supra.* Note that *Va. Code* § 15.2-2307 overrules this decision.

7. The mere acquisition of land does not create a right to rely on existing zoning because it does not involve a significant official act. *Caselin Systems, Inc., supra;*

Snow v. Amherst, supra; Town of Vienna Council v. Kohler, 218 Va. 966, 975, 244 S.E. 2d 542 (1978).

8. 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. *Kohler, supra.*

9. Mere reliance on a particular zoning classification, whether it was created by ordinance or by a variance, does not created a vested right in a property owner to use the land in manner consistent with that classification. *Snow v. Amherst, supra.*

10. Rezoning land to a classification which allows a specific use does not constitute a significant governmental act where that specific use has not been approved through a site plan. *Southside Investors, Inc., supra.* Note that *Va. Code* § 15.2-2307 overrules this decision.

11. The General Assembly has created several "grandfathering" or statutory "safe harbors" which provide landowners with additional protection against regulatory changes, although not amounting to a general statutory scheme of vested rights. These safe harbors have not been affected by enactment of the new vesting law.

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