



**TOWN OF FRONT ROYAL, VIRGINIA
BOARD OF ZONING APPEALS REGULAR MEETING**

Tuesday, June 18, 2024 @ 7:00 PM
Front Royal Town Hall, 2nd Floor East Conference Room

AGENDA

1. Call to Order
2. Roll Call of Members Present
3. Review and Consideration of Minutes
 - December 19, 2023 - Regular Meeting Minutes
 - February 20, 2024 – Regular Meeting Minutes
4. Other
 - By-Laws
 - Town Emails
 - Staff Training
5. Adjournment

BZA MINUTES
DECEMBER 19, 2023

The following minutes are a summary of items on the agenda. This meeting may be viewed in its entirety by accessing the video of the same date online via the Town's website at www.frontroyalva.com for a limited time.

The Board of Zoning Appeals regular meeting of the Town of Front Royal, Virginia was held on December 19, 2023, at 7 p.m. in the Town of Front Royal 2nd floor conference room.

CALL TO ORDER:

Chairman Amanda McCarthy called the Board of Zoning Appeals, December 19, 2023, meeting to order at 7:00 p.m.

ROLL CALL OF MEMBERS PRESENT

- Amanda McCarthy, Chairman
- Lewis Moten
- Clare Schmitt
- Michael Williams

BOARD MEMBERS ABSENT

- Christine Erin

STAFF MEMBERS PRESENT

- John Ware, Deputy Zoning Administrator
- Connie L Potter, Executive Assistant / Clerk for the Board of Zoning Appeals

ELECTION OF OFFICERS (VICE CHAIRMAN)

Chairman Amanda McCarthy opened the floor for nominations for Vice Chairman.

Motion: To nominate Lewis Moten for Vice Chairman

Motion By: Board Member Lewis Moten

Seconded By: Board Member Michael Williams

Action: Approved by unanimous vote of members present to elect Lewis Moten as Vice Chairman for the Board of Zoning Appeals.

REVIEW AND CONSIDERATION OF MINUTES

Prior to the meeting, the Board received the following draft minutes for review and consideration of approval:

- February 21, 2023 – Regular Meeting Minutes

Motion: To approve minutes as presented

Motion By: Vice Chairman Lewis Moten

Seconded By: Chairman Amanda McCarthy

Action: Approved by a unanimous vote of members present

PUBLIC HEARING

- **Variance Application 2300755** submitted by Gualberto C. Camacho-Perez for a variance from Town Code Chapter 175-130.C. pertaining to the expansion of a nonconforming structure and the side yard setback located on the property at 219 E. 7th Street identified by Tax Map 20A4-4-2. The property is located in the C-1, Community Business District and is located in the floodway. The variance would effectively allow the applicant a side yard setback of 9.9 feet. The required side yard setback is 10.7 feet, and the applicant has a side yard setback of 9.9 feet. The variance requested by the applicant is to allow a new foundation for a single-family dwelling.

Chairman Amanda McCarthy explained the rules for speaking at the public hearing.

Deputy Zoning Administrator John Ware presented the staff report.

Applicant, Gualberto C. Camacho-Perez explained his request for a variance.

Public speaker Mike McCool spoke against the variance request.

An open discussion ensued amongst Board members.

Applicant, Gualberto C. Camacho-Perez answered Board member questions.

Motion: To approve Variance Application #2300755 submitted by Gualberto C. Camacho-Perez for a variance from Town Code Chapter 175-130.C. pertaining to the expansion of a nonconforming structure and the side yard setback located on the property at 219 E. 7th Street identified by Tax Map 20A4-4-2.

Motion By: Board Member Michael Williams

Seconded By: Board Member Clare Schmitt

An open discussion ensued.

Ayes: Board Member Clare Schmitt; Board Member Michael Williams

Nays: Vice Chairman Lewis Moten; Chairman Amanda McCarthy

Action: Variance application denied due to tie vote

Board Member Michael Williams stood up and resigned from the Board of Zoning Appeals.

OTHER

Motion: To discuss the Board of Zoning Appeals Bylaws at a future work session

Motion By: Vice Chairman Lewis Moten

Seconded By: Board Member Clare Schmitt

Action: Approved by a unanimous vote of members present

ADJOURNMENT

Hearing no further comments, Chairman Amanda McCarthy asked for a motion to adjourn.

Motion By: Vice Chairman Lewis Moten

Seconded By: Board Member Clare Schmitt

Action: Adjourned by a unanimous vote of members present

The meeting was adjourned at 7:54 p.m.

Approved by the Board of Zoning Appeals
Date: _____

BZA MINUTES
FEBRUARY 20, 2024

The following minutes are a summary of items on the agenda. This meeting may be viewed in its entirety by accessing the video of the same date online via the Town's website at www.frontroyalva.com for a limited time.

The Board of Zoning Appeals regular meeting of the Town of Front Royal, Virginia was held on February 20, 2024, at 7 p.m. in the Town of Front Royal 2nd floor conference room.

CALL TO ORDER:

Chairman McCarthy called the Board of Zoning Appeals, February 20, 2024, meeting to order at 7:02 p.m.

ROLL CALL OF MEMBERS PRESENT

- Amanda McCarthy, Chairman
- Clare Schmitt
- Christine Erin
- Vacancy
- Vacancy

STAFF MEMBERS PRESENT

- Lauren Kopishke, Planning & Zoning Director / Zoning Administrator
- John Ware, Deputy Zoning Administrator
- Connie L Potter, Executive Assistant / Clerk for the Board of Zoning Appeals

ELECTION OF OFFICERS (CHAIRMAN AND VICE CHAIRMAN)

Chairman McCarthy opened the floor to nominations for Chairman.

Motion: To nominate Amanda McCarthy as Chairman

Moved By: Board Member Clare Schmitt

Seconded By: Board Member Christine Erin

Action: Approved by unanimous vote of members present to elect Amanda McCarthy Chairman of the Board of Zoning Appeals.

Chairman McCarthy opened the floor to nominations for Vice Chairman.

Motion: To nominate Christine Erin as Vice Chairman

Moved By: Board Member Clare Schmitt

Seconded By: Chairman Amanda McCarthy

Action: Approved by unanimous vote of members present to elect Christine Erin as Vice Chairman of the Board of Zoning Appeals.

OTHER

- **By-Laws**

Board members agreed to wait until the two (2) vacancies on the Board of Zoning Appeals were filled to discuss any possible changes to the BZA By-Laws.

- **Town Emails**

Zoning Administrator Lauren Kopishke explained there is now a link on the Town website that individuals may click on to communicate by email to the Board of Zoning Appeals members. This will ensure that each Board Member will receive the email.

An open discussion ensued.

- **Staff Training**

Zoning Administrator Lauren Kopishke reviewed highlights of the following chapters from the Albemarle County Land Use Law Handbook. Much of the BZA training comes from this handbook.

Chapter 16 Land Use Law Handbook – Interpreting Statutes and Ordinances.

Chapter 15 Land Use Law Handbook – Appeals of Decisions by Zoning Officials to the Board of Zoning Appeals.

Chapter 14 Land Use Law Handbook – Decisions by Zoning Officials.

Chapter 8 Land Use Law Handbook – The Differences Among Legislative, Ministerial, Administrative, and Quasi-Judicial Acts.

Chapter 1 Land Use Law Handbook – The Locality and Its Boards, Commissions, and Officers.

Chapter 13 Land Use Law Handbook – Variances.

An open discussion ensued.

- **2023 Board of Zoning appeals Annual Report**

Zoning Administrator Lauren Kopishke reviewed the 2023 Annual Report for the Board of Zoning Appeals. Virginia State Code requires the BZA to provide an annual report.

ADJOURNMENT

Hearing no further comments, Chairman Amanda McCarthy asked for a motion to adjourn.

Motion By: Vice Chairman Christine Erin

Seconded By: Board Member Clare Schmitt

Action: Adjourned by a unanimous vote of members present

The meeting was adjourned at 7:53 p.m.

Approved by the Board of Zoning Appeals
Date: _____

BZA BY-LAWS

FRONT ROYAL BOARD OF ZONING APPEALS BY-LAWS

ARTICLE I. MEMBERSHIP

The Board of Zoning Appeals, herein also referred to as the “BZA” or “Board”, shall consist of five (5) members appointed in accordance with §15.2-2308 VA Code Ann, and Section 175-138 of the Town Code.

ARTICLE II. OFFICERS

1. The Board of Zoning Appeals (BZA) shall organize and annually elect a Chairperson, Vice-chairperson, and Secretary. Elections should take place the first meeting held during the calendar year.
2. The Chairperson shall preside at the meetings and hearings of the BZA, and shall decide all points of order and/or procedure, appoint any committees that are found to be needed, and set any desired time limitations for speakers.
3. The Vice-chairperson shall assume the duties of the Chairperson in his or her absence. In the absence of both the Chairperson and Vice-chairperson, and a quorum exists, an acting Chairperson shall be selected by the members present to preside over the meeting.
4. Town Planning & Zoning Staff shall serve as the Secretary of the Board unless otherwise specified by the Board during annual elections. The general duties of the Secretary include the following:
 - a. prepare official correspondence at the direction of the BZA;
 - b. send out required notices;
 - c. keep the minutes and records of the BZA’s proceedings;
 - d. send copies of appeals and applications to the Planning Commission as required;
 - e. maintain other BZA records;
 - f. in response to Writs of Certiorari served upon the BZA, prepare and file with the court, in a timely fashion, certified copies of the record of any BZA decision that has been appealed;
 - g. prepare and file an annual report of the BZA with Town Council;
 - h. notify the circuit court of any vacancies on the BZA; and
 - i. perform other clerical duties as assigned by the Board.

ARTICLE III. MEETINGS, QUORUM, AND VOTING.

1. The regular meeting of the BZA shall be held on the 3rd Tuesday as needed each month. If the BZA is unable to meet on the 3rd Tuesday of the month, the alternative meeting date will be the 4th Tuesday of the month. Each regular meeting shall begin at 7:00 P.M., unless otherwise specified by the Board.
2. Special meetings may be called by the Chairperson provided that at least five (5) days notice of such meeting is given to each member in writing.
3. All meetings shall be open to the public unless a closed meeting is held pursuant to the Virginia Freedom of Information Act §2.2-3700, et seq., Virginia Code Ann.
4. A quorum shall be necessary to conduct any BZA business, other than discussion regarding the next meeting date.
5. A quorum shall consist of three (3) members (i.e., a majority) of the BZA.
6. The concurring vote of three (3) members (a simple majority of the membership) shall be required to:
 - a. grant variances;
 - b. reverse decisions or determinations of the Zoning Administrator;
 - c. amend these By-laws; and
 - d. issuance of a special use or special exception permit, but only if such authority is delegated to the BZA in the future by Town Council.
7. The concurring vote of a majority of all members present and voting, or such other greater number as may be required by the Code of Virginia or the Zoning Ordinance, shall be required to effect all other actions of the Board.
8. A member shall make a disclosure of the member's interest in a specific matter before the BZA when required by law. Any disclosure shall be announced and made part of the record of the BZA prior to a case being heard or as soon as a basis for disclosure is discovered.
9. A member shall be disqualified to act on a specific matter before the BZA when required by law. The reason for disqualification shall be made part of the record of the BZA.
10. A member may be disqualified under any circumstances, which in the opinion of the individual member, would create an appearance of impropriety or unfairness. The decision to be disqualified shall be entered into the record of the BZA, but a member need not state the reasons for disqualification.
11. Any disqualification shall be announced and made part of the record of the BZA prior to a case being heard or as soon as a basis for disqualification is discovered.

12. The order of business at all regular meetings of the BZA may be as follows:
 - a. Call to order.
 - b. Approval of minutes of previous meetings as received, if applicable.
 - c. Business of members of the BZA, if applicable.
 - d. Review of BZA Procedure, if applicable.
 - e. Public Hearing of scheduled, continued, and deferred for decision items, if applicable.
 - f. Unscheduled items, if applicable.
 - g. Adjournment.

ARTICLE IV. DUTIES.

It shall be the duty of the BZA, in accordance with the provisions of §15.2-2309 VA Code Ann., to hear and decide cases involving the following:

1. Variances to the strict application of the requirements of the Zoning Ordinance.
2. Appeals from a decision of the Zoning Administrator, or other administrative officer, in accordance with the provisions of the Zoning Ordinance.
3. Applications for interpretation of the district map where there is any uncertainty as to the location of the district boundary.
4. Issuance of special use permits or special exceptions, as may be delegated to the BZA by Town Council (no such authority has been granted to the BZA by Town Council at this time).

ARTICLE V. APPLICATIONS TO THE BZA.

1. All applications to the BZA for variances and appeals shall be made on forms supplied by the Department of Planning and Zoning. The same shall apply for special use or special exception applications if authority is delegated to the BZA in the future for such matters. All other applications or requests, for which there is no required form, shall be made in writing.
2. All applications shall include all of the information required by the Zoning Ordinance before being scheduled for a public hearing.

ARTICLE VI. PROCESSING OF APPLICATION

1. All applications shall be filed with the Department of Planning and Zoning. The processing and scheduling of applications shall comply with the requirements of the Front Royal Zoning Ordinance and the Code of Virginia.

2. The Secretary of the BZA shall notify the applicants in writing of the date, time, and place of the scheduled public hearing.
3. The Secretary of the BZA shall, in accordance with the Code of Virginia and the Zoning Ordinance, cause to be advertised by publication, in a newspaper of general circulation in the area of the application, the required legal notice of the application.
4. The applicant shall be responsible for fulfilling all applicable notice requirements to abutting and other property owners. Required notices shall be sent by registered or certified mail, with return receipts by the recipient.
5. The Department of Planning & Zoning shall prepare and distribute a staff report and any pertinent information to the BZA at or before the scheduled public hearing.

ARTICLE VII. THE HEARING

The following procedures should be followed when the BZA conducts a public hearing:

1. Chairperson announces the public hearing and the subject matter.
 - a. If the hearing is for a variance, appeal, special use permit or special exception the Chairperson should remind all parties present that the Zoning Ordinance requires a concurring vote of three (3) members of the BZA to approve a variance.
 - b. No cross-examination or questions of speakers testifying may be permitted, except by members of the BZA, without the permission of the Chairperson.
 - c. The Chairperson or the Secretary may swear in all staff and speakers wishing to testify.
2. Chairperson calls on the staff of the Department of Planning and Zoning to present Staff's position and the background of the case, the staff member may then identify the details of the property and briefly describe the application.
3. BZA members may pose questions to Staff.
4. Chairperson calls on the applicant or appellant and/or their authorized agent or attorney to present the applicant's or appellant's position.
5. BZA members may pose questions to the applicant or appellant and/or their authorized agent or attorney.
6. Chairperson calls for testimony from any person present, stressing that the testimony needs to be relevant and limited to the precise issue that is the subject of the hearing.
7. Chairperson calls on Staff to offer a rebuttal or additional remarks, if desired.

8. Chairperson calls on applicant or appellant and/or their authorized agent or attorney to rebut or for additional remarks, if desired.
9. BZA members may pose final questions to the applicant or appellant, and/or their authorized agent or attorney, or Staff.
10. Chairperson closes the public hearing.
11. The BZA may discuss the matter and take action. Decisions and other actions or orders of the BZA should be taken in the form of a motion or resolution. The form and scope of BZA decisions should be as set forth in §15.2-2309 VA Code Ann.
12. A decision of the BZA is considered a “final decision” for the purposes of appeal when the BZA has made a decision that: (i) resolves the merits of the action before the BZA, or (ii) effects a dismissal of the case with prejudice. The thirty (30) day appeal period to the Circuit Court shall commence upon the final decision of the BZA.
13. The final decision of the BZA shall be promptly filed with the Secretary and become part of the BZA’s public record. The Secretary shall promptly prepare and provide to the applicant or appellant the BZA’s final decision on the application.
14. All meetings shall be conducted in accordance with these By-laws, the Front Royal Zoning Ordinance, the Code of Virginia, and if needed, Robert’s Rules of Order.

ARTICLE VIII. REQUEST FOR REHEARING AND RECONSIDERATION.

1. A party may request a rehearing by filing said request in writing with the Secretary within seven (7) days of date of the decision sought to be reheard and reconsidered. A decision will not be reheard or reconsidered at the original meeting where it was made.
2. Any request for rehearing must establish one or more of the following:
 - a. The BZA overlooked or misunderstood a material fact or legal issue which would change the decision sought to be reheard.
 - b. The existence of new and material evidence, which (i) was not previously available, (ii) could not have been reasonably discovered previously after diligent investigation, and (iii) could change the decision sought to be reheard.
 - c. A request for rehearing and reconsideration will be considered by the BZA at its next regularly scheduled meeting.
 - d. A motion to grant a rehearing must be made by at least one (1) member who voted in favor of the decision sought to be reheard.

- e. If a decision is made granting a request for rehearing, the BZA will (i) set a date for rehearing, and (ii) notice will be given by the applicants or by the staff of the Department of Planning and Zoning as required by law and these By-laws.
- f. A rehearing shall proceed in the same manner as a regular BZA hearing.
- g. A request for rehearing and reconsideration alone will not change the deadlines for appeal under the Code of Virginia and Zoning Ordinance.

ARTICLE IX. RECORDS

- 1. A file containing all relevant material and decisions, including any final decision, relating to each case shall be kept by the Department of Planning and Zoning as part of the records of the BZA.
- 2. All records of the BZA shall be public records, unless they are exempted from disclosure under the Virginia Freedom of Information Act, §2.2-3700, et seq., VA Code Ann.

ARTICLE X. SEVERABILITY

If any word, clause, sentence, article, section, subsection, or other part or parts of these By-laws shall be held by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such unconstitutionality or invalidity shall not affect any of the remaining parts of these By-laws, nor shall it affect any application of these By-laws that may be given effect without the unconstitutional or invalid parts, and to this end, all provisions of these By-laws are hereby declared to be severable.

ARTICLE XI. REVISIONS

These By-laws, adopted by action of the Board of Zoning Appeals, may be amended by an affirmative vote of not less than three (3) members.

Revised 06/17/14

STAFF TRAINING

Chapter 1

The Locality and Its Boards, Commissions, and Officers

1-100 The County¹

Counties are political and territorial subdivisions of the State, which serve as local units for the administration of the State's functions and duties. As explained by the Virginia Supreme Court in *Fry v. County of Albemarle*, 86 Va. 195 (1889):

A county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and of transport, and especially for the general administration of justice.

With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are in fact but a branch of the general administration of that policy.

Counties, like cities, are subordinate agencies of the State government and are invested by the General Assembly with subordinate powers of legislation and administration relative to local affairs within their prescribed areas. *Murray v. City of Roanoke*, 192 Va. 321, 324, 64 S.E.2d 804, 807 (1951).

Historically, the “distinctions between cities, towns, and counties were clear. Cities and towns were urban centers for work and shopping. They had relatively high population densities. Counties, on the other hand, were the agricultural, less densely populated areas of the state. As rural localities, counties required fewer powers since they did not face the problems associated with urbanization.” *JLARC, State/Local Relations and Service Responsibilities, 1994 Senate Document 37, March 1993, p. 49*. The practical distinctions between cities, towns, and counties have diminished more recently, with counties urbanizing, and with some becoming densely populated employment and commercial centers with the service demands that come with that.

The Virginia Code frequently refers to “localities.” Counties, cities, and towns are localities; other public entities such as authorities are not localities.

1-110 Powers

Under the Virginia Constitution, all county powers are delegations of authority granted by the General Assembly and, unless otherwise indicated by statute or the constitution, are vested in the board of supervisors. *Constitution of Virginia, Art. VII, § 3; Virginia Code § 15.2-1401; see the discussion in section 1-220*. With respect to the regulation of land use, the General Assembly has granted counties numerous powers to provide for comprehensive planning and to regulate the use and development of land by adopting zoning and subdivision ordinances. *Virginia Code § 15.2-2200 et seq.*

1-120 Limitations on powers

Of course, a county's powers are limited. One limitation on the county is that the exercise of its powers must not violate any constitutional principles. These principles include, but are not limited to, due process and equal protection. Another limitation is that the exercise of the county's powers may not be inconsistent with the general

¹ This chapter emphasizes counties and the County of Albemarle in particular. An in-depth discussion of cities, towns, and their governing bodies is not included. Sections 1-130 and 1-140 briefly discuss the differences between counties, cities, and towns. Although city and town councils have powers that may differ from boards of supervisors, cities and towns have planning and zoning authority similar to counties, with some variations provided under State law or the cities' or towns' charters.

laws of Virginia or of the United States. *Virginia Code* § 1-248. This means that the county's exercise of its powers may not be contrary to any supreme law and may be preempted by a supreme law. Finally, the county's powers are limited by the rule of statutory construction known as the Dillon Rule. The Dillon Rule limits the county's powers to those that are expressly granted by the General Assembly, those that may be necessarily or fairly implied from those powers expressly granted, and those that are essential and indispensable. *Marble Technologies v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010). These issues are discussed in Chapters 5, 6 and 7 of this handbook.

1-130 Counties compared to cities

Like counties, cities are subordinate agencies of the State, with several significant differences including their broader taxing powers.

Unlike all other states, cities in Virginia are “independent cities,” which means that cities are completely independent from the counties that surround them, and those counties generally provide no services within the city. This quality is established in the Virginia Constitution, which defines a “city” to mean “an independent incorporated community which became a city as provided by law before noon on the first day of July, nineteen hundred seventy-one, or which has within defined boundaries a population of 5,000 or more and which has become a city as provided by law.” *Virginia Constitution, Article VII, § 1*. This means that a city provides its own services for its residents, has its own system for taxation, and has its own school division, court system, and constitutional officers.

While many of the general State laws applicable to counties also apply to cities, cities also operate under a charter adopted by the General Assembly that serves as an additional source of city powers.

1-140 Counties compared to towns

Unlike cities, towns in Virginia are not independent of the county in which they exist.

The Virginia Constitution defines “town” to mean “any existing town or an incorporated community within one or more counties which became a town before noon, July one, nineteen hundred seventy-one, as provided by law or which has within defined boundaries a population of 1,000 or more and which has become a town as provided by law.” *Virginia Constitution, Article VII, § 1*. The relationship between counties and towns precedes the current Constitution. *Supervisors of Washington County v. Saltville Land Co.*, 99 Va. 640 (1901) (“The town of Saltville, so far as it lies within Washington county, is as much a part of the county as the county is a part of the state, not merely territorially, but governmentally”); *County of Brunswick v. Peebles & Purdy Co.*, 138 Va. 348 (1924) (“[A town’s] people and property are still subject to the county government for county purposes”).

Both the town and the county in which it is located provide services to the town’s residents. The services provided by the county include the public school system, the court system, constitutional officers (of which a town has none), public safety, health and human services, and parks. To help pay for these services, the residents of a town are subject to county taxation (with some exceptions). *Fairfax County v. City of Alexandria*, 193 Va. 82 (1951) (“[I]n Virginia an incorporated town continues to be an integral part of the county, subject to the jurisdiction of the county authorities and to taxation for general county purposes”). The county taxes are in addition to those imposed by the town.

While many of the general State laws applicable to the county also apply to a town, towns also operate under a town charter adopted by the General Assembly that serves as an additional source of town powers.

The General Assembly has often failed to clearly articulate the delineation of authority and jurisdiction of county ordinances in towns. However, some State laws in the area of planning and land use provide that needed clarity. *Virginia Code* § 15.2-2231, which pertains to comprehensive plans, states in part: “Any county plan may include planning of incorporated towns to the extent to which, in the county local planning commission’s judgment, it is related to planning of the unincorporated territory of the county. However, the plan shall not be considered as a comprehensive plan for any incorporated town unless recommended by the town commission, if any, and adopted by the governing body of the town.” *Virginia Code* § 15.2-2281, pertaining to zoning, is another example: “the

governing body shall have jurisdiction over all the unincorporated territory of the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality.”

In the absence of an express or implied limitation in the State law (or the county ordinance itself), if a county ordinance is for a county-wide purpose or serves a county-wide function, the county ordinance has effect within the town. *1987-88 Va. Op. Atty. Gen. 201, 1986-87 Va. Op. Atty. Gen. 208, 1982-83 Va. Op. Atty. Gen. 212, 1978-79 Va. Op. Atty. Gen. 288, 1977-78 Va. Op. Atty. Gen. 131.*

1-200 The board of supervisors

The board of supervisors is the governing body of the county. The voters in the county elect its members.

1-210 Composition

As noted above, a county is governed by the board of supervisors, and the number of members may range from 3 to 11. *Virginia Code § 15.2-1400*. Some alternative forms of county government may specify a different range. For example, the county executive form of government requires that the number of members range between 3 and 9. *Virginia Code § 15.2-502(A)*. Albemarle County operates under the county executive form of government, and its six-member board is elected by the qualified voters of single-member magisterial districts. *See Virginia Code § 15.2-502; County Code § 2-100 et seq.* Supervisors are elected to four-year terms. *County Code § 2-201.*

1-220 Powers and duties

Unless expressly provided otherwise, all powers granted to localities are vested in their respective governing bodies. *Virginia Code § 15.2-1401* (applicable to all counties); *Miller v. Highland County*, 274 Va. 355, 365, 650 S.E.2d 532, 536 (2007) (“the governing body of a locality is a distinct legal entity authorized in Title 15.2 to exercise the statutory powers of that locality”). The powers of the county as a body politic and corporate are vested in the board of supervisors. *Virginia Code § 15.2-502* (applicable to counties such as the County of Albemarle that have adopted the county executive form of government). Albemarle County is one of two counties in Virginia that operates under the county executive form of government. *Virginia Code § 15.2-500 et seq.* Under this form of government, the board is the policy-making body of the county and is vested with all policy-making powers and responsibilities conferred by general law upon county governing bodies.

A board of supervisors can act only at authorized meetings as a corporate body and not by the actions of its members separately and individually. *Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922). An individual board member is a public officer whose duties are fixed by law. *Old v. Commonwealth*, 148 Va. 299, 302, 138 S.E. 485, 486 (1927). The chair of the board has no significant substantive powers. The only special powers granted to the chair are to “be the head of the local government for all official functions and ceremonial purposes.” *Virginia Code § 15.2-1423*. Otherwise, there do not appear to be any official powers conferred on an individual member of a board of supervisors. *1984-85 Va. Op. Atty. Gen. 23.*

As the policy-making body of the county, the board is empowered to make all the legislative decisions pertaining to land use, and this power may not be delegated to other boards, commissions, or employees in the absence of express statutory authority. *Sinclair v. New Cingular Wireless*, 283 Va. 567, 581, 727 S.E.2d 40, 47 (2012). Thus, the board makes the final decision on those land use matters that are legislative in nature – comprehensive plan amendments, zoning text amendments, zoning map amendments, and special use permits. An example where the delegation of a legislative power is expressly authorized is found in *Virginia Code § 15.2-2309(6)*, which enables a governing body to authorize a board of zoning appeals (“BZA”) to review and approve special use permits. A board also may delegate the responsibility for non-legislative matters to subordinate bodies and officers, provided that the delegation does not run afoul of the Dillon Rule, as discussed in Chapter 5, and the common law rules of delegation, as discussed in Chapter 8, of this handbook.

1-300 The planning commission

A planning commission is an administrative body established by a locality's governing body pursuant to Virginia Code § 15.2-2210 *et seq.*

1-310 Composition

A planning commission must consist of between 5 and 15 members. *Virginia Code § 15.2-2212.* The Albemarle County planning commission is composed of eight members appointed by the board of supervisors. *Virginia Code § 15.2-2212; County Code § 2-401(A).* The members of the commission must be residents of the county and are qualified by knowledge and experience to make decisions on questions of community growth and development. *Virginia Code § 15.2-2212; County Code § 2-401(A).* At least one-half of the members of the commission must be owners of real property. *Virginia Code § 15.2-2212; County Code § 2-401(A).*

Seven members of the Albemarle County planning commission are voting members, and of those seven, six come from each of the county's six magisterial districts and the other is appointed at-large. The eighth member is a non-voting member appointed by the board with the advice of the president of the University of Virginia. *County Code § 2-401(B).* The terms of the commissioners from each of the county's magisterial districts are coterminous with the four-year terms of the supervisors in the district they serve; the term of the at-large member is two years; the term of the non-voting member is one year. *County Code § 2-401(B).*

1-320 Powers and duties

A planning commissions is part of the locality and operates under the authority granted to planning commissions under State law. *Sinclair v. New Cingular Wireless*, 283 Va. 567, 582-583, 720 S.E.2d 40, 48 (2012); *see Board of Supervisors of Fairfax County v. Washington, D.C. SMSA LP*, 258 Va. 558, 522 S.E.2d 876 (1999).

A planning commission has specific powers related to individual development applications. On legislative matters such as comprehensive plan amendments, zoning text amendments, zoning map amendments, and special use permits, the commission is advisory to the governing body and makes recommendations to the board. (*Virginia Code §§ 15.2-2223 (comprehensive plan), 15.2-2285 (rezonings), 15.2-2286 (rezonings and special use permits)*).

On ministerial matters such as subdivision plats and site plans, the subdivision and zoning ordinances may designate the planning commission as the decision-making body. When the commission is acting on a subdivision plat or a site plan, it is acting in a ministerial capacity, and its role is to determine whether the subdivision plat or site plan meets the minimum requirements of the applicable regulations.

The planning commission also has the following powers and duties:

- Advisor to the governing body: Serves as an advisory body to the governing body to promote the orderly development of the county and its environs and to accomplish the objectives set forth in Virginia Code § 15.2-2200.
- Official maps: At the direction of the governing body, or on its own initiative, makes or causes to be made an official map as provided in Virginia Code § 15.2-2233 *et seq.*
- Capital improvement program: At the direction of the governing body, or on its own initiative, annually prepares and revises a capital improvement program based on the comprehensive plan of the locality for a period not to exceed the ensuing five years as provided in Virginia Code § 15.2-2239.
- Subdivision ordinance: At the request of the governing body, or on its own initiative, prepares and recommends amendments to the subdivision ordinance as authorized by Virginia Code § 15.2-2253.
- Zoning ordinance: At the direction of the governing body, or on its own initiative, prepares and recommends

amendments to the zoning ordinance including a map or maps showing the zoning districts of the locality as provided in Virginia Code § 15.2-2285.

- Annual report: Makes recommendations and an annual report to the governing body concerning its operation and the status of planning within the locality.

Virginia Code § 15.2-2221.

A commissioner may be removed for malfeasance in office. *Virginia Code § 15.2-2212.* *Malfeasance* means doing an act which a person ought not do at all. In addition, a commissioner may be removed by the governing body if the commissioner is absent from any three consecutive commission meetings or is absent from any four meetings of the commission within any 12-month period. *Virginia Code § 15.2-2212.* When a commissioner is removed, the governing body must appoint a successor to serve the unexpired term of the person removed. *Virginia Code § 15.2-2212.*

1-400 The architectural review board

An architectural review board (“ARB”) is an administrative body that may be established by the governing body pursuant to Virginia Code § 15.2-2306.

1-410 Composition

An ARB consists of five members who are appointed by the governing body to administer the Historic Districts Law. *Virginia Code § 15.2-2306.* In Albemarle County, this enabling authority is implemented through the entrance corridor overlay district. *County Code §§ 18-30.6, 18-34A.* The members of the ARB must be residents of the county and must have a demonstrated interest, competence, or knowledge in architecture, site design, or both. *County Code § 18-34A.* The members are appointed for four-year terms and serve at the pleasure of the board of supervisors. *County Code § 18-34A.*

1-420 Powers and duties

An ARB is a creature of statute (Virginia Code § 15.2-2306), and it possesses only those powers expressly conferred by statute. *Norton v. City of Danville*, 268 Va. 402, 407, 602 S.E.2d 126, 129 (2004). An ARB has no implied powers.

In Albemarle County, the board of supervisors has granted the ARB the following express powers and duties under County Code § 18-34A:

- Administer the regulations of the overlay district: Administer the entrance corridor overlay district in accordance with the duties stated in County Code § 18-30.6, which include promulgating appropriate design guidelines that must be ratified by the board of supervisors. The key duty of the ARB under County Code § 18-30.6 is to consider requests for certificates of appropriateness, discussed below.
- Consider requests for certificates of appropriateness: Consider requests for certificates of appropriateness by determining whether a proposed building or structure, including signs, is architecturally compatible with the historic landmarks, buildings or structures within the entrance corridor overlay district.
- Recommend areas to be included in overlay district: Recommend areas to be included within the entrance corridor overlay district.
- Act as an advisor to other bodies on land use matters: Act as an advisor to the board of supervisors, the planning commission, and the board of zoning appeals on zoning map amendments, special use permits, site plans, subdivisions, variances, and other matters pertaining to lands within the entrance corridor overlay district.

Under County Code § 18-30.6, the scope of Albemarle County's ARB's authority may be defined by both the territory under the ARB's authority and the extent of its review:

- **Physical reach of the ARB:** The entrance corridor overlay district exists along certain arterial streets in the county identified in the zoning ordinance. These streets are "significant routes of tourist access" to the county or to designated historic landmarks, buildings, structures, or districts in the county or in a contiguous locality. *Virginia Code § 15.2-2306(A)(1)*.
- **Regulatory reach of the ARB:** Within those lands subject to regulation by the ARB, the ARB may issue a certificate of appropriateness for any development requiring a building permit or a site plan for that part of the development that is visible from a designated entrance corridor street. Localities are enabled to require an applicant for a certificate of appropriateness to submit documentation that any development in an area of the locality of known historical or archaeological significance will preserve or accommodate the historical or archaeological resources. *Virginia Code § 15.2-2306(A)(1)*. The ARB also reviews projects requiring a special use permit to allow outdoor storage or display within an entrance corridor, and as noted above, acts in an advisory capacity when requested to do so.

The certificate of appropriateness is a certification that the proposed development is consistent with the ARB's design guidelines. The ARB may issue a certificate if the proposed development satisfies the requirements for issuance and the design guidelines.

In issuing a certificate, the ARB may impose certain conditions or require modifications to the extent they are authorized in the design guidelines such as: (1) the appearance of any architectural feature including motif and style, color, texture, and materials; (2) limitations on the mass, shape and height of buildings and structures; (3) the location and configuration of parking areas; and (4) landscaping and buffering requirements. The certificate of appropriateness also may require any additional landscaping to ensure that the design guidelines are satisfied, and identify the existing trees, wooded areas, and natural features to be preserved.

1-500 The board of zoning appeals

A board of zoning appeals ("BZA") is a public body established by the governing body pursuant to Virginia Code § 15.2-2308.

1-510 Composition

In most localities, the members of a BZA are appointed by the circuit court. *Virginia Code § 15.2-2308(A)*. In localities within two judicial circuits, the court appoints the members with the concurrence of the locality. *Virginia Code § 15.2-2308(A)*. In the cities of Portsmouth and Virginia Beach, the city councils, rather than the circuit courts, appoint the members of the BZA. *Virginia Code § 15.2-2308(E)*.

A BZA may consist of five or seven members. *Virginia Code § 15.2-2308(A)*. A locality may request that the circuit court appoint up to three alternate members. *Virginia Code § 15.2-2308(A)*. Albemarle County's BZA consists of five members with no alternates. *County Code § 18-34.1*. The members of a BZA must be residents of the locality and are appointed for five-year staggered terms. *Virginia Code § 15.2-2308(A)*. Members may be reappointed to succeed themselves. *Virginia Code § 15.2-2308(A)*. Members whose terms expire continue to serve until their successors are appointed and qualify. *Virginia Code § 15.2-2308(A)*.

Members may not hold any other public office in the locality, except that any elected official of a town may serve on the BZA of the county in which the member also resides, and one member of a locality's planning commission may be a member of the locality's BZA. *Virginia Code § 15.2-2308(A)*. A planning commissioner is not appointed to the BZA in Albemarle County.

By ordinance, localities may create a joint BZA consisting of two members who are residents of each participating locality, plus one member from the area at large. *Virginia Code § 15.2-2308(B)*. The members are

appointed by the circuit courts of the respective localities.

A BZA member may be removed for malfeasance, misfeasance, or nonfeasance in office, or for any other just cause, by the court that appointed the person, following a hearing held after at least 15 days' notice. *Virginia Code* § 15.2-2308(D). *Malfeasance* means doing an act which a person ought not do at all; *misfeasance* is the improper doing of an act that a person might lawfully do; *nonfeasance* means the omission of an act that a person ought to do.

1-520 Powers and duties

The BZA is a creature of statute and it possesses only those powers expressly conferred by statute. *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550, 552, 666 S.E.2d 315, 316 (2008) (holding that the BZA does not have the power to sue because that power is not expressly granted by statute); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); *Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc.*, 217 Va. 740, 743, 232 S.E.2d 767, 769 (1977). The BZA has no implied powers. The BZA's powers and duties include the following:

- Appeals of decisions by the zoning administrator or an administrative officer: Hear and decide appeals from any order, requirement, decision, or determination made by the zoning administrator or an administrative officer in the administration or enforcement of the zoning ordinance.
- Variances: Hear and decide applications for variances.
- Special use permits: Hear and decide applications for special use permits if the power is delegated to the BZA by the governing body.
- Interpret the district map: Hear and decide applications to interpret the district map where there is any uncertainty about the location of a district boundary.

Virginia Code § 15.2-2309. The BZA also is required to keep a full public record of its proceedings and submit a report of its activities to the governing body or bodies at least once each year. *Virginia Code* § 15.2-2308(C).

The BZA does not have the power to rezone property. See *Foster v. Geller*, 248 Va. 563, 568, 449 S.E.2d 802, 806 (1994) (reversing trial court and upholding decision of the BZA, which determined that the decision of the director of planning and community development to issue a development permit was erroneous because it did not comply with the requirements of the zoning ordinance for development of substandard land). A BZA is authorized to interpret the zoning ordinance. *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997). However, a BZA does not have the authority to rule on the validity of a zoning ordinance, which is a determination within the sole province of the courts. *Powell Valley Village, supra*.

1-600 The zoning administrator

The zoning administrator is an officer whose office is established by the locality's zoning ordinance. *Virginia Code* § 15.2-2286(A)(4).

The primary duty of the zoning administrator is to administer and enforce the zoning ordinance on behalf of the governing body, and the office has all necessary authority to do so. *Virginia Code* § 15.2-2286(4). The zoning administrator's powers and duties include: (1) interpreting the zoning ordinance; (2) ordering in writing that a violation of the zoning ordinance be abated; (3) ensuring compliance with the zoning ordinance by bringing appropriate legal actions; (4) if authorized by the zoning ordinance, reviewing and approving modifications; and (5) in specific cases, making findings of fact and, with the concurrence of the locality's attorney, conclusions of law, regarding vested rights under *Virginia Code* §§ 15.2-2307 and 15.2-2311(C). *Virginia Code* § 15.2-2286(A)(4).

Like the BZA, the zoning administrator does not have the authority to rule on the validity of the zoning ordinance. *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997).

1-700 The subdivision agent; the site plan agent

A locality may designate an agent to review and act on subdivision plats and site plans, which allows the agent to act in lieu of the locality's planning commission on these matters. *Virginia Code* §§ 15.2-2259, 15.2-2260.

Roles of the Albemarle County Board of Supervisors, Planning Commission, and Architectural Review Board on Various Land Use Matters			
Land Use Matter	Board of Supervisors	Planning Commission	Architectural Review Board
Comprehensive plan amendments	Final action	Recommendation to BOS	Advisory on matters within the Entrance Corridor Overlay District (“ECOD”)
Zoning text amendments	Final action	Recommendation to BOS	Advisory on matters within the ECOD
Zoning map amendments (rezonings)	Final action	Recommendation to BOS	Advisory on matters within the ECOD
Special use permits	Final action (except those delegated to the BZA)	Recommendation to BOS (except those delegated to the BZA)	Advisory on matters within the ECOD
Special exceptions	Final action	Recommendation to BOS if referred to PC	Advisory on matters within the ECOD
Variances	None	None	Advisory (to BZA) on matters within the ECOD
Site plans	Final action if appealed from PC decision (if disapproved by PC)	Final action unless appealed to BOS (if disapproved by PC)	Advisory on matters within the ECOD
Subdivision plats	Final action if appealed from PC decision (if disapproved by PC)	Final action unless appealed to BOS (if disapproved by PC)	Advisory on matters within the ECOD
Certificates of appropriateness	Final action if appealed from ARB decision	None	Final action unless appealed to BOS
Approval of private street under the Subdivision Ordinance	Final action if appealed from PC decision (if disapproved or approved with objectionable conditions)	Final action unless appealed to BOS (if disapproved or approved with objectionable conditions)	Advisory on matters within the ECOD

Note: Site plans and subdivision plats are approved administratively. Site plans and subdivision plats disapproved by the agent, or approved with objectionable conditions, may be appealed by the developer to the commission and thereafter to the board. Disapproved site plans and subdivision plats may be challenged in circuit court in lieu of pursuing administrative appeals.

Chapter 2

The Origins of the Zoning Power

2-100 Introduction

Zoning is the process of classifying land in a locality into districts and establishing in each district regulations concerning building and structure location and design and the uses to which land, buildings, and structures may be put. *Virginia Code* § 15.2-2201.

Understanding the history of the zoning power allows one to appreciate the stated purposes and objectives of zoning (see section 3-200), as well as the scope of the zoning power (Chapter 4), expressed in the current law. Unfortunately, zoning's evolution from the common law of nuisance and its historical use as a tool to racially and economically segregate populations also partially explains its shortcomings in addressing all the issues pertaining to modern land use and development and the social and economic issues a community may be facing (see sections 2-230 and 2-300).

2-200 A brief history of zoning

In the years before zoning, land uses were regulated by not only actions seeking the common law remedy of nuisance, but also through building and fire codes and established minimum standards for construction and access. *American Law of Zoning*, §§ 1.13 and 1.16 (Patricia E. Salkin, 5th ed. 2011).

Even before challenges to zoning laws were making their way through the courts in the early 1900s, the United States Supreme Court recognized that the police power could control how property was used: “[A]ll property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.” *Mugler v. Kansas*, 123 U.S. 623, 665, 8 S. Ct. 273, 299 (1887) (holding that the state could claim that a brewery constituted a nuisance). This principle was adopted by the Virginia Supreme Court in 1926, when it said that the “legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare.” *Gorieb v. Fox*, 145 Va. 554, 560, 134 S.E. 914, 916 (1926), affirmed 274 U.S. 603, 47 S. Ct. 675 (1927) (zoning ordinance). Thus, the power of a locality to regulate the use of land through zoning and other regulations arises from the locality’s police power, which is a residual power, intrinsic in the sovereign, to protect the public health, safety, and welfare.

2-210 The first zoning regulations

A number of localities had established building size and height restrictions by 1900 and the City of Los Angeles established use districts in 1909. *American Law of Zoning*, § 2.20 (Patricia E. Salkin, 5th ed. 2011). However, New York City is credited with adopting the first comprehensive zoning regulations in 1916. The New York City Department of City Planning explains the historical reasons for this event as follows:

Technical restraints that had traditionally limited building height vanished with the introduction of steel beam construction techniques and improved elevators. The Manhattan skyline was beginning to assume its distinctive form. Multifamily residences, particularly in Manhattan, were growing in popularity and new retail districts were springing up to meet new demands. Office space was expanding; by 1900, New York City had become the financial center of the country.

Although the concept of enacting a set of laws to govern land use was revolutionary, the time had come for the city to regulate its physical growth. The huge shadow cast by the 42-story Equitable Building, built in 1915 on lower Broadway, deprived neighboring properties of light and air. Warehouses and factories were intruding into fashionable retail areas on lower Fifth Avenue.

The pioneering 1916 Zoning Resolution, though a relatively simple document, established height and setback controls and separated what were seen as functionally incompatible uses – such as factories – from residential neighborhoods. The ordinance became a model for urban communities throughout the United States as other growing cities found that New York’s problems were not unique.

The issues that gave rise to the New York zoning resolution – building heights, conflicting uses, light, and air – remain important issues in the purposes and objectives of conventional zoning regulations to this day.

2-220 Three landmark United States Supreme Court decisions

Following is an overview of three important United States Supreme Court decisions that have shaped zoning and other land use-related areas of the law.

In 1926, the United States Supreme Court validated the zoning ordinance adopted by the Village of Euclid, a suburb of Cleveland, Ohio, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). The term often used today to describe conventional zoning schemes – *Euclidean zoning* – takes its name from this case.

The ordinance and map adopted by the Village of Euclid created several use, height, and lot area zones within the village. The plaintiff in *Euclid* was the owner of 68 acres in the village and had planned to use its land for industrial uses. The plaintiff contended that the land’s value for those uses was approximately \$10,000 per acre, but if used for residential purposes as zoned, its value was \$2,500 per acre. The owner also contended that the land abutting Euclid Avenue if developed for industrial uses was worth \$150 per foot, but if used for residential purposes was worth \$50 per foot. The owner alleged that the ordinance attempted to restrict and control the lawful uses of its land to confiscate and destroy a great part of its value and was, therefore, unconstitutional. The owner sought an injunction preventing the village from enforcing its ordinance.

In validating the village’s zoning ordinance, the *Euclid* court’s opinion laid down several principles that govern to this day. First, the Court recognized that the police power of state and local governments must be flexible to allow changing conditions to be addressed. In the context of zoning, the court said:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Euclid, 272 U.S. at 386-387, 47 S. Ct. at 118.

The *Euclid* court then identified the standard of review under which local zoning ordinances should be considered to determine their validity:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control. (italics added)

Euclid, 272 U.S. at 387-388, 47 S. Ct. at 118.

The *fairly debatable* standard is the applicable standard for legislative zoning decisions in Virginia. *See Chapters 10 (zoning map amendments and zoning text amendments) and 12 (special use permits).*

The *Euclid* court upheld the validity of the village's ordinance that excluded entire classes of uses from specific zoning districts, even though a particular establishment might not have been dangerous or offensive. With respect to the exclusion of industrial uses, the court said:

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. . . [W]e are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Euclid, 272 U.S. at 388-389, 47 S. Ct. at 118-19.

Finally, in upholding the village's regulations that excluded apartment houses, business houses, retail stores, and shops, hotels, and other similar establishments from single family residential districts, the Court was persuaded by decisions from state courts and various studies which were summarized in part as follows:

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are – promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.

Euclid, 272 U.S. at 391-392, 394, 47 S. Ct. at 119-120.

As noted at the outset of the discussion of *Euclid*, one of the principles underlying the Court's decision was its acknowledgement of the need for flexibility. *Euclid* was considered in the context of an American society that was shifting from agrarian to industrialized and the need to address the problems that came with that shift. The impacts from many of today's industries and businesses bear little resemblance to the impacts from the industries and businesses from the 1920s. Moreover, many localities now find benefits in integrating various types of use

classifications and encourage mixed-uses if development and performance standards are met. See section 2-300 for a discussion of the criticisms of Euclidean zoning and its future.

In *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98 (1954), the United States Supreme Court rejected a landowner's challenge to the legality of the District of Columbia's redevelopment plan on the ground that the District's use of eminent domain violated the Due Process Clause and the Just Compensation Clause of the Fifth Amendment of the United States Constitution. *Berman* is not a zoning case, but it nonetheless warrants attention because the Court was considering issues related to planning and land use, the deference the courts are to give to legislative decisions, and what it means when the government acts to promote the public welfare.

The Court identified the essence of the landowner's argument to be that, while taking property for ridding an area of slums was permissible, taking it merely to develop a better balanced, more attractive community was not. In the following excerpts, the *Berman* court declined to limit the concept of the public welfare that may be enhanced by land use regulations:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman, 348 U.S. at 32-33, 75 S. Ct. at 102-103. The extent to which a Virginia locality may exercise its zoning powers to remedy a particular problem is, of course, constrained by the public purposes and the enabling authority established by the General Assembly.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974), the United State Supreme Court upheld the validity of the Village of Belle Terre's zoning ordinance in the face of a challenge to its zoning regulations which restricted the permissible uses to single-family dwellings and prohibited the occupancy of a dwelling by more than two unrelated persons as a "family," while permitting occupancy by any number of persons related by blood, adoption, or marriage. The Court described an expansive view of the police power to allow a community to be a desirable place to live and work. In noting that regimes of boarding houses, fraternity houses, and similar types of uses presented urban problems with increased density, more traffic, more required parking, and noise, the Court said:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Boraas, 416 U.S. at 9, 94 S. Ct. at 1541.

This examination of the history of zoning provides the context for much of the remainder of this handbook and, in particular, it explains the purposes and objectives of zoning identified in Chapter 3 and the factors to be considered in a zoning decision discussed in Chapter 10.

2-230 The role of land use planning and zoning in racial and economic segregation

The history of land use planning and zoning includes their use as a tool to segregate populations along both racial and economic lines. In a report issued by the McGuireWoods Zoning and Subdivision Work Group entitled *Zoning and Segregation in Virginia: Part 1, Why Virginia Needs a Study of Zoning Laws and Their Connection to Segregation*, (2021), the work group's conclusions include:

- “A primary purpose of zoning and land use regulation is to protect residential property values from perceived threats. These threats range from the intrusion of industrial or commercial uses, to changes in the ethnic, racial or economic status of neighbors. When zoning began in Virginia 110 years ago, the primary perceived threats were from the mixing of races and the presence of African Americans in white neighborhoods.”
- “Although explicit racial zoning ended in 1917, the legacy of systemic racism continues today. In many Virginia jurisdictions, neighborhoods are more racially segregated today than they were 50 years ago.”
- Comprehensive plans and zoning ordinances throughout Virginia reinforce the division of residential areas by wealth and income. This reinforces racial segregation because of the wealth gap between white and minority populations. More importantly, this results in unequal access to civic resources including schools, parks, libraries, sanitation, transportation and other government services.”
- Following the 1917 United States Supreme Court decision in *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16 (1917) which held that explicit racial segregation in zoning was unconstitutional, “racial zoning gave way to the broader notion of a race-based comprehensive planning process and racially informed zoning districts.”
- “Many of the first zoning maps in Virginia applied industrial zoning categories to areas of African American homes while applying residential protections to areas of white homes. . . The majority of land in most localities was zoned exclusively for “single family” housing. In most cases, a minority household could not afford to purchase a house on a large lot and was forced to live in a concentrated neighborhood of higher density.”
- “[Z]oning was one of the tools of explicit segregation in the 20th century. Today, zoning does not explicitly segregate; however, the legacy of segregation is perpetuated by the preservation of wealth and income segregation . . . the wealth gap between white and minority populations perpetuates racial segregation.”
- Zoning contributes to economic segregation. “Restricting the density of housing on large portions of a locality drives up housing prices by constraining supply. Consequently, zoning creates regulatory barriers to housing affordability and ultimately separates people by levels of wealth and income through the establishment of low-density residential zoning districts, often referred to as ‘exclusionary zoning.’ Exclusionary zoning greatly exacerbates economic segregation by lowering overall housing production and by lowering the percentage of multifamily units in many suburbs.”

The report also provides insights into possible solutions, presumably most of which will be considered in a subsequent report: “Comprehensive plans and zoning ordinances can be changed to help remedy the legacy of racial and economic segregation without disrupting existing neighborhoods, mandating integration or spending public money. Many zoning districts have already evolved to allow mixed uses without harming property values or creating conflicts. The primary remedy for residential segregation is to allow more housing choices.” The full report can be found at this link [Zoning and Segregation in Virginia: Part 1 \(mcguirewoods.com\)](https://www.mcguirewoods.com/wp-content/uploads/2021/06/Zoning-and-Segregation-in-Virginia-Part-1.pdf).

Virginia Code § 36-96.3(C) prohibits discrimination by a locality in its application of local land use ordinances and guidelines and in permitting housing developments: (1) on the basis of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, or disability; (2) because the housing development contains or is expected to contain affordable housing units as defined therein; or (3) by prohibiting or imposing conditions on the long-term rental or sale of dwelling units. It is not a violation if land use decisions or decisions relating to the permitting of housing developments are based on considerations of

limiting high concentrations of affordable housing. Sections 7-500 and 7-1000 provide brief discussions of prohibitions of discrimination in the Americans with Disabilities Act and the Fair Housing Act, respectively.

2-300 The present and the future of zoning

It is well established that localities enjoy broad powers to implement land use controls to meet the increasing encroachment of urbanization on the quality of life. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974). “The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S. Ct. 2176, 2182 (1981). Zoning continues to evolve. Cluster developments (*Virginia Code* § 15.2-2286.1) and historic district regulations (*Virginia Code* § 15.2-2306) are two examples of zoning regulations that likely would have been considered arbitrary years ago.

Some have argued that the Dillon Rule, discussed in Chapter 5, limits a Virginia locality’s ability to accomplish the goal of achieving a high quality of life. In their article *Why Does Dillon Rule? Or Judge John’s Odd Legacy* appearing in *Nice & Curious Questions*, Edwin S. Clay III and Patricia Bangs note that some complain that the rule continues to bind the Commonwealth’s ability to respond to the priority needs of its localities and regions, while the Virginia Chamber of Commerce believes that the rule “represents a positive tradition of legislative oversight” and encourages economic growth through a consistency in laws throughout the state.

2-310 Criticism of Euclidean (conventional) zoning

In addition to Euclidean (conventional) zoning’s contribution to racial and economic segregation identified in the report discussed in section 2-230, Euclidean zoning also has not been entirely successful for other reasons.

As the successor to the doctrine of common law nuisance, it may have succeeded more as a way to protect the public health, safety and welfare rather than as an effective planning tool for creating balanced growth, good urban design, beautiful cityscapes, or affordable housing. Roger K. Lewis, *Traditional Zoning Can’t Meet the Challenge of Modern Development*, *The Washington Post*, July 24, 2004. Lewis observed that “conventional zoning has produced patchwork quilts of single-use districts and private enclaves, often with minimal vehicular, pedestrian or visual connections between neighboring zones.”

Others have leveled similar criticisms. Conventional zoning has been criticized because it separates land uses, decreases densities, and increases the amount of land devoted to car travel, “prohibiting the kind of urbanism that typifies our most beloved urban places.” Andres Duany & Emily Talen, *New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative*, 29 *Fordham Urb. L.J.* 1445, note 1145 (2002). Braham, Boyce, Ketcham, *The Alexandrian Planning Process: An Alternative to Traditional Zoning and Smart Growth*, *The Urban Lawyer*, vol. 41 no. 2, Spring 2009 explain:

The type of zoning implemented in the [Standard Zoning Enabling Act], known as Euclidean zoning, favors strict separation of land uses into low-density single-use districts. These sorts of restrictions on land use represented a “significant departure from the way towns were built in the early 20th century,” but were nevertheless broadly adopted. As a result, the American landscape became fragmented along zoning district lines, and the places where people lived and where they worked grew farther apart.

Although suburban development was not new, the development of zoning codes forced the development to take on an entirely different character. As uses spread apart from each other, towns began to sprawl. The debate on urban sprawl has been extensive, but there is wide consensus that sprawl results in towns which are reliant on the automobile, with devastating environmental and emotional consequences. Euclidean zoning, which was an attempt to reconcile the competing pressures within a city, has in fact exacerbated those pressures. (footnotes omitted)

Jonathan Barnett, *New Urbanism and Codes*, in *Codifying New Urbanism* 1, 3 (Congress for the New Urbanism ed.,

2004) describes “mapping of [single-use] zones over big areas” as “a big part of the recipe for suburban sprawl.”

The shortcomings of conventional zoning have given rise to New Urbanism, discussed in section 2-320.

2-320 New Urbanism

Form-based codes based on New Urbanism principles focus on the configuration and architectural quality of urban and suburban environments. Although these codes may be a solution, Lewis notes the difficulty in implementing form-based codes. *Roger K. Lewis, Traditional Zoning Can't Meet the Challenge of Modern Development, The Washington Post, July 24, 2004.*

New Urbanism has been described as an approach that addresses two of the problems with conventional zoning – spatial separation of land use and lack of mobility. “Remedies for the problem of spatial separation include mixing land uses and creating diverse environments similar to traditional, older cities. Possible solutions for the lack of mobility include compact development and the promotion of public transit.” Andres Duany & Emily Talen, *New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative*, 29 Fordham Urb. L.J. 1445, 1447 (2002).

New Urbanism is not without its critics and the criticisms range from not solving the automobile-centric lifestyle, causing sprawl similar to that under conventional zoning, only in a different form, where the developments are greenfields developments, failing to achieve the true mixed use community that is sought, failing to attract a diverse population because the residents in these developments tend to be affluent, and creating a faux urbanism that cannot match the organic urbanism of a true downtown.

Chapter 8

The Differences Among Legislative, Ministerial, Administrative, and Quasi-Judicial Acts

8-100 Introduction

This chapter examines the nature of four types of actions that a public body may take in land use matters: (1) legislative acts; (2) ministerial acts; (3) administrative acts; and (4) quasi-judicial acts. The distinctions are important because, among other things, legislative acts are cloaked with certain presumptions, whereas ministerial acts have no presumptions that attach to them. Various state and federal immunities may follow from the consequences of these acts.

The following table summarizes the varying nature and their key qualities.

The Different Nature of Various Land Use Decisions				
Act	Types of Land Use Decisions	Key Qualities	Effect of Being Classified As Such	Presumptions
Legislative	Comprehensive plan amendments Zoning text amendments Zoning map amendments Special exceptions Special use permits Certificates of appropriateness Exceptions under subdivision laws	Made only by the governing body (exception for SUPs delegated to the BZA) Prescribes a course of conduct by establishing policy or law Balances private conduct against the public health, safety and welfare	Broad discretion Broad range of immunities attach to decision makers Exempt from due process challenges (though statutory procedures must be complied with)	Presumed to be correct, reasonable, and constitutionally valid
Ministerial	Site plans Subdivision plats Certificates of occupancy	Implement policy or law by applying the facts in the particular circumstances to the law or policy	When the requirements of the law or policy have been satisfied, approval is required; there is no discretion to deny	No presumption that decision-maker acted correctly Failure to act correctly will be found to be arbitrary and capricious
Administrative with limited discretion	Variances (until applicant establishes criteria met) Decisions determining whether performance standards are satisfied	Limited discretion delegated by governing body to lower body or officer to apply specific standards to a set of facts Standards must be as reasonably precise as the subject matter requires or permits	Decision must be based only on the standards specified by the governing body Exercise of discretion must be reasonable	No presumptions Exercise of discretion must be reasonable or it will be found to be arbitrary and capricious
Quasi-judicial	Official determinations Appeals	Grants or denies a privilege or benefit	Factual determinations are critical, and findings of fact must be made to allow judicial review	Factual determinations presumed correct; no presumption of correctness for legal conclusions (BZA)

8-200 Legislative acts

A legislative body (for a locality, its governing body) is “the author of public policy.” *In re Woodley*, 290 Va. 482, 490, 777 S.E.2d 560, 565 (2015). The best indications of public policy are to be found in the enactments of the legislative body. *Woodley*, *supra*.

The Virginia Supreme Court has recognized that it is not always easy to determine when a legislative body is acting in a legislative or some other capacity. *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948). The exercise of legislative power involves the “balancing of the consequences of private conduct against the interests of public welfare, health, and safety.” *Helmick v. Town of Warrenton*, 254 Va. 225, 229, 492 S.E.2d 113, 114 (1997). In general, a legislative body exercises a legislative power when it prescribes a course of conduct. *Blankenship*, 188 Va. at 103, 49 S.E.2d at 323 (distinguishing legislative acts from quasi-judicial acts). In other words, legislative acts create new laws; ministerial acts generally implement existing laws. *Helmick*, 254 Va. at 228-229, 492 S.E.2d at 114.

8-210 Acts that are legislative

Generally, zoning is a legislative power that has been delegated from the state to its localities by express enabling authority. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637, 107 S.E.2d 445 (1959). Within the context of land use decisions, there are several acts that the courts have found to be legislative in nature:

- Comprehensive plan adoption and amendments: Amendments to the comprehensive plan are legislative acts. *See Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 487 S.E.2d 207 (1997).
- Zoning text and zoning map adoption and amendments: Ordinances that regulate or restrict conduct with respect to property are purely legislative and, therefore, zoning text and zoning map amendments are legislative acts. *Rowland v. Town Council of Warrenton*, 298 Va. 703, 718, 842 S.E.2d 398, 406 (2020) (rezoning with proffers; “We have long recognized that because the decision of a zoning authority is legislative in nature, a reviewing court should not be concerned with whether the decision was right or wrong”); *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006) (rezoning); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997); *City Council of Virginia Beach v. Harrell*, 236 Va. 99, 372 S.E.2d 139 (1988); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). Thus, when two reasonable zoning classifications apply to a property (the existing and proposed zoning classifications), the governing body has the legislative prerogative to choose between those reasonable zoning classifications. *Board of Supervisors of Fairfax County v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991). Moreover, when the governing body considers the many factors when taking zoning actions, the weighing of those factors is a legislative function. *Miller & Smith*, *supra*.
- Special exceptions and special use permits: Acting on a request for a special exception or a special use permit is a legislative act. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013); *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 581, 727 S.E.2d 40, 47 (2012); *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Bollinger v. Board of Supervisors*, 217 Va. 185, 227 S.E.2d 682 (1976). This rule applies even when the special exception or special use permit is essentially a waiver of a regulation by the governing body permitted under the zoning regulations. *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2004) (special exception allowed by zoning regulations to allow a “deviation” from setback regulations).
- Certificates of appropriateness: Action by a governing body on a certificate of appropriateness under the locality’s historic resources regulations (*Virginia Code* § 15.2-2306) is a legislative act. *Byrne v. City of Alexandria*, 298 Va. 694, 842 S.E.2d 409 (2020); *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004) (treating the decision on the certificate of appropriateness as being similar to a special exception; holding that the city council’s denial of the certificate was unreasonable).
- Setting rates and fees for certain services: Setting rates and fees for sewer or water services is a legislative

function. *Eagle Harbor, LLC v. Isle of Wight County*, 271 Va. 603, 628 S.E.2d 298 (2006); *City of South Boston v. Halifax County*, 247 Va. 277, 441 S.E.2d 11 (1994).

- **Vacating subdivision plats:** Action by a governing body on a request to vacate a subdivision plat is a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997). The determination of whether to vacate a subdivision plat, like the decision regarding the grant or denial of a special use permit, is a decision which regulates or restricts the use of property. *Helmick, supra*.
- **Variations or exceptions under subdivision regulations by a governing body:** Two trial courts have held that variations or exceptions by a governing body under the authority of Virginia Code § 15.2-2242(1) are legislative acts. *GIBC Golf, LLC v. Board of Supervisors of Loudoun County*, 77 Va. Cir. 287 (2006) (exception to requirement that lots front on public street; in acting on the exception, the board of supervisors was responding to the request by a private property owner seeking to maximize its expectations as to development densities permitted by existing zoning; these expectations were weighed against the public's interest in how those private developmental requirements related to the overall transportation needs of the community); *Gladstone v. Board of Supervisors*, 38 Va. Cir. 309 (1996) (a "waiver" of a requirement in the subdivision ordinance by the board of supervisors is a legislative act).

A planning commission does not act in a lawmaking capacity when it considers matters for recommendation to the governing body that are legislative in nature. However, in making its recommendation, the commission considers the same factors and matters of public policy as the governing body.

8-220 Effect of an act being classified as legislative

There are three important presumptions that attach to legislative acts:

- **Presumption of correctness:** A legislative act is presumed to be correct. *Rowland v. Town Council of Warrenton*, 298 Va. 703, 719, 842 S.E.2d 398, 407 (2020).
- **Presumption of reasonableness:** A legislative act is presumed to be reasonable. *Rowland, supra* ("legislative decisions in zoning matters are 'presumed valid and will not be altered by a court absent clear proof that the action is unreasonable, arbitrary, [or] bears no reasonable relation to the public health, safety, morals, or general welfare,'" quoting *EMAC, LLC v. County of Hanover*, 291 Va. 13, 21, 781 S.E.2d 181 (2016); *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006); *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003); *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982); *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997).
- **Presumption of constitutional validity:** A legislative act is presumed to be constitutionally valid. *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). If challenged in court by probative evidence that the decision was unreasonable, the governing body need only produce sufficient evidence of reasonableness to make the issue fairly debatable; if the issue is fairly debatable, the legislative decision must be sustained. *Renkey, supra*; *Robertson, supra*; *Richardson, supra*.

Finally, legislative acts are not subject to procedural due process claims arising from alleged deficiencies in the notice or hearings. A locality is only required to satisfy statutory notice and hearing requirements. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991) (procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings, not legislative proceedings).

Because a legislative act requires the exercise of discretion, members of the governing body are immune from liability under Virginia law from any suit arising out of the exercise or failure to exercise their discretionary or governmental authority. *See, for example, Virginia Code § 15.2-1405 (official immunity for members of board of supervisors)*. *See*

8-230 Legislative acts may not be delegated

Generally, a legislative function can be exercised only by a locality's governing body. *County of Fairfax v. Fleet Industrial Park Ltd. Partnership*, 242 Va. 426, 432, 410 S.E.2d 669, 672 (1991) ("The power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people."); see *Mumpower v. Housing Authority*, 176 Va. 426, 454, 11 S.E.2d 732, 743 (1940); *Laird v. City of Danville*, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983). State law may expressly authorize the legislative power to be delegated (e.g., the authority for a BZA to be authorized to consider special use permits under Virginia Code § 15.2-2309(6)). When legislative authority is lawfully delegated, the exercise of the power continues to be considered a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997).

In *Sinclair*, the Virginia Supreme Court held that the board of supervisors could not delegate to its planning commission the power to grant waivers from, or modifications to, otherwise applicable zoning regulations because those types of acts are legislative in nature that should be addressed through the special exception process. Similarly, in *Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983), the Virginia Supreme Court held that the city council could not delegate to its planning commission the power to rezone property. In *Krisnathevin v. Board of Zoning Appeals for Fairfax County*, 243 Va. 251, 253, 414 S.E.2d 595, 596 (1992), the Virginia Supreme Court invalidated the administrative rezoning of a parcel by a county staff person who changed the zoning designation of a parcel from "convenience center" to "community facilities" by flipping its district designation with the adjoining parcel.

8-300 Ministerial acts

Compared to legislative acts, ministerial acts are at the other end of the spectrum. A ministerial act is one performed under a given set of facts and in a prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, one's own judgment upon the propriety of the act being done. *Richlands Medical Association v. Commonwealth ex rel. State Health Commissioner*, 230 Va. 384, 337 S.E.2d 737 (1985). An act is ministerial even though an officer must determine the existence of the facts that make it necessary for him to act. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976).

8-310 Acts that are ministerial

The approval of site plans and subdivision plats are ministerial acts. At an early point in the site plan process, a locality may have the discretion to deny a site plan or a subdivision plat, but once the applicant has complied with all existing ordinances the function of approval becomes ministerial, and the plan or plat must be approved. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976); *Planning Commission of City of Falls Church v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971); compare *Umstadt v. Centex Homes*, 274 Va. 541, 650 S.E.2d 527 (2007) (determination of whether a subdivision application was complete was not ministerial such that a subdivider was entitled to mandamus; the determination of completeness involved an investigation of submitted plans, the conditions existing on the land and the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances, and regulations to the conditions found to exist). The ministerial nature of site plans and subdivision plats is best reflected in the requirement that if a site plan or subdivision plat is disapproved, a locality is required to identify for the applicant each requirement that is not satisfied and explain what the applicant must do to satisfy that requirement. *Virginia Code* §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary).

The ultimate question is not whether a site plan or subdivision plat *should* be approved or disapproved as a policy matter, but whether the plan or plat will be approved or disapproved upon a determination as to whether it satisfies the applicable ordinances.

The granting of a certificate of occupancy is ministerial once all requirements are satisfied. *DeCarlo v. Board of Zoning Appeals of the Town of Vienna*, 78 Va. Cir. 88 (2009) (because the petitioner satisfied all applicable code requirements, the zoning administrator had no authority to deny a certificate of occupancy based upon uncoded

safety concerns).

8-320 Effect of an act being classified as ministerial

In contrast to a legislative act that establishes a policy or law, a ministerial act implements that policy or law by applying the facts in the circumstances to the established standards that govern the decision. When all the requirements of a statute or ordinance are satisfied, an action that was once discretionary becomes ministerial and mandatory, and the application must be approved. *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 487 S.E.2d 207 (1997) (once zoning requirements were satisfied and building permit application otherwise satisfied Virginia Uniform Statewide Building Code requirements, issuance of building permit was ministerial and mandatory).

Site plan and subdivision plat regulations should not inject the site plan or subdivision plat review process with discretionary or policy considerations. For example, in *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999), the county denied a subdivision master plan, relying on provisions in its subdivision ordinance that required the board of supervisors to approve the “size and shape” of all lots even if they otherwise met the requirements of the zoning ordinance, and allowed the board to deny a plat if, in its opinion, the land was unsuitable for subdivision. The ordinance also provided that land was deemed unsuitable for subdivision if it would not preserve a “rural environment.” The Virginia Supreme Court held that these provisions were invalid. As another example, site plan or subdivision plat review must not include a determination of consistency with the comprehensive plan because at the site plan or subdivision plat stage, the comprehensive plan is irrelevant. *See, e.g., Rackham v. Vanguard Limited Partnership*, 34 Va. Cir. 478 (1994) (the comprehensive plan may not be a basis for denying a subdivision plat which is otherwise in conformity with duly adopted standards, ordinances, and statutes). The ultimate question for the decision-maker should be whether the site plan or subdivision plat will be approved or denied upon a determination that it satisfies the applicable regulations, not whether the plan should be approved or denied as a policy matter.

Unlike legislative acts, the presumptions of correctness and reasonableness do not attach to the performance of ministerial duties. *But see West v. Mills*, 238 Va. 162, 168, 380 S.E.2d 917, 921 (1989) (“[w]e keep in mind that the members of the planning commission are presumed to have acted correctly”). If a ministerial duty is not performed as required by law, a court would likely find the decision to be arbitrary and capricious and issue a writ of mandamus compelling the ministerial duty to be performed. *Phillips v. TELUS, Inc.*, 223 Va. 585, 292 S.E.2d 311 (1982). An arbitrary and capricious act is one that is “‘willful and unreasonable’ and taken ‘without consideration or in disregard of facts or without determining principle,’” or when the deciding body departs from the appropriate standard when making its decision. *James v. City of Falls Church*, 280 Va. 31, 42, 694 S.E.2d 568, 574 (2010). For example, the denial of a certificate of occupancy because the zoning administrator had fire and safety concerns was arbitrary and capricious because the petitioners had satisfied all requirements of the town code. *DeCarlo v. Board of Zoning Appeals of the Town of Vienna*, 78 Va. Cir. 88 (2009).

The official immunity afforded to a locality’s officers and employees under Virginia law does not exist for the performance of a ministerial duty. *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190 (1991). *See Chapter 31 for more information about civil liability arising from ministerial acts.*

8-330 Guidance for considering and acting on a site plan or subdivision plat

The most relevant issue when a site plan or subdivision plat is considered is whether it satisfies the requirements of the site plan or subdivision ordinance. As explained in section 8-320, whether the proposed use is consistent with the comprehensive plan, is otherwise appropriate for the neighborhood, and other policy issues, are not relevant provided that the proposed use is allowed by the zoning ordinance.

There are many situations where the exercise of discretion may be required in conjunction with a site plan or subdivision plat. A site plan or subdivision ordinance may allow an applicant to request variations or exceptions of their respective requirements, and the regulations may confer some discretion on the decision-maker when acting on the request, as explained in section 8-400. The approval of these requests may be a prerequisite to the action on the

site plan or subdivision plat and are separate and distinct from the ministerial nature of the review of the site plan or subdivision plat itself. The reader should be aware that variations or exceptions under a site plan or subdivision ordinance are different than variances requested from a BZA under the zoning ordinance.

One question that occasionally arises is whether a site plan or subdivision plat may be denied on health, safety, or nuisance grounds, even though the site plan or subdivision plat meets all the express requirements of the applicable regulations. General statements in land use regulations regarding general purposes of protecting the public health, safety, and welfare, or preventing nuisances, do not themselves provide a basis to deny a site plan or a subdivision plat. *See Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999) (Virginia Code § 15.2-2200 is merely a statement of purpose and intent and is not a source of power). Within the scope of the enabling authority, the applicable land use regulations themselves are supposed to address health, safety, welfare, and nuisance issues through specific and comprehensive regulations.

8-400 Administrative acts that include the exercise of discretion

Administrative acts that include the exercise of discretion are those where the decision-makers are engaged in a discretionary act and “the official duty involves the necessity . . . to make some investigation, to examine evidence and form [their] judgment thereon.” *Umstadd v. Centex Homes*, 274 Va. 541, 546, 650 S.E.2d 527, 530 (2007) (mandamus denied because determining whether an application is complete is a discretionary act).

8-410 Acts that are administrative that may require the exercise of discretion

Administrative acts that may require the exercise of discretion include variances or at least variance that were considered under the version of Virginia Code § 15.2-2309(2) in effect before 2015 (*Chilton-Belloni v. Angle ex rel. City of Staunton*, 294 Va. 328, 806 S.E.2d 129 (2017) (describing a variance as “essentially a discretionary opportunity for the BZA to accommodate an exception to existing law and so cannot be a true ‘adjudication’”), *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004)) and a broad range of decisions where the decision-maker must determine whether performance standards stated in the ordinance have been satisfied. Since 2015, Virginia Code § 15.2-2309(2) provides a BZA *must* grant a variance if the statutory requirements for a variance are satisfied.

The determination of whether an application is complete may also be discretionary. *See Umstadd v. Centex Homes*, 274 Va. 541, 650 S.E.2d 527 (2007) (the determination of completeness involved an investigation of submitted plans, the conditions existing on the land and the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist).

8-420 The authority to delegate the exercise of discretion

Although zoning-related decisions generally require a legislative act, certain functions of the zoning power may be delegated under specific standards. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637, 107 S.E.2d 445 (1959). The nature of the power delegated has been described as “more essentially ministerial than legislative.” *Ours Properties, Inc. v. Ley*, 198 Va. 848, 852, 96 S.E.2d 754, 757 (1957); *Thompson v. Smith*, 155 Va. 367, 381, 154 S.E.2d 579, 584 (1930).

The delegation of authority to a subordinate officer or body is long-recognized in Virginia and has been described as “essential to carry out the legitimate functions of government.” *Bell v. Dorey*, 248 Va. 378, 379, 448 S.E.2d 622, 623 (1994). In *Ours Properties, Inc. v. Ley*, 198 Va. at 851, 96 S.E.2d at 756, the Virginia Supreme Court considered whether the Falls Church city council could delegate certain zoning authority to the city’s building official:

Under the changing circumstances and conditions of life, it is frequently necessary that power be delegated to an agent to determine some fact or state of things upon which the legislative body may make laws operative. Otherwise, the wheels of government would cease to operate. Of course, the discretion and standards prescribed for guidance must be as reasonably precise as the subject

matter requires or permits. . . In Virginia, we have repeatedly held that an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by the general terms of a law, exist in the performance of their duties, and especially when the performance of their duties is necessary for the safety and welfare of the public.

The *Ours Properties* court continued that it was adopting the majority rule that “considerable freedom to exercise discretion and judgment must be accorded officials in charge under a zoning ordinance, and that the courts should be liberal in upholding such ordinances in order to facilitate their proper administration.” *See also Thompson v. Smith*, 155 Va. 367, 381, 154 S.E.2d 579, 584 (1930). The discretion delegated must be administrative, not legislative, in nature. *Sinclair v. New Cingular Wireless*, 283 Va. 198, 720 S.E.2d 543 (2012) (delegation of authority to planning commission to consider waivers from, or modifications to, otherwise applicable zoning regulations was invalid because the delegated act was legislative and appropriately addressed through the special exception process).

8-430 The delegated discretion must be accompanied by clear standards

The ability of a governing body to delegate discretionary authority is limited. The governing body must provide, by ordinance, “uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards.” *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637, 639, 107 S.E.2d 445, 447 (1959); *see also National Maritime Union v. City of Norfolk*, 202 Va. 672, 680, 119 S.E.2d 307, 313 (1961) (“The courts, in passing on zoning ordinances, have firmly established the rule that where such ordinances grant discretionary power for their administration, there must be provided standards for the guidance of the administering authority”). In other words, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits. *Andrews, supra* (standard of “whether [a] proposed use would be desirable or advantageous to the neighborhood or the community or the county at large [required to comply] to the minimum requirement for the promotion of the public health, safety, convenience and general welfare” found “too general and wholly vague”).

The governing body may delegate to a subordinate officer or board the power to ascertain and determine whether the qualifications, facts, or conditions comprehended in and required by the general terms of a law exist. *Ours Properties, Inc. v. Ley*, 198 Va. 848, 96 S.E.2d 754 (1957). In *Ours Properties*, the Virginia Supreme Court upheld an ordinance vesting discretion in zoning officials to grant an application for an industrial establishment if “satisfactory evidence is presented that such establishment will not adversely affect any contiguous district through the dissemination of smoke, fumes, dust, odor, or noise or by reason of vibration and that such establishment will not result in any unusual danger of fire or explosion.” A delegation of the power to exercise discretion based upon a finding of facts was not of itself an arbitrary or capricious delegation. *Ours Properties*, 198 Va. at 852, 96 S.E.2d at 758.

When a discretionary approval includes the authority to impose conditions, the purpose of a particular regulation may imbue the decision-making body with the discretion to impose conditions that address the purposes of the regulation. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319, 1987 WL 488696 (1987).

8-440 The discretion delegated must be exercised according to the delegated standards, and may not be exercised in an arbitrary or capricious manner

In taking an administrative action involving the exercise of discretion, the decision-maker is allowed to exercise a certain amount of judgment regarding the propriety of the request so long as it is within the scope of the authority granted. However, when the decision-maker exercises its discretion, it may not exercise that discretion in an arbitrary or capricious manner. *Glass v. Board of Supervisors of Frederick County*, 30 Va. Cir. 504 (1981). Actions are defined as arbitrary and capricious when they are “willful and unreasonable” and taken “without consideration or in disregard of facts or law or without determining principle.” *School Board of City of Norfolk v. Wescott*, 254 Va. 218, 224, 492 S.E.2d 146, 150 (1997).

One situation where the decision-maker may run afoul of its delegated authority is if it fails to adhere to the

standards applicable to the delegation and bases its decision on a standard created *ad hoc*. For example, in *Recycle America, LLC v. Loudoun County*, 59 Va. Cir. 504 (2001), the board of supervisors denied a waiver from a setback requirement under the county's solid waste ordinances. The waiver regulations imposed express standards to be considered in evaluating the request, and these standards pertained to whether a reduced setback would create a nuisance. However, the board denied the waiver because such a setback had not been granted for other similarly situated facilities. In finding the board's decision to be arbitrary and capricious, the court said: "This decision sets forth a benchmark, absent from the ordinance, that weighs the outcomes of a request predicated upon a comparison with others rather than adherence to a self-imposed merits-based standard." *Recycle America*, 59 Va. Cir. at 507.

Another situation where the decision-maker may get itself into trouble is if it believes that the delegation of the authority – e.g., "the zoning administrator *may* determine the performance standards are satisfied if . . ." – confers broad discretion that supersedes the delegated standards. This issue also arose in *Recycle America*, and the court said:

[T]he word "may," as used in the waiver provisions of the Solid Waste Management Code, is descriptive of the power granted to the Board to decide the issue and not as a license to exercise unlimited discretion when evaluating individual requests. *Leighton v. Maury*, 76 Va. 865 (1882). To do otherwise would render meaningless the provision relating to the creation of a nuisance.

Recycle America, 59 Va. Cir. at 507.

If the decision-maker has not abused its discretion by acting arbitrarily or capriciously, and it has acted within the scope of its legislatively delegated authority, then its actions should be sustained. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319, 1987 WL 488696 (1987).

8-500 Quasi-judicial acts

It is not always easy to determine when a public body is acting in a quasi-judicial capacity, or in a wholly legislative capacity. In general, quasi-judicial acts are acts by a public body or an officer when it grants or denies a privilege or benefit, and in a legislative capacity when it prescribes a course of conduct. *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948).

8-510 Acts that are quasi-judicial

A zoning administrator acts in a quasi-judicial capacity when making official determinations. *Lynch v. Spotsylvania County Board of Zoning Appeals*, 42 Va. Cir. 164 (1997). It would appear, therefore, that a BZA acts in a similar quasi-judicial capacity when it considers an appeal of such a determination. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 72 Va. Cir. 342 (2006) *reversed on other grounds at* 275 Va. 452, 657 S.E.2d 147 (2008).

8-520 Effect of an act being classified as quasi-judicial

On questions of fact, the findings and conclusions of the BZA are presumed to be correct. *Virginia Code* § 15.2-2314. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the BZA, that the BZA erred in its decision. *Virginia Code* § 15.2-2314.

On questions of law, the court hears arguments on those questions *de novo* ("anew"), as though the BZA had not decided the question. *Virginia Code* § 15.2-2314.

The party challenging the BZA's decision has the burden of proof. *Foster, supra*. Although the trial is not *de novo* and is generally held on the record of the proceedings before the BZA, any party may introduce evidence in court. *Virginia Code* § 15.2-2314. See *Chapter 15*.

Chapter 13

Variances

13-100 Introduction

A variance is a “reasonable deviation from” certain provisions of a locality’s zoning ordinance. *Virginia Code* § 15.2-2201; *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). Specifically, a *variance* is defined as:

[A] reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

Virginia Code § 15.2-2201. The 2015 amendments to the definition replaced the phrase “unnecessary or unreasonable hardship to the property owner” with “unreasonably restrict the utilization of the property.” The extent to which this amended definition, as well as the changes to the criteria for granting a variance (discussed in section 13-600), have changed the law of variances is still unfolding. However, the concepts of regulations *unreasonably restricting* utilization of the property or causing *hardship* remain and these are still high bars to satisfy.

A variance “allows a property owner to do what is otherwise not allowed under the ordinance.” *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982). Stated a different way, variances allow someone to do something “in violation of the ordinance.” *Bell, supra*. By comparison, special use permits (which include special exceptions and conditional use permits) do not allow a landowner to do something in violation of the zoning regulations but, instead, allow the property to be developed in a way consistent with those regulations, but only with approval of the governing body following a case-specific review. Therefore, a governing body desiring to retain legislative control of its zoning ordinance should consider incorporating flexibility into zoning regulations and expanding the availability of special use permits.

13-200 The nature of variances

Historically, variances provided an administrative remedy in those rare circumstances when a facially valid zoning ordinance may prove to be unconstitutional (e.g., a regulatory taking of the property without just compensation) in its application to a particular property, and to do so without destroying the viability of the locality’s zoning ordinance. *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980). The variance process furnished “elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner.” *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 767, 222 S.E.2d 570, 573 (1976). Under the standards and criteria in effect today, variances are available even when the restrictions on the use of property are not such that they have constitutional implications. Thus, a variance is simply an authorized deviation from certain zoning requirements because of the special characteristics of a property. *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994). A variance ensures that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. *Hendrix v. Board of Zoning Appeals of City of Virginia Beach*, 222 Va. 57, 278 S.E.2d 814 (1981).

A variance cannot confer on a landowner greater rights than could be afforded by the enactment of a zoning ordinance. *Snow, supra*. A variance also does not relieve the owner from having to comply with other aspects of the zoning ordinance that were not directly addressed by the approved variance. *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008). In addition, a variance may not allow a change in use, which only may be accomplished “by a rezoning or by a conditional zoning.” *Virginia Code* § 15.2-2201; *Tolman v. Richmond*

Board of Zoning Appeals, 46 Va. Cir. 359 (1998) (where the variance allowed the expansion of a nonconforming property from three to seven apartments, the variance allowed an increase in the intensity and the number of dwellings but did not allow a change in use). Given the nature and purpose of variances, they should be granted only to elevate a property to parity with similarly situated properties, rather than to confer a special privilege over other property in the district. The courts may revise some of these longstanding principles as the case law applying the current variance laws develops.

Five Things to Know About Variances

- Variances should be granted only to achieve parity with other properties in the district; they should not be granted to allow the applicant to do what others in the zoning district may not do without a variance.
- Variances should be sparingly granted; a high number of variance applications on a recurring issue indicates problems with the zoning ordinance, and the solution is to amend the regulations, not to keep considering variance applications.
- Variances run with the land, and the consequences of a board of zoning appeals' ("BZA") decision to grant a variance may last for years.
- Each variance must be considered on its own merits, not on prior variance decisions by the BZA; thus, although a BZA should be consistent in its decision-making within the limits of Virginia Code § 15.2-2309(2), it is not compelled to grant a variance because a prior BZA granted a variance from the same restriction in the same neighborhood if there are factual differences.
- If there is an existing reasonable use of the property, neither an unreasonable restriction on the property's use nor a hardship exists and a variance may not be lawfully granted; applications for variances to expand an existing structure, or to add more structures to a parcel, should fail if the use of the existing structure is reasonable.

Special rules apply to variances related to condominium conversions with nonconformities and variance applicants who are disabled or for facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act, and these are addressed in section 13-800.

13-300 The authority of a BZA to consider applications for variances

One of the powers expressly conferred on BZAs is the power to hear and decide applications for variances. *Virginia Code § 15.2-2309(2)*.

When considering an application for a variance, a BZA is acting in an administrative capacity and, under applicable constitutional principles, it is empowered to act only in accordance with the standards prescribed by Virginia Code § 15.2-2309(2). *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

13-400 The application

Applications for variances may be made by any property owner, tenant, government official, department, board or bureau. *Virginia Code § 15.2-2310*. Applications are made to the zoning administrator. *Virginia Code § 15.2-2310*. Before a variance application is considered by the BZA, the application and accompanying maps, plans, or other information must be transmitted to the secretary of the BZA, who must place the matter on the docket. *Virginia Code § 15.2-2310*.

13-500 Procedural requirements prior to and during a hearing on a variance application

Several procedural rules apply to the conduct of a hearing on a variance application:

- Scheduling the hearing on the variance application: The BZA must "fix a reasonable time for the hearing" on a variance. *Virginia Code § 15.2-2312*.
- Notice of the hearing: The BZA must "give public notice thereof as well as due notice to the parties in interest."

Virginia Code § 15.2-2312. Notice of the hearing must be provided as required in *Virginia Code* § 15.2-2204.
Virginia Code § 15.2-2310.

- Before the hearing; contact by parties with BZA members: The *non-legal staff* of the governing body, as well as the applicant, landowner, or its agent or attorney, may have *ex parte* communications with a member of the BZA before the hearing but may not discuss the facts or law relative to the variance. If any *ex parte* discussion of facts or law occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited *ex parte* communications do not include discussions that are part of a public meeting or discussions before a public meeting to which the applicant, landowner, or their agent or attorney are all invited. The *non-legal staff of the governing body* is “any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542].” *Virginia Code* § 15.2-2308.1(A) and (C). The legal staff of a governing body is not similarly prohibited from having *ex parte* communications with BZA members.
- Before the hearing; sharing of locality-produced information: Any materials relating to a variance, including a staff recommendation or report furnished to a BZA member, must be available without cost to the applicant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the applicant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (*Virginia Code* § 2.2-3700, *et seq.*). *Virginia Code* § 15.2-2308.1(B).
- At the hearing; the right to equal time for a party to present its side of the case: The BZA must offer an equal amount of time in a hearing on the case to the applicant and the staff of the local governing body. *Virginia Code* § 15.2-2308(C).
- At the hearing; the burden of proof is on the applicant: The applicant has the burden of proof to prove by a preponderance of the evidence that their application meets the standard for a variance as defined in *Virginia Code* § 15.2-2201 and the criteria in *Virginia Code* § 15.2-2309(2). *Virginia Code* § 15.2-2309(2).
- Decision: The BZA *must grant* a variance if the evidence shows that the strict application of the terms of the zoning ordinance would “*unreasonably restrict* the utilization of the property or that granting of the variance would alleviate a *hardship* due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance” and “(i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application.” *Virginia Code* § 15.2-2309(2). *See section 13-600 for further discussion.*
- Time for the decision: The decision must be made within 90 days. *Virginia Code* § 15.2-2312. This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the 90-day period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).
- Required vote: The concurring vote of a majority of the BZA’s membership is necessary to grant a variance. *Virginia Code* § 15.2-2312. This means that a five-member BZA may grant a variance only if at least three members vote for granting the variance. Thus, if only three members of the BZA are present for the vote, all three must vote in favor of granting the variance.

- Explaining the basis for the decision: A BZA may grant a variance only if the evidence *shows* that all of the criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion so that the circuit court can properly adjudicate the issues if there is an appeal.

13-600 Criteria to establish a right to a variance

The criteria that the BZA must consider when reviewing an application for a variance are referenced in section 13-500 (under “*Decision*”). The reader should anticipate that most variance decisions will come down to the question of whether an *unreasonable restriction* or a *hardship* exists and, unless BZAs and the courts give very relaxed readings of those criteria, there should be few variance applications that actually satisfy the criteria to establish the right to a variance.

13-610 The strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance or alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability.

The evidence must show “that the strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance.” *Virginia Code § 15.2-2309(2)(A)(2)*. If a variance is necessary to accommodate a person with a disability, the evidence must show that the granting of a variance is necessary to alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability. *Virginia Code § 15.2-2309(2)(A)(2)*. For a discussion of the hardship arising for persons with disabilities, see section 13-820.

13-611 Unreasonable restriction on the utilization of the property or a hardship due to a physical condition relating to the property or improvements

The key criteria that must be satisfied for a variance to be granted is whether there is an *unreasonable restriction* on the utilization of the property or a *hardship* due to a physical condition relating to the property or improvements. Of those two criteria, the *hardship* that may arise if a variance is not granted has been by far the more commonly analyzed criterion. That may change under the current variance laws because of a peculiarity in the required showing for a hardship. Under either the *unreasonable restriction* or *hardship* criterion, the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201, which includes the “standard” that the “strict application of the ordinance would unreasonably restrict the utilization of the property.” Thus, an applicant seeking a variance under the *hardship* criterion must establish both a hardship and an unreasonable restriction (the latter to satisfy the standard in Virginia Code § 15.2-2201), whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which continues to be high standard to satisfy).

There are few, if any, cases where the *unreasonable restriction* criterion has been analyzed or formed the basis for granting a variance. The word *unreasonable* cannot be overlooked during the analysis. Something is *reasonable* when it is “[f]air, proper, or moderate under the circumstances; sensible.” *BASF and James City County v. State Corporation Commission*, 289 Va. 375, 770 S.E.2d 458 770 S.E.2d 458 (2015). Something is *unreasonable* if it, in the context here, is “absurd, inappropriate,” “exceeding the bounds of reason or moderation,” or “unconscionable.” *Webster’s Third New International Dictionary* (2002). If an application for a variance is based on the criterion that a restriction is *unreasonable*, the locality should consider whether the restriction – the regulation – should be amended or repealed because unreasonableness raises an issue of whether the regulation is constitutional or facially valid.

In *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), the trial court held that the BZA incorrectly decided that a 35-foot rear-yard setback was not an unreasonable restriction where the setback prevented the petitioners from adding a screen porch that would extend into the setback. The 2,124 square-foot house was built in 1959 on a corner lot and the house had a diagonal footprint on the lot. There

also were utilities and other setbacks that limited extension into other areas on the lot. Although the rear-yard setback was a restriction, the court engaged in no meaningful analysis as to why the 35-foot rear yard setback was *unreasonable* beyond the fact that the setback did not allow the petitioners to do what they wanted to do.

The *hardship* criterion has experienced a profound evolution since 2009. Before 2009, the criterion called for an *undue hardship approaching confiscation* – language that is tantamount to circumstances approaching a regulatory taking of private property for a public use requiring compensation. In 2009, the criterion was amended to require the applicant to merely show an *undue hardship*, though the BZA still had to find an undue hardship approaching confiscation. Beginning in 2015, Virginia Code § 15.2-2309(2) merely requires a *hardship* due to a physical condition relating to the property or improvements. In *In re December 12, 2019 Decision of Board of Zoning Appeals of City of Chesapeake*, 105 Va. Cir. 54 (2020), the trial court affirmed the decision of the BZA granting a variance, concluding that the record supported the BZA’s finding of a hardship. In rejecting the petitioner neighbor’s arguments based on pre-2015 variance law that imposed a higher *hardship* threshold, the court said the following: “This Court must give effect to the removal of the language [that had been in the prior variance law]; the Court ‘will not construe legislative action in a manner that would ascribe to the General Assembly a futile gesture. Legislative amendments are presumed as intended to effect a change in the law. . . We will not read into the statute language which the legislature purposefully deleted.’” *Shaw v. Commonwealth*, 9 Va. App. 331, 334 (1990).”

13-612 The physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance

The attributes composing the *physical condition of the property* are not described in either the definition of *variance* in Virginia Code § 15.2-2201 or in the variance elements in Virginia Code § 15.2-2309(2). However, the reader should consider the property’s narrowness, shallowness, size, shape, exceptional topographic conditions, or any other similar physical conditions. These conditions, in effect, define the *hardship* the BZA must find in order to grant a variance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The attributes of any *improvements* on the property existing on the effective date of the zoning ordinance may also be considered, an element that was added in the 2015 amendments. The effect of this change is seen in *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), where the presence of and limitations caused by utilities on the lot affected the trial court’s decision to hold that the BZA erred when it did not grant a variance to the petitioners.

13-620 The property for which the variance is being requested was acquired in good faith

The evidence must show that “the property for which the variance is being requested was acquired in good faith.” *Virginia Code § 15.2-2309(2)(¶2(i))*.

Although there is no case law identifying what a good faith acquisition of property might be in the context of a variance, it appears that good faith may be shown if the variance is not sought to correct a violation of the zoning ordinance existing on the property when it was acquired by an owner who knew of the violation. An owner’s knowledge that the previous owner of the property had been denied a variance does not affect “good faith” status. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The purchase price of the property is irrelevant to the consideration of whether an owner acted in good faith. *Spence, supra*.

13-630 Any hardship was not created by the applicant for the variance

The evidence must show that “any hardship was not created by the applicant for the variance.” *Virginia Code § 15.2-2309(2)(¶2(i))*. This appears to be similar to the prior standard that prohibited *self-inflicted* hardships, and the cases below were evaluated under that standard.

The situation where the applicant has created a hardship would arise when an owner violates a provision of the

zoning ordinance and then seeks a variance to provide relief from the unlawful act. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). Following are some examples where the court considered whether a hardship was self-inflicted:

- To correct zoning violation; reliance on erroneous boundary markers: Hardship was self-inflicted where the owners constructed a house in violation of side yard setback requirements, although done inadvertently in reliance on misplaced property line markers. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993) (reliance on statement by homeowners' association, which told builder it could assume the property lines were indicated by certain utility markers, that in fact were not on the property lines, resulting in house being constructed 8 inches from property line).
- To correct zoning violation: Hardship was self-inflicted where the owner continued construction of an apartment over an existing garage in violation of the zoning ordinance after knowledge and warning of the likely consequences of her unlawful conduct. *Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959).
- Knowing need for variance: Hardship was not self-inflicted where the owner purchased property knowing that he needed a variance to build a house, because a self-inflicted hardship must pertain to a violation of the zoning ordinance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The standard must be satisfied regardless of whether the hardship was created intentionally or inadvertently. It is an open question as to whether the acts of a contractor or some other third party will be attributed to the *applicant*.

13-640 Granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area

The evidence must show that “granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area.” *Virginia Code § 15.2-2309(2)(i)(ii)*.

The BZA must consider the effect that granting the variance may have on nearby properties. See *Board of Zoning Appeals of City of Chesapeake v. Glasser Bros. Corp.*, 242 Va. 197, 408 S.E.2d 895 (1991). For example, in *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993), granting a variance would have required three adjacent lots to provide an additional 25 feet of front yard where they abutted a pipestem lot line or driveway pavement. The court concluded that the BZA failed to consider the potentially detrimental impact the granting of the variance would have on the future development of the three lots.

The prior version of Virginia Code § 15.2-2309(2) also required consideration of whether the “character of the district” would be changed. The elimination of that broader consideration may open the door for variances that might change the character of the district by, for example, allowing a tall building or the encroachment of a building into a front yard. Perhaps the theory of the new law is that a single variance cannot change the character of a district, and a series of variances is needed to change the character of a district. The issue of a series of variances is addressed in the criterion in section 13-650.

13-650 The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance

The “condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.” *Virginia Code § 15.2-2309(2)(i)(iii)*.

An owner's showing that the special condition of the property and the resulting hardship are non-recurring is of considerable importance in determining the propriety of the variance. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (in determining that a variance from setbacks was improperly granted, the Court rejected the

argument that the historic overlay district regulations were intended to apply only to old buildings and granting a setback variance for the proposed new building would render the zoning ordinance meaningless; rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of the lots in the area were even more shallow yet they complied with the zoning ordinance and the piecemeal granting of variances would nullify the zoning regulations; and, there was “no factual support” for the claim that the condition was unique since all lots in the area must comply with the base and overlay district regulations and the issue must be addressed legislatively).

In *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), the trial court held that the BZA erred when it denied the petitioners’ variance that would have provided relief from a 35-foot rear yard setback that prevented the petitioners from adding a screened porch that would extend into the setback. The BZA’s conclusion that the setback issue was recurring and could be addressed through a zoning text amendment was based on the 35-foot rear yard setback and its effect on the residents of the zoning district being restricted from having screened porches, which had a greater setback than open decks. The court rejected that reasoning because the BZA failed to base its decision on whether the *condition or the situation of the property* was of so general or recurring that it could be resolved by amending the zoning ordinance. The court said that this issue had to be understood in the context of the petitioners’ lot being a corner lot that was wider than deep, with a house having a diagonal footprint, and with expansion to allow a screened porch into other areas on the lot constrained by utilities and other setbacks. Given the apparently unique condition or situation of the property at issue, the court concluded that the condition or situation was not general or recurring, and therefore a legislative solution was not reasonably practicable.

Why are variances for general or recurring problems prohibited? A high number of variance applications from a particular regulation may indicate that there is a problem with the zoning ordinance. If there is a problem with the zoning ordinance, that problem needs to be addressed legislatively. *Martin, supra*. As the Virginia Supreme Court has said, variances are an “administrative infringement upon the legislative prerogatives of the local governing body.” *Packer v. Hornsby*, 221 Va. 117, 123, 267 S.E.2d 140, 143 (1980). Thus, a legislative solution is always preferred over the piecemeal granting of variances. In *Hendrix v. Board of Zoning Appeals of the City of Virginia Beach*, 222 Va. 57, 61, 278 S.E.2d 814, 817 (1981), the Virginia Supreme Court said that “[t]he power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the local governing body.” The Court added that using variances to resolve these problems when a legislative solution is reasonably practicable is prohibited “because the piecemeal granting of variances could ‘ultimately nullify a zoning restriction throughout [a] zoning district’ (internal citation omitted).”

13-660 Granting the variance does not result in a use that is not otherwise permitted on the property or a change in the zoning classification of the property

Granting a variance may not “result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property.” *Virginia Code § 15.2-2309(2)(i)*. This element overlaps the definition of *variance*, which provides that a *variance* does “not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.” *Virginia Code § 15.2-2201*. Use variances have been prohibited in Virginia since 1988. This element is also directly related to the scope of the regulations which may be varied, which are limited to those pertaining to the “shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure.” *Virginia Code § 15.2-2201*.

13-670 The relief or remedy sought by the variance application is not available through a special exception or a zoning modification at the time of the filing of the variance application

The “relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to [Virginia Code § 15.2-2309(6)] or the process for modification of a zoning ordinance pursuant to subdivision [Virginia Code § 15.2-2286(A)(4)] at the time of the filing of the variance application.” *Virginia Code § 15.2-2309(2)(v)*.

This provision is consistent with those cases explaining that a variance “allows a property owner to do what is

otherwise not allowed under the ordinance.” *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982). If the zoning ordinance provides an alternative remedy, a variance is unnecessary. In other words, a variance is only a remedy of last resort.

13-680 The variance is not contrary to the purpose of the ordinance

Virginia Code § 15.2-2309(2) requires that the evidence show not only the elements discussed in sections 13-610 through 13-670, but also that the variance application “meets the standard for a variance as defined” in Virginia Code § 15.2-2201. The definition of *variance* provides that it shall not be “contrary to the purpose of the ordinance.” *Virginia Code* § 15.2-2201.

For example, a variance from the setback requirements in a residential zoning district might be considered to be in harmony with the intended spirit and purpose of the zoning ordinance where: (1) the zoning regulations state that their purpose is to promote the development of existing parcels in residential zoning districts with useful housing stock; (2) a variance is sought to allow a house to be constructed on a vacant lot with a minor setback encroachment; and (3) without a variance, the house could not be constructed. As a contrary example, a variance to allow the location of a house in a floodway is not in harmony with the intended spirit and purpose of a zoning ordinance that prohibited development in the floodway. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).

13-690 The variance application must meet the standard for a variance as defined in Virginia Code § 15.2-2201

Virginia Code § 15.2-2309(2) requires that the evidence show that the variance application “meets the standard for a variance as defined” in Virginia Code § 15.2-2201.

Whether the applicant is seeking a variance under either the *unreasonable restriction* or *hardship* criterion in Virginia Code § 15.2-2309(2), the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201, which includes the “standard” that the “strict application of the ordinance would unreasonably restrict the utilization of the property.” Thus, an applicant seeking a variance under the *hardship* criterion in Virginia Code § 15.2-2309(2) must establish both a hardship and an unreasonable restriction (the latter to satisfy the standard in Virginia Code § 15.2-2201), whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which continues to be a high standard to satisfy). This issue is also discussed in section 13-611 as part of the discussion of the *unreasonable restriction* and *hardship* criteria.

13-700 Consideration of a variance application; matters the BZA may and may not decide

A BZA acts in an administrative capacity in accordance with the standards prescribed by Virginia Code § 15.2-2309(2) when it considers a variance application. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004).

13-710 The BZA acts with discretion, to a point

Within the context of the applicant’s burden of proof to show by a preponderance of the evidence that it has satisfied the criteria for granting a variance, the BZA must exercise its discretion with regard to the particular facts of the application, including the precise extent of the relief sought. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). In the performance of this duty, the BZA is “clothed with discretionary power, and this power must be exercised intelligently, fairly and within the domain of reason, and not arbitrarily.” *Board of Zoning Appeals v. Fowler*, 201 Va. 942, 948, 114 S.E.2d 753, 758 (1960); *see also Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959). “Any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts, is an illegal action by a board of zoning appeals.” *Martin v. City of Alexandria*, 286 Va. 61, 69, 743 S.E.2d 139, 143 (2013).

However, if the standards and criteria for granting a variance are satisfied, Virginia Code § 15.2-2309(2) states that the BZA *must* grant the variance.

13-720 The BZA should explain its decision

Under the prior law, the Virginia Supreme Court said repeatedly that, if the BZA fails to state its findings as required by Virginia Code § 15.2-2309 in granting or denying the variance, the parties cannot properly litigate, and the trial court cannot properly adjudicate, the issues on appeal. *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980); *see also Amberst County Board of Supervisors v. Amberst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005). A BZA is no longer required to state *findings*; however, a BZA may grant a variance only if the evidence *shows* that all the standards and criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion.

13-730 Variances may not be approved unless the standards and criteria in Virginia Code § 15.2-2309(2) are satisfied

Variances may not be approved unless the standards and criteria in Virginia Code § 15.2-2309(2) are satisfied. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (BZA does not have the authority to grant a variance from a regulation prohibiting a nonconforming sign from being repaired at a cost in excess of 50% of its original cost because the regulation does not pertain to the size, area, bulk, or location of a building or structure). Thus, for example, it is inappropriate for the BZA to grant a variance because a proposed design is superior or more attractive than what would be allowed without the variance.

In addition, variances may not be approved solely because similar variances were previously approved. For example, although not mentioned in the court's opinion in *Cochran*, the Fairfax County BZA had previously granted 20 to 25 variances in the neighborhood that was the center of the controversy in that case. An attorney involved in that case has suggested that the omission of this fact from the Virginia Supreme Court's opinion suggests the irrelevance that prior variances should have on the merits of a variance application before the BZA.

13-740 The BZA may impose conditions

In granting a variance, a BZA may impose conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public interest and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. *Virginia Code § 15.2-2309(2)*. Property upon which a variance has been granted is treated as conforming for all purposes under state law and local ordinances; however, a structure permitted by a variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the zoning ordinance. *Virginia Code § 15.2-2309(2)*. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance is required. *Virginia Code § 15.2-2309(2)*. *See section 13-820 for authority to condition variances to accommodate persons with disabilities for as long as the need for the variance exists.*

13-800 Special situations: condominium conversions, the Americans with Disabilities Act, the Fair Housing Act, the National Flood Insurance Program

The preceding analysis pertains to variances subject to and analyzed solely under Virginia Code § 15.2-2309(2). There are at least three special situations where rigid adherence to Virginia Code § 15.2-2309(2) is superseded.

13-810 Condominium conversions

Virginia Code § 55.1-1905(E) provides in part that localities may provide by ordinance that a proposed conversion condominium that does not conform to the zoning, land use, and site plan regulations obtain a variance

before the property becoming a conversion condominium. The BZA must grant the variance “if the applicant can demonstrate to the reasonable satisfaction of the [BZA] that the nonconformities are not likely to be adversely affected by the proposed conversion.” *Virginia Code § 55.1-1905(E)*.

13-820 The Americans with Disabilities Act and the Fair Housing Act

Variance applications received from disabled persons or facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act require special consideration. Under both of those Acts, the locality is required to make reasonable accommodations from its policies and rules (*e.g.*, its zoning regulations and the criteria for granting a variance in Virginia Code § 15.2-2309(2)) so as not to discriminate against disabled persons.

Virginia Code § 15.2-2309(2) expressly recognizes modifying zoning regulations to accommodate persons with disabilities by allowing variances to “alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability.” Virginia Code § 15.2-2309(2) continues: “Any variance granted to provide a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability may expire when the person benefited by it is no longer in need of the modification to such property or improvements provided by the variance, subject to the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 *et seq.*), as applicable. If a request for a reasonable modification is made to a locality and is appropriate under the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 *et seq.*), as applicable, such request shall be granted by the locality unless a variance from the board of zoning appeals under this section is required in order for such request to be granted.”

13-830 National Flood Insurance Program

Localities participating in the National Flood Insurance Program are required to adopt floodplain management regulations required by federal law either as part of its zoning ordinance or otherwise. *44 CFR § 59.1 et seq.*

A locality’s floodplain management regulations must include a provision that provides a procedure and standards for variances for development in the floodplain. A landowner may be eligible for a variance under the floodplain management regulations in two circumstances: (1) for new construction or substantial improvements where nearby structures were constructed below the base flood elevation, generally for parcels less than ½ acre in size; and (2) for new construction, substantial improvement, or development that is required for water-dependent facilities. *44 CFR § 60.6*. Encroachment standards and construction standards specific to the floodplain are among the standards that may be varied. *44 CFR § 60.6*. The findings required to be made by the BZA include a finding substantially similar to the hardship standard applicable to variances considered under Virginia Code § 15.2-2309(2), as well as a finding that the variance will not result in unacceptable or prohibited increases in flood heights. *44 CFR § 60.6*. The BZA is also required to consider a number of factors related to the impact of the variance, if granted. *44 CFR § 60.6*.

13-900 Modifications

Virginia Code § 15.2-2286(A)(4) enables localities to authorize zoning administrators to review and approve *modifications* from zoning regulations. A *modification* is relief from any provision contained in the zoning ordinance with respect to the physical requirements on a lot or parcel of land, including but not limited to the size, height, location or features of or related to any building, structure, or improvements.

13-1000 Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA’s decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code § 15.2-2314*. Persons challenging a decision as a person aggrieved must allege that they are aggrieved within the meaning of the Virginia Supreme Court’s decision in *Friends of the Rappahannock v. Caroline County*, 286 Va.

13-1010 The time in which to file a petition for writ of certiorari

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. *Virginia Code § 15.2-2314*. The date of the *final decision* is the date the BZA takes its vote on the matter that decides its merits. *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 268, 618 S.E.2d 311, 315 (2005). Local zoning regulations or BZA by-laws establishing a different method to determine the running of the 30-day period are inconsistent with Virginia Code § 15.2-2314 and are invalid. *West Lewinsville, supra* (holding invalid BZA by-laws that commenced the 30-day period on the “official filing date,” which was a date specified in the BZA clerk’s letter that was eight days after the BZA voted on the appeal).

The failure of a party to file a petition for writ of certiorari within the 30-day period does not divest the circuit court of its subject matter jurisdiction, so the issue of timely filing is waived if it is not raised in the circuit court. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 347-348, 626 S.E.2d 374, 381 (2006).

13-1020 Nature of the proceeding in circuit court

A proceeding under Virginia Code § 15.2-2314 “has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance.” *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 275 Va. 452, 456-457, 657 S.E.2d 147, 149 (2008) (proceeding under Virginia Code § 15.2-2314 is not a trial proceeding for which nonsuit is available under Virginia Code § 8.01-380(B); adding that the option to take additional evidence was insufficient to change the nature of the proceeding from an appeal to a trial).

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court within 21 days after being served with the writ of certiorari. *Virginia Code § 15.2-2314*. The necessary parties in a case challenging a BZA decision are the governing body, the landowner, and the applicant before the BZA (assuming the latter is different from the landowner). *Virginia Code § 15.2-2314*. The governing body must be named in the petition within the 30-day appeal period. *Boasso America Corporation v. Zoning Administrator of the City of Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017). In *Boasso*, the petitioner appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, the petition did not name the city as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city had to be named in the petition within the 30-day period, or whether the petitioner could add the city as a necessary party by amending the petition after the 30-day period had run. The trial court granted the city’s motion to dismiss the petition because the city had not been named as a necessary party within the 30-day appeal period. The Virginia Supreme Court affirmed. The Court held that a locality’s governing body that “is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition.” In *In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County*, 88 Va. Cir. 114 (2014), the trial court concluded that the failure to serve the governing body with the petition may implicate the provisions of Virginia Code §§ 8.01-275.1 and 8.01-277, but would not constitute grounds for dismissing the case under a motion to dismiss for failing to name a necessary party because the county was included in the style of the case). The court may also allow other aggrieved parties to intervene in the proceeding. *Virginia Code § 15.2-2314*.

The court’s role is to determine whether the BZA’s *decision* was correct. This limited scope of review that applies in a certiorari proceeding prohibits the court from ruling on the validity or constitutionality of the ordinance or statute underlying the BZA’s decision. *City of Emporia v. Mangum*, 263 Va. 38, 44, 556 S.E.2d 779, 783 (2002); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); *Kebaish v. Board of Zoning Appeals of Fairfax County*, 2004 Va. Cir. LEXIS 37 at 17-18, 2004 WL 516224 at 6-7 (2004) (trial court would not rule on the constitutionality of the federal Religious Land Use and Institutionalized Persons Act of 2000 in a certiorari proceeding).

Because the individual members of a BZA act only as a single entity, the court does not review the individual actions of each member of the BZA but reviews the decision of the BZA. *Sundlun v. Board of Zoning Appeals of Fauquier County*, 23 Va. Cir. 53 (1991). The result reached by the circuit court in *Sundlun* is consistent with the broader principle that public bodies act only through the body itself, and not by the acts of its individual members. See *Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922) (a board of supervisors can act only at authorized meetings as a corporate body and not by actions of its members separately and individually).

A petitioner in a certiorari proceeding to review a decision of the BZA cannot challenge the composition of the BZA or the authority of a member to sit on the BZA. *Sundlun, supra*.

13-1030 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions on variance applications, the decision of the BZA is presumed to be correct. *Virginia Code § 15.2-2314*. The petitioner may rebut that presumption by proving by a preponderance of the evidence, including the record before the BZA, that the BZA erred in its decision. *Virginia Code § 15.2-2314*.

The circuit court may reverse or affirm, wholly or partly, or modify the BZA's decision. *Virginia Code § 15.2-2314*. If the BZA's decision is affirmed and the circuit court finds that the appeal was frivolous, the petitioner may be ordered to pay the costs incurred in making the return of the record. *Virginia Code § 15.2-2314*. The petitioner may be entitled to recover its costs only if the court determines that the BZA acted in bad faith or with malice in making the decision that was appealed. *Virginia Code § 15.2-2314*. Any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Virginia Code § 15.2-2314*.

Chapter 14

Decisions by Zoning Officials

14-100 Introduction

This chapter examines the typical decisions referred to in various provisions of the Virginia Code as decisions, determinations, orders, and requirements, including notices of violation (collectively, *decisions*), and except where otherwise noted, this refers to written decisions) made by the zoning administrator and other administrative officers (collectively, the *zoning administrator*), and what makes a decision one that may have binding effect. *See James v. City of Falls Church*, 280 Va. 31, 43, 694 S.E.2d 568, 575 (2010) (a planning commission is not an administrative officer for purposes of making decisions under Virginia Code § 15.2-2311).

Chapter 15 explores the BZA's consideration of appeals from decisions made by the zoning administrator. Chapter 16 (Interpreting a Statute or Ordinance), Chapter 17 (Classifying Primary Uses Determining Whether a Use is an Accessory Use), Chapter 18 (Nonconforming Uses and Structures), and Chapter 19 (Vested Rights) provide guidance on a selected range of issues frequently considered by a zoning administrator and a BZA.

14-200 Decisions made by the zoning administrator

A locality is enabled to provide for administering and enforcing its the zoning ordinance. *Virginia Code § 15.2-2286(A)(4)*. The decisions made by the zoning administrator and other administrative officers under this authority invariably affect the interests of various persons, including the landowner and its neighbors. The zoning administrator in particular has all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, and this authority includes: (1) ordering in writing the remedying of any condition found in violation of the ordinance; (2) insuring compliance with the ordinance, bringing legal action, including injunction, abatement, or other appropriate action or proceeding subject to appeal; and (3) in specific cases, making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of vested rights under Virginia Code §§ 15.2-2307 and 15.2-2311(C). *Virginia Code § 15.2-2286(A)(4)*.

When a request for a decision is made, the zoning administrator must respond within 90 days unless the requester has agreed to a longer period. *Virginia Code § 15.2-2286(A)(4)*. The range of issues that the zoning administrator may be asked to resolve in a decision include:

- The meaning of a particular regulation in the zoning ordinance.
- How a land use should be classified and whether the use is permitted within a particular zoning district.
- Whether a proposed structure complies with setback, height, bulk and other requirements.
- Whether a use or structure is nonconforming.
- Whether an owner has vested rights.
- Whether a lot meets minimum lot size requirements.
- Whether a use or structure complies with the zoning ordinance.

Even though zoning administrators must necessarily interpret the zoning ordinance to execute their responsibilities, they may not rule upon the validity of a zoning regulation, nor waive any requirement they are not expressly authorized to waive. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 487 S.E.2d 207 (1997) (declaring a

zoning ordinance invalid is within the sole province of the courts); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992) (waiver).

14-210 What makes a decision by the zoning administrator one that may have binding effect

A decision, and in particular, a determination, must be based upon a set of existing facts, rather than upon a recitation of non-existent facts, hypotheticals, proposals, ideas, concepts, or “what-if” suppositions. *See Lynch v. Spotsylvania County Board of Zoning Appeals*, 42 Va. Cir. 164 (1997).

If a zoning violation is not the issue, there must be some application pending for specific relief that triggers the zoning administrator’s need to make a decision. *Lilly v. Caroline County*, 259 Va. 291, 298, 526 S.E.2d 743, 746 (2000). The application for specific relief need not pertain directly to a decision on the question answered. *Lilly, supra* (a determination of whether a radio tower was a use permitted by right arose in the context of a proposed zoning amendment and an application for a special use permit).

If a zoning violation is the issue, a decision need not be triggered by an application for specific relief. The zoning administrator may decide that a zoning violation exists upon any information that comes to their attention, by any means. *Gwinn v. Alward*, 235 Va. 616, 622, 369 S.E.2d 410, 412 (1988). Any other approach would hamstring the zoning administrator in enforcing the locality’s zoning laws. *Gwinn, supra*.

When a Decision May Have Binding Effect	
Decision Pertains to a Zoning Violation	Decision Pertains to Another Issue
• Need not be based on a pending application before the locality, but may be based on information that comes to the zoning administrator’s attention • Must be based upon a set of existing facts • Must be in writing	• Must be a pending application before the locality • Must be based upon a set of existing facts • Should be in writing, but may be made orally

If there is no pending application or no zoning violation in issue, any decision by the zoning administrator will likely be found to be an advisory opinion that does not trigger the right to appeal under Virginia Code § 15.2-2311. *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 445 S.E.2d 97 (1994). This rule has been highlighted in two decisions of the Virginia Supreme Court.

In *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), Crucible operated a security training facility in Stafford County and wanted to expand its facility. It sought and obtained from the zoning administrator an “interpretation” that the proposed facility would be classified as a “school,” a by-right use in the applicable zoning district at the time. The zoning administrator’s interpretation was contained in a letter entitled “Zoning Verification,” and the interpretation was conditioned on it being valid as of the date of the letter and was subject to change. Relying on that letter, Crucible bought the property. When the county changed its zoning regulations to allow schools only by special use permit, Crucible sought to claim vested rights based on the zoning administrator’s “Zoning Verification.” The Virginia Supreme Court held that the “Zoning Verification” was not a determination within the meaning of Virginia Code § 15.2-2311(C) so as to allow rights to vest, stating:

The zoning verification letter merely stated that Crucible’s facility fell within the definition of “school” according to the then-current zoning laws and that those laws were subject to change. The zoning verification letter did not permit Crucible to use its property in a way that was otherwise not allowed under then-current zoning laws, and Crucible cannot establish a right to proceed based upon Code § 15.2-2311(C).

Crucible, 278 Va. at 161, 677 S.E.2d at 288.

In *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010), the city’s zoning administrator was asked to interpret the zoning ordinance to decide whether church parcels within a historic district could be consolidated and concluded that they could. Based on the zoning administrator’s interpretation, the church filed a plat to consolidate

the parcels. When the plat reached the city's planning commission, the commission disagreed with the zoning administrator's interpretation and disapproved the plat. In concluding that the zoning administrator's interpretation did not rise to the level of a decision to which vested rights might accrue under Virginia Code § 15.2-2311(C), the Virginia Supreme Court said:

[T]he zoning administrator merely provided an interpretation of City Code § 48-800(a). In its letter to the zoning administrator, Columbia Baptist requested a "zoning interpretation." And in his reply letter, the zoning administrator made clear that he was responding to a "request for an interpretation." He further stated: "while the actual consolidation process is a Planning Commission function [,] it is my *interpretation*" [emphasis in original] that the ordinances permit the consolidation . . . That "interpretation" lacked the finality of an "order, requirement, decision or determination" under Code § 15.2-2311(C).

James, 280 Va. at 44, 694 S.E.2d at 575. The Court went on to hold that the planning commission had the authority to interpret the zoning ordinance in consideration of the plat, and it was not obliged to adopt the zoning administrator's interpretation. *See also Greene v. Board of Zoning Appeals of Fairfax County*, 34 Va. Cir. 227 (1994) (erroneous written determination as to whether property was to be used only for open space was advisory to the county only, it was not one triggering rights and obligations under what is now Virginia Code § 15.2-2311).

A decision has legal significance because, if a person aggrieved by the decision fails to timely appeal it to the BZA, it becomes a final, binding decision – a *thing decided*. At first impression, a different procedure applies when one seeks to challenge a zoning decision made in conjunction with the issuance of a building permit and received no actual notice of the issuance of the permit. *Virginia Code § 15.2-2313*. In such a situation, Virginia Code § 15.2-2313 appears to allow the aggrieved party to pursue relief in court even though no appeal was taken from the decision of the administrative officer to the BZA, provided that the lawsuit is filed within 15 days after the start of construction. However, relying on the Virginia Supreme Court's description in *Lilly*, *supra*, of an appeal to the BZA as a *mandatory appeal*, two trial courts have concluded that an appeal to the BZA under Virginia Code § 15.2-2311 is a prerequisite to an action under Virginia Code § 15.2-2313. *Campbell v. Davidson*, 96 Va. Cir. 55 (2017); *Mirror Ridge Homeowners Association v. Loudoun County Board of Supervisors*, 51 Va. Cir. 406 (2000). *See section 14-230 for required notice of right to appeal written notices of violation or orders.*

14-220 The thing decided rule

Important legal rights and responsibilities attach to a decision. A person aggrieved by a decision of the zoning administrator has the right to appeal it to the BZA. *Virginia Code § 15.2-2311*; *see Chapter 15*. If this mandatory appeal is not timely filed, the zoning administrator's decision becomes a *thing decided* and, thus, it is not subject to court challenge. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988) (zoning administrator's determination that a landowner operated a junkyard on his property in violation of the zoning ordinance became a thing decided and not subject to attack because the landowner did not appeal the decision); *Board of Supervisors of Fairfax County v. Martin*, 23 Va. Cir. 37 (1990) (landowners who failed to appeal decisions to the BZA would not later be allowed to put on evidence of their claim that their use was nonconforming).

When an application for specific relief is pending, a decision or determination that triggers the right to appeal may be made orally. *Lilly, supra* (zoning administrator orally determined at a public hearing whether a use was by-right, the persons aggrieved were present at the hearing, and the zoning administrator advised the public that they could appeal the determination to the BZA).

14-221 The rationale for the rule

The thing decided rule is based on a fundamental principle of administrative law – when an administrative remedy is provided, that remedy must be exhausted before an administrative determination may be challenged in court. In the zoning context, "a landowner may be precluded from making a direct judicial attack on a zoning decision if the landowner has failed to exhaust 'adequate and available administrative remedies before proceeding

with a court challenge.”” *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 23, 445 S.E.2d 97, 100 (1994), quoting *Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989); *Henrico County v. Market Inns, Inc.*, 228 Va. 82, 319 S.E.2d 737 (1984). Thus, a person aggrieved by a decision of the zoning administrator must exhaust the administrative remedy provided – a timely appeal to the BZA under Virginia Code § 15.2-2311 – before an issue may be raised in court.

The exhaustion doctrine serves several purposes: (1) it permits the BZA to apply its experience with the zoning ordinance and to perform functions within its area of expertise; (2) it provides an opportunity for the locality and the other parties to more fully develop the facts upon which the decision is based; (3) it avoids unnecessary judicial review by giving the BZA an opportunity to correct any mistakes of the zoning administrator; and (4) it preserves the autonomy of the administrative system established by a locality for reviewing official determinations.

Thus, an aggrieved person who fails to timely appeal a zoning administrator’s decision to the BZA is thereafter precluded from challenging the following in a civil court proceeding:

- Interpretation: The interpretation of a zoning regulation. *See Phillips v. Telum, Inc.*, 223 Va. 585, 292 S.E.2d 311 (1982); *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 222 S.E.2d 570 (1976); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Noel v. Chesterfield County*, 37 Va. Cir. 219 (1995).
- Use classification: The classification of a use on the property. *Lilly v. Caroline County*, 259 Va. 291 (2000) (tower was a use allowed by right); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988) (activities and use constituted a junkyard).
- Nonconforming status: Whether a use has nonconforming status. *Board of Supervisors of Fairfax County v. Martin*, 23 Va. Cir. 37 (1990).
- Vested rights: Whether a landowner has vested rights to develop its property. *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 831, S.E.2d 483 (2019).
- Violations: Whether a violation of the zoning ordinance exists in a civil enforcement proceeding. *County of Chesterfield v. Lane*, 104 Va. Cir. 1 (2019); *City of Chesapeake v. Kinser*, 97 Va. Cir. 453 (2015) (in civil action seeking declaratory and injunctive relief, the city was entitled to summary judgment supported by the thing decided rule where the defendants had withdrawn their appeal to the BZA); *see City of Virginia Beach v. Witchduck Lake Enterprises*, 99 Va. Cir. 151 (2018) (declining to apply the thing decided rule in a criminal enforcement proceeding).

This short list is not exhaustive. Essentially, the determination of any issue germane to a zoning administrator’s decision may become a thing decided if it is not timely appealed.

The preclusive effect of the rule applies in civil zoning enforcement actions, thereby preventing a defendant from raising issues not appealed as defenses. *Dick Kelly Enterprises, supra*. The rule also may facilitate the resolution of civil zoning enforcement actions. In *McLane v. Clark*, 2010 Va. Cir. LEXIS 66, 2010 WL 2693526 (2010), a Fairfax County zoning inspector issued a notice of violation in 2008 to the owners of a bed and breakfast. The notice of violation was never appealed, but the county did not enforce the alleged violation at that time. Almost two years later, the zoning administrator filed a civil enforcement action in which the county sought both mandatory and prohibitory injunctive relief. The circuit court concluded that the thing decided rule entitled the county to obtain a prohibitory injunction without a trial. The court noted that one of the purposes of a prohibitory injunction was to prevent the future commission of an anticipated wrong. Citing the statutory authority for injunctive relief under Virginia Code §§ 15.2-2208 and 15.2-2286(A)(4), the court concluded:

Given that these statutes expressly provide for injunctive relief for the violation of a zoning ordinance, all that is required by the County in this case is proof of a violation. A Notice of Violation was issued to the Clarks on March 18, 2008, and it was not appealed. Therefore, the fact

that the Clarks were in violation of a zoning ordinance is a thing decided. [citation omitted]
Accordingly, the County has shown all that is required for entry of a prohibitory injunction.

McLane, 2010 Va. Cir. LEXIS at 9, 2010 WL 2693526.

As for the county's request for a mandatory injunction, the court observed that its purpose is to "undo an existing wrongful condition" whose "use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue." *McLane*, 2010 Va. Cir. LEXIS at 4, 2010 WL 2693526 (2010). Although the thing decided rule conclusively determined that the owners were in violation in 2008, the owners contended that the 2008 violation had been abated. The court concluded that the 2008 notice of violation was insufficient to establish that the violation still existed so as to justify the issuance of a mandatory injunction without a trial on the issue.

There are circumstances when the administrative remedy – appeal to the BZA – need not be exhausted. Because neither the zoning administrator nor the BZA may rule on the validity of a zoning ordinance, there is no requirement to exhaust administrative remedies before challenging the validity of an ordinance. *Dail v. York County*, 259 Va. 577, 582, 528 S.E.2d 447, 450 (2000) (challenge to county ordinance); *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997) (no requirement to appeal the county building inspector's determination or to apply for a new zoning permit because there was no administrative remedy equal to the relief sought).

In addition, a landowner need not exhaust administrative remedies by seeking a vested rights determination from the zoning administrator before asking the court to make such a determination. *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 157-158, 677 S.E.2d 283, 286 (2009). This is so because, historically, the courts were empowered to make vested rights determinations. The 1993 amendment to Virginia Code § 15.2-2286 that authorized zoning administrators to make vested rights determinations did not divest the courts of their authority. Thus, the authority exists concurrently in the zoning administrator and the courts. However, once a landowner pursues a vested rights determination through the zoning administrator and the BZA, it must exhaust that remedy and, if it fails to do so, the matter is a thing decided. *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 583, 831 S.E.2d 483 (2019). The Virginia Supreme Court explained: "To allow Bragg Hill to independently seek a vested rights determination in circuit court, beyond the 30-day appeal period following the BZA's determination would render Code § 15.2-2314 meaningless" and would defeat the purpose of the administrative remedy, which "would be eternally subject to collateral attack in a future circuit court proceeding." *Bragg Hill*, 297 Va. at 583-584, 831 S.E.2d 492.

14-222 The rule will apply if the zoning administrator made the basis of the decision clear

The thing decided rule will apply if the zoning administrator has made the basis of the decision clear. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988). It does not appear that this requirement is overly demanding or requires an unusual amount of detail.

In *Lilly*, the Virginia Supreme Court concluded that the oral statement by the zoning administrator at a public hearing that a "radio tower was a by-right use in the Rural Preservation zoning district" was a sufficient explanation of the basis for his determination. *Lilly*, 259 Va. at 297, 526 S.E.2d at 746.

In *Dick Kelly Enterprises*, the zoning administrator had notified the landowner of certain "zoning and building code violations at the subject property," noted that the property was located in a "Bay Front Residential District," and that "we have learned that for a period in excess of two years you have used it as a forty-two (42) unit apartment complex" rather than as a 42-unit motel. The zoning administrator further stated that the subject property's use was "inconsistent with the use approved in the Certificate of Occupancy, violates Section 904 of the zoning ordinance and Sections 112 and 115 of the building code" and "violates the area, parking, and other BFR district regulations." The Virginia Supreme Court concluded that the zoning administrator had adequately made clear the basis for the decision. *Dick Kelly Enterprises*, 243 Va. at 379, 416 S.E.2d at 684.

In *Alward*, zoning officials sent the landowner a series of letters stating that the use of his property was “considered by the Fairfax County Zoning Ordinance to be a junk yard . . . Consequently, the use of this commercial property as a repository for junk vehicles, trash service equipment, and miscellaneous junk and debris is in violation of the Ordinance.” The letter also advised the landowner that the property was located in a C-8, highway commercial, zoning district and, as such, could not be used for “trash hauling and related storage of vehicles,” and that the use of the property “as the location for a refuse collection service and the related storage of vehicles observed on September 13, 1984, is in violation of the Fairfax County Zoning Ordinance.” The Virginia Supreme Court concluded that the zoning officials had adequately made clear the basis for their determination. *Alward*, 235 Va. at 622, 369 S.E.2d at 413.

14-230 Required notice to the owner when a request for a decision is made by a person other than the owner

Virginia Code § 15.2-2204(H) provides that when a person other than the landowner or the landowner’s agent requests a decision, determination, order, or requirement from either the zoning administrator, or another administrative officer that is subject to appeal under Virginia Code §§ 15.2-2311 and 15.2-2314, written notice of the request must be given to the landowner of the property within 10 days after receipt of the request.

The written notice to the landowner must either be given by the zoning administrator or other administrative officer or, at the direction of the zoning administrator or other officer, the requesting applicant. If the applicant is required to provide the notice to the landowner, the applicant also must provide satisfactory evidence to the zoning administrator or other administrative officer that the notice has been given. Written notice mailed to the owner at the last known address of the owner as shown on the current real estate tax assessment books or current real estate tax assessment records satisfies the notice requirements.

14-240 Required notice to the owner of a notice of violation or order

A notice of violation or an order of the zoning administrator will be binding against a landowner only if the zoning administrator provided notice of violation or the order to the landowner. *Virginia Code § 15.2-2311(A)*. Otherwise, any decision of the BZA on the matter is nonbinding against the landowner. *Virginia Code § 15.2-2311(A)*. If the landowner had actual notice of the notice of violation or the order, or participated in the BZA appeal hearing, the lack of notice is waived. *Virginia Code § 15.2-2311(A)*.

14-250 Required notice of right to appeal written notices of violation or orders

Any written notice of a zoning violation or a written order of the zoning administrator must include a statement informing the recipient that they may have a right to appeal the notice of zoning violation or written order within 30 days, and that the decision will be final and unappealable if not appealed within 30 days. The 30-day appeal period for the recipient of the notice or order does not begin until they are advised of the right to appeal. *Virginia Code § 15.2-2311(A)*. A written notice that is sent by registered or certified mail to, or posted at, the last known address of the landowner as shown on the current real estate tax assessment books or current real estate tax assessment records, is deemed sufficient notice to the landowner and satisfies the notice requirements. *Virginia Code § 15.2-2311(A)*. Finally, the notice of appeal must inform the recipient of the applicable appeal fee and provide a reference to where additional information may be obtained regarding filing an appeal. *Virginia Code § 15.2-2311(A)*.

Under Virginia Code § 15.2-2311(A), the required notice of appeal applies only to written notices of violation and written orders of the zoning administrator. It does not apply to other decisions and determinations that may be made and, thus, the 30-day appeal period may run against someone who may not have received, or may not have been entitled to receive, notice of the decision or determination. In other words, third parties do not have an unlimited period of time to appeal a decision, even if they assert that they are aggrieved. Otherwise, there would be no finality to a decision or determination. *But see Ripol v. Westmoreland County Industrial Development Authority*, 82 Va. Cir. 69 (2010), where third-parties were allowed to challenge a decision as to whether a proposed use was a “school” long after the 30-day appeal period had passed because the decision was not directed to them and there was no evidence that the petitioners knew about the decision when it was made.

14-300 The doctrine of estoppel and its application to erroneous decisions

A zoning official may make an incorrect decision, and that incorrect decision may place a burden on the person affected by it; other times an incorrect decision may give landowners greater rights than they might otherwise be entitled to and, once discovered, the locality may seek to correct that error.

14-310 The doctrine of estoppel

In the land use context, the doctrine of estoppel is typically raised by a landowner who has been erroneously granted a permit or some other kind of approval. For example, a building official may issue a building permit for a building that will be unlawfully located within the setback area on the lot. When the mistake is discovered, but construction on the building has begun, the landowner will claim that the locality is estopped (prevented) from applying the setback regulations to the lot because it relied on the building permit issued by the locality.

Except in the circumstances discussed in section 14-320, the doctrine of estoppel does not apply to Virginia localities. *Wolfe v. Board of Zoning Appeals of Fairfax County*, 260 Va. 7, 532 S.E.2d 621 (2000); *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138 (1981); *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978); *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968). The doctrine of estoppel does not apply to localities because:

An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute.

WANV, 219 Va. at 63, 244 S.E.2d at 763-764.

No subordinate municipal official can bind the municipality to an incorrect . . . interpretation of the [locality's] ordinances.

Wolfe, 260 Va. at 19, 532 S.E.2d at 627; *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992).

If a building permit is issued in violation of law, it confers no greater rights upon a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance or authorize a structure at a location prohibited by the ordinance. Its issuance by such a municipal officer is unauthorized and void. [citations omitted] Administrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them.

Segaloff, 209 Va. at 382, 163 S.E.2d at 685 (building canopy constructed in setback as shown on approved building permit plans, but in violation of setback regulations).

Thus, estoppel does not apply because the laws of the state and a locality are supreme to any decision of an official in the administration of those laws. The effect is to prevent a law from being overridden or circumscribed by erroneous decisions at the administrative level. It is irrelevant whether the official is acting in good faith. *Hurt*, 222 Va. at 97, 279 S.E.2d at 142 (estoppel would not apply even though the building official acted in good faith and under the honest belief that he had a legal right to issue the building permit, because he was without authority to issue a building permit for the construction of a multi-family apartment building unless and until the county regulation had been met).

14-320 Virginia Code § 15.2-2311(C) and statutory estoppel

Virginia Code § 15.2-2311(C) provides “for the potential vesting of a right to use property in a manner that otherwise would not have been allowed.” *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008). When a zoning administrator makes an erroneous written decision that works to the benefit of a landowner (e.g., by allowing the landowner to do something not otherwise allowed by the zoning ordinance) and that error is discovered, the zoning administrator presumably will seek to correct it. Virginia Code

§ 15.2-2311(C) creates a limited circumstance when estoppel principles apply to localities, and vests rights in the landowner if the zoning administrator does not correct an erroneous written determination within 60 days after the date of the decision.

Specifically, Virginia Code § 15.2-2311(C) provides:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical errors.

See section 19-400 for a discussion of the vested rights that may attach to an erroneous determination.

14-400 The doctrine of laches as applied to decisions related to zoning enforcement

In most Virginia localities, zoning enforcement is triggered by a complaint, which is usually lodged by a neighbor of the alleged violator or other concerned citizens. Some localities are engaged in proactive zoning enforcement where zoning inspectors go out seeking zoning violations on their own. Under this prevailing state of zoning enforcement, it is possible for zoning violations to go unnoticed by the locality for years, sometimes decades. The passage of time, however, in no way legitimizes the illegal use or prevents the locality from enforcing its zoning regulations.

Laches is an equitable defense that may be raised by a party who claims that the failure of another party to assert a known right for an unexplained length of time is prejudicial to the party raising the defense. *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 47, 353 S.E.2d 727, 735 (1987). Assuming for the sake of argument that the defense of laches applies against localities, the defense would be raised by a zoning violator facing a zoning enforcement action. However, laches does not apply to a locality in the discharge of its governmental functions, and this includes the enforcement of its zoning regulations. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 381, 416 S.E.2d 680, 685 (1992); *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 164, 349 S.E.2d 351, 354 (1986).

In *Dick Kelly Enterprises*, the landowner unsuccessfully argued that the doctrine should apply because it had been illegally operating an apartment building in a building zoned for a motel use for six years before the zoning regulations were enforced. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the circuit court rejected the landowner's claim that laches should prevent the county from enjoining him from operating his illegal vehicle light service business because the county had not enforced against his property for over 40 years, the business was now his sole source of income, and because he was no longer able to work away from his home due to his and his wife's medical conditions.

To put it simply, an illegal use does not become a legal use solely because it has escaped detection from zoning inspectors for a certain period of time.

Chapter 15

Appeals of Decisions by Zoning Officials to the Board of Zoning Appeals

15-100 Introduction

A board of zoning appeals (“BZA”) has the power and duty to consider a variety of matters. Some of those matters originate with the BZA, such as applications for special use permits (see Chapter 12) and variances (see Chapter 13). The procedures and standards applicable to those matters are covered in those respective chapters. Other matters originate with either the zoning administrator or other administrative officers (collectively, the *zoning administrator*), and they come to the BZA in the nature of an appeal from that zoning official’s decisions, determinations, orders, and requirements, including notices of violation (collectively, *decisions*). *Virginia Code* § 15.2-2309. This chapter focuses on appeals of those decisions to the BZA.

The range of issues that the zoning administrator may be asked to resolve in a decision, and which may be appealed to the BZA, include:

- The meaning of a particular regulation in the zoning ordinance.
- How a land use should be classified and whether the use is permitted within a particular zoning district.
- Whether a proposed structure complies with lot size, setback, height, bulk, or other requirements.
- Whether a use or structure complies with the zoning ordinance or is nonconforming.
- Whether an owner has vested rights.

A decision has legal significance because, if a person aggrieved by the decision fails to timely appeal it to the BZA, it becomes a final, binding decision – a *thing decided*. (see Chapter 14 for further discussion of the *thing decided* rule).

15-200 Standing to appeal

Any person aggrieved, and any officer, department, board, or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision, or determination (to repeat, collectively, a *decision*) made by any other administrative officer in the administration or enforcement of the state zoning laws, the locality’s zoning ordinance, or any modification of zoning requirements pursuant to Virginia Code § 15.2-2286, may appeal the decision to the BZA. *Virginia Code* § 15.2-2311(A).

To have a right to appeal a decision, a person who is not affiliated with the locality must be a *person aggrieved* by the decision. *Virginia Code* § 15.2-2311(A). The meaning of *aggrieved* is settled under Virginia case law:

... [I]n order for a petitioner to be “aggrieved,” it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner “must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest” ... The word “aggrieved” in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Virginia Marine Resources Commission v. Clark, 281 Va. 679, 687, 709 S.E.2d 150, 155 (2011), quoting *Virginia Beach Beautification Commission v. Board of Zoning Appeals of the City of Virginia Beach*, 231 Va. 415, 419-420, 344 S.E.2d 899, 902-903 (1986); see *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 445 S.E.2d 97 (1994); *Mann v. Loudoun County Board of Supervisors*, 75 Va. Cir. 24 (2008). Organizations that neither own nor occupy any real

property, nor hold any right that would be affected by a decision, are not persons aggrieved. *Pearsall v. Virginia Racing Commission*, 26 Va. App. 376 (1998).

Mere proximity to the parcel that is the subject of the appeal alone is insufficient to establish standing; a *particularized harm* must exist. *Friends of the Rappahannock v. Caroline County*, 286 Va. 38, 743 S.E.2d 142 (2013) (to allege standing, proximity to the subject property, alone, is insufficient; instead, a plaintiff must allege sufficient facts showing harm to some personal right or property right different than that suffered by the public generally). This standard applies to appeals of zoning decisions to the BZA. *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County*, 89 Va. Cir. 345 (2014). The alleged harm also cannot be speculative. In *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County*, the zoning administrator determined that a proposed warehouse was part of a “public benefit use” that could be allowed by special use permit, and not a prohibited “storage” use. The trial court concluded that the neighbor’s alleged harm that the decision changed the nature of their residential neighborhood with resulting visual impacts, increased traffic flow, and noise from truck deliveries, and the need for increased vigilance, was “speculative” and insufficient to establish standing. The court noted that the proposed warehouse still required a special use permit from the board of supervisors, and until that board approved the special use permit, it was “impossible to know what harms, if any, might result.”

15-300 Notice of the decision and perfecting an appeal

An appeal must be filed within 30 days after the decision is made. *Virginia Code* § 15.2-2311(A); see *Voorhees v. County of Fairfax Board of Zoning Appeals*, 2009 Va. Cir. LEXIS 84, 2009 WL 1269384 (2009) (BZA did not err in denying appeal as untimely where zoning approval of grading plans was made on April 20, and the petitioner’s appeal was not filed until May 23; failure of petitioners to receive notice of zoning approval does not trigger any due process rights where notice of the decision was not required by state law or county ordinance).

Written notice of a zoning violation or a written order of the zoning administrator must include a statement informing recipients that they may have a right to appeal the decision within 30 days in accordance with Virginia Code § 15.2-2311, and that the decision will be final and unappealable if it is not appealed within 30 days. *Virginia Code* § 15.2-2311(A). The notice of the zoning violation or written order must state that the applicable appeal fee and explain where additional information may be obtained regarding the filing of an appeal. *Virginia Code* § 15.2-2311(A). The appeal period does not begin until the statement is given and the zoning administrator’s written order is sent by registered or certified mail to, or posted at, the last known address or usual place of abode of the property owner or its registered agent, if any. *Virginia Code* § 15.2-2311(A).

A locality’s zoning ordinance may provide for an appeal period of less than 30 days, but not less than 10 days, for short-term recurring violations pertaining to temporary or seasonal commercial uses, parking commercial trucks in residential zoning districts, or maximum occupancy limitations on residential dwelling units. *Virginia Code* § 15.2-2286(A)(4).

The failure to file a timely appeal results in the official determination becoming final and binding – a *thing decided*, at least in a subsequent civil court proceeding.

At least one trial court has concluded that an appeal to the BZA pursuant to Virginia Code § 15.2-2311(A) may not be circumvented by filing a court action under Virginia Code § 15.2-2313. Virginia Code § 15.2-2313 provides:

Where a building permit has been issued and the construction of the building for which the permit was issued is subsequently sought to be prevented, restrained, corrected or abated as a violation of the zoning ordinance, by suit filed within fifteen days after the start of construction by a person who had no actual notice of the issuance of the permit, the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals.

In *Campbell v. Davidson*, 96 Va. Cir. 55 (2017), the city had issued building permits for the construction of a 301-unit multifamily apartment complex on April 11, 2017. On April 25, 2017, the plaintiffs, who were landowners in

the vicinity of the apartment complex, filed a lawsuit against the city and the zoning administrator pursuant to Virginia Code § 15.2-2313. The plaintiffs alleged that the building permits had been issued in violation of the zoning ordinance. The plaintiffs never filed an appeal to the board of zoning appeals under Virginia Code § 15.2-2311.

The issue in *Campbell* was whether Virginia Code §§ 15.2-2311 and 15.2-2313 provide optional avenues for appeal or whether they are sequential. Citing prior Virginia case law, the trial court granted the city's and zoning administrator's motion to dismiss the lawsuit, holding that an appeal under Virginia Code § 15.2-2311 is a "mandatory appeal" and the plaintiffs were precluded from direct judicial attack under Virginia Code § 15.2-2313 because they failed to timely exhaust their administrative remedies under Virginia Code § 15.2-2311. The trial court said that what the plaintiffs had attempted in this case "was essentially an end-run around that mandatory administrative appeal." The trial court in *Mirror Ridge Homeowners Association v. Board of Supervisors of Loudoun County*, 51 Va. Cir. 406 (2000) reached a similar conclusion. In dismissing both cases on the plaintiffs' failure to exhaust their remedy under Virginia Code § 15.2-2311, the trial courts do not satisfactorily address the express language in Virginia Code § 15.2-2313 that "the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals."

In those localities imposing civil penalties for zoning violations, the civil penalties may not be assessed by a court having jurisdiction during the 30-day appeal period. *Virginia Code § 15.2-2311(A)*.

The notice of appeal must be filed with the zoning administrator and with the BZA and must specify the grounds for the appeal. *Virginia Code § 15.2-2311(A)*. After the notice of appeal is filed, the zoning administrator must promptly transmit to the BZA all the papers constituting the record upon which the action appealed was taken. *Virginia Code § 15.2-2311(A)*.

If an appellant fails to perfect the appeal because it was not filed within 30 days after the date of the determination or there is a question as to whether the appellant is aggrieved, the BZA should consider and act on these jurisdictional issues. It is not the locality's staff's role to reject or dismiss the appeal or to refuse to process it.

15-400 Effect of filing an appeal on pending proceedings

Generally, filing an appeal with the BZA stays all proceedings in furtherance of the action appealed from. *Virginia Code § 15.2-2311(B)*. *Proceedings*, as the term is used in Virginia Code § 15.2-2311(B), refers to not only litigation, but also "any action that proceeds from the action appealed from." *Wahrhaftig v. Artman*, 73 Va. Cir. 37, 38 (2007) (because Virginia Code § 15.2-2311(B) is remedial in nature, it should be liberally construed and, therefore, construction of the structure authorized by the county's issuance of zoning permits was stayed pending an appeal to the BZA). For example, if the zoning administrator makes an official determination that a zoning violation exists on the landowner's property and initiates a zoning enforcement action, that action is stayed while the appeal is considered by the BZA. As another example, if a site plan is being processed and there is an appeal of the use classification related to the site plan, processing of the site plan is stayed until the appeal is resolved.

However, proceedings pertaining to parts of a project that are separate and distinct components, such as different phases of a phased site plan or subdivision plat, are not stayed. *Ripol v. Westmoreland County Industrial Development Authority*, 82 Va. Cir. 69 (2010) (BZA appeal pertaining to the site plan for Phase 1A did not stay proceedings pertaining to Phase 1B; therefore, the zoning administrator was not stayed from acting on the site plan for Phase 1B of the project where the two phases were separate and distinct components).

Finally, a zoning administrator may certify to the BZA that facts exist such that a stay, in their opinion, would cause imminent peril to life or property. *Virginia Code § 15.2-2311(B)*. If the zoning administrator makes such a certification, the pending proceedings will not be stayed unless the appellant successfully applies to the BZA or the circuit court for a restraining order. *Virginia Code § 15.2-2311(B)*.

15-500 Procedural requirements before and during an appeal hearing

Several procedural rules apply to the conduct of an appeal hearing:

- Scheduling the hearing on the appeal: The BZA must “fix a reasonable time for the hearing” *Virginia Code* § 15.2-2312.
- Notice of the hearing: The BZA must “give public notice thereof as well as due notice to the parties in interest.” *Virginia Code* § 15.2-2312. Notice of the hearing must be provided as required in *Virginia Code* § 15.2-2204. *Virginia Code* § 15.2-2309(3).
- Before the hearing; contact by parties with BZA members: The *non-legal staff* of the governing body, as well as the appellant, landowner, or its agent or attorney, may have *ex parte* communications with a member of the BZA before the hearing but may not discuss the facts or law relative to the appeal. If any *ex parte* discussion of facts or law occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited *ex parte* communications do not include discussions that are part of a public meeting or discussions before a public meeting to which the appellant, landowner, or its agent or attorney are all invited. The *non-legal staff of the governing body* is “any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542.” *Virginia Code* § 15.2-2308.1(A) and (C).
- Before the hearing; sharing locality-produced information: Any materials relating to an appeal, including a staff recommendation or report furnished to a BZA member, must be available without cost to the appellant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the appellant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (*Virginia Code* § 2.2-3700, *et seq.*). *Virginia Code* § 15.2-2308.1(B).
- At the hearing; the right to equal time for a party to present its side of the case: The BZA must offer an equal amount of time in a hearing on the case to the appellant or other person aggrieved and the staff of the local governing body. *Virginia Code* § 15.2-2308(C).
- At the hearing; the zoning administrator’s required explanation: At a hearing on an appeal, the zoning administrator must explain the basis for their decision. *Virginia Code* § 15.2-2309(1).
- At the hearing; the presumption of correctness: At the hearing, the zoning administrator’s decision is presumed to be correct. *Virginia Code* § 15.2-2309(1).
- At the hearing; the burden of proof is on the appellant: After the zoning administrator explains the basis for the decision, the appellant has the burden of proof to rebut the presumption of correctness by a preponderance of the evidence. *Virginia Code* § 15.2-2309(1).
- Decision: The decision by the BZA must be based on its “judgment of whether the administrative officer was correct.” *Virginia Code* § 15.2-2309(1). The BZA may reverse or affirm, wholly or partly, or may modify, the decision of the zoning administrator. *Virginia Code* § 15.2-2312. *See section 15-700 for further discussion.*
- Time for the decision: The decision must be made within 90 days. *Virginia Code* § 15.2-2312. The 90-day period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on an appeal after the time period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).
- Required vote: The concurring vote of a majority of the BZA’s membership is necessary to reverse the determination of the zoning administrator. *Virginia Code* § 15.2-2312. This means that a seven-member BZA may reverse the zoning administrator’s determination only if at least four members vote for reversal, and a five-member BZA may reverse only if at least three members vote for reversal. *See Hughey v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 138 (1996) (3-3 vote of a seven-member BZA was a “decision” because the vote established that the BZA could not and would not reverse the zoning administrator’s decision). Thus, if only three members of a five-

member BZA are present for the vote, all three must vote in favor of reversal; however, the zoning administrator's determination may be affirmed or modified on a 2-1 vote. If the BZA's vote on an appeal results in a tie vote, the person filing the appeal may request to have the matter carried over until the next meeting, but the BZA is not required to grant the request. *Virginia Code § 15.2-2311(D)*.

- **Findings to support the decision:** To facilitate judicial review, the BZA is required to make findings that reasonably articulate the basis for its decision. *See Packer v. Hornsby*, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980) (adding that if the BZA does not, “the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal”). There is no minimum standard to which a BZA must adhere in making findings of fact. At bottom, the BZA must ensure that it has created a record that addresses the findings so that the circuit court can properly adjudicate the issues on appeal. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) (“In fact, the verbatim transcript contains numerous findings of fact in support of the BZA’s decision”).

15-600 Considering an appeal; matters the BZA may and may not decide

The BZA’s decision on appeal is limited to the issue of whether the zoning administrator’s decision was correct. *Virginia Code § 15.2-2309(1)*; *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 295, 435 S.E.2d 385, 388 (1993); *see In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015) (BZA correctly determined that the zoning administrator erred when he determined that he needed more information before he could make a determination as to the nonconforming status of a towing and recovery lot when the zoning ordinance at the time had a by-right use classification that was consistent with the actual use at the time). This does not mean that the BZA’s inquiry is limited only to the reasons and authority cited in the zoning administrator’s written decision. *Town of Madison v. Board of Zoning Appeals/Potichas*, 65 Va. Cir. 433, 434-435 (2004). Regardless of what the zoning administrator states in their determination, the BZA’s role is to determine whether the *decision* was correct and must apply the terms and provisions of the zoning ordinance even if the zoning administrator did not cite them. *Madison, supra*.

Summary of the Scope of Review on Appeal
• The issue for the BZA is whether the zoning administrator’s decision was correct. • Statements by the appellant or their attorney may further limit the scope of the appeal. • In the consideration of an appeal, the BZA may not: → Determine whether a proposed use is appropriate in the zoning district. → Determine what is in the public interest. → Amend or repeal a zoning regulation. → Determine that a zoning regulation is invalid.

The scope of the proceeding before the BZA may be limited by statements made by the appellant or their attorney. *See Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). In *Adams*, the applicant’s attorney stated at the BZA hearing on his client’s application for a variance for a sign that the “only issue is whether Adams spent too much on the sign and whether, because of the misunderstanding between the City and Adams [on] what could be done and what could not be done and whether it would in fact be proper for a variance. That’s all that’s before you.” Because the scope of the BZA proceeding was limited by the attorney’s statements, the scope of judicial review was likewise limited. The Virginia Supreme Court determined that the BZA correctly denied the variance, particularly since the BZA did not have the authority to grant a variance on the grounds presented. *Adams*, 261 Va. at 414, 544 S.E.2d at 319.

A BZA may not determine what uses are appropriate in a zoning district because that is a legislative function reserved to the governing body. *Foster v. Geller*, 248 Va. 563, 568, 449 S.E.2d 802, 806 (1994) (the BZA does not have the power to rezone property); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982) (the decision of the legislative body, when framing its zoning ordinance, to place certain uses in the special exception or conditional use category, is a legislative action). In such an appeal, the BZA’s role is only to determine whether the use is within one of the use classifications the governing body has decided to allow in the district.

Likewise, a BZA may not determine what is in the public interest because that determination requires the balancing of private conduct and the public interest, which is a legislative decision that lies with the governing body, not the BZA. *Helnick v. Town of Warrenton*, 254 Va. 225, 229, 492 S.E.2d 113, 114 (1997) (the exercise of legislative power involves the “balancing of the consequences of private conduct against the interests of public welfare, health, and safety”); *Southland Corp.*, 224 Va. at 521, 297 S.E.2d at 721 (the power to regulate the use of land by zoning laws is a legislative power, residing in the state, which must be exercised in accordance with constitutional principles). Administrative zoning decisions such as those made by the BZA must be grounded within the legislative framework provided. *Higgs v. Kirkbride*, 258 Va. 567, 573, 522 S.E.2d 861, 864 (1999). While the BZA should consider the zoning ordinance, the ordinance should not be extended by interpretation or construction beyond its intended purpose. *Higgs, supra*. In addition, equitable considerations are inappropriate. *Coleman v. Board of Zoning Appeals of the City of Fairfax*, 2011 Va. Cir. LEXIS 66 (2011) (reversing decision of the BZA because a single BZA member relied on “equitable considerations” in voting to overturn the decision of the zoning administrator that the counseling center had engaged in an activity not allowed by the zoning ordinance; the circuit court said that the BZA member’s statements revealed that he arrived at his decision because the counseling center had engaged in that activity for years). See Chapter 29 for discussion of the rule that public bodies act only as a corporate body and not by the actions of its members separately and individually.

Lastly, one of the common duties of the BZA on an appeal may be to determine whether the zoning administrator correctly interpreted the zoning ordinance. The power to interpret the zoning ordinance has its limitations. Although the BZA (as well as the zoning administrator) must necessarily interpret the zoning ordinance to execute its responsibilities, that obligation does not give rise to a power to declare a regulation invalid, which is a determination within the sole province of the judiciary. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 487 S.E.2d 207 (1997). In addition, the BZA does not have the power to amend or repeal portions of a zoning ordinance. *Foster, supra*. The principles relevant to the interpretation of the zoning ordinance by the BZA are well established. *Higgs, supra*. See Chapter 16 for a discussion of some of those key principles.

15-700 The effect of a decision on an owner who did not receive a notice of violation or order

For a notice of violation or an order of the zoning administrator to be binding against a landowner, the landowner must have been given notice of the violation or the order. *Virginia Code § 15.2-2311(A)*. Otherwise, any decision of the BZA on the matter is nonbinding against the landowner. *Virginia Code § 15.2-2311(A)*. If the landowner had actual notice of the violation or the order, or participated in the appeal hearing, the lack of notice is waived. *Virginia Code § 15.2-2311(A)*.

15-800 Presenting an appeal to the BZA

Appeals to the BZA can become legal free-for-alls resulting in long, drawn-out hearings where a multitude of issues, both relevant and irrelevant, are raised by the participants and the BZA, and where the relevant and material issues may be lost in the confusion. This risk is especially true where the BZA’s practices and procedures do not require a level of formality that imposes structure to the proceedings and the participants and the BZA are not familiar with the relevant issues and the applicable legal standards.

15-810 Insist on a clearly stated and comprehensive statement of the basis for the appeal

The appellant’s written appeal must clearly state the basis for the appeal. When the appeal is received, the BZA or its staff must review the statement to ensure this requirement is satisfied. A statement of the basis for the appeal is critical because it should be relied on to frame *and limit* the issues on appeal.

If the statement is unclear or needs further information, the BZA or its staff should ask the appellant to elaborate on the basis for the appeal. Without a clearly stated basis for appeal, the parties and the BZA can only guess what the key issues will be on appeal (such as whether a use is nonconforming). In any event, the appellant must provide as much information as possible about the appeal before the appeal is scheduled for hearing.

15-820 Presenting the appeal

There are several things a locality's staff can do to present their side of an appeal to ensure that the BZA understands and focuses on the material issues.

- Identify the dispositive issues: Staff must identify the dispositive issues and keep them at the forefront for the BZA's consideration. This will depend, in part, on the appellant providing a detailed statement of the basis for the appeal.
- Provide a legal memorandum: Appeals to the BZA are quasi-judicial proceedings that often raise legal issues that need to be explained to the BZA. For example, assume that the issue on appeal is whether a use is accessory to a primary use; the BZA may need to be briefed on the elements of establishing an accessory use and how those elements have been interpreted under the case law. If necessary, a legal memorandum prepared by the locality's attorney should accompany the staff report. Staff should not be concerned that a legal memorandum will cause the appeal to become too legalistic. The BZA is always obligated to apply the correct legal principles when it makes its decision.
- Use visual aids: Presentations should include a visual component for several reasons. Maps, aerial photographs, and ground-level photographs familiarize the BZA and the persons attending the public hearing with the property at issue. Applicable zoning regulations, definitions of key terms, and other information provide the BZA, the participants, and others in attendance points of reference that they can easily refer to when necessary.
- Focus the oral presentation on the dispositive issues: BZA members must read the locality's staff report and other materials, the appellant's written materials, and all the other writings received pertaining to the appeal before the public hearing. Staff should assume that the BZA has read these materials and focus its oral presentation on the dispositive issues and the relevant materials and facts, rather than merely re-read the staff report at the public hearing.
- Minimize the detours to the irrelevant and immaterial issues: All parties to an appeal need to ensure that the BZA understands the relevant and material issues. Whether intentional or not, some appellants may raise irrelevant or immaterial issues and arguments (*e.g.*, common topics include the claim that the owner is a longstanding resident who pays taxes; less obvious though irrelevant topics include the claim that the zoning on the property is inappropriate for the neighborhood), misstate or misrepresent the law (*e.g.*, by stating that a regulation or a case stands for A, when it actually stands for B), or play the victim or seek sympathy (*e.g.*, "I already built the structure"; "I didn't know it was a violation"; "So and so said it was okay"; "So and so has been harassing me about this/has been verbally abusive"; "Doesn't the zoning department have anything better to do with its time?"). Unfortunately, this strategy may be effective with some BZA members.

The strategies applied to properly present a particular appeal will depend on the issues and parties involved, and the public interest that may be generated by the appeal.

15-900 Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board, or bureau of the locality, may appeal the BZA's decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code* § 15.2-2314.

15-910 The time in which to file a petition for writ of certiorari

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. *Virginia Code* § 15.2-2314. The date of the *final decision* is the date the BZA takes its vote on the matter that decides its merits. *West Levinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 268, 618 S.E.2d 311, 315 (2005). Local zoning regulations or BZA by-laws establishing a different method to determine

the running of the 30-day period are inconsistent with Virginia Code § 15.2-2314 and are invalid. *West Lewinsville, supra* (holding invalid BZA by-laws that commenced the 30-day period on the “official filing date,” which was a date specified in the BZA clerk’s letter that was eight days after the BZA voted on the appeal). The failure of a party to file a petition for writ of certiorari within the 30-day period does not divest the circuit court of its subject matter jurisdiction, so the issue of timely filing is waived if it is not raised in the circuit court. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 347-348, 626 S.E.2d 374, 381 (2006).

15-920 The parties in an appeal to the circuit court

The necessary parties in a case challenging a BZA decision are the governing body and the landowner and the appellant before the BZA (assuming the latter is different from the landowner). The third paragraph of Virginia Code § 15.2-2314 states:

Any review of a decision of the board shall not be considered an action against the board and the board shall not be a party to the proceedings; however, the board shall participate in the proceedings to the extent required by this section. *The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings in the circuit court.* The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals. (italics added)

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court within 21 days after the writ of certiorari is served on it. *Virginia Code § 15.2-2314*.

In *Boasso America Corporation v. Zoning Administrator of the City of Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017), Boasso appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, Boasso’s petition did not name the city council as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city council had to be named in the petition within the 30-day period, or whether Boasso could add it as a necessary party by amending its petition after the 30-day period had run. The trial court granted the city’s motion to dismiss the petition because the city council had not been named as a necessary party within the 30-day appeal period. The Virginia Supreme Court affirmed. The Court held that a locality’s governing body that “is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition.”

The court may also allow other aggrieved parties to intervene in the proceeding. *Virginia Code § 15.2-2314*. Naming the governing body in the style of the case is not required. *See In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County*, 2014 WL 1391769 (Va. Cir. Ct. 2014).

15-930 The nature of the proceeding in circuit court

A proceeding under Virginia Code § 15.2-2314 “has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance.” *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 275 Va. 452, 456-457, 657 S.E.2d 147, 149 (2008) (proceeding under Virginia Code § 15.2-2314 is not a trial proceeding for which nonsuit is available under Virginia Code § 8.01-380(B); adding that the option to take additional evidence was insufficient to change the nature of the proceeding from an appeal to a trial).

The court’s review of the BZA’s decision is limited to the scope of the BZA proceeding, *i.e.*, whether the zoning administrator’s decision was correct. *Foster v. Geller*, 248 Va. 563, 567, 449 S.E.2d 802, 805 (1994); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294-295, 435 S.E.2d 385, 388 (1993). Thus, the court’s role, like the BZA’s, is to determine whether the *decision* was correct, applying all the applicable terms and provisions of the zoning ordinance, even if the zoning administrator did not cite them.

The limited scope of review that applies in a certiorari proceeding prohibits the court from ruling on the validity

or constitutionality of the ordinance or statute underlying the BZA's decision. *City of Emporia v. Mangum*, 263 Va. 38, 44, 556 S.E.2d 779, 783 (2002); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); *Kebaish v. Board of Zoning Appeals of Fairfax County*, 2004 Va. Cir. LEXIS 37 at 17-18, 2004 WL 516224 at 6-7 (2004) (trial court would not rule on the constitutionality of the federal Religious Land Use and Institutionalized Persons Act of 2000 in a certiorari proceeding).

Because the individual members of a BZA act only as a single entity, the court does not review the individual actions of each member of the BZA but reviews the decision of the BZA. *Sundlun v. Board of Zoning Appeals of Fauquier County*, 23 Va. Cir. 53 (1991). The result reached by the circuit court in *Sundlun* is consistent with the broader principle that public bodies act only through the body itself, and not by the acts of its individual members. See *Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922) (a board of supervisors can act only at authorized meetings as a corporate body and not by actions of its members separately and individually).

A petitioner in a certiorari proceeding to review a decision of the BZA cannot challenge the composition of the BZA or the authority of a member to sit on the BZA. *Sundlun, supra*.

An appeal may be dismissed as moot if the landowners no longer own the property to which an appeal pertains. *Board of Supervisors of Fairfax County v. Ratcliff*, 298 Va. 622, 842 S.E.2d 377 (2020) (landowners sold their home while the county's appeal of the circuit court decision in favor of the landowners was pending; the Virginia Supreme Court vacated the judgment of the trial court).

15-940 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions arising from appeals from decisions by the zoning administrator, two rules apply. On questions of fact, the findings and conclusions of the BZA are presumed to be correct. *Virginia Code* § 15.2-2314. The appealing party may rebut that presumption by proving by a preponderance of the evidence, which includes the record before the BZA, that the BZA erred in its decision. *Virginia Code* § 15.2-2314. On questions of law, the court hears arguments on those questions *de novo* ("anew"), as though the BZA had not decided the question and, therefore, without any presumptions. *Virginia Code* § 15.2-2314. The interpretation of statutes and ordinances are questions of law to which no presumption of correctness applies. *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 269, 673 S.E.2d 170, 179 (2009).

The party challenging the BZA's decision has the burden of proof. *Trustees of the Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 380-381, 641 S.E.2d 104, 107 (2007); *Foster v. Geller*, 248 Va. 563, 566, 449 S.E.2d 802, 805 (1994). Although the trial is not *de novo* and is generally held on the record of the proceedings before the BZA, any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Virginia Code* § 15.2-2314.

The circuit court may reverse or affirm, wholly or partly, or modify the BZA's decision. *Virginia Code* § 15.2-2314. If the BZA's decision is affirmed and the circuit court finds that the appeal was frivolous, the petitioner may be ordered to pay the costs incurred in making the return of the record. *Virginia Code* § 15.2-2314. The petitioner may be entitled to recover its costs only if the court determines that the BZA acted in bad faith or with malice in making the decision that was appealed. *Virginia Code* § 15.2-2314.

Chapter 16

Interpreting Statutes and Ordinances

16-100 Introduction

This chapter provides general guidance regarding the interpretation of statutes and ordinances, which is a common task of not only the zoning administrator, but also the board of zoning appeals (“BZA”) and all others charged with administering the zoning, subdivision, and other statutes and ordinances. This is by no means an exhaustive review of the rules of statutory interpretation. It does, however, provide a general framework for interpreting statutes and ordinances and addresses many misconceptions about this sometimes-difficult task.

The rules of interpretation are the same for statutes and ordinances, and for simplicity, they are collectively referred to in this chapter as *laws*.

16-200 Who is responsible for interpreting the land use ordinances and the comprehensive plan

At the staff level, the task of interpreting the zoning ordinance is assigned to the zoning administrator. *Virginia Code* § 15.2-2286. A BZA is also authorized to interpret the zoning ordinance. *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999). The task of interpreting the subdivision ordinance is assigned to the subdivision agent. *Virginia Code* § 15.2-2241(9).

A locality’s public bodies also have the authority to interpret an ordinance if it is necessary to do so to exercise its powers. *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010) (planning commission had the authority to interpret the zoning ordinance as part of its consideration of a subdivision plat; also holding that the planning commission was not obligated to adopt the zoning administrator’s interpretation of the zoning ordinance). In addition, a governing body is authorized to interpret the comprehensive plan. *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980); *Gasner v. Board of Supervisors of Fairfax County*, 1993 WL 945908 (Va. Cir. Ct. 1993). On appeal from decisions of the zoning administrator, a governing body is authorized to interpret proffers. *Virginia Code* § 15.2-2299 *et seq.*

In the end, the courts “shoulder the duty of interpreting statutes because ‘pure statutory interpretation is the prerogative of the judiciary.’” *Fitzgerald v. Loudoun County Sheriff’s Office*, 289 Va. 499, 505, 771 S.E.2d 858, 860 (2015). “This axiom stems from basic principles of separation of powers,” *Fitzgerald, supra*, because “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

16-300 Give a law its plain and natural meaning

The first step in interpreting a law is to employ the plain and natural meaning of the words used. *City of Charlottesville v. Payne*, 299 Va. 515, 856 S.E.2d 203 (2021); *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 618 S.E.2d 311 (2005); *Capelle v. Orange County*, 269 Va. 60, 607 S.E.2d 103 (2005); *Fritts v. Carolinas Cement Company*, 262 Va. 401, 551 S.E.2d 336 (2001); *McClung v. County of Henrico*, 200 Va. 870, 108 S.E.2d 513 (1959). If the language of a law is clear and unambiguous, there is no need to “construe” it. *Taylor v. Shaw and Cannon Co.*, 236 Va. 15, 372 S.E.2d 128 (1988). Resort to rules of construction, legislative history, and extrinsic facts are not permitted because the words of the law itself must be taken as written to determine their meaning. *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999); *Taylor, supra*.

Following are several principles that guide this analysis, recognizing that some of them, ordinarily, would be resorted to only when attempting to determine the meaning of an *ambiguous* law (the courts often apply them to unambiguous laws), but they do help understand how to discern the plain and natural meaning:

- The intent of a law is determined from its language: Often, those charged with interpreting a law mistakenly jump to a *perceived* intent of the law, construe it accordingly, and ignore the language of the law itself. However, when employing the plain and natural meaning to language that is unambiguous, the key question is not what the governing body intended to enact, but the meaning of the words of the law enacted. *Carter v. Nelms*, 204 Va. 338, 131 S.E.2d 401 (1963). When a law is unambiguous, the governing body’s *intent* is determined only from what the law says, and not from what anyone thinks it should have said. *Payne, supra* (the General Assembly’s intent is determined “from the plain and natural meaning of the words used”); *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) (“We determine the General Assembly’s intent from the words employed in the statutes”).
- The words chosen must be applied unless an absurd result would follow: It must be assumed that the governing body chose, with deliberation and care, the words it used when it adopted the law at issue. *Miller v. Highland County*, 274 Va. 355, 650 S.E.2d 532 (2007) (as employed in the relevant statutes, the terms “locality” and “board of supervisors” are not synonymous or interchangeable). The words used are binding when the law is interpreted, *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 396 S.E.2d 672 (1990), unless such a literal interpretation would involve a manifest absurdity. *Payne, supra* (“In interpreting a statute, we are bound by “the plain language of a statute unless the terms are ambiguous or applying the plain language would lead to an absurd result”); *Dominion Trust Co. v. Kenbridge Construction Co.*, 248 Va. 393, 448 S.E.2d 659 (1994). If the rule was otherwise, the legislative power of the governing body would be usurped by those not holding that power. *Barr, supra*. For example, in *Land & Learning Development, LLC v. Board of Supervisors of Shenandoah County*, 55 Va. Cir. 226 (2001), the court agreed with the board of supervisors that cluster developments in a certain zoning district were limited to 25 acres, even though the court agreed with the developer’s argument that “limiting the maximum size of a cluster housing development undermines the stated goal of preserving open spaces.” The court recognized that there were countervailing policy goals that led the board to impose the size limitation, and it would not substitute its judgment for that of the board.
- The meaning given to words must be considered in their context: When ascertaining the plain meaning of a law, each word’s meaning must be considered in the context of the entire phrase from which it is taken. *Bell v. Commonwealth*, 22 Va. App. 93 (1996). An undefined term must be given its ordinary meaning, given the context in which it is used. *Sansom v. Board of Supervisors of Madison County*, 257 Va. 589, 514 S.E.2d 345 (1999). The context may be examined by considering the other language used in the law. *Sansom, supra*. The context of the language used by the governing body is also considered to determine if it shows an intent to have the law apply retroactively and prospectively. *Board of Supervisors of James City County v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014) (holding that Virginia Code § 15.2-2303.1:1, which delayed the collection of “any cash proffer” to be paid on a per dwelling unit basis until completion of the final inspection and prior to the issuance of a certificate of occupancy, did not apply retroactively).

Suggested Approach to Determine the Plain and Natural Meaning of a Law
• Read the entire phrase to understand its context generally, and its context with other provisions of the law. • Review the law’s definitions to determine the meaning of words used in the phrase. • Review dictionaries to determine the meaning of words not defined in the law and apply a meaning that is relevant to the context in which the term is used. When it resorts to a dictionary, the Virginia Supreme Court often cites <i>Webster’s Third New International Dictionary</i>.

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- Give meaning to every word: No part of a law may be treated as meaningless unless absolutely necessary. *Garrison v. First Federal Savings and Loan of South Carolina*, 241 Va. 335, 402 S.E.2d 25 (1991); *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation*, 277 Va. 198, 671 S.E.2d 160 (2009) (holding that the BZA correctly affirmed the determination by the zoning administrator that a site plan showing multi-family structures violated the zoning district regulations because, although “condominium-type ownership” was allowed by special use permit in the district, multi-family structures were not allowed; since “condominium-type ownership” applies to the legal form of land tenure to be adopted, not to the physical structure of the buildings to be erected and the ownership aspect of the term could not be ignored). An exception to this rule applies when a word appears to have been inserted through inadvertence or mistake and is incapable of any sensible

meaning or is otherwise repugnant to the rest of the law. *Burnette v. Commonwealth*, 194 Va. 785, 75 S.E.2d 482 (1953).

- Dictionaries may be used to define non-technical words: It is unlikely that every word in a law, or every word in a code, is defined. A word that is non-technical is presumed to have been used in its ordinary sense. *Frere v. Commonwealth*, 19 Va. App. 460 (1995). Dictionaries may be used as aids in obtaining the plain and natural meaning of a word. *Fritts, supra*; *Brown-Forman Corp. v. Sims Wholesale Co.*, 20 Va. App. 423 (1995). Other resources also may be relied on. For example, in order to determine whether a flag qualifies as an official flag of the United States, it may be appropriate to rely on Executive Order 10834 if the term is not otherwise defined in the zoning ordinance. *Hanover County v. Dunn*, 82 Va. Cir. 225 (2011) (upholding determination that the defendant's flag was not a flag of the United States allowed by the zoning ordinance because it did not comply with Executive Order 10834; therefore, the defendant's banners were mere representations of the flag and were prohibited under the zoning ordinance).
- The same word used different sections of a law should be given same meaning; exception. When the same word is used in different sections of a law, the courts will give it the same meaning in each instance unless there is a clear indication that the legislative body intended a different meaning. *REVI, LLC v. Chicago Title Insurance Co.*, 290 Va. 203, 211, 776 S.E.2d 808, 812 (2015).
- Avoid absurd or unreasonable results: Zoning regulations, as with all other laws, must be interpreted to achieve a sensible meaning, and interpretations that produce absurd or unreasonable results must be avoided. *McFadden v. McNorton*, 193 Va. 455, 69 S.E.2d 445 (1952); *Hoover v. Saunders*, 104 Va. 783 (1906). An absurd result describes situations in which the law would be "internally inconsistent or otherwise incapable of operation." *Payne, supra*; *Loch Levan Land Limited Partnership v. Board of Supervisors of Henrico County*, 297 Va. 674, 686, 831 S.E.2d 690, 696 (2019); *Covel v. Town of Vienna*, 280 Va. 151, 159, 694 S.E.2d 609 (2010); *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006). In *Loch Levan*, the Virginia Supreme Court also explained what is not an "absurd" result: "absurd" in this context does not mean 'bad policy' or 'a result a litigant really, really does not like.'
- Avoid curious, narrow, or strained interpretations. Curious, narrow, or strained interpretations also should be avoided. *Payne, supra* ("the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction"). Certainly, a law should not be extended by interpretation beyond its intended purpose. *Higgs v. Kirkebride*, 258 Va. 567, 522 S.E.2d 861 (1999). It is perfectly reasonable to conclude that if the governing body had intended to include a provision in an ordinance, it could, and would, have done so. *Board of Zoning Appeals ex rel. County of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999).
- Assume that amendments are intended to make substantive changes: When current and prior versions of a law are at issue, there is a presumption that the governing body, in amending the law, intended to make a substantive change in the law. *West Levinsville Heights, supra*. Further, it is assumed that the amendments to a law are purposeful, rather than unnecessary. *West Levinsville Heights, supra*; *Boyd v. Commonwealth of Virginia*, 216 Va. 16, 215 S.E.2d 915 (1975). However, when amendments are enacted soon after controversies arise over the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act – a formal change – rebutting the presumption of substantial change. *Boyd, supra*.
- Ejusdem generis: General words are to be taken as referring only to those things of the same class as the special words.
Example: A statute that refers to "... animals such as cats and dogs."
Effect of the rule: The general word "animals" does not include wild animals.
- Noscitur a sociis: The meaning of a term can be understood from the words around it.
Example: In a statute pertaining to money and interest earned, the term "interest" means "annual interest."
Effect of the rule: Because of the words around it, "interest" could not mean daily, weekly, or monthly interest.

- Expressio unius est exclusio alterius: Reference to one or more things in a particular class excludes all other things in that class.
Example: The reference to “locality” excludes “authorities.”
Effect of the rule: Among the various types of entities, the fact that the statute refers to “locality” means that other public entities such as “authorities” are excluded.
- Exceptions: Exceptions in a law to a general provision are given a strict construction. *Commonwealth v. Edwards*, 235 Va. 499, 370 S.E.2d 296 (1988). This means that the entitlement to the exception must appear clearly from the language relied upon. *Westminster Canterbury of Hampton Roads, Inc. v. City of Virginia Beach*, 238 Va. 493, 385 S.E.2d 561 (1989).

Some additional rules, even though they are to be applied when interpreting an ambiguous law, are found in section 16-440 that may provide additional guidance in interpreting a law.

Section 16-310 examines two cases where the zoning administrator and the BZA correctly interpreted the zoning ordinance. The cases show that when done correctly, the exercise can be relatively simple. However, zoning administrators and BZAs can go seriously astray when they ignore the fundamental principles discussed in this chapter and instead strain to reach a particular result. The cases in sections 16-320 and 16-330 illustrate situations in the land use context where the public bodies failed to adhere to some of these fundamental principles.

16-310 Follow the basic rules to reach a sound result

In *The Lamar Company, LLC v. Board of Zoning Appeals, City of Lynchburg*, 270 Va. 540, 620 S.E.2d 753 (2005), Lamar sought approval to remove two billboards and re-erect billboards approximately 10 yards from their current location. The relevant zoning regulations prohibited a billboard from being erected in the district unless the billboard “replaced” a then-existing billboard in the district. Because the zoning ordinance did not define “replaces,” the zoning administrator resorted to the dictionary and applied the following definition – “to place again: restore to a former place, position, or condition.” Based on this definition, the zoning administrator determined that the new billboards would satisfy the zoning ordinance only if they were placed in the exact same location (*i.e.*, the footprint of) as the existing billboards. Because the new billboards would not be in the exact same location as the existing billboards, the zoning administrator denied Lamar’s request to move the billboards, and the BZA affirmed that decision.

The Virginia Supreme Court found no error in the BZA’s decision. The Court’s opinion is instructive as to how laws should be interpreted: (1) the zoning administrator chose from among several possible definitions of “replaces,” but chose the one determined to best reflect the meaning of the word *within the context of the zoning ordinance*; (2) although the “footprint” requirement may not have been the only possible interpretation, it clearly fell within the reasonable scope of the dictionary definition; and (3) both the zoning administrator and the BZA were familiar with the use of the word “replaces” and other relevant terms used in the zoning ordinance.

In *Trustees of the Christ and St. Luke’s Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007), the issue was whether two parcels separated by a public street were *adjacent* within the meaning of the zoning ordinance to allow them to be considered a single lot for zoning purposes. The zoning administrator and the BZA concluded that they were not adjacent and the Virginia Supreme Court affirmed. The Court stated that “deciding when two objects are not widely separated but are close enough to be adjacent requires a ‘judgment call.’”

16-320 Don’t ignore the plain meaning of a law, even with the best intentions

In *Board of Zoning Appeals ex rel. County of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999), the zoning administrator and the BZA went astray when, to reach a conclusion they believed would be equitable to a landowner and the county, they ignored the plain meaning of a regulation and construed it in a manner they thought was fair, though contrary to the regulation.

The issue in *852 L.L.C.* was how to interpret a regulation in the York County zoning ordinance pertaining to computing developable land area. The regulation provided density credits for certain bodies of water that could be included in calculating net developable density. Specifically, the regulation allowed: (1) a 0% density credit for existing ponds, lakes, or other impounded water bodies; (2) a 50% density credit for certain nontidal wetlands; and (3) a 100% density credit for stormwater management ponds or basins. The owner sought a determination of the density credit for an 11-acre body of water on a 30-acre parcel.

The zoning administrator initially determined that the body of water was an existing lake and entitled to no density credit. When the owner complained, the zoning administrator agreed to consider a portion of the body of water to be a stormwater management facility, but only that portion that would be required to meet the stormwater management requirements of the drainage area. The zoning administrator arrived at a density credit of 18.6%, and the BZA affirmed the decision on appeal. The trial court reversed the decision of the BZA.

On appeal to the Virginia Supreme Court, the BZA argued that the density credit regulation was ambiguous where a body of water served multiple purposes (lake, wetland, or stormwater management facility), and that its decision offered “a fair interpretation of the ordinance which recognizes legitimate development expectations, while protecting the county from overdevelopment.”

The Virginia Supreme Court concluded that, however equitable the BZA’s solution might be, it “extended beyond permissible ordinance interpretation and became prohibited legislative action taken by an administrator.” First, the Court concluded that the ordinance was unambiguous because it provided that the computation of the density credit “shall” be determined by one of the three percentages stated in the ordinance. Because it was undisputed that the body of water was used for stormwater management (though it may have had excess capacity for that purpose), the plain meaning of the regulation required that it be given a 100% density credit. The Court concluded: “Nowhere does the ordinance permit the administrator to allocate a reduced density credit based on what the administrator and his staff determine is the appropriate percentage ‘necessary for a development site such as the subject property’ . . . Had the County Board of Supervisors intended the administrator to have such latitude, it would have so provided in the ordinance; such latitude may not properly be created by administrative interpretation.” *852 L.L.C.*, 257 Va. at 490, 514 S.E.2d at 770.

In *Renkey v. County Board of Arlington County*, 272 Va. 369, 375, 634 S.E.2d 352, 356 (2006), the board rezoned land from the R-5 to the C-R zoning district, even though the first paragraph of the C-R district regulations stated that in order to be eligible for the C-R classification, “a site shall be located within an area designated ‘medium density mixed use’ and zoned ‘C-3’.” The Virginia Supreme Court rejected the board’s claim that this provision was nothing more than part of the district regulation’s preamble, which began with the stated purposes of the C-R zoning district. The Court said that the language at issue set out mandatory eligibility criteria for the district.

16-330 Don’t read language into a law that isn’t there

In *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000), the plaintiffs owned land in the vicinity of a proposed radio station and tower and sought to challenge a decision by the zoning administrator that a radio tower was a use allowed by right. The Lillys had been present at all four public hearings before the board of supervisors at which the question arose. At the fourth public hearing, the zoning administrator announced his determination that the construction of a radio tower was a by-right use and told the audience that his ruling could be appealed to the BZA. No one, including the Lillys, appealed the zoning administrator’s determination to the BZA.

The Lillys filed a declaratory relief action challenging the board of supervisors’ decisions approving a radio station and tower. The circuit court ruled that their action was barred because they failed to exhaust their administrative remedies by timely appealing the zoning administrator’s verbal determination to the BZA. On appeal, the Lillys claimed, among other things, that they had not received notice of the zoning administrator’s determination. In its analysis of Virginia Code § 15.2-2311(A), the Virginia Supreme Court noted that nothing in section 15.2-2311(A) required that the zoning administrator’s decision be in writing. Indeed, Virginia Code § 15.2-2311(A) only requires that “any *written notice of a zoning violation* or a *written order* of the zoning administrator” must inform the aggrieved person of his or her right to appeal. The zoning administrator’s decision in *Lilly* was neither a

notice of zoning violation nor an order. Although the practice among zoning administrators may be to put all their determinations and decisions in writing, there is no requirement in Virginia Code § 15.2-2311(A) that a zoning administrator's determination or decision, or the notice of the right to appeal, be in writing unless it is a notice of a zoning violation or a written order.

The Virginia Supreme Court concluded that the Lillys had actual notice of the decision because they were present at the public hearing, the zoning administrator made clear the basis for the decision, and the zoning administrator intended the decision to be final – based on his statement that it could be appealed to the BZA.

The following four cases illustrate errors made by zoning administrators and BZAs who read language into zoning ordinances that did not exist.

In *Donovan v. Board of Zoning Appeals of Rockingham County*, 251 Va. 271, 467 S.E.2d 808 (1996), the Virginia Supreme Court held that the BZA erred when it determined that an automobile graveyard lost its nonconforming status because it was not screened within three years after the adoption of the zoning ordinance. The Court concluded that “[n]othing in the ordinance provides that the failure to screen an automobile graveyard terminates a valid nonconforming use.” *Donovan*, 251 Va. at 276, 467 S.E.2d at 811.

In *Cook v. Board of Zoning Appeals of City of Falls Church*, 244 Va. 107, 418 S.E.2d 879 (1992), the Virginia Supreme Court held that the BZA erred when it determined that all structures built before 1910 were deemed to be on the city's official register of protected property. The Court found that the BZA's interpretation was contrary to the regulation's express requirement that each structure successfully complete a certification procedure before being placed on the official register.

In *Shri Ganesh, LLC v. City Council for the City of Hampton*, 2014 Va. LEXIS 19 2014 WL 11398528 (2014) (unpublished), the owner of an unimproved parcel sought to install posts to prevent trespassers from driving golf carts across the parcel to the beach. The relevant zoning regulation at the time allowed as a permitted use “an accessory building or structure, . . . provided that no accessory *building* shall be constructed on a lot until the construction of the main building has been actually commenced . . .” The zoning administrator determined that the posts were not allowed because an accessory building *or structure* could not be constructed before commencing construction of the main building. However, the posts did not meet the definition of a “building.” The Virginia Supreme Court concluded that the zoning administrator's determination was plainly wrong because the restriction in the ordinance that prohibited accessory *buildings* from being constructed until construction of the main building had commenced did not apply to accessory *structures*.

In *Ramsey v. Board of Zoning Appeals of the Town of Front Royal*, 68 Va. Cir. 135 (2005), a landowner appealed the BZA's decision that a special use permit was required to construct a garage on a lot, a portion of which was in the floodplain, even though the garage would not be constructed on the portion of the lot that was in the floodplain. The relevant zoning regulation stated that a special use permit was required “for all uses, activities and development occurring within any floodplain district . . .” The zoning administrator and the BZA erred because they misread the regulation to mean that a special use permit was required for uses, activities, and development occurring *anywhere on any lot, any portion of which lay within any floodplain district*. The zoning regulations did not impose such a requirement.

16-340 Two rules specifically applicable to zoning ordinances

The Virginia Supreme Court has said that zoning ordinances “should be given a fair and reasonable construction in the light of the manifest intent of the legislative body enacting them, the object sought to be attained, the natural import of the words used in common and accepted usage, the setting in which such words are employed, and the general structure of the ordinance as a whole.” *Patton v. City of Galax*, 269 Va. 219, 229-230, 609 S.E.2d 41, 46 (2005), quoting *Mooreland v. Young*, 197 Va. 771, 91 S.E.2d 438 (1956); *McEwan v. Board of Supervisors of County of Fairfax*, 103 Va. Cir. 238 (2019).

However, zoning regulations also are in derogation of the common law and operate to deprive an owner of a use their land which otherwise would be lawful; therefore, they should be strictly construed in favor of the property

owner. 83 *Am. Jur. 2d, Zoning and Planning*, § 699; see, e.g., *Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997) (“Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms”); *Higgs v. Kirkbride*, 258 Va. 567, 522 S.E.2d 861 (1999) (an ordinance should not be extended by interpretation beyond its intended purpose). A rule of strict construction only means that the regulations are not to be enlarged in their operation beyond their express terms. As a rule of statutory construction, this rule applies only when an ordinance is ambiguous. See section 16-400 for a summary of the rules that apply to the construction of ambiguous ordinances.

16-350 The meanings given by the courts to certain commonly used words and phrases that are modifiers

Certain words and phrases that act as modifiers recur throughout the Virginia Code and local ordinances, and it is helpful to understand how the courts have interpreted these terms:

- **“All”:** The word *all* suggests an expansive meaning because *all* is a term of great breadth. *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012).
- **“An” and “any”:** The words *an* and *any*, are unrestrictive modifiers and are generally considered to apply without limitation. *Sussex Community Services Association v. Virginia Society for Mentally Retarded Children, Inc.*, 251 Va. 240, 243, 467 S.E.2d 468, 469 (1996); see *Board of Supervisors of James City County v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014), where the Virginia Supreme Court concluded that Virginia Code § 15.2-2303.1:1(A), and its reference to *any cash proffer*, applied retroactively.
- **“Shall include”:** The term *shall include* is not exhaustive, and merely indicates that the listed items, among others, are covered by the relevant provision. *Shall include* is not equivalent to *limited to*. *Project Vote/Voting for America, Inc.*, 682 F.3d at 337.

16-400 If a law is ambiguous, apply rules of construction to give meaning

An ambiguous law is subject to rules of construction to give it meaning. Language is ambiguous if it can be understood in more than one way. *Virginia-Am. Water Co. v. Prince William Service Authority*, 246 Va. 509, 436 S.E.2d 618 (1993). An ambiguity also exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness. *Brown v. Lukhard*, 229 Va. 316, 330 S.E.2d 84 (1985). The fact that parties may disagree as to the meaning of a law does not necessarily mean that a law is ambiguous. *Michie’s Jurisprudence, Statutes*, p. 310. When a law is ambiguous, the language must be construed to promote the end for which it was enacted, if such an interpretation can reasonably be made from the language used. *VEPCO v. Board of County Supervisors of Prince William County*, 226 Va. 382, 309 S.E.2d 308 (1983). A law should be read to give reasonable effect to the words used and to promote the ability of the enactment to remedy the mischief at which it is directed. *Jones v. Connell*, 227 Va. 176, 314 S.E.2d 61 (1984).

Surprisingly, there do not appear to be many published opinions where a Virginia court has found a law to be ambiguous and applied the rules of statutory construction. A good example of an ambiguous law is found in *Anglin v. Joyner*, 181 Va. 660, 26 S.E.2d 58 (1943), where the statute in issue provided for the forfeiture of a chauffeur’s license upon “conviction or forfeiture of bail upon two charges of reckless driving all within the preceding twelve months.” A chauffeur was convicted in August 1941 and February 1942. The chauffeur contended that the statute required that he be charged two times within a 12-month period for the forfeiture statute to apply. The Virginia Supreme Court found the statute to be ambiguous but found that the Department of Motor Vehicles’ longstanding consistent interpretation was to apply the 12-month period to the dates of the convictions, not the dates of the charges, and upheld the forfeiture of the chauffeur’s license.

The reader should be aware that the rules of statutory construction are numerous, some are contradictory to one another, and they can be selectively invoked to support a desired result. “Canons of construction need not be conclusive and are often countered, of course, by some pointing in a different direction.” *Circuit City Stores, Inc. v.*

Adams, 532 U.S. 105, 115, 121 S.Ct. 1302 (2001). Sections 16-410 through 16-440 provide brief discussions of some of the key rules.

16-410 Ascertain the intent of the governing body

If a law is ambiguous, the intent of the governing body must be ascertained. This determination involves the appraisal of the subject matter, purposes, objects, and effects of the law, in addition to its express terms. *Vollin v. Arlington Co. Electoral Board*, 216 Va. 674, 222 S.E.2d 793 (1976). One source for determining the intent of the governing body is the law's preamble, which is the introductory statement explaining the law's basis and objective. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006). In a typical zoning ordinance, each district's regulations begin with a preamble stating the governing body's purpose and intent for that district.

The views of the meaning and application of a law indicated by both the legislative and administrative departments of the locality also are material in determining the purpose and intent of the law. *Belle-Haven Citizens Association v. Schumann*, 201 Va. 36, 109 S.E.2d 139 (1959). For example, in *Gasner v. Board of Supervisors of Fairfax County*, 1993 WL 945908 (Va. Cir. Ct. 1993), the circuit court found that a provision of Fairfax County's comprehensive plan (which is not a law) calling for "environmentally responsible" development was ambiguous. As such, the court concluded that the board of supervisors could interpret the term in a manner that, in its discretion, best implemented the objectives of the plan, provided that its construction was reasonable.

16-420 Weight may be given to the consistent construction by officials charged with enforcement

When a law is ambiguous, the Virginia Supreme Court has often said that the consistent construction of a law by officials charged with its enforcement, such as the zoning administrator, is given great *weight*. *Cook v. Board of Zoning Appeals of City of Falls Church*, 244 Va. 107, 418 S.E.2d 879 (1992). The reader should be aware that some earlier zoning cases also refer to the court giving *deference* to the interpretation given by the zoning administrator or the BZA. See *The Lamar Company, LLC v. Board of Zoning Appeals, City of Lynchburg*, 270 Va. 540, 620 S.E.2d 753 (2005) and *Trustees of the Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007). Those cases, and their reference to *deference*, were based on a different standard of judicial review in BZA cases that changed on July 1, 2006.

In *The Nielsen Company, LLC v. County Board of Arlington County*, 289 Va. 79, 767 S.E.2d 1 (2015), a tax case, the Virginia Supreme Court said that "[w]hen 'the statute is obscure or its meaning doubtful, [a court] will give great weight to and sometimes follow the interpretation which those whose duty it has been to administer it have placed upon it.'" "Weight," the *Nielsen* Court said, "refers to the degree of consideration a court will give an agency's position in the course of the court's wholly independent assessment of an issue." It should be noted that the courts have often cited this rule even in cases where the court found the ordinance to be unambiguous. *Weight* is different than *deference*.

With the foregoing statements of the Virginia Supreme Court in mind, it remains vital that each interpretation of a law must be supportable on its own merits. When viewed from that perspective, the following principles from earlier case law make sense:

- Courts will reject plainly wrong consistent administrative interpretations: If the consistent administrative interpretation is so at odds with the plain language used in the law as a whole, the interpretation is plainly wrong and will be reversed. *Board of Zoning Appeals ex rel. County of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999).
- Locality may change what had been a consistent administrative interpretation that was wrong: A locality will not be estopped from changing a longstanding consistent administrative interpretation where it is wrong. In *Land & Learning Development, LLC v. Board of Supervisors of Shenandoah County*, 55 Va. Cir. 226 (2001), the court agreed with the board of supervisors that cluster developments in a certain zoning district were limited to 25 acres, thereby disqualifying the landowner's 29.069-acre parcel from such a development. The landowner claimed that county officials had not adhered to the 25-acre size limitation and had not interpreted the zoning district regulations as

imposing such a size limitation. Citing *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968) and other cases, the court granted the board's demurrer on this issue, stating that the board was not estopped from advancing its present (and correct) interpretation.

- Longstanding consistent interpretations may be entitled to greater weight: Longstanding consistent interpretations may be entitled to great weight. In *McEwan v. Board of Supervisors of Fairfax County*, 103 Va. Cir. 238 (2019), the trial court gave great weight to consistent interpretations of the term “transient occupancy” by the zoning administrator in 1984, 1990, 1991, 1994, and 2010.
- The evidence required to show that an administrative interpretation has been consistent: How many prior interpretations are required in order to establish a consistent administrative interpretation of an ordinance? The evidentiary burden to establish a consistent construction does not appear to be high. In *Trustees of the Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007), the BZA was able to establish a consistent construction of the regulation at issue by a letter from the assistant city attorney to the trustee's attorney explaining that “[t]his interpretation has been applied uniformly throughout the city” and then explaining the rationale for that interpretation.

16-430 Construe the law as a whole

A law should not be construed by singling out a particular phrase. *VEPCO v. Board of County Supervisors of Prince William County*, 226 Va. 382, 309 S.E.2d 308 (1983). Various provisions of a law must be read as a consistent and harmonious whole, with effect given to each word. *Jones v. Connell*, 227 Va. 176, 314 S.E.2d 61 (1984). All relative provisions and sections of a law must be considered and read together in construing a single provision or section. *National Maritime Union of America, AFL-CIO v. City of Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961).

Provisions that relate to the same subject are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete arrangement. *Lillard v. Fairfax County Airport Authority*, 208 Va. 81, 155 S.E.2d 338 (1962) (regulations that deal with the same or connected subjects may be considered *in pari materia* and should be read and construed together so as to harmonize and give effect to all the provisions of each); *Prillaman v. Commonwealth*, 199 Va. 401, 100 S.E.2d 4 (1957).

16-440 Other rules of construction

Following are other common rules of construction applied to determine the meaning of an ambiguous law:

- The last antecedent rule: “Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. Thus, a proviso usually is construed to apply to the provision or clause immediately preceding it.” *Alger v. Commonwealth*, 267 Va. 255, 259–260, 590 S.E.2d 563, 565–666 (2004) (internal quotation marks and citations omitted). For example, regarding an ordinance establishing a real estate tax amnesty program, in the clause “[f]or delinquent local taxes described in subsection (a) owed as of February 1, 2017,” “as of February 1, 2017” only applied to the word “owed,” and did not apply to “delinquent.” Therefore, real estate taxes did not have to be delinquent as of February 1, 2017 to be eligible for tax amnesty. *HRIP Miller & Rhoads Acquisition, LLC v. City of Richmond*, 2020 WL 1585118, at 2 (2020) (unpublished).
- General and specific laws: If conflicts between laws cannot be resolved, the more specific law will be deemed controlling. *Virginia Department of Health v. Kepa, Inc.*, 289 Va. 131, 142, 766 S.E.2d 884, 890 (2015) (“[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.” [citation omitted]). A specific law may not be nullified by one of general application unless the legislative intent is plain. *Commonwealth ex rel. Virginia Department of Corrections v. Brown*, 259 Va. 697, 529 S.E.2d 96 (2000).
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- General and specific words: When general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words. *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996).
- Different terms: When a law uses different terms in the same section, the terms are presumed to have a different meaning from one another. *Klarfeld v. Salisbury*, 233 Va. 277, 355 S.E.2d 319 (1987).
- Punctuation: The punctuation used in a law is the most fallible of all means to interpret a law, and it should not be used as an aid of interpretation except as a last resort. *See, e.g., Harris v. Commonwealth*, 142 Va. 620, 128 S.E. 578 (1925).
- Preambles: Preambles explain the governing body's purpose and intent for a zoning ordinance or district regulation but cannot enlarge or confer powers to control the words of the act unless they are doubtful or ambiguous. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006) (holding that mandatory eligibility criteria for the zoning classification at issue was not part of the preamble; see case discussion in section 16-320). In a typical zoning ordinance, each district's regulations begin with a preamble stating the governing body's purpose and intent for that district.