ADVANCED REAL ESTATE LAW

CURRENT ISSUES IN SUBDIVISION, ANNEXATION AND ZONING

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Land Use Law: Current Issues in Subdivision, Annexation and Zoning

I. ANALYSIS OF THE LAND SUBDIVISION PROCESS

A. How City, County and Township Platting Processes Work

1. Dillon's Rule is fundamental controlling principle in Virginia, as it has been since the inception of the Commonwealth of Virginia. Dillon's Rule provides that localities have only those powers: (i) expressly granted; (ii) necessarily or fairly implied from such express grants; and (iii) that are essential and indispensable. If a locality attempts to enact a local ordinance, which exceeds the scope of its specific grant of authority, the ordinance is invalid. Moreover, municipal zoning ordinances are subordinate to the laws of the Commonwealth. As such, if there is a conflict between a local ordinance and a state statute, the laws of the Commonwealth prevail.

Statutory authority is granted to the localities related to land use and planning issues in Chapter 22 of Title 15.2 of the Code of Virginia (Va. Code § 15.2-2200, *et. seq.)*. The Virginia Code specifically delineates statutory authority on matters of planning, subdivision of land, and zoning. The Code further provides regulations related to the role of the Planning Commission; the Comprehensive Plan; the Official Map; Capital Improvement Plans; Land Subdivision and Development; Zoning; and Road Impact Fees.

Implied power is derived from express grants of authority such as those found in Virginia Code § 15.2-2283 and 2286. The enumerated purposes expressly granted by the Code include ordinances which affect: (i) providing for adequate light, air, convenience of access, and safety from fire, flood, crime, and other dangers; (ii) preventing congestion in public streets; (iii) creating of a convenient, attractive, and harmonious community; (iv) providing adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports, and other public requirements; (v) protecting historic areas; (vi) protecting against overcrowding, over-density of population, obstruction of light

and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic, or other dangers; (vii) encouraging economic development activities; (viii) preserving agricultural lands and the environment; (ix) protecting approach slopes and other safety areas of civilian and military airports; (x) promoting creation and preservation of adequate affordable housing; and (xi) protecting surface and groundwater.

2. Allocation of Responsibility. Responsibility for planning rests with the elected City Council; the administrative planning staff of the City; the Planning Commission; the Board of Zoning Appeals (BZA); and the Circuit Court. The City Council is generally responsible for all legislative actions (the formulation of policy), and the Planning Commission and planning staff are responsible for recommending and implementing policy.

3. The Comprehensive Plan. The Virginia Code requires local planning commissions to prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction in order to guide and accomplish a coordinated, adjusted and harmonious development of the area, which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants. Va. Code § 15.2-2223.

The comprehensive plan is general in nature, in that it shall designate the general or approximate location, character, and extent of such features shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use. The Plan is designed to show the locality's long-range recommendations for the general development of the territory covered by the plan, and may include: (i) the designation of areas for various types of public and private development and use; (ii) the designation of a transportation system; (iii) the designation of a system of community service facilities such as parks, forests, schools, playgrounds, public buildings and institutions, hospitals, community

centers, waterworks, sewage disposal or waste disposal areas, and the like; (iv) the designation of historical areas and areas for urban renewal; (v) the designation of areas for implementing ground water protection measures; (vi) an official map, a capital improvements program, a subdivision ordinance, a zoning ordinance and zoning district maps, mineral resource district maps, and agricultural and forestal district maps, where applicable; (vii) the location of recycling centers; and (viii) the designation of areas for the implementation of measures to promote the construction and maintenance of affordable housing, sufficient to meet the current and future needs of residents of all levels of income in the locality while considering the current and future needs of the planning district within which the locality is situated. Va. Code § 15.2-2223.

If the governing body desires an amendment, it may direct the local planning commission to prepare an amendment and submit it to public hearing within sixty (60) days after formal written request by the governing body. The bill also provides that the local governing body may approve, amend and approve, or disapprove the proposed comprehensive plan amendment within ninety (90) days after conducting its public hearing. Va. Code § 15.2-2229.

The Transportation Funding and Reform Act of 2007 included mandatory provisions for the comprehensive plans of seventy five "growing jurisdictions" with a population of 20,000 or greater for the designation of "urban development areas." Density in UDA's must be at least 4 uds and 0.4 FAR. These UDA's must be sufficient to meet projected residential and commercial growth for an ensuing ten (10) year period and must be reexamined every five (5) years. Moreover, all comprehensive plans must incorporate principles of "new urbanism" and "traditional neighborhood design."

B. When Lot Splits and Industrial Lands Are Exempt

Va. Code § 15.2-2254 provides that no persons may subdivide land without fully complying with the statutory provisions of the Code of Virginia and the applicable local subdivision ordinance. A violation of this section results in a

fine of not less than $500 and takes all measures to afford compliance with the ordinance.

Va Code § 15.2-2244.1 was amended in 2000 to provide an additional method for subdivision of a lot for conveyance to a family member. Under the former law (adopted in 2000 Session), the property owner must agree to place a restrictive covenant on the subdivided property that would prohibit the transfer of the property to a nonmember of the immediate family for a period of fifteen (15) years. This new legislation provides that a locality may reduce or provide exceptions to such period of years when changed circumstances so require.

C. Prohibited Land Divisions

A subdivision plat may not be recorded in the Clerk's Office of the Circuit Court without fully complying with the terms of the adopted ordinance, including without limitation obtaining the necessary approvals. No person may transfer a lot or any portion of a subdivision unless the plat creating the subdivision has been duly approved and recorded in the Clerk's office.

An exception to this rule provides that any subdivision plat lawfully created prior to the adoption of the subdivision ordinance may be transferred as a "grandfathered" exception to the ordinance. Any subdivision plat recorded before January 1, 1975 is deemed valid even though the plat failed to meet the technical and/or statutory requirements of the Code existing at the time the plat was recorded. Va. Code § 15.2-2266.

Local governing bodies of any counties that have not withdrawn from the state secondary highway system may request the Commonwealth Transportation Board, by resolution, to take any new subdivision street into the state secondary highway system for maintenance if such subdivision street has been developed and constructed in accordance with the Board's subdivision street requirements. Only those subdivision streets constructed in compliance with the Board's subdivision street requirements are to be taken into the state secondary highway

system for maintenance. The Board is further required to promulgate regulations establishing such subdivision street requirements.

The governing body of a locality may, notwithstanding the provisions of the Virginia Public Procurement Act, negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a special exception condition in order to expand the scope of the road improvements by utilizing cash proffers of others or other available locally generated funds. This bill contains an emergency clause. Va. Code § 2260.

D. Rules Applying to Inspections, Dedications and Vacations of Subdivision Plats

The recordation of an approved subdivision plat shall operate to transfer to the locality, in fee simple: (a) streets, alleys or premises platted for other public use; (b) any easement indicated on the plat to create a right of public passage over the land; or (c) storm water facilities, water and sewage facilities, including the installation and maintenance of any facilities utilized for public purposes, as may be required by the city. Va. Code § 15.2-2265.

The owners of a subdivision may present plans to construct in, or under any streets located in the subdivision any gas, water, sewer, electric or power works, pipes, wires, fixtures or systems. The city council has thirty days to approve or disapprove same pursuant to Va. Code § 15.2-2269.

All public easements, except those for public passage, easements containing improvements, those that contain private utility facilities, common or shared easements for the use of franchised cable operators and public service corporations, may be relocated by recordation of a subdivision plat signed by the owner of the real property, approved by an authorized official of the city, regardless of the manner of acquisition of the original easement. In instances involving the relocation of storm water drainage from a public roadway, the locality must first determine that the relocation does not threaten either the integrity of the roadway or public passage. Va. Code § 15.2-2265.

There is no obligation of the city to pay for grading, paving, sidewalk, and sewer, curb and gutter improvements. Va. Code § 15.2-2268.

When streets in a subdivision have not been accepted into the highway system and serve only, or primarily, the general welfare of the residents of a subdivision and do not serve as connector roadways to other public rights-of-way, two thirds of the owners of the subdivision may make an application to the city to limit ingress and egress to the subdivision roadways.

The locality may permit such a restriction subject to the following conditions: (a) The restriction may be abolished at any time in the sole discretion of the city; (b) The restriction shall not be asserted in opposition to the public ownership; (c) The ingress and egress shall not block access of government or public service company vehicles; (d) Maintenance of the streets will be paid for by the owners; and (e) Such other conditions as may be imposed by the governing body. Va. Code § 15.2-2267.

The sub divider retains the right to validly reserve land as delimitated on the subdivision plat.

Site plans may include dedication to a locality as a condition of approval. Va. Code § 15.2-2270. Such dedications may be vacated by mutual consent of the property owner and locality, which is included in a written and recorded instrument. A dedication may also be vacated by the locality giving notice of its intent to vacate and adopting an ordinance to vacate its interest in the dedicated improvement.

Pursuant to Va. Code § 15.2-2271, where no lot contained in a subdivision has been sold, the recorded plat, or a portion thereof may be vacated with the consent of the locality and/or an ordinance allowing the vacation. Any interest in streets, alleys, easements for public passage, drainage easements, and easements for public utilities granted to the locality as a condition of the approval of a site plan may be vacated pursuant to Va. Code § 15.2-2270.

E. Private or Public Streets? Which Choice and When?

Discussion Item

F. Extraterritoriality

The Transfer of Development Rights ("TDR") is a technique wherein a locality may allow the transfer of the right to develop a parcel under current zoning classification from one part of the community to another. TDR has been used throughout the country to protect environmental resources, farms, forests or open spaces. TDR legislation is comprised of three elements - the sending district, the receiving district and the TDR credits. TDRs actually are marketed for purchase and sale. Virginia enacted enabling legislation became effect on July 1, 2006. Va. Code § 15.2-2316.1, *et. seq.* Localities have begun the arduous process of drafting local ordinances.

The General Assembly enacted enabling legislation permitting localities to provide for the transfer of development rights from a parcel of property located in the locality to another parcel of property located elsewhere in the locality. Va. Code § 15.2-2316.1.

Transfer of Development Rights provides that any county and an adjacent city may enter voluntarily into an agreement to permit the county to designate eligible receiving areas in the city if the governing body of the city has also amended its zoning ordinance to designate the same areas as eligible to receive density being transferred from sending areas in the county. The bill also expands the definition of "sending property" and provides a greater ability to bank TDR's for trading.

G. The Powers and Processes of Planning Commissions.

1. The Planning Department provides professional planning advice to the Planning Commission and local governing body. The Department reviews subdivision and development plans, works with developers to modify plans to meet regulatory requirements and to accomplish permissible local objectives, and otherwise administers the planning and development process.

Planning Commission provides the initial review and consideration of development plans, proposed zoning ordinances and amendments, and comprehensive plans. The duties of the Planning Commission are statutorily prescribed. See Va. Code § 15.2-2200 and Va. Code § 15.2-2211. The duties of the Planning Commission include the following: (i) Preparation of comprehensive plan and recommendation to City Council. Va. Code § 15.2-2223; (ii) Review of comprehensive plan at least every 5 years and preparation and recommendation of amendments deemed appropriate. Va. Code § 15.2-2230; (iii) Determination that the location of streets, parks, public areas, public buildings, or structures and public utility facilities are consistent with the comprehensive plan. Va. Code § 15.2-2223; (iv) Preparation and recommendation of an official map as described in Va. Code § 15.2-2233; (v) Preparation and recommendation of an annual capital improvement program. Va. Code § 15.2-2239; (vi) Preparation and recommendation of a subdivision ordinance. Va. Code § 15.2-2251; (vii) Coordination by and between state agencies regarding state projects and request state agency assistance in developing comprehensive plan revisions where state agency projects may be involved (i.e. VDOT road projects). Va. Code § 15.2-2202(B); and (viii) Preparation and recommendation of a zoning ordinance and amendments thereto. However, the City Council may not adopt zoning ordinance and/or any amendments thereto without prior referral to the Planning Commission for its review and recommendation. Va. Code § 15.2-2285.

In 2007, the General Assembly passed a bill which requires a local planning commission or other agent of a locality to forward a plat to the appropriate state agency or agencies for review within ten (10) business days if approval of a feature or features of that plat by a state agency or an unauthorized public authority is necessary. That bill mandates that any state agency or public authority reviewing a plat: (a) complete its review within forty-five (45) days of receipt of first submission and within forty-five (45) days of receipt if the plat has

previously been disapproved; and (b) allow use of public rights-of-way for placement of utilities by permit when practical. Va. Code § 15.2-2260.

2. Conditional Rezoning. Va. Code §§ 15.2-2286, 15.2-2296, 15.2-2297 and 15.2-2298 authorize localities to accept proffers voluntarily offered as part of a rezoning application. Proffers can be used to tailor the uses allowed as part of the rezoning to those specifically desired by the rezoning applicant, thus ruling out other uses which may be allowed by right in the zoning category for which the rezoning is sought but which may be objectionable to the locality. Authority to accept this type of proffer is available to all localities.

Counties using the urban county executive form of government and localities adjacent to such counties may accept proffers of cash, real property, and construction of off site public improvements so long as such proffers are voluntary and reasonable. The off site improvements need not have been previously identified in the Capital Improvement Plan. Va. Code § 15.2-2303 (A) through (F).

Localities, other than those described in the preceding paragraph, which have experienced population growth of more than 10% as defined in the statute, and adjacent localities, may accept proffers of cash, real property, and the construction of off site public improvements subject to the following conditions: (a) the rezoning must give rise to the need for conditions; (b) the conditions have a reasonable relation to the rezoning; (c) if the governing body produces sufficient evidence to establish that the reasonableness of the piecemeal downzoning is fairly debatable, the validity of the ordinance will be sustained; (d) the conditions are in conformance with the local comprehensive plan; (e) the locality has an adopted capital improvement program pursuant to Va. Code § 15.2-2239; and (f) the proffers are voluntary. Va. Code § 15.2-2298.

Proffers may include off site improvements to land not included in the zoning district of the subject property. Virginia Code §§ 15.2-2286, 15.2-2296, 15.2-2297 and 15.2-2298 authorize localities to accept proffers "voluntarily"

offered as part of a rezoning application. Va. Code § 15.2-2297(a) (v) and Va. Code § 15.2-2298(A) prohibit proffers which require establishment of a homeowners' association for the collection of contributions and payment to the local government for maintenance of public facilities, such as publicly owned streets and roadways.

The Virginia Supreme Court has ruled that where the only basis for the rejection by a locality of a proposed residential rezoning was refusal by the developer to make cash proffer in an amount suggested by the locality to cover the cost of school related capital improvements, the proffers were not voluntary and the denial was therefore invalid. *Bd. Of Supervisors of Powhatan County v. Reed's Landing Corp.,* 250 Va. 397, 463 S.E. 2d 668 (1995). However, if there are other valid reasons for the denial, it will be upheld. *Gregory v. Bd. of Supervisors of Chesterfield County,* 257 Va. 530, 514 S.E. 2d 350 (1999).

H. When Subdivision Is Not Zoning and Vice Versa

The locality may not use its authority to rezone property effectively by denial of a subdivision plat. When an applicant meets all requirements, plat approval is a ministerial act, and the planning commission has no discretion in approving the submitted application. Moreover, the planning commission may consider only evidence, which bears on the grounds authorized by statute for plat approval or disapproval.

Subdivision ordinances must contain reasonable provisions that apply to or provide for: (a) plat details; (b) coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage; (c) adequate drainage and flood control, light and air, and identifying soil characteristics; (d) specifications for the manner in which streets are to be constructed and utilities or other community facilities are to be installed; (e) acceptance of dedication of certain rights-of-way, public improvements, and utilities; (f) conveyance, in appropriate cases, of common or shared easements to cable television operators and public service corporations

furnishing cable television, gas, telephone and electric service to the proposed subdivision; and (g) monuments to establish street and property lines. Va. Code § 15.2-2241.

Every subdivision plat shall be submitted for recordation and must meet the requirements of Va. Code § 15.2-2262. A certified professional engineer or land surveyor, who shall endorse a certificate setting forth the source of title and identify the last recorded instrument in the chain of title, must prepare the plat. If the plat contains lands acquired by more than one source of title, the outlines of the several tracts shall be clearly identified on the plat. The plat must include a current legal description of the land to be subdivided and an endorsement that the subdivision is done with the free consent of all owners, trustees, and any person with an interest in the land. Va. Code § 15.2-2264.

Subdivision ordinances must contain provisions dictating that approval shall be withdrawn and plats marked void unless plats are presented for recordation within six (6) months after final approval (or such longer period as may be approved by the governing body). An exception is a situation wherein construction of facilities to be dedicated for public use has commenced pursuant to an approved plan or permit with surety or other approved security. In this one case, the time for plat recordation shall be extended to one (1) year after final approval or to the time limit specified in the surety agreement approved by the governing body, whichever is greater.

Subdivision ordinances are required to include reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner. Moreover, subdivision ordinances must have provisions governing partial and final release of performance guarantees within thirty (30) days of notice of completion of the facilities the developer was required to construct, unless the locality notifies the developer of defects or non-approval of the facilities. Va. Code § 15.2-2245.

I. What to Do When the Land Use Regulation Is in the "Gray Area" and Approval Is Denied

In exercising its police power, the legislative branch of a local government has wide discretion in the enactment and amendment of zoning ordinances. *City of Manassas v. Rosson*, 224 Va., 12, 17 (1982). An exercise of this power is presumed valid so long as it is not unreasonable and arbitrary.

1. Legislative Acts. A governing body acts legislatively when there is a "balancing of the consequences of private conduct against the interest of public welfare, health, and safety to create new laws." *Helmick v. Town of Warrenton*, 254 Va. 225, 229 (1997). The test employed to determine whether an ordinance is legislative is to consider whether the ordinance makes a new law, or executes a law already in existence. *R.G. Moore Bldg. Corp. v. Committee*, 239 Va. 484, 491 (1990). If it makes a new law, the ordinance is considered a legislative act. Legislative acts may be delegated and remain legislative as long as the delegation is allowed by statute. *Helmick*, 254 Va. 229. Comprehensive zoning ordinances, rezoning amendments and rezoning ordinances are considered to be legislative acts. Legislative acts may also include conditional use permits, *County Board v. Bratic*, 237 Va. 221, 226 (1989) and the specific location of zoning boundary lines. *City of Covington v. APB Whiting, Inc.*, 234 Va. 155, (1987).

2. Standard of Review of Legislative Acts. One challenging the enactment or amendment of a zoning ordinance has the burden of proving that the act is "clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relations to the public health, safety, morals, or general welfare." *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653, 661 (1959). If there is evidence of unreasonableness, the governing body may rebut the evidence by presenting evidence of reasonableness. *Bell v. City of Charlottesville*, 224 Va. 490, (1982). Upon doing so, the issue becomes fairly debatable and the challenged ordinance will be sustained. The reasonableness of

an ordinance is fairly debatable, "when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusion."

Generally, the motives of the governing body in undertaking an act are immaterial. *Helmick*, 254 Va. 225. Thus, in considering a legislative act, a court may consider only the words of a [zoning ordinance] to determine its meaning, and when the meaning is plain, resort to rules of construction, legislative history and extrinsic evidence is impermissible. *Higgs v. Kirkbride*, 258 Va. 567, 522 (1999).

Dillon's Rule was first recognized by the Virginia Supreme Court in *City of Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896) and is applied by Virginia courts to resolve any ambiguities in enabling authority against the localities. Localities have only those powers (1) expressly granted, (2) necessarily or fairly implied from express grants, and (3) essential and indispensable. Any doubt about the existence of authority is construed against the locality. See also: *Hylton Enterprises, Inc. v. Bd. of Supervisors of Prince William County, et al.*, 220 Va. 435, 258 S.E. 2d 577 (1979).

A corollary to Dillon's Rule is codified in Virginia Code § 1-13.17, and prohibits the enactment of ordinances that are inconsistent with the laws of the United States or the Commonwealth. *Blanton v. Amelia County*, 261 Va. 55, 540 S.E. 2d 869 (2001). Another corollary to Dillon's Rule is the "reasonable selection of method rule" which permits localities to exercise reasonable discretion in the implementation of expressly granted authority where the enabling act fails to specify any method of implementation.

Implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits. The test in application of the doctrine is always reasonableness, in which concern for what is necessary to promote the public interest is a key element. The Supreme Court of Virginia will generally imply local power only when an expressly granted power

would be rendered ineffective without such an implication. The Court looks to the purpose and objective of statutes in considering whether authority is necessarily implied from powers expressly granted. See *Gordon v. Bd. of Supervisors of Fairfax County*, 207 Va. 827, 153 S.E. 2d 270 (1967).

Moreover, a statute must be given a rational interpretation consistent with its purposes and not one which will substantially defeat its objectives. *Mayor and Members of City Council of City of Lexington v. Indus. Dev. Auth. of Rockbridge County*, 221 Va. 865, 275 S.E. 2d 888 (1981). If there is a reasonable doubt as to whether legislative power exists, the doubt must be resolved against the existence of the asserted authority. *City of Richmond v. Confrere Club of Richmond*, 239 Va. 77, 387 S.E. 2d 471 (1990). However, when an enabling statute is clear and unambiguous, its intent is determined from the plain meaning of the words used, and, in that event, neither rules of construction nor extrinsic evidence may be employed. *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E. 2d 163 (1987).

3. Presumption of Legislative Validity. Virginia follows the rule that legislative decisions by localities are presumed to be valid. A legislative action that is presumed to be valid "will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare." *City Council of City of Virginia Beach v. Harrell*, 236 Va. 99, 101, 372 S.E. 2d 139 (1988). *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E. 2d 512 (1996).

A legislative act involves the "balancing of the consequences of private conduct against the interests of public welfare, health, and safety." *Bd. of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 522, 297 S.E. 2d 718, 722 (1982). Administrative actions involve implementation of existing laws while legislative actions create new ones. Legislative acts include the adoption of a comprehensive plan and amendments thereto, adoption of a zoning ordinance (both text and map) and amendments thereto, and the issuance of special permits, special exceptions or conditional use permits.

The consequence of the presumption of validity is that a plaintiff attacking the validity of a local legislative decision must establish a prima facie case of invalidity to shift the burden of proof to the locality. *City of Covington v. APB Whiting, Inc.*, 234 Va. 155, 360 S.E. 2d 206 (1987).

A plaintiff must show that the existing zoning is unreasonable and the zoning requested is reasonable. *City Council of the City of Virginia Beach v. Harrell*, 236 Va. 99, 372 S.E. 2d 139 (1988). In considering whether a legislative act is reasonable, the motives of the governing body in undertaking the act are immaterial. The presumption of validity survives a determination of invalidity by the trial court upon review by an appellate court. The appellate court also gives the usual presumption of correctness to the findings of the lower court, and then, meshing the presumptions, it examines the record to determine whether the evidence sustains the lower court's finding. *Bd. of Supervisors of Fairfax County v. McDonald's Corp.*, 261 Va. 583, 544 S.E. 2d 334 (2001).

4. Fairly Debatable Rule. The fairly debatable rule is utilized by the courts to decide a case involving a local legislative decision when the plaintiff has made out a prima facie case of invalidity, and the locality has responded with evidence of validity. The fairly debatable rule does not require that the locality introduce sufficient evidence to comprise a "preponderance" of the evidence, only enough to make the issue of validity one over which reasonable men could differ.

The evidence required to raise a question to the fairly debatable level must be "not only substantial but relevant and material as well." Until it has heard evidence in a case, the trial court cannot determine whether a locality's decision is "fairly debatable." In a classic case of the fairly debatable issue, it is not the property owner, or the courts, but the legislative body, which has the prerogative to choose the applicable classification. Stated differently, the locality has the legislative prerogative to choose between those reasonable zoning classifications. *Bd. of Supervisors v. Miller & Smith*, 242 Va. 382, 410 S.E. 2d 648 (1991).

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

5. Administrative Decisions. Administrative decisions are not governed by the presumption of validity and fairly debatable rule. Although great weight is given to consistent construction of zoning ordinance by the officials charged with its enforcement, administrative decisions, such as the issuance of a building permit when the conditions of applicable ordinances have been met, or the approval of properly prepared site plans or subdivision plats may be compelled by mandamus from the circuit court directing the appropriate government official to grant the requested approval or issue the requested permit. *Bd. of Supervisors of Fairfax County v. Horne*, 216 Va. 113, 215 S.E. 2d 453 (1975).

Once a governing body determines that a site plan is in accordance with zoning conditions and the plan is recorded, any future conflict between the zoning ordinance and plat will be governed by the approved provisions of the site plan. Va. Code § 15.2-2261.1. pursues approval of the final plat or plan within a reasonable period of time under the circumstances; or the governing body or its designated agent has approved a final subdivision, plat, site plan or plan of development. Id.

6. Vested Rights. A "vested right" is a constitutional doctrine, which defines the circumstances in which a landowner has so relied upon a local government approval that the locality may not thereafter deny the landowner's

right to proceed with the project even though land use regulations may have changed.

Until 1999, vested rights in Virginia was a doctrine developed through case law. The 1998 session of the General Assembly adopted a legislative definition of vested rights by amending Virginia Code § 15.2-2307. In addition to the new vesting law in recent years, the legislature has created several statutory grandfathering or "safe harbor" provisions for landowners, which go beyond the scope of the common law doctrine of vesting.

7. Standing to Sue. Most challenges to local planning ordinances seek declaratory judgments. A plaintiff seeking a declaratory judgment has standing if she has a "justiciable interest" in the subject matter of the litigation. The statutes related to declaratory judgment are liberally interpreted and administered. Va. Code § 8.01-184. A person has a sufficient interest in the subject matter of the case if the parties will be actual adversaries and the issues will be fully and faithfully developed. A plaintiff must also be "aggrieved," that is, one who has suffered a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation different from that suffered by the public generally. *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of Va. Beach*, 231 Va. 415, 419-20, 344 S.E. 2d 899, 902-03 (1986). However, there is no private right to enforce zoning laws. *Fields v. Elkins* 52 Va. Cir. 206 (Alexandria 2000).

8. Ambiguities. Where ambiguities exist in local ordinance, the courts have traditionally construed them against the locality and in favor of the property owner. This reflects two common law principles: (1) language is construed against the drafter of the language, and (2) statutes and ordinances in derogation of common law property rights will be strictly construed in favor of the property owner. *Town of Mount Jackson v. Fawley*, 53 Va. Cir. 49 (Shenandoah County 2000) (citing *Young v. Town of Vienna*, 203 Va. 265, 123

S.E. 2d 288 (1962)). See *E. C. Yokley*, Zoning Law and Practice, 4th ed. *Michie* 1989.

J. Design Subdivision Regulations the Old Fashioned Way.

The Virginia Code provides a mechanism for a locality to establish a preliminary subdivision plat review. Preliminary plats may be referred to state agencies, such as the Virginia Department of Transportation ("VDOT") for consideration of the use of rights of way for the location of utilities. Upon the approval of all applicable state, regional or local agencies, the locality must act within 35 days of the receipt of these approvals. A preliminary subdivision plat shall be valid for 5 years provided the sub divider: (a) submits a final subdivision plat for all or a portion of the property within one year of approval of the preliminary subdivision plat, and (b) thereafter "diligently pursues approval" of the final subdivision plat.

Upon the expiration of 3 years following approval and upon 90-days notice by certified mail to the sub divider upon a specific findings of fact that the sub divider has not diligently pursued the approval of the final subdivision plat, the approved may be revoked. Va. Code § 15.2-2260. The enabling legislation limits the time for review of subdivision plats (90 days for preliminary plats, if required) (60 days for final plats). Va. Code §§ 15.2-2259 and 2260.

Approval of subdivision plats and site plans is a ministerial act involving no legislative discretion. See *Prince William County v. Hylton Enters., Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976). The local governing body has authority to review plats and plans, but may delegate that authority (i.e. to Planning Commission, the Planning Director, etc.). Va. Code §§ 15.2-2255 and 2254(2).

Judicial review by mandamus is available for denial or refusal to act on a properly submitted subdivision plan or plat, which meets the terms of the ordinance. Moreover, the circuit court is empowered to review any alleged action deemed arbitrary and capricious. Va. Code §§ 15.2-2259 and 2260.

Effect of Plat or Plan Approval. Upon recording of an approved

subdivision plat; (a) title to land and easements dedicated to public uses vests in the locality. Va. Code § 15.2-2265; (b) the locality has no obligation to install streets or other public facilities, absent an enforceable agreement to do so. Va. Code § 15.2-2265; (c) subdivision ordinances may mandate certain on-site improvements. Va. Code § 15.2-2241 (such as (i) exactions for off-site road improvements; Va.Code § 15.2-2242; and (ii) authorizes off-site water, sewer, and drainage exactions. Va. Code § 15.2-2243); and (d) for so long as a final site plan remains valid, or for 5 years after approval if a recorded subdivision plat, no amendment of any local ordinance, map, regulation, or policy adopted after approval of the recorded plat or final site plan shall adversely affect the right of the sub divider or developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the recorded plat or site plan unless the change or amendment is required to comply with state law or the public health, safety or welfare. Va. Code § 15.2-2261.

Upon application of the sub divider prior to the recordation of the final subdivision plat, the sub divider may request an extension of time. An extension may be granted if it is determined to be reasonable taking into account the size and complexity of the project. In the event the locality declines to grant such an extension, the applicant may appeal to the Circuit Court within 60 days of the denial.

Approval of subdivisions are rarely deemed to be ministerial in nature. Failure of an authority to stringently apply the terms of a subdivision ordinance may be enforced by mandamus.

K. Get Up to Speed on the New Urbanism and Subdivision Regulations

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

A locality may use cluster zoning ordinances to encourage the placement of development on a specific portion of the property, allowing the remaining land to continue as undeveloped green or open space. Additional positive features of cluster ordinances include the following: (a) greater flexibility in the developmental design of residential projects; (b) ability to preserve environmental features of the site; (c) discourage sprawling development; (d) provide the opportunity for diversity in development; (e) permit an economic and cost efficient manner of delivery of public services; (f) reduce the cost of housing; and (g) preserve open usable space, agricultural land, recreational features and the natural beauty of a site.

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

Overlay mapping may accomplish many beneficial purposes including the following: (a) conservation of environmental resources; (b) rehabilitation or redevelopment of deteriorated neighborhoods or contaminated land; (c) preservation of historic properties; (d) promote affordable or workforce housing development; and (e) encourage economic development.

3. New Urbanism. New urbanists are sometimes referred to as "neo-traditionalists". New urbanism allows the creation of mixed use developments which may replicate the traditional urban neighborhoods. Such developments stand in stark contrast to sprawling subdivision developments of recent years.

A new urban development may contain varied housing styles, retail, offices and services located within walking distance. Other features include green space, recreational amenities, sidewalks and bike trails. The new urban development permits a resident to live, work and play within the neighborhood. New urbanism continues to gain popularity within the Commonwealth specific

localities, regionally, new urban developments are sprouting up as in-fill development as well. Localities are required to address urban development areas and new urbanism in their comprehensive plans. Va. Code § 15.2-2233.1.

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

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

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

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

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

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

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

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

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

Bold political leadership, defining a parameter of success, understanding the market, the degree of public sector involvement, the selection of a solid private partner, effective communication with all of the stakeholders, including the members of the community, provide the unique opportunity for a high quality project, timely developed using smart growth policies for the benefit of the locality and the residents of the community.

5. Planned Unit Development Zoning. Planned unit development ("PUD") zoning permits large parcels of real estate to be developed in a more flexible manner than its existing zoning classification. PUD ordinances vary from locality to locality. Most PUD ordinances do not disturb the underlying zoning classification and offer the PUD development as an alternative to the existing zoning.

PUD ordinances may allow the following: (a) a mixture of residential, commercial, and mixed uses; (b) increased density; (c) preserve open space; (d) encourage quality development; and (e) mandate that the developer compensate the locality for the cost of infrastructure or community facilities.

6. Affordable Housing Ordinances. Permissible inclusionary zoning enabling legislation was enacted by the General Assembly permitting counties using the "urban county executive" form of government to adopt zoning provisions designed to promote affordable housing. These localities may provide incentives for the construction of such housing through zoning density bonuses in exchange for which the governing body is able to control the resale and rental prices of resulting affordable housing for up to 50 years. This statute sanctions affordable housing ordinances based upon optional density bonuses previously

enacted by the localities. Va. Code § 15.2-2304. Va. Code § 15.2-2305 extends authority to all other localities to enact local affordable housing ordinances using density bonuses to offset the cost to developers of providing such housing as part of projects.

7. Transportation Districts. In addition, Va. Code §§ 15.2-4800, *et. seq.* and 15.2-4603, *et. seq.* authorize certain localities to create transportation districts wherein special assessments may be levied for the construction of transportation improvements. Va. Code §§ 15.2-2317 *et. seq.* authorizes the assessment of road impact fees in a handful of larger localities and their contiguous neighbors. Va. Code § 15.2-2242(4) authorizes acceptance of voluntary payments for off site road improvements as part of the subdivision process.

8. Urban Transportation Service Districts (UTSD). Urban counties with populations over Ninety Thousand (90,000) which do not currently maintain their own roads may create UTSD's. The density is within one unit per acre of property. The county must maintain the roads, but receives per lane mile maintenance payments from the State.

These urban counties may impose and collect impact fees to defray capital costs related to residential development if the localities' comprehensive plans include the calculation of the capital costs of public facilities related to residential development or parcels zoned agricultural and being subdivided for a by right residential development.

Public facilities include schools, roads, storm water management facilities, open spaces, public safety and libraries. Water and sewer systems are specifically exempted.

9. Agricultural and Forestal Districts. Localities may also adopt ordinances providing for the creation of agricultural and forestal districts pursuant to the Agricultural and Forestal Districts Act § 15.2-4300, *et. seq.*, and the Local Agricultural and Forestal Districts Act, § 15.2-4400, *et. seq.*, without special

assessments. These generally are for larger tracts of 200 acres or more, although there are certain provisions permitting smaller ones to qualify. Each type of use has minimum acreage requirements. Inclusion of and in this program provides incentives for the preservation of natural resources.

10. Open Space. The Virginia Open-Space Land Act, § 10.1-1700, *et. seq.*, and the Virginia Conservation Easement Act, § 10.1-1009, *et. seq.*, are other tools used by localities to preserve land for agricultural, forestal, recreational, or open-space uses.

The definitions of "open-space easement" and "conservation easement" are the same, but open-space easements are typically held by a public body (such as the Virginia Outdoors Foundation or a locality), while conservation easements are typically held by a nonprofit organization. The state and federal governments provide tax credits to landowners donating open space easements. Enabling legislation allows localities to adopt a variety of tree protection ordinances. Va. Code §§ 10.1-1127.1; 15.2-960; 15.2-961.

11. Economic Revitalization Zone. A 2007 bill passed by the General Assembly allows any city, by ordinance, to establish one or more economic revitalization zones for the purpose of providing incentives to private entities to purchase real property and interests in real property to assemble parcels suitable for economic development. Each city establishing an economic revitalization zone may grant tax incentives and provide regulatory flexibility. Properties that are acquired through the use of eminent domain shall not be eligible for the incentives and regulatory flexibility provided by the ordinance.

L. Review New Case Histories Involving Local Subdivisions

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

By State statute, the cash donations associated with a proffer are to be "voluntary". Chesterfield County enacted a policy, specifying a $5,083 per residential lot maximum cash proffer that the County would accept, which was challenged as a taking. The judicial challenge was not made from the application of the statute to a specific rezoning matter but on its face.

The Court held that the policy, on its face, did not violate the U.S. Constitution because the policy itself did not *require* the donation, but simply specified a maximum acceptable amount. *National Association of Home Builders v. Chesterfield County,* 907 F. Supp. 166 (E.D. Va. 1995).

A local governing body may not deny a rezoning *solely* because the applicant fails to make a cash proffer. In such an instance, the desired proffer ceases to be voluntary. *Board of Supervisors v. Reed's Landing Corp.,* 250 Va. 397, 400, 463 S.E. 2d 668, 670 (1995). The locality must base its decision to grant or deny a rezoning application upon the merits of the entire application, including the proffers. However, where the absence of the maximum cash proffer is a key factor in a locality's denial of a zoning application, but the denial is also based on other health, safety, and welfare concerns, the denial will not be overturned. *Gregory v. Board of Supervisors,* 257 Va. 530, 537, 514 S.E. 2d 350, 354 (1999).

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

"Comprehensive" downzoning and a "piecemeal" downzoning are distinguished as follows: A locality may always undertake a downzoning as part of a comprehensive revision of its zoning ordinance. *Board of Supervisors of Fairfax County v. Snell Const. Corp.,* 214 Va. 655, 202 S.E. 2d 889 (1974). The

Court set forth the elements of a piecemeal downzoning as follows: it is initiated by the locality on its own motion; it selectively addresses a single parcel and/or an adjacent parcel; and it reduces the permissible residential density below the limitations imposed by the comprehensive plan.

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

No straightforward test exists to determine whether a downzoning action is comprehensive or piecemeal in nature. Real estate devoted to *open space* is real property used to preserve park and recreational areas, conserve land or other natural resources, or preserve floodways and land of historic or scenic value. By definition, a zoning action impacting all land within a local jurisdiction is comprehensive.

However, a sizeable amount of property affected does not necessarily amount to a comprehensive action. In *Aldre Properties, Inc. v. Board of Supervisors of Fairfax County,* Fairfax County Circuit Court Chancery No. 78463-A (1985) (unpublished), the court ruled that a downzoning affecting over 40,000 acres was a piecemeal action. In contrast, the Virginia Supreme Court examined various criteria in determining that the challenged downzoning was piecemeal rather than comprehensive, including: that only a small percentage of the jurisdiction's total area was affected (3,500 acres or 2% of the City's total area); 50% of the area down zoned consisted of one parcel; certain parcels in the impacted area were down zoned while other were not; and there were no

measurable reasons for the varied treatment of these parcels. *City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1,* 239 Va. 412, 389 S.E. 2d 312 (1990).

A zoning authority may choose between two reasonable uses, even though one use might be more appropriate or even be the most appropriate use for the land in question and a trial court does not have authority to require a zoning board to grant one zoning category over another. *Bd. of Supervisors of Fairfax County v. Miller & Smith, Inc.,* 242 Va. 382, 410 S.E. 2d 648 (1991). Virginia Code § 15.2-2282 restates the requirement of the equal protection clause of the Constitution that regulations within a district shall be uniform (i.e. that similarly situated properties shall be similarly treated) although the regulations of one district may differ from those of another. *Bell v. City Council of the City of Chesapeake,* 244 Va. 490, 297 S.E. 2d 810 (1982). "Adjacency alone is insufficient to establish a zoning discrimination claim." *Helmick v. Town of Warrenton,* 254 Va. 225, 231, 492 S.E. 2d 113, 116 (1997).

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

3. Preservation of Agricultural, Horticultural, Forestal and Open Space. A Special Assessment may be enacted by local ordinance pursuant to Va. Code § 58.1-3230, *et. seq.* Real estate devoted to *agricultural use* must be used for the "production for sale of plants and animals useful to man" or otherwise meet the requirements for payments or other compensation pursuant to a soil conservation program; *horticultural use* requires that the land be devoted to the production for sale of fruits, vegetables, or nursery and floral products, or otherwise meet the requirements for payments or other compensation pursuant to a soil conservation program. Real estate devoted to *forestal use* is land devoted to tree growth in such quantity and so spaced as to constitute a forest area; and real

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

4. Exclusionary Zoning. Classifications are exclusionary as zoning ordinances separate land uses by excluding all uses outside the defined permissible uses. The concept of *exclusionary zoning* has been generally referred to as those ordinances designed to exclude classifications of persons within a certain district. The Virginia Supreme Court has historically struck down discriminatory exclusionary zoning ordinances.

In 1959, the Supreme Court struck down an ordinance in Fairfax County which zoned the western two-thirds of the county to agricultural with development limited to lots no smaller than two (2) acres. The Court reasoned that the ordinance has no reasonable relationship to the health, safety or general welfare of the County, but, instead was designed to exclude residents with low incomes. By dividing the County in such a manner, the effect would have insured that all low income residents would be forced to reside in the eastern third of the County. *Board of Supervisors v. Carper,* 200 Va. 653, 107 S.E. 2d 390 (1959). Virginia Code § 15.2-2282 mandates that "[a] zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district."

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

5. Offsite Improvements and Impact Fees. Va. Code § 15.2-2243 provides that a locality may provide in its subdivision ordinance for the payment of an applicant's pro rata share of the cost of providing reasonable and necessary sewage, water and drainage facilities located outside the land sought to be developed but at least partially necessitated by the proposed subdivision. There is no enabling legislation which would permit localities to require payment for the construction of road improvements. Generally, zoning enabling legislation has been held not to allow localities to extract dedication of land, or payment for or

construction of roads or other public facilities. In *Alexandria v. The Texas Company,* 172 Va. 209, 1 S.E. 2d 296 (1939) the Virginia Supreme Court held:

> The principle is well settled that a State cannot grant a privilege subject to the agreement that the grantee will surrender a constitutional right, even in those cases where the State has the unqualified power to withhold the grant altogether. Where such a condition is imposed upon the grantee, he may ignore or enjoin the enforcement of the condition without thereby losing the grant.
>
> If a State, possessing the power to deny a grant altogether, cannot grant a privilege subject to the condition that the grantee will surrender a constitutional right, certainly it cannot constitutionally exact this price of the grantee where, as in the instant case, it has no lawful power to decline the grant. *Id.*

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

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

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

However, the provisions of Virginia Code §§ 15.2-2296 *et. seq.*, discussed *infra*, authorize a substantial number of localities to accept "proffers" of land, and payments for or construction of public facilities as part of a conditional zoning approval. In addition, Virginia Code §§ 15.2-4800 *et. seq.* and 15.2-4500 *et. seq.* authorize certain localities to create transportation districts wherein special assessments may be levied for the construction of transportation improvements. *Va. Code.* § 15.2-2317 *et. seq.* authorize the assessment of road impact fees in a few large localities and their contiguous neighbors. Virginia Code § 15.2-2242(4) authorizes acceptance of voluntary payments for off site road improvements as part of the subdivision process.

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