

Plat And Subdivison Law Of Virginia

Prepared and Presented by:

**Ann Kiley Crenshaw
Shepelle Watkins-White
Kaufman & Canoles, P.C.
Carol Wagner Hahn
Virginia Beach City Attorney's Office**

I. OVERVIEW

A. Subdivisions Plats

1. Definitions.
2. The Subdivision Ordinance.
3. General Requirements after Subdivision Ordinance is Adopted – Va. Code § 15.2-2254
4. Review and Approval Process – Preliminary Final Plats
5. Important Statutory Requirements for Subdivisions.
6. Validity of Plat Approvals
7. Road/Utility Dedications
8. Vacation of Subdivision Plats and Interests in Subdivision Plats.

B. Site Plans/Plans of Development.

1. Site Plan and Plan of Development Distinguished
2. Plans of Development are Subject to Many of the Statutory Requirements Applicable to Subdivisions
3. Conflict with Zoning Provisions – Va. Code § 15.2-2261
4. Validity of Final Site Plans
5. Road/Utility Dedications – Va. Code § 15.2-2270.

C. Variances.

1. Definitions.
2. Types of Variances
3. Variances Differ from Special Exceptions

D. Appeals

1. Denial of Zoning.
2. Approval of Special Use Permits with Unacceptable Conditions
3. Opinions of the Planning Office
4. Variances
5. Subdivisions
6. Site Plans/Plans of Development.

II. VESTED RIGHTS

A. Locally Enforced Restrictions on Property

1. Generally
2. Conditions
3. Development Agreements.
4. Proffers
5. Enforcement and Procedures

12:15 P.M. to 1:15 P.M.

Lunch on your own

B. Vested Rights

1. Generally
2. Dillon's Rule.
3. Common Law Vested Rights Generally
4. Vesting by Ordinance .
5. Development Agreements.
6. Proper Exercise of the Police Power
7. "Takings" Issues (U.S. Const., Fifth Amend.)

III. LAND USE FROM THE LOCAL GOVERNMENT PERSPECTIVE

- A. What is Land Use Planning from the Local Government Perspective
- B. Dillon's Rule.
- C. Comprehensive Plan
- D. Capital Improvement Program
- E. Zoning Ordinances

IV. PLATS AND LAND USE MATTERS FROM AN ENGINEERING VIEWPOINT

V. CASE STUDIES PANEL DISCUSSIONS

VI. QUESTIONS AND ANSWERS

Plat and Subdivision Law of Virginia

I. Subdivision Plats

A. Definitions and General Considerations

1. Dillon's Rule is fundamental controlling principal 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.
2. 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.). Title 15.2 sets forth a straightforward, well-drafted description of the statutory provisions granted to the localities related to land use planning and development. The Virginia Code specifically delineates statutory authority on matters of planning, subdivision of land, and zoning. Additionally, the Code provides further 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. 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.

3. Express Grants of Authority. Localities' expressly granted authority permits the inclusion of any of the specific matters in a locality's zoning ordinance. Virginia Code § 15.2-2286.
4. Implied Grants of Power. Implied power is derived from express grants of authority such as those found in Virginia Code § 15.2-2286. However, the statutorily enumerated purposes for zoning may serve as the basis for a locality's authority to enact a zoning provision. The enumerated purposes include Virginia Code § 15.2-2283; See also Virginia Code § 15.2-220 :
 - a. providing for adequate light, air, convenience of access, and safety from fire, flood, crime, and other dangers;
 - b. preventing congestion in public streets;
 - c. creating of a convenient, attractive, and harmonious community;
 - d. 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;
 - e. protecting historic areas;

- f. 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;
 - g. encouraging economic development activities;
 - h. preserving agricultural and the environment;
 - i. protecting approach slopes and other safety areas of civilian and military airports;
 - j. promoting creation and preservation of adequate affordable housing; and
 - k. protecting surface and groundwater.
5. The 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.
6. The City Council has final authority over all matters described herein, except as specifically noted. City Council has final legislative authority to enact ordinances, amendments, and plans governing the development process, and to approve conditional use permits and subdivisions and site plans.

- a. The City Council has additional authorities including the authority to legislate by ordinance;
 - b. The right to issue special permits for special exceptions. Va. Code § 15.2-2286;
 - c. Responsible for the preparation and approval of an annual budget which may include a capital budget implementing the capital improvements program developed by the planning commission. Va. Code §§ 15.2-2503 and 15.2-2239.
 - d. Hears appeals from decisions of the zoning administrator including conditional zoning matters. Va. Code § 15.2-2301
7. Subdivision regulations are clearly distinguishable from zoning ordinances. The purpose of zoning ordinances is to provide an overall comprehensive plan for land use. Subdivision ordinances govern standards for the development of new neighborhoods or developments. Subdivision ordinances are designed to govern the manner in which unrestricted land may be developed.
8. 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:
 - a. Preparation of comprehensive plan and recommendation to City Council. Va. Code § 15.2-2223.

- b. Review of comprehensive plan at least every 5 years and preparation and recommendation of amendments deemed appropriate. Va. Code § 15.2-2230.
- c. Determination that the location of streets, parks, public areas, public buildings, or structures and public utility facilities are consistent with the comprehensive plan.
- d. Preparation and recommendation of an official map as described in Va. Code § 15.2-2233.
- e. Preparation and recommendation of an annual capital improvement program. Va. Code § 15.2-2239.
- f. Preparation and recommendation of a subdivision ordinance. Va. Code § 15.2-2251.
- g. 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).
- h. Preparation and recommendation of a zoning ordinance and amendments thereto. 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.

9. Board of Zoning Appeals (BZA). If the City Council has enacted a zoning ordinance, statute requires the creation of a BZA, whose members shall be appointed by the local Circuit Court. Va. Code § 15.2-2309. BZA's possess only those powers expressly conferred upon them by statute. Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc., 217 Va. 740 (1977).
- a. The BZA decides appeals from administrative interpretations of zoning ordinances and acts as a "safety valve" to ensure that strict application of zoning ordinances does not affect an undue hardship approaching confiscation.
 - b. The BZA hears appeals from any person aggrieved or any officer, department, board, or bureau of the locality from any decision of an administrative officer administering any provision of zoning or ordinance relating to zoning. Va. Code §§ 15.2-2309 (1); (3) and 15.2-2311.
 - c. The BZA may authorize on appeal or original application in specific cases, variances from the terms of the zoning ordinance when, owing to special conditions, a literal enforcement of the provisions will result in unnecessary hardship. Va. Code § 15.2-2309 (2).
 - d. Non-legislative decisions of the BZA are presumed to be correct and will not be disturbed by the Circuit Court on

review unless they are determined to be plainly wrong or in violation of the purpose and intent of the zoning ordinance.

Masterson v. Board of Zoning Appeals, 233 Va. 37 (1987);

Foster, et al. v. Geller, et al., 248 Va. 563 (1994).

- e. The BZA must interpret zoning ordinances; however, they have no authority to pass on the validity of a zoning ordinance. Decisions related to the validity of a zoning ordinance are the province of the judiciary. Town of Jonesville, et al. v. Powell Valley Village Limited Partnership, et al., 254 Va. 70 (1997).
- f. The 90-day time limit for BZA action on an appeal is directory not mandatory and its expiration does not cause the BZA to lose jurisdiction over an issue pending before it. Tran v. BZA, 262 Va. 572 (2001).
- g. The BZA also decides whether to grant variances from local zoning ordinances. No variance is authorized unless the Board finds: (i) that strict application of the ordinance would produce undue hardship; (ii) that the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and (iii) that the authorization of the variance will not be of substantial detriment to adjacent property and the character of the

zoning district will not be changed by granting the variance.

- h. The BZA hears and decides applications for interpretation of the zoning map where there is uncertainty as the location of a boundary.
- i. The BZA may also hear and decide applications for special exceptions, when specifically authorized by an ordinance of the locality.

10. 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.

- a. Every City Council must adopt a comprehensive plan for the territory under its jurisdiction.
- b. The comprehensive plan shall be general in nature, in that it shall designate the general or approximate location, character, and extent of such feature 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.
- c. 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.

- d. The comprehensive plan may only be amended following notice and public notice. The comprehensive plan shall be adopted 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.

11. Planning Department and Staff

- a. 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.
- b. Planning Commission provides the initial review and consideration of development plans, proposed zoning ordinances and amendments and comprehensive plans.

B. The Subdivision Ordinance

1. 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.
2. 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, and for light and air, and for 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.
- 3. Every subdivision plat shall be submitted for recordation and must meet the requirements of Va. Code § 15.2-2262.
 - a. 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.
 - b. 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.
 - c. The plat must include a current legal description of the land to be subdivided and an endorsement the subdivision is with the free consent of all owners, trustees, and any person with an interest in the land. Va. Code § 15.2-2264
- 4. Subdivision ordinances must also contain provisions dictating that approval shall be withdrawn and plats marked void unless plats are presented for recordation within 6 months after final approval (or such longer period as may be approved by the governing body). An except is where construction of facilities to be dedicated for public use has commenced pursuant to an approved plan or permit with surety or other approved security the time for plat recordation shall be extended to 1 year after final approval or to the time limit

specified in the surety agreement approved by the governing body, whichever is greater.

5. Subdivision ordinances are also 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.

6. Subdivision ordinances must have provisions governing partial and final release of performance guarantees within 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

**C. General Requirements After Subdivision Ordinance Is Adopted-
Virginia Code § 15.2-2254**

1. 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 from the appropriate local and authorities.
2. 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.

D. Review and Approval Process - Preliminary Final Plats

1. 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 state agencies, the locality must act within 35 days of the receipt of these approvals.
2. A preliminary subdivision plat shall be valid for 5 years provided:
 - a. The sub divider 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;
 - c. 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.
Va. Code § 152-2260.
3. 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.

4. 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).
5. 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.
6. Site Plans: Localities may require site plans or plans of development. The statutory provisions for submittal, consideration, and approval of subdivision plats apply with equal force to site plans. Va. Code §§ 15.2-2286; 15.2-2246 and 2258.
7. Effect of Plat or Plan Approval.
 - a. Upon recommendation of an approved subdivision plat, 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.
 - (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.
 - 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.
8. 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.

E. Important Statutory Requirements For Subdivisions

1. Localities are required to adopt subdivision ordinances. Va. Code § 15.2-224. A subdivision is defined as “the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development.” Va. Code § 15.2-2202.
2. A subdivision plat must be approved and recorded before any person can sell or transfer lands of a subdivision any unless the subdivision was lawfully created prior to the adoption of a subdivision ordinance. Va. Code § 15.2-2254.
3. Any subdivision plat recorded before January 1, 1953 is deemed valid pursuant 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.

F. Validity Of Plat Approvals

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

G. Road/Utility Dedications

1. The recordation of an approved subdivision plat shall operate to transfer to the locality, in fee simple:
 - a. Streets, alleys or other public use;

- b. To transfer any easement indicated on the plat to create a right of public passage over the land; 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.
2. 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. Va. Code § 15.2-2269.
3. 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.

4. There is no obligation of the city of pay for grading, paving, sidewalk, and sewer, curb and gutter improvements. Va. Code § 15.2-2268.
5. 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.
6. 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 be blocked 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.
7. The sub divider retains the right to validly reserve land as delimited on the subdivision plat.

H. Vacation of Subdivision Plats And Interests In Subdivision Plats

1. 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.
2. Any interest in streets, alleys, easements for public passage, drainage easements, easement for public utilities granted to the locality as a condition of the approval of a site plane may be vacated pursuant to Va. Code §15.2-2270.

II. Site Plans – Plans of Development

A. Site Plan and Plan of Development Distinguished

1. Site plan is defined as a “proposal for a development or a subdivision including all covenants, grants or easements and other conditions relating to use, location and bulk of building, density of development, common open space, public facilities and such other information as required by the subdivision ordinance to which the proposed development or subdivision is subject. Va. Code § 15.2-2201.
2. Plan of development is a nonspecific conceptual plan of proposed development that is not of any specific detail for which a property owner would be ready to build. See City of Suffolk v. BZA, 266 Va. 137, 145 (2003).

B. Plans of Development are Subject to Many of the Same Statutory Requirements Applicable to Subdivisions

1. Virginia law prohibits municipalities from conditioning approval of plans of development or subdivision plats on the property owner obtaining a special exception, special use or conditional use permit for the development or construction of residential dwellings for the use, height and density permitted by right under the zoning ordinance. Va. Code § 15.2-2288.1.
2. A municipality may adopt regulations relating to the extent and manner in which water, sewer and other utility facilities shall be installed as a condition precedent to the approval of a subdivision plat or plan of development. Va. Code § 15.2-2121.
3. A property owner will have vested rights against the imposition of pro rata fees for traffic impacts when a development plan has received the localities' approval. Va. Code § 15.2-2242(5).

C. Conflict with Zoning Provisions

1. 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.

D. Validity of Final Site Plans

1. Approved final site plans are valid for a minimum of five years from the date of approval. A municipality may extend the period of validity. Va. Code § 15.2-2261.

- a. Extension may be granted upon the property owner's submission of an application requesting an extension prior to the expiration of the site plan.
2. The site plan is deemed final when it has been reviewed and approved by the locality, if the only requirement to be satisfied is the posting of any bonds or escrows. Id.
3. The importance of the period of validity is that no subsequent amendment to the zoning ordinance may adversely affect the details of the plan. Id.

E. Road/Utility Dedications

1. Site plans may include dedication to a locality as a condition of approval. Va. Code § 15.2-2270.
 - a. Such dedications may be vacated by mutual consent of the property owner and locality, which is included in a written and recorded instrument.
 - b. The 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.

III. Variances

A. Introduction

1. Zoning Ordinances are intended to provide a means by which localities can manage and oversee the orderly development of compatible land uses. Generally, zoning ordinances are to promote

health, safety or the general welfare of the public. Va. Code § 15.2-2283. As such, localities have been empowered to classify the territory under its jurisdiction into districts whatever the number, size or shape that may be necessary to carryout the general purposes of zoning. Va. Code § 15.2-2280.

2. However, the need to vary from the specific development criteria imposed in each of the zoning districts may be necessary. To accomplish this, the property owner can seek a variance from the development criteria that presents a hindrance to development.

B. Definitions

1. Zoning is defined as the process of classifying land within a locality into areas and districts; prescribing and applying in each area and district regulations concerning building and structure placement and design and uses permitted within those districts. Va. Code § 15.2-2201.
2. Variance means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner. Such need for variance would not be shared generally by other properties; provided such variance is not contrary to the intended spirit and purpose of the ordinance and

would result in substantial justice being done. Variance, however, does not include a change in use. Id.

- a. The inclusion of the language “reasonable deviation,” suggests that a total deviation or deviation that renders meaningless the specific ordinance provision would not be a variance. (See Board of Supervisors v. Rowe, 216 Va. 28 (1975) (stating that a variance releasing landowners from all the restrictions and obligations complained of would be contrary to the intended “spirit and purpose” of a challenged ordinance.)
3. Special Exception means a special use that is not permitted in a particular district, except by a special use permit granted under the provisions of Virginia statutes and any zoning ordinances adopted pursuant to Virginia statutes. Va. Code § 15.2-2201.

C. Type of Variances

1. Relief from Constitutionally and Permissible Application
 - a. When the application of a zoning ordinance provision would result in a complete denial of all reasonable uses of the property, the same would be considered a confiscation. As such, the law permits variances from the zoning ordinance restrictions under this situation. Cochran v. Board of Zoning Appeals, 267 Va. 765 (2004).
2. Unreasonable Restriction on Use.

- a. When a proposed use is physically identical or the impact on land use is the same, and where a variance requested is to confirm existing legally nonconformities, then it is unreasonable to deny a property owner the right to convert apartments to condominiums. Natrella v. Board of Zoning Appeals, 231 Va. 451 (1986).
3. Legislative Enactment
 - a. Variances are not permitted where legislative enactment by the governing body is “reasonably practical” to resolve the situation giving rise to the need for a variance. Prince William County Board of Zoning Appeals v. Bond, 225 Va. 177 (1983). Variances are intended to address unique situations. Thus, where the need for a variance is of a reoccurring nature, the appropriate means of addressing the issue is by legislative act of the governing body.

D. Standards to be Applied in Granting a Variance.

1. If a locality has enacted a zoning ordinance, the locality is required to establish a local Board of Zoning Appeals (BZA). The BZA is authorized to hear on appeal or original application variances from the terms of a zoning ordinance, if the variance will not be contrary to the public interest, when owing to special conditions the literal enforcement of the provisions will result in unnecessary hardship.

However, the spirit of the ordinance must be observed and the landowner must show (Va. Code § 15.2-2308):

- a. The property was acquired in good faith. It is important to note that the fact that a property owner acquires the property knowing that a variance may be necessary does not affect the property owner's ability to claim a purchase in good faith.
- b. The landowner must also show one of the following conditions existing on the property:
 - (i) exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance;
 - (ii) exceptional topographic conditions or other extraordinary situation or condition of the piece of the property; or
 - (iii) by reason of the condition, situation or development of property immediately adjacent thereto the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property. Natrella v. Board of Zoning Appeals, 231 Va. 451 (1986).

- c. If the BZA determines that a variance is warranted, it must specifically find that strictly applying the ordinance would produce undue hardship.
 - (i) Here, the BZA should weigh the undue hardship against the potential detriment to the public interest and adjacent property. Board of Zoning Appeals v. Glasser Bros. Corp., 242 Va. 197, 201 (1991).
 - (ii) Undue hardship requires a showing that the application of the zoning regulations would effectively prohibit or unreasonably restrict the use of the property or create a clearly demonstrable hardship approaching confiscation. Packer v. Hornsby, 221 Va. 117 (1980).
 - (iii) Self-inflicted hardship, e.g. failing to obtain a building permit, does not justify issuance of a variance. Steele v. Fluvanna County Board of Zoning Appeals, 246 Va. 502.
 - (iv) Financial hardship, standing alone, does not justify issuance of a variance. Azalea Corp. v. City of Richmond, 201 Va. 636 (1960).
- d. That the hardship is not shared generally by other properties in the same zoning district.

- e. That authorizing the variance will not be a substantial detriment to adjacent property and the character of the zoning district will not be changed.
- 2. That the condition of the property must not be so general such that it would be reasonable to formulate a general regulation to be adopted as an amendment to the ordinance.
- 3. Judicial Review of Zoning Appeals Decision
 - a. The decision of a Board of Zoning Appeals carries a presumption of correctness. Natrella v. Board of Zoning Appeals, 231 Va. 456. A trial court may only consider whether the Board has applied erroneous principles of law or where discretion of the Board is involved, whether the decision is plainly wrong and in violation of the purposes and intent of the zoning ordinance. Steel v. Fluvanna County Board of Zoning Appeals, 246 Va. 502 (1993).

E. Variances Distinguished from Special Exceptions

- 1. Special exception is a term that is interchangeable with special use permit and is a legislative act. Variances, however, are administrative. Fairfax County v. Southland Corporation, 222 Va. 514 (1982).
 - a. 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, 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. Id.

- (i) Legislative acts may be delegated and remain legislative as long as the delegation is allowed by statute. Helmick, 254 Va. 229.
 - (a) Comprehensive zoning ordinances, rezoning amendments and rezoning ordinances are considered to be legislative acts. Id. 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).
- (ii) 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).

- (a) 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. Id.
- (b) 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 conclusions.” Id.
- (c) Generally, the motives of the governing body in undertaking an act are immaterial. Helmick, 254 Va. 225.
- (d) 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).

b. Administrative Acts. Administrative acts are those acts that pursue a plan already adopted by the legislative body, or may be properly classified among the executive powers. R.G. Moore Building Corp., 239 Va. 491.

(i) Administrative acts are restricted to the specific authority granted Higgs, 258 Va. 573.

2. Special exceptions are those uses permitted only after governmental scrutiny because they are deemed to have a potentially greater impact upon neighboring properties or the public. Fairfax County v. Southland.

a. However, in both variances and special exceptions, the reviewing body has the authority to impose conditions and limitations on the granting of either. See Va. Code § 15.2-2309. See also Fairfax County v. Southland Corp., 224 Va. 514.

IV. Appeals

A. Denial Of Zoning

1. 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 V., 12, 17 (1982). An exercise of this power is presumed valid so long as it is not unreasonable and arbitrary. Id.
2. 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).
 - a. The test employed to determine whether an ordinance is legislative is to consider whether the ordinance makes a new law, 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. Id.
 - b. 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. Id. 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).

3. 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).
 - a. 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. Id.
 - b. 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.” Id.
 - c. Generally, the motives of the governing body in undertaking an act are immaterial. Helmick, 254 Va. 225.

- d. 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).
4. Dillon's Rule.
- a. Dillon's Rule is paramount in Virginia. Dillon's Rule was first recognized by the Virginia Supreme Court in City of Winchester v. Redmond, 93 Va. 711, 25 S.E. 1001 (1896) and is applied by Virginia courts to resolve any ambiguities in enabling authority against the localities.
 - b. Localities have only those powers (1) expressly granted, (2) necessarily or fairly implied from express grants, and (3) those that are essential and indispensable. Any doubt about the existence of authority is construed against the locality. See also Hylton Enters. v. Bd. of Supervisors, 220 Va. 435, 258 S.E. 2d 5787 (1979).
 - c. Dillon's Rule is strictly applied. Unless the legislature has provided an express grant of the power in question, the Supreme Court rarely upholds local authority to exercise that power.

- d. A corollary to Dillon’s Rule is codified in Virginia Code § 1-13.17, which prohibits the enactment of ordinances that are inconsistent with the laws of the United States or the Commonwealth. Blanton v. Amelia County, 261 Va. 55, 540 S.E. 2d 869 (2001).
 - e. 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.
5. Implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits. The test in application of the doctrine is always reasonableness, in which concern for what is necessary to promote the public interest is a key element.
6. The Supreme Court of Virginia will generally imply local power only when an expressly granted power would be rendered ineffective without such an implication.
- a. 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).

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

7. Presumption of Legislative Validity.

- a. Virginia follows the rule that legislative decisions by localities are presumed to be valid. A legislative action that is presumed to be valid “will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare.” City Council of City of Va.

Beach v. Harrell, 236 Va. 99, 101, 372 S.E. 2d 139 (1988).

Richardson v. City of Suffolk, 252 Va. 336, 477 S.E. 2d 512 (1996).

- b. 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).
- c. Administrative actions involve implementation of existing laws while legislative actions create new ones.
- d. 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.
- e. The consequence of the presumption of validity is that a plaintiff attacking the validity of a local legislative decision must establish a prima facie case of invalidity to shift the burden of proof to the locality. City of Covington v. APB Whiting, Inc., 234 Va. 155, 360 S.E. 2d 206 (1987). A plaintiff must show that the existing zoning is unreasonable and the zoning requested is reasonable. City Council of the City of Virginia Beach v. Harrell, 236 Va. 99, 372 S.E. 2d

139. In considering whether a legislative act is reasonable, the motives of the governing body in undertaking the act are immaterial.

- f. 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).

8. Fairly Debatable Rule.

- a. 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.
- b. 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."

- c. 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.
- d. There are a number of exceptions to the presumption of validity and fairly debatable rule.
 - i. 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.
 - ii. 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.
- e. Administrative decisions are not governed by the presumption of validity and fairly debatable rule. Although

great weight is given to consistent construction of zoning ordinance by the officials charged with its enforcement, administrative duties, such as the issuance of a building permit when the conditions of applicable ordinances have been met, or the approval of properly prepared site plans or subdivision plats may be compelled by mandamus from the circuit court directing the appropriate government official to grant the requested approval or issue the requested permit. Bd. of Supervisors of Fairfax County v. Home, 216 Va. 113, 215 S.E. 2d 453 (1975).

- f. Vested Rights.
 - i. "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.
 - ii. Until 1999 vested rights in Virginia was a doctrine developed through case law. The 1998 session of the General Assembly adopted a legislative definition of vested rights by amending Virginia Code § 15.2-2307. In addition to the new vesting law in recent years, the legislature has created

several statutory grandfathering or "safe harbors" provisions for landowners, which go beyond the scope of the common law doctrine of vesting.

g. Standing to Sue.

- i. 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.
- ii. 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.
- iii. A plaintiff must also be "aggrieved," that is one who has suffered a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation different from that suffered by the public generally. Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals of Va. Beach, 231 Va. 415, 419-20, 344 S.E. 2d 899, 902-03 (1986).

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

h. 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.

B. Approval of Special Use Permits with Unacceptable Conditions

1. A special use permit or special exception is a legislative act.
2. A challenge to the enactment or amendment of a special use permit bears the burden of proving that the act is clearly unreasonable, arbitrary, or capricious and that it bears no reasonable or substantial relationship to the public health, safety, morals, or general welfare.

C. Opinions Of The Planning Offices

Administrative Acts. Administrative acts are acts that pursue a plan already adopted by the legislative body or may be properly classified among the executive powers. R.G. Moore Building Corp., 239 Va. 491. Administrative acts are restricted to the specific authority granted. Higgs, 258 Va. 573 and are reviewed as ministerial acts.

D. Variances

1. Judicial Review of Board of Zoning Appeals Decisions. The decision of a Board of Zoning Appeals carries a presumption of correctness. Natrella v. Board of Zoning Appeals, 231 Va. 456. A trial court may only consider whether the Board has applied erroneous principles of law or where discretion of the Board is involved, whether the decision is plainly wrong and in violation of the purposes and intent of the zoning ordinance. Steele v. Fluvanna County Board of Zoning Appeals, 246 Va. 502.
 - a. General Standards for the Granting of Variances. Virginia Code §15.2-2309(2), not contrary to the public interest and due to special conditions, application of zoning ordinance will result in unnecessary hardship.
 - b. Specific Findings to be Made By BZA. Virginia Code § 15.2-230(2): That the property was acquired by the applicant in good faith; and that due to particular physical surroundings, size, shape; or exceptional topographic

conditions; or extraordinary situations or conditions of the property; or conditions, situations, or development of property immediately adjacent thereto, the strict application of the ordinance would effectively prohibit or unreasonably restrict the property's use; or where strict application of the ordinance would constitute a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or mere inconvenience. An applicant must show the existence of at least one of these special conditions. Natrella v. Board of Zoning Appeals, 231 Va. 451. That strictly applying the ordinance would produce undue hardship.

- i. Here, the BZA should weigh the undue hardship against the potential detriment to the public interest and adjacent property should a variance be granted. Board of Zoning Appeals v. Glasser Bros. Corp., 242 Va. 197, 201 (1991).
- ii. Undue hardship requires a showing that the application of the zoning regulation would effectively prohibit or unreasonably restrict the use of the property or create a clearly demonstrable hardship approaching confiscation. Packer v. Hornsby, 221 Va. 117 (1980).

- iii. Self-inflicted hardship, e.g. failing to obtain a building permit, does not justify issuance of a variance. Steele v. Fluvanna County Bd. Of Zoning Appeals, 246 Va. 502).
- iv. Financial hardship, standing alone, does not justify issuance of a variance. Azalea Corp. v. City of Richmond, 201 Va. 636 (1960).
- d. That the hardship is not shared generally by other properties in the same zoning district.
- e. That authorizing the variance will not be a substantial detriment to adjacent property and the character of the zoning district will not be changed.
- f. That the condition of the property is not so general such that it would be reasonable to formulate a general regulation to be adopted as an amendment to the ordinance.

2. General Considerations

- a. Variance may be granted regarding requirements relating to dimensions of characteristics of land and structures. However, the BZA may not grant variances for the use of land, building's structure.
- b. The BZA may, in authorizing a variance, impose conditions regarding location, character and other features and may require a guarantee or bond. Virginia Code § 15.2-2309(6).

- c. The BZA is required to make appropriate findings, supported by the record, or state appropriate conclusions supported by the record, unless the record itself, taken as a whole, suffices to render the Board's decision fairly debatable. Ames v. Town of Painter, 239 Va. 343, 350 (1990).

E. Subdivisions

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.

F. Site Plans-Plans Of Development

1. Approval of a site plan and the issuance of a building permit are ministerial, rather than discretionary acts, the performance of which may be enforced by mandamus when an applicant has complied with or is ready, willing, and able to comply with such requirements. Board of Suprvs. V. Horne, 216 Va. 113, 215 S.E.2d 453 (1975).

V. Vested Rights

A. Locally Enforced Restrictions on Property

1. Generally

- a. Localities are authorized to enforce the provisions of their zoning ordinances. The enforcement authority includes empowering the zoning administrator to:
 - (i) order the remedying of a violation;
 - (ii) insure compliance by bringing legal action or other appropriate action or proceeding; and
 - (iii) make findings of fact regarding the legal status of a claim of vested or nonconforming rights with the concurrence of the attorney for the governing body.Va. Code § 15.2-2286.

2. Conditions

- a. Localities are permitted to grant special exceptions to uses permitted under the zoning ordinances. In granting the special exceptions, the locality is also authorized to impose suitable regulations and safeguards to insure the compatibility of the proposed use with adjacent and neighboring properties. Va. Code § 15.2-2286.

3. Development Agreements

- a. Development Agreements, which are mutually consented to by the property owner and the locality, may impose restrictions that are treated as provisions of the zoning ordinance.

4. Proffers
 - a. In connection with a rezoning request, a property owner may voluntarily proffer, in writing, conditions related to the rezoning to minimize the impact of the rezoning on the municipality. Va. Code § 15.2-2297.
5. Enforcement Procedures
 - a. Any conditions imposed in connection with a special exception granted by the governing board, conditions imposed by the BZA in granting a variance or the governing body may enforce proffers offered in connection with a rezoning request when a violation of the conditions or proffers occurs. Va. Code §§ 15.2-2299, 15.2-2286.

B. Vested Rights

1. Generally
 - a. When a property owner has a “vested right” in a specific use of property, that right may not be affected by any subsequent changes to the zoning ordinance that affect, limit or prohibit that use. To obtain the benefit of a vested rights claim, the landowner must (i) be the beneficiary of a significant affirmative governmental act that remains in effect allowing development of a specific project; (ii) rely in good faith on the significant governmental affirmative act; and (iii) incur extensive obligations or substantial

expense in diligent pursuit of the specific project. Va. Code § 15.2-2307.

- b. Significant affirmative governmental acts include:
- (i) the governing bodies' acceptance of proffers;
 - (ii) the governing body has granted a rezoning for a specific use or density;
 - (iii) the governing body or BZA has granted a special exception or use permit;
 - (iv) the BZA has granted a variance;
 - (v) the governing body or designated agent has approved a preliminary subdivision plat, site plan or plan of development and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances;
or
 - (vi) the governing body or its designated agent has approved a final subdivision, plat, site plan or plan of development. Id.

2. Dillon's Rule

- a. Dillon's rules provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from, expressly granted

powers and those that are essential and indispensable. City of Chesapeake v. Gardner Enterprises, 253 Va. 243 (1997).

- b. When an ordinance exceeds the scope of Dillon's rule, it is invalid. Thus, where the relevant statute expressly grants a locality the power to regulate existing structures, implicit in this power is the authority to regulate also new construction. To rule otherwise would thwart the legislative objective of granting local governments the authority to regulate changes pertaining to nonconforming uses. Id.

3. Common Law Vested Rights Generally

- a. Nonconforming use is defined as a lawful use existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance. Knowlton v. Browning-Ferris Industries of Virginia, 220 Va. 571, 572 (n.1) (1979).
- b. Nonconforming land, buildings and structures or their uses, which do not conform to the zoning regulations of the district in which they are located, may continue if maintained in the condition existing at the time they became nonconforming. Va. Code § 15.2-2307.
 - (i) To determine whether a use is maintained in the condition existing at the time of nonconformance,

consideration may be given to any increases in the size and scope. This determination depends in each case upon the extent of the increase and affect on the purposes and policies the zoning ordinance was designed to promote. Knowlton v. Browning-Ferris Industries of Virginia, 220 Va. 571.

- (ii) To allow the continuance of a nonconforming use, the use of any such building, structure or land must not be discontinued for any period greater than two years. Va. Code § 15.2-2307.
- (iii) A Zoning ordinance may provide that nonconforming uses comply with the current zoning regulations if the use is enlarged, extended, reconstructed, or structurally altered. Id.
 - (a) Generally, rezoning ordinances allow reconstruction, extension or enlargement up to a stated percentage before requiring compliance with existing regulations.

4. Vesting by Ordinance

- a. Localities are authorized to provide by ordinance, that buildings, land, and structures, which do not conform to the zoning ordinance, may be continued so long as they are not

enlarged and are not discontinued for a period greater than two years. Va. Code § 15.2-2307.

5. Development Agreements

- a. Virginia law permits certain counties to enter into development agreements for the purpose of encouraging economic development. If such an agreement is entered into between the county and the property owner:
 - (i) dedicates real property to the county, the Commonwealth, other political subdivision or federal government;
 - (ii) makes or is required to make cash payment to the county, Commonwealth, other political subdivision or federal government; or
 - (iii) makes or is required to make public improvements for the county, Commonwealth, other political subdivision or federal government, the payment or construction shall vest the property's owner's right under the agreement. Va. Code § 15.2-2303.1.
- b. If the property owner's right has vested, no amendment to the zoning map or amendment to the text of the zoning ordinance that eliminates, restricts, reduces or modifies the use, density or intensity of uses will be effective with

respect to the property during the term of the agreement.

Id.

- c. This provision will not be upheld; however, if there has been a mistake, fraud or change in circumstances substantially affecting the public health, safety or welfare.

Id.

6. Proper Exercise of Police Power

- a. Nonconforming uses are not favored in law because they detract from the effectiveness of a comprehensive zoning plan. City of Chesapeake v. Gardner Enterprises, 253 Va. 243 (1997). The legislature has declared that the purpose of zoning and planning is to improve the public health, safety, convenience, and welfare of the citizens. Va. Code § 15.2-2200. Thus, the implementation of zoning powers and enforcement thereof is a legitimate exercise of police powers. Board of Supvrs. v. Snell Constr. Corp., 214 Va. 655 (1974).

