FUNDAMENTAL ZONING AND LAND USE ACTIONS

Ann K. Crenshaw

I. FUNDAMENTAL ZONING AND LAND USE ACTIONS.

A. Zoning and Land Use Ordinance Adoption and Amendment.

1. The Players.

a. Planning Commission. The duties of the Planning Commission are statutorily prescribed, including:

(1) Preparation of a comprehensive plan and recommendation thereof to the governing body. Va. Code § 15.2-2223.

(2) Review of the comprehensive plan at least every 5 years and preparation and recommendation of amendments thereto. Va. Code § 15.2-2230.

(3) Confirmation that the location of streets, parks, public areas, public buildings or structures and public utility facilities or public service corporation facilities are consistent with the plan. Va. Code § 15.2-2232.

(4) 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).

(5) Preparation and recommendation of an official map. Va. Code § 15.2-2233.

(6) Preparation and recommendation of an annual capital improvement program. Va. Code § 15.2-2239.

(7) Preparation and recommendation of a subdivision ordinance. Va. Code § 15.2-2251.

(8) Preparation and recommendation of a zoning ordinance and amendments thereto. The governing body may not enact either a zoning ordinance or any amendments thereto until the matter has first been referred to the commission for its review and recommendation. Va. Code § 15.2-2285.

b. Governing Body. The governing body has final authority over all matters referred to the Planning Commission with minor limitations. The governing body's duties include the following:

(1) Authority to legislate by ordinance in a particular locality.

(2) May retain the right to issue special permits or special exceptions. Va. Code § 15.2-2286(3).

(3) Responsibility for the preparation and approval of an annual budget which may include a capital budget improvements program. Va. Code §§ 15.2-2503 and 15.2-2239.

(4) Responsibility for administration and enforcement of site plan and subdivision regulations pertaining to public infrastructure, such as streets, curbs, gutters, sidewalks, bike trails, water drainage

systems and solid waste management. Va. Code §§ 15.2-2241 and 15.2-2255.

(5) Conducts appeals from decisions of the zoning administrator involving conditional zoning matters. Va. Code § 15.2-2301.

c. Zoning Administrator. The locality may provide in its zoning ordinance for the appointment or designation of a zoning administrator. Va. Code § 15.2-2286(d).

(1) The zoning administrator shall have all necessary authority to administer and enforce the zoning ordinance, including ordering in curative action for violations and institution of legal proceedings to enforce compliance. Va. Code § 15.2-2299.

(2) The zoning administrator shall administer and enforce conditions related to conditional rezonings pursuant to Va. Code §§ 15.2-2296, *et seq.*

(3) Virginia Code § 15.2-2311(C) provides that no written order, requirement, decision or determination made by a zoning administrator may be reversed after 60 days.

(4) Virginia Code § 15.2-2286(a)(4) provides that the zoning administrator shall respond within 90 days to a request for a decision or determination.

d. Board of Zoning Appeals (BZA). BZA's are creatures of statute and possess only those powers expressly conferred upon them. Any locality which has enacted a zoning

ordinance is required to create a BZA whose members shall be appointed by the local circuit court. Va. Code § 15.2-2309. The duties of the BZA include the following:

(1) To entertain appeals from any person aggrieved or any officer or department of the locality from any decision of an administrative officer administering any provision of zoning or ordinance relating to zoning provided for in Article 8 of the Code. Va. Code §§ 15.2-2309(1) and 15.2-2311.

(2) The BZA may grant, on appeal or original application in specific cases, variances from the terms of the zoning ordinance "when, owing to special conditions, a literal enforcement or the provisions will result in unnecessary hardship." Va. Code § 15.2-2309(2). Specific standards for the granting of variances are set out in Virginia Code § 15.2-2309(2).

(3) To entertain appeals from decisions of the zoning administrator. Va. Code § 15.2-2309(3).

(4) To entertain applications for interpretation of zoning maps. Va. Code § 15.2-2309(4).

(5) If authorized by the governing body, the BZA may hear and decide special exceptions and special permits. Va. Code § 15.2-2309(6). In such cases, the BZA is considered to be acting in a legislative, rather than quasi-judicial, capacity, and, upon judicial review, its decision is accorded the presumption of validity and evidence will be

weighted using the fairly debatable rule. *Bd. of Supervisors of Fairfax County v. Southland Corp.* 224 Va. 514, 297 S.E. 2d 718 (1982).

(6) 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.

(7) Judicial review is confined to a determination as to whether the BZA has applied erroneous principles of law, or, when a board's discretion is involved, whether the decision is plainly wrong.

A party challenging a decision of the BZA has the burden of proof on issues of whether the BZA applied erroneous principles of law or was plainly wrong and in violation of purposes and intent of zoning ordinance. The BZA exercises its discretionary judgment in deciding whether the evidence presented before it justifies the grant of a variance; thus, the BZA's decisions can be overturned only for arbitrary or capricious conduct constituting a clear abuse of discretion.

(8) Judicial review of a BZA decision on a writ of *certiorari* is limited to the scope of the BZA proceeding and the court may only consider the correctness of the BZA decision.

(9) 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. Gwin*, 262 Va. 572, 554 S.E. 2d 63 (2001).

2. Zoning and Planning Distinguished.

   a. The terms "zoning" and "planning" are not synonymous. Planning is a much broader concept which includes the municipality as a whole. Planning sets forth concepts for the development of a community for not only the use of land but also all matters impacting the public welfare.

   b. A comprehensive plan is not a zoning regulation, it is the roadmap for the adoption of zoning ordinances and any amendments thereto.

3. Authority to Adopt Ordinances.

   a. The Virginia Code confers authority on municipalities to adopt zoning ordinances, establish planning commissions and control the development and subdivision of land within its boundaries. Va. Code §§ 15.2-427 through 15.2-503.2.

   b. Municipal zoning ordinances are subordinate to the laws of the Commonwealth. As such, if there is a conflict between an ordinance adopted by the locality and state law, the laws of the Commonwealth prevail.

4. Relationship Between the Comprehensive Plan and Zoning Ordinances.

a. Planning commissions generally prepare comprehensive plans and official maps for adoption by the City Council. Va. Code § 15.2-2223.

b. The Virginia Code provides that upon the adoption of a comprehensive plan by the governing body, the plan shall dictate the approximate location, the design and character of each component of the plan.

c. The planning commission is vested with the preparation of zoning ordinances and amendments thereto for recommendation to City Council. City Council possesses the ultimate authority to adopt ordinances and amendments thereto.

d. At the discretion of City Council, local planning commissions are required to prepare and conduct annual capital improvement programs. Such annual reviews are to be based upon the comprehensive plan projected for a five year period. This review is submitted to the governing body in consideration of the municipalities' budget.

5. The Zoning Ordinance. Va. Code §§ 15.2-2280 through 15.2-2316.

a. Zoning is a legislative act.

Virginia Code § 15.2-2280 authorizes localities to divide their jurisdictions by lines into districts within which the locality may regulate the:

(1) Use of land;

(2) Size, height, location, construction, repair, maintenance, and removal of structures;

(3) Areas and dimensions of land, water and air space to be occupied by buildings, structures and uses as well as yards and open spaces, and the size of lots based upon the availability of public utilities; and

(4) The excavation and mining of soil and other resources.

b. Arbitrary, but legal.

Although lines must be drawn between districts resulting in arbitrary distinctions between what is permitted in one district and what is permitted in a neighboring district, Virginia courts have held that the drawing of such arbitrary distinctions is lawful. Virginia courts have held that the legislative function is more or less arbitrary.

In making zoning judgments, the governing body must consider the general boundary guidelines set forth in the

comprehensive plan, the location of property lines, the physical characteristics of land, and other factors affecting optimum geographical alignment. *Bd. of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E. 2d 79 (1983).

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 *Bell v. City Council of the City of Chesapeake*, 244 Va. 490, 297 S.E. 2d 810 (1982) 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.

"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. *Helmick*

Bd. of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E. 2d 199 (1975).

The drawing of zoning boundaries must depend upon some rational basis, e.g. guidelines of the plan, location of property lines, or physical characteristics. *Bd. of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E. 2d 33 (1975).

6. Authorized Objectives of Zoning. Virginia Code § 15.2-2283 sets forth the authorized objectives of zoning ordinances and mandates that reasonable consideration be given to each stated purpose, "where applicable."

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

   b. Reduce and prevent traffic congestion in streets;

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

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

   e. Protect and preserve historic areas;

   f. Protect against the overcrowding of land with an undue density of population, in relationship to public facilities and infrastructure existing;

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

h. Preserve agricultural lands, forests and other lands of significance for the protection of the natural environment;

i. Protect airport safety;

j. Promote the creation and preservation of affordable housing for meeting the current and future needs of the locality as well as a reasonable proportion of the current and future needs of the planning district;

k. Reasonable provisions for the protection of groundwater and surface water; and

l. A 2001 amendment to Virginia Code § 15.2-2286 authorizes tax credits for voluntary downzonings.

7. Proffered Zoning. 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.

a. Pursuant to Virginia Code § 15.2-2298, localities and adjacent localities may accept proffers of cash, real property, and the construction of off-site public improvements subject to the following conditions:

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

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

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

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

(5) The proffers are voluntary.

b. A 2001 amendment to Va. Code § 15.2-2297(a)(v) and Va. Code § 15.2-2298(A) prohibit proffers which require establishment of a homeowners' association for the collections of contributions and payment to the local government for maintenance of public facilities.

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

8. Unauthorized Objectives. Pursuant to Dillon's Rule, virtually anything not expressly provided for by state statutes may be ruled *ultra vires*. Some objectives which have been held not to be authorized are:

a. Aesthetic zoning. Aesthetic objectives of zoning provisions are not illegal per se, but they must be supported by some otherwise legitimate zoning purpose. Aesthetic objectives cannot be the sole purpose of the regulation. *Bd.*

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

b. "Socioeconomic" zoning. The Virginia Supreme Court found a Fairfax ordinance increasing the minimum lot size from one-half to two acres in the western two-thirds of the locality to be socioeconomic zoning unlawfully designed to prevent the less affluent from occupying the territory. *Bd. of Supervisors of Fairfax County v. Carper*, 200 Va. 653, 107 S.E. 2d 390 (1959).

c. Also considered "socioeconomic" zoning is mandatory "inclusionary" zoning where the landowner is required to include in his project a certain amount of low-cost or affordable housing. Such requirements also have been found to be an unconstitutional taking. *Bd. of Supervisors of Fairfax County v. DeGroff Enters., Inc.*, 214 Va. 235, 198 S.E. 2d 600 (1973).

However, Virginia Code § 15.2-2304 was enacted which generally enables counties using the "urban county executive" form of government to adopt zoning provisions designed to promote affordable housing by providing incentives for the construction of such housing through zoning density bonuses; in exchange for which the governing body is able to control the resale and rental prices of resulting affordable housing for up to 50 years. This statute also sanctions affordable housing ordinances based upon optional density bonuses already in existence in other localities. Subsequently thereto Va. Code § 15.2-2305 extended the authority to all other localities to enact

local affordable housing ordinances using density bonuses to offset the cost to developers of providing such housing as part of projects.

d. Off-site improvements.

Generally, the zoning enabling legislation has been held not to allow localities to exact dedication of land, payment for or construction of roads or other public facilities.

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. 172 Va. 217, 1 S.E. 2d at 299.

This is particularly true where the need for the public improvement is not substantially generated by the development itself. *Rowe; Cuppv. Bd. Of Supervisors of Fairfax County, 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 an existing public road, the local government could not condition subdivision approval upon improvement to the existing public road. *Hylton Enters., Inc. v. Bd. of Supervisors of Prince William County*, 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 15.2-460.3 *et seq.* authorize certain localities to create

transportation districts wherein special assessments may be levied for the construction of transportation improvements. *Va. Code* § 15.2-2317 *et seq.*, authorize the assessment of road impact fees in a few large localities and their contiguous neighbors. Virginia Code § 15.2-2242(4) authorizes acceptance of voluntary payments for off site road improvements as part of the subdivision process.

e. "Timed phase zoning. This technique has been declared *ultra vires* in Virginia. *Bd. of Supervisors v. Williams*. This is a technique, whereby a locality maintains low density zoning in an area pending extension of public facilities although the plan indicates that higher density is the ultimately appropriate land-use.

f. Interim zoning.

(1) There is no specific statutory authority for interim zoning, i.e., zoning adopted as a temporary measure pending completion of the drafting, study and formal adoption of a "permanent" zoning ordinance.

(2) The natural and prudent reaction of landowners with any intention of developing their property under the terms of an existing zoning ordinance when the local governing body announces its intent to undertake

B. Rezonings.

1. Preparation.

a. Know your ordinance and comprehensive plan. Successful rezoning applications are the product of careful consideration and planning. The process begins with the initial consideration of the authority to make the application. For example, a contract purchaser must have appropriate cooperation with the landowner, including the allocation of sufficient time in which to achieve the desired result.

b. Understanding.

A thorough understanding of the intended use of the property is essential, including, but not limited to, the hours of operation, the number of employees, the projected number of customers/visitors and the like. The client may have planned for accessory uses which may require special use permits.

c. Site Development Matters.

(1) The input of your engineer is critical in issues related to site development. Professional input at an early stage avoids unnecessary costs and delays later in the process. The engineer offers great insight as to issues, including:

(a) Ingress/egress issues

(b) Stormwater management issues

(c) Wetlands delineation

(d) Chesapeake Bay Act issues

(e) Location of structure and parking matters

(f) Relationship to development standards and to adjacent properties

(g) Traffic impact issues

(h) Survey matters

(i) Easements and restrictions

(2) In order to identify potential issues, carefully review your intended use and preliminary review of the site with the following:

(a) Comprehensive plan

(b) Zoning ordinance

(c) Applicable development standards

(d) Historical applications for rezoning of this property

(e) Historical applications of similarly situated properties

(f) Potential historic or environmental issues

(g) Master transportation plan

(h) Utilities plan

(i) Projected highway expansion

(3) Coordinate title examination findings with engineer and surveyor.

(4) Determine the need for other consultants, such as the following:

(a) Land Planner

(b) Economic or Market Analyst

(c) Environmental Consultant

(d) Architect

(e) Engineer

(f) Surveyor

(g) Traffic Engineer

(h) Landscape Architect

2. Meetings with Planning Staff.

A pre-application meeting with a member of staff is critical in two respects – it permits the thorough explanation of the goals and objectives of your request, and, most importantly, it affords the opportunity for feedback, education and identification of any weaknesses in the projects (creates an opportunity to mitigate before the issues are publicly identified.)

3. Contacts with Neighbors.

Meetings with adjacent property owners, civic associations and any special interest groups prior to the filing of an application allows the applicant the opportunity to address concerns and avoid opposition.

4. Application.

a. Understand what you need to achieve your intended goal.

(1) Rezoning

(2) Use Permit

(3) Special Exception

(4) Conditional Use Planned Development

(5) Variance

b. Application Information

c. Zoning Powers of Attorney

d. Proffers

e. Disclosure Affidavit

f. Legal Description

g. Exhibits

h. Miscellaneous Information

5. Significance of Proffered Conditions.

   a. Conditional zoning versus straight zoning

   b. Allowable proffers – cash and other categories

   c. Roadway improvements and traffic signals

   d. Utilities issues

   e. Phasing of project

   f. Buffers and screening

   g. Elevations and setbacks

   h. Access limitations

   i. Site coverage, size and density

   i. Architecture materials, signage and lighting

   j. Dedication of land for public purposes

   k. Height and use restrictions

   l. Recreational amenities

6. Presentation of Case – Be Prepared.

   a. Clear, concise and early education of panel. Early contact with members determines whether you have a need for your consultant/expert presentation.

   b. Written presentation/outline (time limits!)

   c. Use of color charts/technology

7. Maintain credibility and avoid criticism and unproductive arguments. Recognize the political realities of the process.

C. Quasi-Judicial or Administrative Actions.

1. Variances.

a. A Board of Zoning Appeals ("BZA") may grant a variance to depart from the literal requirements of a zoning ordinance if such a grant is not contrary to the public interest. *Spence v. Bd. of Zoning Appeals for the City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

b. The applicant must demonstrate that the property was acquired in "good faith." The purchase of property at a low price or with knowledge of the prior owners' unsuccessful attempt to obtain a variance has been interpreted by the Supreme Court not to be a self-inflicted hardship which would constitute a lack of good faith so as to bar an applicant from obtaining a variance. *Id.*

c. Variances are appropriate in situations in which strict enforcement of a zoning ordinance creates unique hardships to the property in question, not to other property owned by the applicant or his neighbors. A BZA must make three findings, as specified in Virginia Code § 15.1-495, namely:

(1) That the strict application of the ordinance would result in undue hardship;

(2) That such hardship is not shared generally by other properties within the same zoning classifications or in near proximity thereto; and

(3) That the grant of a variance will not be substantially detrimental to the adjacent property and that the issuance of the variance will not result in a change in the neighborhood or vicinity's character.

d. The applicant must show the existence of at least one of several special conditions. Upon the determination of the special condition demonstrating an unnecessary hardship, the BZA is mandated that each of the requirements are satisfied.

e. The Virginia Code lists the "special conditions" which give rise to an "unnecessary hardship" as one wherein the strict application of the ordinance would effectively prohibit or unreasonably restrict the use of the applicant's property or create or clearly demonstrate a hardship akin to confiscation. Stated differently, a BZA is not empowered with the authority to grant a special convenience sought by the landowner.

f. The specific findings of the BZA are essential to the judicial review of a BZA's decision by the circuit courts.

2. Permits.

a. Special exceptions and special permits ("Permits") may be granted by the governing body (or in some instances by the BZA). Actions must be consistent with good zoning

practices. Applications for Permits must be evaluated within the context of applicable state statutes and ordinances enacted by the locality.

b. Permits provide options for creating a mechanism to provide relief from practical problems and hardships from a literal enforcement of zoning ordinances. At the same time, the ability to grant Permits protects zoning ordinances from allegations of unreasonable intervention with private land rights.

c. Permits should be granted pursuant to the terms of the applicable ordinance and with prudent safeguards and protection.

d. Consideration is limited to the specific facts and circumstances of the particular case. The governing body is permitted discretionary power, which may not be arbitrarily applied.

e. Self-inflicted hardship affords no basis for the issuance of a Permit.

CONSTITUTIONAL LIMITATIONS ON ZONING AND LAND USE ACTIONS

Robert C. Barclay

CONSTITUTIONAL LIMITATIONS ON ZONING AND LAND USE ACTIONS

There are three constitutional principals that land use regulations may infringe upon. They the prohibition against uncompensated takings, the guarantee of due process and the requirement of equal protection of the laws.

I. **TAKINGS.**

A. **Magna Carta**

Chapter 28, restricted King's right of purveyance (appropriation of necessities for his household): "No constable or other of our bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment."

B. **U.S. Constitution**

1. Fifth Amendment, provides protection against federal action "nor shall private property be taken for public use."

2. Fourteenth Amendment, applies protection to state action "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

C. **Virginia Constitution**

Article I, § 11: "that the General Assembly shall not pass.....any law whereby private property shall be taken or damaged for public uses, without just compensation"

D. **Federal Cases**

1. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Justice Holmes invented regulatory takings jurisprudence by announcing that "if regulation goes too far it will be recognized as a taking," but he did not say how far is too far.

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

a. What is the nature of the government's action?

b. What is the economic impact of the regulation on the claimant?

c. What is the extent to which the regulation interferes with the claimant's distinct investment-backed expectations?

3. *Agins v. Tiburon*, 447 U.S. 255 (1980). Described the standard for determining whether a regulation applying to land constitutes a taking in terms of a two-prong test:

a. Does the regulation substantially advance a legitimate state interest?

b. Does the regulation allow the landowner an economically viable use of his land?

4. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Bill of Rights was designed to restrict the freedom and flexibility of governmental action. Prior to this case many jurisdictions (including California and New York) did not find compensation to be warranted for regulatory takings. The only recourse was invalidation of the regulation. *First English* established the principal nationwide that when a regulatory taking occurs, the mandatory remedy is compensation.

5. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). When a land use regulation deprives a landowner of all economically viable use of his land, a "categorical taking" has occurred and the other tests for determining the existence of a taking do not need to be applied. There are two exceptions to the rule that compensation must be paid for a categorical taking. First, when the regulated use is not recognized as real property under the common law rules of the state in which the regulation applies, and second, when the regulated use is considered a nuisance under the common law rules of the state in which the regulation applies. When the *Lucas* rule applies there is a presumption that the legislative action is invalid and the burden is on the governing body to show the existence of one of the two exceptions to mandatory compensation. This is the reverse of the normal circumstance of the presumption of legislative validity. The key issue for a landowner after *Lucas* is determining if a regulation has denied all economically viable use of all of the property. In order to trigger the deprivation of all economically viable use of a parcel of land the regulatory taking must be permanent; a

temporary deprivation is only partial and must be considered under the *Penn Central* balancing test. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

6. *Dolan v. City of Tigard*, 512 U.S. 377 (1994). In a situation where the government demands that private property be dedicated for public use in exchange for a permit to further develop the property, there must be "rough proportionality" between the detriment caused by the private development and the private property exacted. The Supreme Court especially noted in this case that the Takings Clause of the Fifth Amendment is as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment and deserved similar vigilance. Such reasoning was however limited to governmental exactions (such as requiring right-of-way dedications for development approval) and does not extend to general police powers such as zoning. *See City of Monterey v. Del Monte Dune sat Monterey, Ltd.*, 526 U.S. 686 (1999).

7. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Pragmatism over formalism. A case is ripe to challenge a perceived regulatory taking in court when it is obvious the basis for a governmental denial of a landowner's application to develop property is one that will effectively deny any application for development. Additionally, the Supreme Court upheld a landowner's right to challenge a regulation even if the regulation was in effect when the landowner purchased the property.

E. **Virginia Cases**

1. *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271 (1937). Zoning is clearly acceptable in Virginia and legislative acts that are fairly debatable have a presumption of validity. Monetary loss to a landowner does not necessarily create a compensable loss, "constitutional rights are not to be measured in terms of money," but "great financial losses should not be inflicted where the benefit to others is negligible." This last sentence seems to mirror reasoning used decades later by the U.S. Supreme Court in *Lucas*. Nevertheless, in *City of Virginia Beach v. Virginia Land Investment Association No. 1*, 239 Va. 412 (1990) the Virginia Supreme Court ruled that no taking will be found unless a regulation denies the landowner all economically viable use of his property.

2. *Omni Homes, Inc. v. Prince William County*, 253 Va. 59 (1997). In its first major look at regulatory takings after *Lucas,* the Virginia Supreme Court provided an analysis of the takings doctrine in Virginia. The Court applied the three prong balancing test of *Penn Central* and the categorical test from *Lucas*. The facts of the case were that the County had purchased the parcel of land adjacent to Omni Homes' parcel and then denied Omni the right to gain access to the public road and utilities across the County's parcel. The trial court agreed with Omni that this destroyed all economically viable use of Omni's property and constituted a taking. The Virginia Supreme Court disagreed, noting that Omni had no legal right to cross what became the County's parcel prior to the County's purchase, and that Omni's land still had a viable use, though perhaps not economically viable for Omni due to Omni's expenditures on the property to that point. The Court also considered Article I, § 11 of the Virginia Constitution prohibiting taking or damaging private property for public use. It held that a taking requires the deprivation of all economically viable use, and a damaging requires the dislocation of a specific right contained in the property owner's bundle of rights. Because Omni still had a property that could be developed, even if not how Omni wished, there was no taking or damaging.

3. *City of Virginia Beach v. Bell, Trustee*, 255 Va. 395 (1998). Here the Virginia Supreme Court held that a *Lucas* type categorical taking did not take place if the government regulation existed when the landowner obtained the property. Thus, a right

to use the land in a certain way prior to the regulation was no longer appurtenant to the property after the regulation. This reasoning was specifically rejected by the U.S. Supreme Court in *Palazzolo*, "enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."

4. The "proffer" and other exaction cases stand for the general proposition that localities must be guarded in demanding the dedication or construction of public improvements not substantially generated by the proposed development:

a. *James City County v. Rowe*, 216 Va. 128 (1975). The Virginia Supreme Court in *Rowe* said, " The precise question before us is whether a local governing body has the power to enact a zoning ordinance that requires individual landowners, as a condition to the right to develop their parcels, to dedicate a portion of their fee for the purpose of providing a road, the need for which is substantially generated by public traffic demands rather than the proposed development." The Court held that the County did not have such power.

b. *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984). The Virginia Supreme Court noted Dillon's Rule in finding, "The right to grant special exceptions 'under suitable regulations and safeguards' does not imply the power to require a citizen to turn land over to the county and build roads for the benefit of the public."

c. *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979). Here the County disapproved a subdivision plan because the applicant refused to reconstruct two state roads adjacent to his property. The Court rejected this exaction holding the County had no such power to require the applicant to construct portions of the two adjacent state roads.

II. **DUE PROCESS.**

A. **U.S. Constitution**

1. Fifth Amendment, "No person shall be ...deprived of life, liberty, or property, without due process of law.'

2. Fourteenth Amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

B. **Virginia Constitution**

Article I, § 11: "That no person shall be deprived of his life, liberty, or property without due process of law.

C. **Procedural Due Process**. Although Virginia courts, like most states, accord legislative acts a presumption of validity, they can be rigorous in holding governmental entities to procedural regularity. A good example is *Town of Madison v. Ford*, 255 Va. 429 (1998). In *Madison* **the Court held that the failure of the minutes recording the town council meeting to reflect the actual vote taken, by name of council member and vote cast, rendered the zoning ordinance adopted by that vote void under Article VII, § 7 of the Virginia Constitution. The minutes stated that all council members were present, named the proponent and seconding member and that the ordinance was adopted "unanimously." The Court felt this did not recognize the possibility of an abstention or absence and thus did not comply with constitutional requirements.**

Such an emphasis on procedural regularity should not however lead to the conclusion that procedural due process always demands that one be provided with reasonable notice of regulatory action and a reasonable opportunity to be heard by an impartial tribunal. The Virginia Supreme Court has specifically held that procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings; a legislative act need only meet statutory notice and hearing requirements.

This statutory requirement for most land use and zoning matters is set forth in the Virginia Code as follows:

15.2-2204. Advertisement of plans, ordinances, etc.; joint public

hearings; written notice of certain amendments.

A. Plans or ordinances, or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a descriptive summary of the proposed action and a reference to the place or places within the locality where copies of the proposed plans, ordinances or amendments may be examined.

The local planning commission shall not recommend nor the governing body adopt any plan, ordinance or amendment thereof until notice of intention to do so has been published once a week for two successive weeks in some newspaper published or having general circulation in the locality; however, the notice for both the local planning commission and the governing body may be published concurrently. The notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than five days nor more than 21 days after the second advertisement appears in such newspaper. The local planning commission and governing body may hold a joint public hearing after public notice as set forth hereinabove. If a joint hearing is held, then public notice as set forth above need be given only by the governing body. The term "two successive weeks" as used in this paragraph shall mean that such notice shall be published at least twice in such newspaper with not less than six days elapsing between the first and second publication. After enactment of any plan, ordinance or amendment, further publication thereof shall not be required.

B. When a proposed amendment of the zoning ordinance involves a change in the zoning map classification of 25 or fewer parcels of land,

then, in addition to the advertising as above required, written notice shall be given by the local planning commission, or its representative, at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved; to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected, including those parcels which lie in other localities of the Commonwealth; and, if any portion of the affected property is within a planned unit development, then to such incorporated property owner's associations within the planned unit development that have members owning property located within 2,000 feet of the affected property as may be required by the commission or its agent. Notice sent by registered or certified mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed adequate compliance with this requirement. If the hearing is continued, notice shall be remailed. Costs of any notice required under this chapter shall be taxed to the applicant.

When a proposed amendment of the zoning ordinance involves a change in the zoning map classification of more than 25 parcels of land, or a change to the applicable zoning ordinance text regulations that decreases the allowed dwelling unit density of any parcel of land, then, in addition to the advertising as above required, written notice shall be given by the local planning commission, or its representative, at least five days before the hearing to the owner, owners, or their agent of each parcel of land involved, provided, however, that written notice of such changes to zoning ordinance text regulations shall not have to be mailed to the owner, owners, or their agent of lots shown

on a subdivision plat approved and recorded pursuant to the provisions of Article 6 (§§ 15.2-2240 et seq.) of this chapter where such lots are less than 11,500 square feet. One notice sent by first class mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed adequate compliance with this requirement, provided that a representative of the local commission shall make affidavit that such mailings have been made and file such affidavit with the papers in the case. Nothing in this subsection shall be construed as to invalidate any subsequently adopted amendment or ordinance because of the inadvertent failure by the representative of the local commission to give written notice to the owner, owners or their agent of any parcel involved.

The governing body may provide that, in the case of a condominium or a cooperative, the written notice may be mailed to the unit owners' association or proprietary lessees' association, respectively, in lieu of each individual unit owner.

Whenever the notices required hereby are sent by an agency, department or division of the local governing body, or their representative, such notices may be sent by first class mail; however, a representative of such agency, department or division shall make affidavit that such mailings have been made and file such affidavit with the papers in the case.

A party's actual notice of, or active participation in, the proceedings for which the written notice provided by this section is required shall waive the right of that party to challenge the validity of the proceeding due to failure of the party to receive the written notice

required by this section.

C. When a proposed comprehensive plan or amendment thereto; a proposed change in zoning map classification; or an application for special exception for a change in use or to increase by greater than 50 percent of the bulk or height of an existing or proposed building, but not including renewals of previously approved special exceptions, involves any parcel of land located within one-half mile of a boundary of an adjoining locality of the Commonwealth, then, in addition to the advertising and written notification as above required, written notice shall also be given by the local commission, or its representative, at least 10 days before the hearing to the chief administrative officer, or his designee, of such adjoining locality.

D. When (i) a proposed comprehensive plan or amendment thereto, (ii) a proposed change in zoning map classification, or (iii) an application for special exception for a change in use involves any parcel of land located within 3,000 feet of a boundary of a military base, military installation, or military airport, excluding armories operated by the Virginia National Guard, then, in addition to the advertising and written notification as above required, written notice shall also be given by the local commission, or its representative, at least 10 days before the hearing to the commander of the military base, military installation, or military airport and shall advise the commander of the opportunity to submit comments or recommendations.

E. The adoption or amendment prior to July 1, 1996, of any plan or ordinance under the authority of prior acts shall not be declared invalid by reason of a failure to advertise or give notice as may be

required by such act or by this chapter, provided a public hearing was conducted by the governing body prior to such adoption or amendment. Every action contesting a decision of a locality based on a failure to advertise or give notice as may be required by this chapter shall be filed within 30 days of such decision with the circuit court having jurisdiction of the land affected by the decision. However, any litigation pending prior to July 1, 1996, shall not be affected by the 1996 amendment to this section.

F. Notwithstanding any contrary provision of law, general or special, any city with a population between 200,000 and 210,000 which is required by this title or by its charter to publish a notice, may cause such notice to be published in any newspaper of general circulation in the city.

The notice contents required by this statute have been addressed by the Virginia Supreme Court in *Glazebrook v. Board of Supervisors of Spotsylvania County*, 266 Va. 550 (2003). This case involved a significant downzoning of much of the County, but the advertised notice mentioned only changes to "development standards." This was found not to meet the descriptive summary requirements of subsection A of the statute.

The mailed notice to all parcels adjoining a parcel subject to a special permit application is mandatory, even if only a portion of a large tract is the subject of a proposed permit. *Lawrence Transfer & Storage Corp. v. Board of Zoning Appeals of Augusta County*, 229 Va. 568 (1985).

D. **Substantive Due Process**. The U.S. Supreme Court set forth a three part test for a regulation to meet substantive due process requirements in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). It is 1) there be a valid public purpose for a regulation; 2) the means adopted to achieve that purpose be substantially related to it; and 3) the impact of the regulation upon the individual not be unduly harsh. A claimant must prove a property interest to proceed on a claim of violation of substantive due process. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The Fourth Circuit has held that there is not a claim of entitlement to a substantive due process violation if the locality's action is legislative in nature. *Gardener v. Baltimore Mayor*, 969 F.2d 63 (4th Cir. 1992). The remedy for violation of due process is invalidation of the offending ordinance.

E. **Vagueness**. An ordinance which is so vague that a "person of ordinary intelligence" is not given "a reasonable opportunity to know what is prohibited so he can act accordingly" is considered a denial of due process, *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). *Wiley v. Hanover County,* 209 Va. 153 (1968). In *County of Fairfax, et al. v. Southern Iron Works, Inc., et al.* 242 Va. 435 (1991) the Virginia Supreme Court held that the *Grayned* standard did not apply to zoning laws. However, the Fourth Circuit disagrees. *See Williams v. City of Columbia,* 906 F.2d 994 (4th Cir. 1990). In applying the misdemeanor provisions of a local zoning ordinance the Virginia Court of Appeals has held that the void for vagueness doctrine requires that legislation must define criminal offenses with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner which does not allow arbitrary and discriminatory enforcement. *Vaughn v. City of Newport News,* 20 Va. App. 530 (1995). In *Vaughn* the Court of Appeals upheld a conviction of violation of a zoning ordinance where the landowner had violated a provision prohibiting the outside storage of goods, materials, and equipment by storing "appliances, pieces of wood, pipes, and other miscellaneous property" outside his business. The landowner had argued that the ordinance was void for vagueness because the terms "goods materials and equipment" were not defined in the zoning ordinance. The Court ruled that reading the provision in its entirety and in conjunction with other zoning provisions made the reference reasonably

definite.

III. **EQUAL PROTECTION.**

A. **U.S. Constitution**

Fourteenth Amendment: "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

B. **Virginia Constitution**

Article I, § 14: "That the people have a right to uniform government."

C. Virginia's Supreme Court has cited the U.S. Constitution's equal protection clause in preventing a locality from placing restrictions on one property owner different from those imposed on his competitors. In *The City of Alexandria v. The Texas Co.*, 172 Va. 209 (1939), where the City granted a building permit but refused the owner the right to erect floodlights, the Court said, "The principal 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." Although the language of Virginia's constitution does not exactly parallel the U.S. Constitution's equal protection language, Virginia's due process and takings clauses have been applied to prohibit denial of equal protection. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128 (1975).

D. Va. Code § 15.2-2282 contains a statutory version of equal protection specifically applicable to zoning regulations which requires that zoning regulations be uniform for each class or kind of use throughout each zoning district.

> All zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.

E. **Exclusionary Zoning** (zoning designed to or having the effect of keeping a certain race or income group out of a jurisdiction) may be found a violation of either the equal protection clause of the U.S. Constitution (which requires a finding of intent to discriminate) or of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 360, *et seq.*, which requires a showing of discriminatory effect). Neither of these laws is designed to prevent economic discrimination, although some cases have held that poverty may be a "suspect classification" triggering an increased level of judicial scrutiny under the equal protection clause. *See San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973). The issue of using land-use regulation to economically discriminate arose when the Virginia Supreme Court criticized zoning practices which tend to prevent middle class families from residing in major portions of a county. *See Board of Supervisors v. Carper,* 200 Va. 653 (1959). The county board of supervisors' zoning policies were discriminatory where their effect was to elevate the cost of building sites and housing so much that they tended to exclude from some portions of county those persons who did not have means substantial enough to afford to move into county. *Board of Supervisors of Fairfax County v. Williams,* 216 Va. 49 (1975). The size of the class suffering from the discrimination need be no larger than one. *Village of Willowbrook, et al v. Olech,* 528 U.S. 562 (2000).

F. The remedy for a violation of equal protection is generally invalidation.

JUDICIAL CHALLENGES TO REZONING AND LAND USE

Ann K. Crenshaw

JUDICIAL CHALLENGES TO REZONING AND LAND USE.

A. Dillon's Rule.

1. 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.

2. 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).

3. 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.

4. 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).

5. 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.

6. The Supreme Court of Virginia will usually 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).

7. 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).

B. Presumption of Legislative Validity.

1. 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).

   a. 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).

   b. 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.

   c. 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.

d. 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).

2. 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.

(1) 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.

(2) 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. Horne* 216 Va. 113. 215 S.E. 2d 453 (1975).

C. Vested Rights.

"Vested rights" is a constitutional doctrine that 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 harbors" provisions for landowners which go beyond the scope of the common law doctrine of vesting.

The following discussion is divided into three sections, one dealing with the new law, one with vesting rules which existed prior to enactment of the new law, and the several statutory safe harbors.

1. The new law.

A landowner's rights shall be deemed vested in a land use ". . . and such vesting shall not be affected by a subsequent amendment to a zoning ordinance. . ." when the landowner 1) obtains or is the beneficiary of a significant governmental approval (as later defined) which remains in effect allowing development of a specific project; 2) relies in good faith on the significant affirmative governmental act; and 3) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

D. Standing to Sue.

1. Most challenges to local planning ordinances seek declaratory judgments.

   a. A plaintiff seeking a declaratory judgment has standing if she has a "justiciable interest" in the subject matter of the litigation.

   b. The statutes related to declaratory judgment are liberally interpreted and administered. Va. Code § 8.01-184.

2. 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.

3. 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).

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

E. 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.

"Language is ambiguous if it admits of being understood in more than one way or refers to two or more things simultaneously. An ambiguity exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness." *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E. 2d 84, 87(1985) (citations omitted).