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Annual Survey of Virginia Law: Planning, Zoning and Subdivision Law

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PLANNING, ZONING AND SUBDIVISION LAW

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I. INTRODUCTION

In recent years, a debate has sharpened in Virginia concerning the limits of public power over private property and the determination of which arm of the government will exercise the public's power in land use matters. This debate has continued into 1990 and 1991.

One development worth noting is that federal courts now play a more important role in this debate. Recent land use decisions in federal courts have tended to afford landowners greater protection of their property rights. In contrast, Virginia courts have emphasized form and procedure over substance in the land use cases decided in 1990 and 1991.

During the 1990 session, the General Assembly actively confronted land use issues and asserted its authority over local governments. However, during the 1991 session it seemed constrained to act on land use issues, perhaps due to pressure from some local governments for more authority to manage (or prevent) growth. Yet, those local governments that sought more authority over land use decisions from the legislature, received additional authority in only a few instances.

This survey of planning, zoning and subdivision law discusses significant cases recently decided by the circuit courts of Virginia, as well as by the various federal courts sitting in Virginia. It also reviews important statutory changes made to the Code of Virginia ("Code") in the most recent session of the General Assembly.

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II. ZONING

A. *Downzoning*

Downzoning was a controversial issue in Virginia during the summer of 1990.[1] *Seabrooke Partners v. City of Chesapeake*[2] was a 1990 downzoning case decided by the Supreme Court of Virginia. In *Seabrooke Partners*, the supreme court upheld a trial court's determination that the City of Chesapeake had met its burden of producing sufficient evidence of a change in neighborhood circumstances to make the reasonableness of a piecemeal downzoning fairly debatable.[3] *Seabrooke Partners* illustrates the property owner's heavy burden when challenging even piecemeal downzonings. Even if a property owner makes a prima facie showing that since the enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the local governing body need only produce sufficient evidence to make the reasonableness of its action fairly debatable for the downzoning to be sustained.[4]

B. *Public Notice Requirements and Limitations of Actions*

Statutory public notice requirements and a thirty-day limitation period for filing actions contesting zoning decisions have become major issues in challenging rezonings. Section 15.1-493(C) of the Code requires local governing bodies to hold a public hearing after giving notice, as set forth in section 15.1-431 of the Code, before enacting or amending a zoning ordinance.[5] These notice requirements are mandatory conditions precedent to a local governing body's exercise of its zoning power. If the requirements are not complied with, the local governing body has no authority to act.[6]

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1. *See* VA. CODE ANN. § 15.1-1372.3(C) (Cum. Supp. 1991) (vesting permitted and permissible uses and densities for property located in the Route 28 Transportation Improvement District); City of Va. Beach v. Virginia Land Inv. Ass'n, 239 Va. 412, 389 S.E.2d 312 (1990).

2. 240 Va. 102, 393 S.E.2d 191 (1990).

3. *Id.* at 107, 393 S.E.2d at 194.

4. Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

5. VA. CODE ANN. §§ 15.1-493(C), -431 (Cum. Supp. 1991).

6. Lawrence Transfer & Storage v. Board of Zoning Appeals, 229 Va. 568, 331 S.E.2d 460 (1985); Town of Vinton v. Falcun Corp., 226 Va. 62, 66-67, 306 S.E.2d 867, 869 (1983). In an unpublished letter opinion, one Virginia circuit court ruled that improper notice was a sufficient reason for denying rezoning because the governing body would have lacked the authority to act. Miller & Smith Land, Inc. v. Board of Supervisors, No. 11201, letter op. (County of Loudoun Cir. Ct. June 22, 1989).

Section 15.1-493(G) of the Code requires that all actions contesting a zoning or special exception decision of a local governing body be filed within thirty days.[7] The thirty-day limitation, however, is not a statute of limitations. The supreme court in *Friends of Clarke Mountain Foundation, Inc. v. Board of Supervisors*[8] stated that the statute only requires that every action contesting a zoning decision of a local governing body be filed within thirty days. Therefore, a suit that is filed in a timely fashion will not be dismissed for failure to join necessary parties after the thirty-day period.[9]

Arguably, if notice of the public hearing was improper, a zoning decision could be invalidated by the filing of an action after the thirty-day limitation on the ground that the governing body had no authority to act, particularly if the failure to challenge the zoning action within thirty days was attributable to improper notice. The relationship between the public notice requirements and the thirty-day limitation period arose last year in three Virginia circuit court cases: *Davis v. Stafford County*,[10] *Blankenship v. Board of Supervisors*,[11] and *Evans v. Town of Bluefield*.[12]

In *Evans*, the trial court ruled that because the town of Bluefield had not given any notice to persons so entitled, a savings provision relating to an inadvertent failure to mail a notice was inapplicable, and thus the town was without authority to rezone certain property. Because the town had not committed a valid act, the thirty-day limitation was not applicable.[13]

In contrast, the trial court in *Davis* dismissed a challenge to the granting of a special use permit for failure to meet the thirty-day limitation period. The court applied the limitation, even though the plaintiffs alleged that the improper notice was the reason for their failure to file within thirty days.[14]

Similarly, the landowners in *Blankenship* unsuccessfully tried to use the approach advanced in *Davis* to challenge a comprehensive rezoning. They contended that notice of the rezoning was improper

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7. VA. CODE ANN. § 15.1-493(G) (Cum. Supp. 1991).
8. 7 V.L.R. 1223, ___ Va. ___, ___ S.E.2d ___ (Va. 1991).
9. *Id.* at 2778-79, ___ Va. ___, S.E.2d at ___.
10. 20 Va. Cir. 122 (County of Stafford Cir. Ct. 1990).
11. 19 Va. Cir. 254 (County of Washington Cir. Ct. 1990).
12. No. 11-034, letter op. (County of Tazewell Cir. Ct. May 18, 1990).
13. *Id.*
14. *Davis*, 20 Va. Cir. at 127-28.

and, therefore, the rezoning by the governing body was invalid. However, the trial court found sufficient notice, and dismissed the action because the landowners failed to meet the thirty-day limitation.[15]

The General Assembly passed legislation clarifying that public notices concerning amendments to a zoning map need not state the general usage and density ranges in the applicable part of a comprehensive plan, if the particular locality has not adopted a comprehensive plan with general usage and density ranges. Now, in the case of a proposed amendment to the zoning map, the public notice must state the general usage and density range of a proposed amendment and the general usage and density ranges, if any, in the applicable part of a comprehensive plan.[16]

C. *Standing*

Like notice and time limitations, standing could become a more significant issue in zoning challenges, particularly if citizens groups continue to contest zoning decisions. In Virginia, "[a] plaintiff has standing to bring a declaratory judgment proceeding if he has 'a justiciable interest' in the subject matter of the litigation, either in his own right or in a representative capacity."[17]

In an unreported decision, one Virginia circuit court ruled that adjoining property owners were the only plaintiffs with standing to bring a declaratory judgment action to contest zoning issues.[18] In contrast, the trial court in *Meadowbrook-West/Garland Heights Civic Association v. Chesterfield County*,[19] ruled that an association that does not own property can have standing to challenge a zoning ordinance.[20] In *Meadowbrook-West/Garland Heights*, however, the association was comprised of some adjacent property owners.

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15. *Blankenship*, 19 Va. Cir. at 257. Regarding the short limitation period, the trial court stated "[i]f these matters are not brought swiftly to a head, the uncertainty created thereby will cause confusion, disrupt property sales, and cause financial hardship for property owners and homebuilders." *Id.*

16. VA. CODE ANN. § 15.1-493(C) (Cum. Supp. 1991).

17. Cupp v. Board of Supervisors, 227 Va. 580, 590, 318 S.E.2d 407, 412 (1984) (quoting Board of Supervisors v. Fralin & Waldron, 222 Va. 218, 223, 278 S.E.2d 859, 862 (1981)).

18. Hurley v. County of Amelia, No. C90-25, letter op. (County of Amelia Cir. Ct. Jan. 16, 1991).

19. 21 Va. Cir. 81 (County of Chesterfield Cir. Ct. 1990).

20. *Id.* at 84.

D. *Conditional Zoning*

The General Assembly passed legislation making conditional zoning provisions applicable to towns which have had a population growth of ten percent or more from the next-to-latest to latest decennial census year.[21] This action demonstrates the legislature's continued willingness to grant greater local authority, in some instances, to those areas of the state which are experiencing rapid population growth and pressure. It also signals the acceptance of conditional zoning as a growth management tool.

III. Constitutional Issues, Federal Legislation and Federal Courts

As stated earlier, federal courts now play a more prominent role in land use matters and afford landowners greater protection of their property rights. The tendency of federal courts to protect property rights in land use cases is illustrated by two recent decisions, *Potomac Greens Associates Partnership v. City Council of Alexandria*,[22] and *Front Royal & Warren County Industrial Park Corporation v. Town of Front Royal*.[23]

In *Potomac Greens*, a federal court declared that two of the three conditions that the City Council of Alexandria imposed on a developer's application for site plan approval were invalid. The three conditions were: compliance with the city's transportation management plan ordinance (TMP), construction of additional lanes on the George Washington Memorial Parkway (an off-site highway), and elimination of one level of a proposed parking garage. Compliance with the TMP would have required the developer to demonstrate a "significant reduction in the traffic and transportation impacts of the use."[24]

The court held that the TMP was unconstitutionally vague because it did not contain standards by which the city and applicants could measure or gauge whether the plans would significantly reduce traffic.[25] It further held that the city was without authority to enact the TMP or to condition site plan approval on compliance

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21. Va. Code Ann. § 15.1-491.2:1 (Cum. Supp. 1991).
22. 761 F. Supp. 416 (E.D. Va. 1991).
23. 749 F. Supp. 1439 (W.D. Va. 1990).
24. *Potomac Greens*, 761 F. Supp. at 417.
25. *Id.* at 419.

with it.[26] The city asserted that subsections 15.1-491(c) and (h) of the Zoning Enabling Act granted it the authority to enact the TMP. Finding the case analogous to *Board of Supervisors v. Horne*,[27] the court found no statutory authority granting Alexandria the ability to enact the TMP. The court stated that the development site had been zoned I-2 since 1931 and that if that zoning classification was no longer appropriate, the city should have amended its zoning ordinance.[28]

The court also found no authority for the city's condition that additional highway lanes be constructed.[29] It determined that the leading trilogy of Virginia land use cases, *Hylton Enterprises v. Board of Supervisors*,[30] *Cupp v. Board of Supervisors*,[31] and *Board of Supervisors v. Rowe*,[32] stood for the proposition that the Code did not impliedly authorize localities to require a developer of land to improve public highways as a condition of development.[33] Since the city also lacked express authority to make the requirement, the court invalidated the condition.[34]

In *Front Royal*, the United States District Court for the Western District of Virginia awarded damages for a taking which the court previously determined had occurred.[35] The legal basis for the landowners' claims was Title 42, Section 1983 of the United States Code. On the issue of damages, the court analogized the takings in question to regulatory takings, because the town of Front Royal had taken affirmative steps to prevent the landowners from devel-

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26. *Potomac Greens*, 761 F. Supp. at 421.

27. 216 Va. 113, 215 S.E.2d 453 (1975). In *Horne*, the Supreme Court of Virginia held that the Board of Supervisors of Fairfax County had no authority under the Code to enact an ordinance suspending the filing of site plans and subdivision plats pending amendment of its zoning ordinance. *Id.* at 122, 215 S.E.2d at 459.

28. *Potomac Greens*, 761 F. Supp. at 421.

29. *Id.*

30. 220 Va. 435, 258 S.E.2d 577 (1979).

31. 227 Va. 580, 318 S.E.2d 407 (1984).

32. 216 Va. 128, 216 S.E.2d 199 (1975).

33. *Potomac Greens*, 761 F. Supp. at 421.

34. The court found that under its police power, Alexandria had a sufficient safety consideration for requiring the elimination of one level of the parking garage. *Id.* at 422.

35. In 1989, the federal court found that the failure of the town of Front Royal to connect municipal sewer service to the property of the complaining landowners effected a taking of the landowners' property and violated their due process rights. The obligation to provide public utilities was specifically and clearly required by an annexation order. Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 708 F. Supp. 1477, 1487-88 (W.D. Va. 1989).

oping their properties.[36] Citing opinions of the Eighth and Eleventh Circuits, the court found the appropriate measure of damages to be the difference in value between what the landowners would have had, absent the taking, and what remained after the taking, plus interest.[37]

In another federal case, *James City County v. United States Environmental Protection Agency*,[38] the United States District Court for the Eastern District of Virginia overturned a veto by the United States Environmental Protection Agency (EPA), of an Army Corps of Engineers ("Corps") permit which was necessary to impound a navigable waterway needed to create the Ware Creek Reservoir. The reservoir had been proposed to serve the water way needs of James City County. The court found that the EPA, which, under certain circumstances, is empowered under section 404(c) of the Clean Water Act to veto Corps permits, should not have applied a presumption that alternative water supplies were available to James City County.[39] Additionally, the court determined that even if the EPA's application of the presumption had been correct, the record showed that no practicable alternatives were available to James City County.[40]

IV. Vested Rights

The Supreme Court of Virginia ruled that informal governmental approvals do not satisfy the governmental action element required in vested rights cases. A landowner must show a "significant official governmental act" to claim the right to use property in a manner prohibited by subsequent land use legislation.[41]

Vested rights cases involve a determination of the time at which local governments can compel property owners to comply with a new, valid land use ordinance. Property owners sometimes assert a right to develop property according to an ordinance which was in effect at a prior point in time. This is based on the theory that subsequent property use limitations should not affect a property

36. *Front Royal*, 749 F. Supp. at 1443.

37. *Id.* at 1445 (citing Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990); Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985)).

38. No. 89-156-NN, mem. op. (E.D. Va. Nov. 6, 1990).

39. *Id.* at 8-9.

40. *Id.* at 12.

41. Town of Stephens City v. Russell, 241 Va. 160, 164, 399 S.E.2d 814, 816 (1991); Notestein v. Board of Supervisors, 240 Va. 146, 152, 393 S.E.2d 205, 208 (1990).

owner who has incurred substantial expense preparing property for development according to ordinances then in effect.[42]

Until this year, the two leading Virginia cases on vested rights were *Board of Supervisors v. Medical Structures, Inc.*[43] and *Board of Supervisors v. Cities Service Oil*,[44] both decided in 1972. In both of these cases, the supreme court held that the landowners had vested rights to use land under a certain zoning classification and could not be deprived of those rights by subsequent legislation, when the landowners had obtained special use permits, filed site plans, and incurred substantial expense toward developing their property in reliance on existing zoning.[45]

Two recent cases, *Notestein v. Board of Supervisors*[46] and *Town of Stephens City v. Russell*[47] address at what point in the development process a landowner acquires a vested right. A third case, *Holland v. Johnson*,[48] discusses which governmental body is empowered to decide when a landowner acquires a vested right.

In *Notestein*, the supreme court ruled that an essential element in vesting cases is the presence of "significant official acts" by a governmental entity.[49] The Notesteins filed an application for a landfill permit with the Virginia Department of Waste Management ("Waste Management"), which notified Appomattox County where the land was situated. The county was required to inform Waste Management whether the proposed landfill was consistent with the zoning ordinance. At that time, no zoning ordinance existed which would have prohibited the Notesteins from using their property as a landfill.[50] After filing the application, the Notesteins received several informal approvals, including: Waste Management's notification that their property was suitable for a landfill; Waste Management's advice that they conduct hydrogeological

42. Frequently localities will, as a matter of "legislative grace," make this determination by establishing a "grandfather clause" which exempts property owners already in the development process from the new law. For a complete discussion of vested rights, see Hanes & Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989).

43. 213 Va. 355, 192 S.E.2d 799 (1972).

44. 213 Va. 359, 193 S.E.2d 1 (1972).

45. *Medical Structures*, 213 Va. at 358, 192 S.E.2d at 801; *Cities Service Oil*, 213 Va. at 362, 193 S.E.2d at 3.

46. 240 Va. 146, 393 S.E.2d 205 (1990).

47. 241 Va. 160, 399 S.E.2d 814 (1991).

48. 241 Va. 553, 403 S.E.2d 356 (1991).

49. 240 Va. at 152, 393 S.E.2d at 208.

50. *Id.* at 148-49, 393 S.E.2d at 206.

and geotechnical studies; the County Administrator's advice that the county had no legal basis to stop the landfill; and the assurances of individual members of the Board of Supervisors that any zoning ordinance that might be adopted would not prohibit their landfill.[51] However, even though the Notesteins had secured financing for the landfill and rejected purchase offers on a good faith reliance upon the informal approvals, the supreme court held that they were not protected from the subsequent enactment of a zoning ordinance preventing the landfill. The court rejected an estoppel argument, ruling that estoppel does not apply to the government in the discharge of its governmental functions.[52] Instead, the court adopted the "significant official governmental act" requirement, which it also applied in the *Russell* case.[53]

In *Russell*, a landowner sought subdivision and site plan approval for a land use which was permissible under the zoning ordinance of the Town of Stephens City.[54] Yet, because the subdivision plat and site plan that Russell filed had not been approved at the time the town changed its zoning ordinance, there was no "significant official governmental act" entitling Russell to vested rights in the previously existing zoning classification.[55]

The supreme court's application of the "significant official governmental act" requirement in *Russell* makes clear that property owners have less protection for permissible uses than for permitted uses.[56] This decreased protection, in turn, will decrease the predictability of permissible land uses. Additionally, the decreased protection may create pressure on the General Assembly to enact comprehensive vesting legislation in the future.

In *Holland*, the third vested rights case, the supreme court ruled

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51. *Id.* at 149-50, 393 S.E.2d at 206-07.

52. *Id.* at 152, 393 S.E.2d at 208.

53. *Russell*, 241 Va. at 164-65, 399 S.E.2d at 816.

54. *Id.* at 161-63, 399 S.E.2d at 814-15.

55. *Id.* at 164-65, 399 S.E.2d at 816.

56. Arguably, the Supreme Court of Virginia may have overlooked the substance of its earlier decision. The court stated in *Medical Structures*: "[T]he site plan has virtually replaced the building permit as the most vital document in the development process. . . . The filing of such a plan creates a monument to the developer's intention, and when the plan is approved, the building permit, except in rare situations, will be issued." *Medical Structures*, 213 Va. at 357-58, 192 S.E.2d at 801. As Hanes and Minchew asserted in their article, "[t]he critical meaning of these passages suggests . . . that a filed site plan for a permissible use is no different from a filed site plan for a permitted use and that both uses deserve the same degree of vesting protection upon bona fide site plan filing." Hanes & Minchew, *supra* note 42, at 407.

that the power to determine when a property owner acquires a vested right rests solely with the courts.[57] The Zoning Administrator of Franklin County opined that Rockydale Quarries had a vested right to operate a quarry which could not be impaired by a subsequent zoning ordinance.[58] Based on a separation of powers argument and a lack of authority in the Code, the supreme court held that a zoning administrator was not empowered to make vested rights determinations.[59]

V. SUBDIVISIONS

A. *Court Actions*

The case of *Hylton Enterprises, Inc. v. Board of Supervisors*[60] continues to shape subdivision law in Virginia. *Hylton* is recognized for the proposition that local governing bodies do not have the statutory authority, express or implied, to require subdividers to construct improvements to existing roads.[61] *Hylton*, along with *Cupp v. Board of Supervisors*[62] and *Board of Supervisors v. Rowe*,[63] strongly suggests that even when local governing bodies do have the statutory authority to require subdividers to construct improvements, the need for those improvements must be substantially generated by the subdivision itself in order for such authorization to meet constitutional standards.[64]

Based on *Hylton*, the Virginia circuit court in *Smith v. Board of Supervisors*,[65] held that Culpeper County could not deny a subdi-

57. *Holland*, 241 Va. at 556, 403 S.E.2d at 357.

58. *Id.* at 554, 403 S.E.2d at 357.

59. *Id.* at 556, 403 S.E.2d at 357.

60. 220 Va. 435, 258 S.E.2d 577 (1979).

61. *Id.* at 440-41, 258 S.E.2d at 581. Subject to statutory procedures and requirements, certain localities are authorized by road impact fee statutes to impose impact fees on new developments to pay all or a part of the cost of reasonable road improvements attributable in substantial part to the development. VA. CODE ANN. §§ 15.1-498.1 to -498.10 (Repl. Vol. 1989).

62. 227 Va. 580, 318 S.E.2d 407 (1984).

63. 216 Va. 128, 216 S.E.2d 199 (1975).

64. For example, in an Opinion of the Attorney General dated August 16, 1990, the Attorney General opined that a local governing body could only constitutionally require dedication of avigation easements as a condition of subdivision approval if the need for the easements were generated by the proposed subdivision itself. Under the facts presented in the opinion, the presence of the airport, not the subdivision, created the need for the easements. 1990 Report of the Att'y Gen. 94-97 (1990). Also, some federal cases such as Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), suggest a similar nexus is also constitutionally required.

65. No. 145-C-89, letter op. (County of Culpeper Cir. Ct. Oct. 18, 1990).

vision plat because a provision in the subdivision ordinance required "off-site" improvements by the subdividers to public roads.[66] *Smith* is also important because the subdivision plat in question did not comply with the density requirements of the county's comprehensive plan, though it did comply with its zoning ordinance.[67] Based on *Board of Supervisors v. Safeco*[68] and *Board of Supervisors v. Snell Construction Corp.*,[69] which held that a comprehensive plan is not a zoning ordinance but a guideline for zoning ordinances, the court ruled that "provisions of a comprehensive plan, not carried out by the zoning ordinance, cannot be used as a basis to deny a subdivision which conforms to the zoning ordinance and the requirements of the subdivision ordinance."[70]

In *Fairview Co. v. Board of Supervisors*,[71] the Spotsylvania County Circuit Court stated in dictum that a subdivision plat may properly be disapproved where it violates the zoning ordinance.[72] In *Fairview*, however, the review agent refused to accept the subdivision plat for review because of the plat's nonconformity with the county's zoning ordinance. The court stated that the review agent did not have the authority to refuse to review a plat that met the basic submittal requirements.[73]

When a planning commission or other agent disapproves a subdivision plat and the subdivider believes the disapproval was improper, the subdivider has a right to appeal to the appropriate circuit court within sixty days.[74] In *Folan v. Town of Kilmarnock*,[75] the Lancaster County Circuit Court ruled that the Council of the Town of Kilmarnock could not require that a subdivider first appeal to the council, before taking an appeal to the appropriate circuit court.

In another Lancaster County case, *Board of Supervisors v. Cabell Cove Associates*,[76] the court held that a land developer could not avoid the requirements of a subdivision ordinance by artifi-

66. *Smith*, letter op. at 4.
67. *Id.* at 1-2.
68. 226 Va. 329, 310 S.E.2d 445 (1983).
69. 214 Va. 655, 202 S.E.2d 889 (1974).
70. *Smith*, No. 145-C-89, letter op. at 2.
71. 21 Va. Cir. 193 (County of Spotsylvania Cir. Ct. 1990).
72. *Id.* at 195-96.
73. *Id.* at 196-97.
74. VA. CODE ANN. § 15.1-475 (Cum. Supp. 1991).
75. No. 161-1990, letter op. (County of Lancaster Cir. Ct. Nov. 26, 1990).
76. 20 Va. Cir. 245 (County of Lancaster Cir. Ct. 1990).

cially attaching land in remote areas to lots in more desirable areas. In *Cabell Cove Associates*, the court considered a plat that technically did not come within the county's definition of a subdivision, and therefore, arguably, was not subject to the provisions of the county's subdivision ordinance. The court ordered the plat to be vacated because the plat's unusual and contorted lot shapes violated the spirit and purpose of the ordinance.[77]

B. *Legislative Changes*

Relating to the subdivision of land for the purpose of sale or gift to a member of the immediate family, the General Assembly enacted legislation expanding the definition of "immediate family" to include the grandchildren and grandparents of the owner.[78] The General Assembly also enacted legislation allowing a governing body to make partial releases of bonds, or other performance guarantees, where the released amount is less than eighty percent of the original amount.[79] However, a partial release will not be allowed until "thirty percent of the facilities, covered by any bond, escrow, letter of credit, or other performance guarantee" are completed.[80]

VI. Affordable Housing

In 1990, the General Assembly provided certain local governments, including Fairfax County, with the authority to require developers to provide affordable housing units, with compensation being given to the developers in the form of increased density over the amount normally permitted by the existing zoning district.[81] In 1991, the General Assembly expanded the list of eligible local governments that previously could adopt affordable housing amendments; and it added to and clarified certain regulations that local governments may include in their affordable housing programs.[82]

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77. *Cabell Cove Associates*, 20 Va. at 248-49.

78. Va. Code Ann. § 15.1-466(A)(12) (Cum. Supp. 1991). The General Assembly did not amend § 15.1-466(A)(13) of the Code which is analogous to § 15.1-466(A)(12), except that the former applies to Fairfax County and the latter applies to all other counties and the City of Suffolk.

79. *Id.*

80. *Id.*

81. *Id.* § 15.1-491.8, -491.9.

82. *Id.* § 15.1-491.9(A) to (B). Among the more significant additional permissible regulations are:

1. Application, at the discretion of the local governing body, of the requirements of an

In addition, it authorized Arlington County to acquire easements designed to maintain the market rents of a portion of the units of any multi-family residential property at a percentage of the market rent for the remaining units of the property.[83]

The General Assembly also passed legislation affecting manufactured housing. Manufactured housing presented an important opportunity to create affordable home ownership because it has an inherently lower cost than conventional on-site construction. The General Assembly responded to the growing community acceptance of manufactured housing as a valued component of a locality's housing stock.

The General Assembly established a nine-member Virginia Manufactured Housing Board to issue licenses to manufacturers, dealers, brokers, and salespersons in the manufactured housing industry and to otherwise govern and regulate the industry.[84] There are also new provisions that deal with set-up and tie down requirements,[85] warranties,[86] and the establishment of a new recovery fund to pay claims arising out of violations of the manufactured housing statutes.[87]

VII. Land Use Taxation

Land enrolled in Virginia's land use assessment program receives a reduced real property tax assessment.[88] Lots which are at least five acres and are devoted solely to agricultural use or open-space use, and forest lots equal to or exceeding twenty acres qualify for

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affordable housing program to a site which is the subject of a site plan or subdivision plat, is expected to yield 50 or more units, and has approved sewer. *Id.* § 15.1-491.9(B)(2).

2. Up to a twenty percent increase in density for qualifying sites with 12.5 percent of the total units set aside as affordable dwelling units. In the event the 20 percent increase is not achieved, the 12.5 percent ratio is reduced proportionately. *Id.* § 15.1-491.9(B)(3).

3. Requirements that the affordable dwelling units be built "and offered for sale or rental concurrently with the construction and certificate of occupancy of a reasonable proportion of the market rate units." *Id.* § 15.1-491.9(B)(14).

83. *Id.* § 15.1-687.4. This legislation was effective March 11, 1991.

84. *Id.* §§ 36-85.17 to -85.18; *see also id.* §§ 36-85.19 to -85.21 (setting forth licensure requirements; grounds for denying, suspending or revoking licenses; and notice and hearing requirements).

85. *Id.* § 36-85.22.

86. *Id.* § 36-85.23 to -85.25.

87. *Id.* § 36-85.31 to -85.36.

88. *Id.* § 58.1-3231, -3233 (Repl. Vol. 1991).

this special tax assessment program.[89]

Governing bodies have had the authority to reduce the qualified lot size to two acres for land devoted to open-space use in certain scenic areas and certain areas with high population density.[90] In an effort to encourage open-space use in Fairfax County, the General Assembly in 1991 granted it the authority to reduce the qualified lot size to two acres for land devoted to open-space use in the county.[91] Some high-growth areas may seek similar authority from the General Assembly in the future.

For land devoted to open-space use to qualify for the special tax assessment program, the land must also be (i) situated in an agricultural, forestall, or agricultural and forestall district; or (ii) subject to a recorded perpetual easement held by a public body that promotes open space use; or (iii) subject to a recorded commitment entered into by the landowner with the local governing body not to change to a non-qualifying use for a time period of not less than four nor more than ten years.[92]

VIII. CONDEMNATION

A. *Legislative Changes*

The General Assembly created a test area designed to examine whether the currently existing system of appointing condemnation commissioners results in higher condemnation costs to the Commonwealth, compared to the test system of condemnation.[93] This test area consists of several Northern Virginia localities, including the counties of Arlington, Fairfax, Loudoun and Prince William, and the cities of Alexandria, Fairfax, and Falls Church.

Under the currently existing system of condemnation, if the parties cannot agree upon the names of commissioners to be summoned, when the issue of just compensation is to be determined by a commission, each party presents to the court a list of six freeholders, from which the court selects nine persons to be summoned as commissioners. The petitioner and the owners each have two peremptory challenges and the remaining five persons are

89. *Id.* § 58.1-3233.2.
90. *Id.*
91. *Id.*
92. *Id.* § 58.1-3233.3.
93. Act of Mar. 23, 1991, ch. 520, 1 1991 Va. Acts 838, 839, cl. 2.

appointed.[94]

Under the test system, when the Commonwealth Transportation Commissioner is the condemnor in any of the designated Northern Virginia localities, jury commissioners select condemnation commissioners in the same manner that juries are selected.[95] The clerk draws nine names, plus two alternate names, from the list submitted by the jury commission and then notifies those persons whose names were drawn to appear in court on the date set for trial.[96] The commissioners who appear on that day are called to be sworn on their voir dire until a disinterested and impartial panel is obtained.[97] Depending on the number of jurors excused for cause, if any, each party may exercise an equal number of peremptory strikes to reduce the number of commissioners to five.[98] If fewer then seven commissioners remain before the court prior to the exercise of preemptory strikes, the trial may proceed and be heard by less than five commissioners provided the parties agree; but no trial shall proceed with fewer than three commissioners.[99]

In another legislative change, the General Assembly enacted a definition of "freeholder." For purposes of the chapter on condemnation, "freeholder" means any person owning an interest in land in fee, including a person owning a condominium unit.[100]

B. *Judicial Action*

Under section 25-46.34(a) of the Code, a condemnor may obtain, as a matter of right, a voluntary dismissal of a condemnation proceeding if no hearing has begun on the issue of just compensation and the condemnor has not acquired the title or lesser interest in the property or taken possession of the property.[101] Section 25-

94. VA. CODE ANN. § 25-46.20(A) (Cum. Supp. 1991).

95. *Id.* §§ 25-46.20, -46.20:1. As under the currently existing system of selecting condemnation commissioners, to be eligible as commissioners under the test system persons must be (1) residents of the county or city in which the property to be condemned, or the greater portion thereof, is situated, and (2) disinterested freeholders of property within the jurisdiction. *Id.* § 25-46.20:1.

96. *Id.* § 25-46.20:2.

97. *Id.* § 25-46.20:4.

98. *Id.*

99. *Id.*

100. *Id.* § 25-46.3.

101. *Id.* § 25-46.34(a) (Repl. Vol. 1985). In such an instance, the petitioner is required to pay the owners' reasonable expenses actually incurred in preparing for trial on the issue of just compensation. *Id.*

46.34(b) of the Code gives the condemnor the same right after a hearing has begun on the issue of just compensation, if the condemnor has not acquired title or a lesser interest in the property or taken possession of the property.[102] Section 25-46.34 is silent, however, as to dismissals in cases where the condemnor has acquired title or an interest in the property or taken possession of the property. In *Trout v. Commonwealth Transportation Commissioner*,[103] the supreme court decided that a condemnor has no right to a nonsuit or a voluntary dismissal of a condemnation proceeding, without the owners' consent, after any interest in, or possession of, the property has been acquired.[104]

In *Trout*, the trial court granted a condemnor's motion for a nonsuit pursuant to section 8.01-380 of the Code. The condemnor, who had already taken title and possession of the property, had moved for a nonsuit after the trial court granted the owners' motion in limine precluding the condemnor from adducing any expert testimony at trial. The condemnor had failed to comply with a previous order to provide complete and full responses to interrogatories requesting identification of expert witnesses and summaries of their expected testimony.[105]

In reversing the trial court, the supreme court noted that the Code requires all condemnation proceedings to be brought and conducted according to the provisions of the Virginia Condemnation Act "[u]nless otherwise *specifically* provided by law."[106] It held that the nonsuit statute, which permits a party to suffer a nonsuit as a matter of right "as to any cause of action or claim," was not such a specific provision because a condemnation proceeding is not brought as a cause of action."[107] Citing *Hamer v. School Board of Chesapeake*,[108] which was decided last year, the supreme court stated that the parties to a condemnation proceeding are not in the same position as plaintiffs and defendants in traditional actions or suits, and that the traditional burdens of proof rules are inapplicable.[109]

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102. VA. CODE ANN. § 25-46.34(b). Like dismissals before a hearing, the petitioner is required to pay the owners' expenses. *Id.*

103. 241 Va. 69, 400 S.E.2d 172 (1991).

104. *Id.* at 75, 400 S.E.2d at 174-75.

105. *Id.* at 71, 400 S.E.2d at 172-73.

106. *Id.* at 72, 400 S.E.2d at 173 (emphasis added).

107. *Id.* at 72-73, 400 S.E.2d at 173-74.

108. 240 Va. 66, 393 S.E.2d 623 (1990).

109. *Trout*, 241 Va. at 73, 400 S.E.2d at 174.

Hamer involved the question of which condemnation-related questions courts could review. The question of whether a taking is for a public purpose is a judicial question, reviewable by the courts, but the question of the necessity of the project is a legislative one, unless the legislature provides otherwise by statute.[110] Courts can only review the condemnor's discretion in determining the location and quality of property to be taken, if the discretion was exercised arbitrarily or capriciously.[111]

According to the scheme of shifting burdens outlined in *Hamer*, when a condemnee alleges that the condemnor has arbitrarily and capriciously decided upon the location or quantity of property to be taken, the condemnee has the burden of production on that issue. If the condemnee establishes a prima facie case, the burden of production shifts to the condemnor to produce sufficient evidence to show that the issue was fairly debatable. If the condemnor satisfies that burden, the condemnor's determination will be upheld.[112]

In *The Lamar Corp. v. City of Richmond*,[113] the supreme court ruled that lessors, whose structures are annexed to land taken under power of eminent domain, are not entitled to a separate proceeding to ascertain just compensation. With respect to the leasehold, the court ruled that when the condemned property is subject to a lease, the lessee is not a proper party to the condemnation proceeding.[114] Instead, the entire compensation is ascertained as though the property belonged to one person, and then that sum is apportioned among the different parties according to their respective rights.[115]

With respect to the structures, as between the condemnor and the lessees, those structures attached to the condemned real estate but owned by the lessees are realty, regardless of whether the structures would be deemed realty under fixture law.[116] The court

110. *Hamer*, 240 Va. at 70, 393 S.E.2d at 625 (citing Stewart v. Highway Comm'r, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972)). Section 15.1-237 of the Code, by cross-reference to other sections, does subject the necessity of some takings to judicial review under certain circumstances, but not the particular project involved in *Hamer*. *Id.*

111. *Id.* at 71-72, 393 S.E.2d at 626 (citing Kricorian v. C & P Tel. Co., 217 Va. 284, 288, 277 S.E.2d 725, 728 (1976)).

112. *Id.* at 71-72, 393 S.E.2d at 626-27.

113. 241 Va. 346, 402 S.E.2d 31 (1991).

114. *Id.* at 350, 402 S.E.2d at 33.

115. *Id.* (citing Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 369, 137 S.E. 458, 463 (1927)).

116. *Id.* at 351-52, 402 S.E.2d at 34.

ruled, however, that like leaseholds, title to the structures passes to the condemnor as an incident of the entire taking, and the value of the structure is included in the total award. The lessee becomes entitled to a share of the total award, and thus to a subsequent proceeding to determine the appropriate amount of that share, but not to a separate condemnation proceeding.[117]

IX. Conclusion

Issues concerning the development of private property and the limitations of local government authority over it, will likely continue to grow in importance in the Commonwealth. Furthermore, bills carried over from last year, crafted to grant localities more power, will be tested again in the legislative process.

117. *The Lamar Corp.*, 241 Va. at 352, 402 S.E.2d at 34.