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I. INTRODUCTION

Responsible land use and zoning are an integral part of every locality's role in government. Throughout the twentieth century, Virginia legislation made clear that zoning and other land use controls are well within the police power of local government. Each Virginia locality has a comprehensive plan: a blueprint that guides the course of development.[1] Development rights in each locality are determined by local zoning and subdivision ordinances.[2] Each locality also has administrative boards—Boards of Supervisors ("BOS"), Boards of Zoning Appeals ("BZA"), and planning commissions—to resolve planning and zoning disputes.[3] All of these structures are necessarily idiosyncratic, and each locality has the power to guide planning within its own borders.

However, the General Assembly controls the authority originally granted to localities, directly managing the scope of counties' reach and modifying the power granted to cities by altering their charters.[4] Further, Virginia follows Dillon's Rule, which forbids local government from imposing stricter limitations on development than the General Assembly has authorized in the Virginia

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1. *See* VA. CODE ANN. § 15.2-2223 (Repl. Vol. 2008 & Supp. 2009).

2. *See id.* §§ 15.2-2283 (Repl. Vol. 2008) (zoning); *id.* § 15.2-2240 (Repl. Vol. 2008) (subdividing).

3. For example, the General Assembly has authorized the creation of BZAs to review actions taken pursuant to a zoning ordinance, including variance and special exception appeals. *See id.* § 15.2–2309 (Supp. 2009).

4. *See id.* §§ 15.2-900 to 15.2-976, 15.2-1100 to 15.2-1133, 15.2-1200 to 15.2-1249 (Repl. Vol. 2008 & Supp. 2009).

Code.[5] Both of these factors contribute to the complex nature of land use, zoning, and planning in Virginia.

Not since its twenty-fifth volume has the *Annual Survey of Virginia Law* featured a separate article on land use and zoning.[6] Instead, this topic has been covered by articles on real estate law, and, to a degree, civil practice and procedure. The *Annual Survey*'s coverage of land use and zoning decisions, then, has been understandably spotty and fragmented. As such, this article will discuss select judicial decisions from the past three years, not simply 2009. In addition, this article will survey recent legislation in the realm of land use and zoning.

II. COURT DECISIONS

A. *Construction and Interpretation of Ordinances and Statutes*

Like any other area of law, a primary function of the judiciary in land use, planning, and zoning proceedings is to interpret what the legislature meant in enacting a particular code provision. Questions of interpretation may find their way into circuit courts[7] and higher courts regularly, but those courts tend to give a great deal of deference to administrative interpretation by the local zoning administrator and local governing bodies.[8] The reason for such deference is that "[z]oning administrators and boards of zoning appeals . . . are able to ensure consistent application consonant with a local government's intent for specific ordinances. Such agencies develop expertise in the relationship between particular textual language and a local government's overall zoning plan."[9]

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5. *See* Winchester v. Redmond, 93 Va. 711, 714, 25 S.E. 1001, 1002 (1896) ("[A locality] possesses no powers except those conferred upon it, expressly or by fair implication, by the law which created it and other statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It can do no act, nor make any contract, nor incur any liability, that is not thus authorized.").

6. *See* Woodrow W. Turner, Jr. & Mark R. Herring, *Annual Survey of Virginia Law: Planning, Zoning and Subdivision Law*, 25 U. RICH. L. REV. 841 (1991).

7. VA. CODE ANN. § 15.2-2314 (Repl. Vol. 2008 & Supp. 2009).

8. *See, e.g.*, Trs. of the Christ & St. Luke's Episcopal Church v. Bd. of Zoning Appeals, 273 Va. 375, 381, 641 S.E.2d 104, 107 (2007).

9. *Id.* at 382, 641 S.E.2d at 107 (alteration in original) (quoting Lamar Co. v. Bd. of Zoning Appeals, 270 Va. 540, 547, 620 S.E.2d 753, 757 (2005)).

1. Trustees of the Christ and St. Luke's

In *Trustees of the Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals*, a church administration sought interpretation of the word "adjacent" in a Norfolk ordinance.[10] Church trustees owned two parcels of land separated by a fifty-foot wide avenue.[11] Both parcels were situated in an area zoned "HC-G2," one of the historical conservation districts in the area.[12] One restriction on property zoned HC-G2 prohibits a building from occupying more than fifty-five percent of the lot on which it is situated.[13] The church sanctuary was located on one of the church parcels, and it constituted a legal "nonconforming structure."[14] The church planned to expand the sanctuary, but it could only do so if the expansion did not create additional nonconformity with the "fifty-five percent rule."[15] The only way the church could expand the sanctuary legally was if the two parcels, separated by a public road, were considered a single lot, as the expansion would cover only 54.98% of the combined lot area.[16]

To obtain this result, the church trustees sought an interpretation of the term "adjacent" as it appears in section 2-3 of the Norfolk Zoning Ordinance[17] from the zoning administrator of the City of Norfolk.[18] The zoning administrator concluded that the term adjacent means "next to" and not "across the street from."[19] On appeal, the BZA agreed, and stated "that when two pieces of property are separated by a fifty-foot public street, they are not adjacent for purposes of defining zoning lots."[20] The trustees filed

10. *Id.* at 377–78, 641 S.E.2d at 105.
11. *Id.* at 378, 641 S.E.2d at 105.
12. *Id.*
13. NORFOLK, VA., ZONING ORDINANCE § 9-1.9 (Supp. 2009).
14. *Trs. of the Christ*, 273 Va. at 378–79, 641 S.E.2d at 105–06.
15. *Id.*
16. *Id.* at 379, 641, S.E.2d at 106.
17. "For zoning purposes a lot or zoning lot is a piece of land identified on a plat of record or in a deed of record and of sufficient area and dimensions to meet district requirements . . . ." A lot may consist of "[c]ombinations of adjoining individual parcels and/or portions of such parcels . . . ." NORFOLK, VA., ZONING ORDINANCE § 2-3 (Supp. 2009).
18. *Trs. Of the Christ*, 273 Va. at 379, 641 S.E.2d at 106.
19. *Id.* at 379–80, 641 S.E.2d at 106.
20. *Id.* at 380, 641 S.E.2d at 106.

a petition with the circuit court, which affirmed with both the zoning administrator and the BZA.[21]

Finally, the Supreme Court of Virginia affirmed all lower decisions, stating that "deciding when two objects are not widely separated, but are close enough to be adjacent requires a 'judgment call.'"[22] In the court's view, that determination is best left to the zoning administrator and the BZA, and those entities found that the spirit and purpose of the city ordinance would be disserved by the opposite interpretation.[23] Quoting the zoning administrator, the court said: "It would work against [the spirit and purpose of the zoning requirements] to permit buildings located on one side of a street to cover nearly 100% of a parcel in those situations where the owner happens to own a vacant or nearly vacant parcel across the street."[24] Thus, the court interpreted the word "adjacent" in harmony with the purpose and intent of the underlying ordinance, and it indicated that similar interpretative methodology will be employed in the future.[25]

2. *Lovelace v. Orange County BZA*

In *Lovelace v. Orange County Board of Zoning Appeals*, the Supreme Court of Virginia held that a plat restricting a "reserved area" does not prohibit construction and recordation of a residence where no covenant was previously filed.[26] The controversy arose when the Lovelaces purchased a 106-acre parcel, which was part of a previous subdivision, described as "remaining land" on the subdivision plat filed with the county.[27] Elsewhere on that plat was the explanation that the "[r]eserved area as shown hereon is intended as open space . . . and is not to be further developed or subdivided."[28] When the Lovelaces applied for a zoning permit to commence construction on a residential home, it was denied by the zoning administrator.[29] The administrator con-

21. Trs. of the Christ & St. Luke's Episcopal Church v. Zoning Appeals Bd., 69 Va. Cir. 457, 459 (Cir. Ct. 2006) (Norfolk City).

22. *Trs. of the Christ*, 273 Va. at 381, 641 S.E.2d at 107.

23. *Id.* at 382, 641 S.E.2d at 107–08.

24. *Id.*, 641 S.E.2d at 108.

25. *See id.* at 383, 641 S.E.2d at 108.

26. 276 Va. 155, 160, 661 S.E.2d 831, 833–34 (2008).

27. *Id.* at 157, 661 S.E.2d at 832.

28. *Id.*

29. *Id.*

tended that development could not be approved because an Orange County ordinance prohibits the approval of plats that would violate the terms or intent of preserving reserved areas.[30] The ordinance allows certain parcels to be reserved for exclusive agricultural use upon the filing of a declaration of covenant with the clerk of the court.[31] The BZA affirmed on appeal, as did the circuit court.[32]

In reversing both the BZA and the circuit court, the Supreme Court of Virginia held that failure to record a declaration of covenant combined with the ambiguous language on the subdivision plat itself meant that the use of the Lovelaces' parcel was unrestricted.[33] The court focused on the lack of proper recordation under the ordinance, and how that lack deprived the Lovelaces of notice of restriction on development.[34] Since restrictions on the free use of land are disfavored, the court held that the requirements to restrict land usage would be strictly construed and the burden would be placed on the party seeking to enforce restrictions.[35]

3. *Renkey v. County Board*

In *Renkey v. County Board*, the Supreme Court of Virginia decided that provisions of the Arlington County Zoning Ordinance were operative language and not part of a preamble, as the circuit court had held.[36] In *Renkey*, Arlington County approved a rezoning from "R-5 one-family, restricted" to "commercial redevelopment" without first zoning the area "general commercial," as required by ordinance.[37] Residents opposed to the rezoning challenged the county's actions on that basis.[38] The county argued that the ordinance language on which the residents relied was merely a preamble and had no binding effect on the county's

30. *Id.*
31. ORANGE COUNTY, VA., CODE OF ORDINANCES § 70-734(a) (Supp. 2008).
32. *Lovelace*, 276 Va. at 157–58, 661 S.E.2d at 832.
33. *Id.* at 158, 661 S.E.2d at 833.
34. *See id.* at 159, 661 S.E.2d at 833.
35. *Id.* (quoting Waynesboro Vill., L.L.C. v. BMC Props., 255 Va. 75, 80, 496 S.E.2d 64, 67 (1998)).
36. 272 Va. 369, 370, 634 S.E.2d 352, 353 (2006).
37. *See id.* at 372, 634 S.E.2d at 354.
38. *Id.*

agents.[39] The circuit court agreed, and the residents appealed to the supreme court.

On appeal, the supreme court reversed. It held that the plain language of the statute indicates that it is not a preamble because only the initial portion of the paragraph states the purpose of the zoning classification.[40] The remainder of the paragraph set out "mandatory, eligibility criteria for the . . . classification."[41] The court concluded that "[i]n clear, unambiguous language, [the ordinance] requires that a site first be zoned [general commercial] before it can be rezoned [commercial redevelopment], so it serves a gate-keeping function," not just a purpose- or intent-stating function.[42]

B. *Administration and Enforcement*

1. Scope of Zoning Authority

In *Board of Supervisors v. Town of Purcellville*, county and town officials disagreed about which entity had zoning authority over a jointly managed growth area.[43] Relying on Dillon's Rule, the Supreme Court of Virginia reversed the circuit court and held that the county retained zoning authority over all property not annexed to the town.[44]

Years before the controversy, the Town of Purcellville and Loudoun County entered an annexation agreement, whereby the town received the right to annex areas within a specified area in exchange for relinquishing its right to seek independent city status.[45] The annexation agreement provided a joint comprehensive plan to direct development of the specified area, and both localities agreed that the joint plan would be supreme within the specified annexation area.[46] The joint plan contained preferred loca-

39. *Id.*
40. *Id.* at 375, 634 S.E.2d 356.
41. *Id.*
42. *Id.*
43. 276 Va. 419, 425, 427, 666 S.E.2d 512, 514, 515 (2008).
44. *Id.* at 437–38, 440, 666 S.E.2d at 520–22.
45. *Id.* at 425, 666 S.E.2d 514.
46. *Id.* at 425–26, 666 S.E.2d at 514. The joint comprehensive plan was implemented as an aspect of both the town's comprehensive plan and the county's. *Id.* at 426, 666 S.E.2d at 514.

tions for middle and high schools, but subdivisions were developed over those preferred locations.[47] In response to the continued demand for schools, the county purchased a tract of land some two miles from the originally proposed location, intending to build a high school.[48]

Soon thereafter, the county convened to determine whether it needed to seek a commission permit before commencing construction,[49] and if so, whether it needed to confer with the town on the matter.[50] The county resolved that it did not need to seek a commission permit, and it could act on its own.[51] The town challenged both determinations in a multitude of forums, finally culminating with a consolidated hearing of all challenges in circuit court.[52] The circuit court held that the town had joint and concurrent authority to review and approve the location of new development within the specified annexation area.[53]

The supreme court began its analysis forcefully: "A municipal corporation is a mere local agency of the State and has no powers beyond the corporate limits except such as are clearly and unmistakably delegated by the legislature."[54] The court distinguished between the joint *planning* authority of town and the singular *zoning* authority of the county within the specified annexation area.[55] Relying on Virginia Code sections 15.2-2232(A) and 15.2-2223, the court established that the legislature granted zoning authority to each locality only for "development of the territory *within its jurisdiction.*"[56] Finding that the county retains jurisdic-

47. *Id.* at 426–47, 666 S.E.2d at 515.

48. *Id.* at 427, 666 S.E.2d at 515.

49. *Id.* "If a proposed development is not already a feature shown on the [comprehensive] plan, then the proposal must be 'submitted to and approved by the [zoning] commission as being substantially in accord with the adopted comprehensive plan.'" *Id.* at 426, 666 S.E.2d at 514 (quoting VA. CODE ANN. § 15.2-2232(A) (Repl. Vol. 2008)). Both the town and the county refer to this subsequent approval process as a "commission permit." *Id.*

50. *Id.* at 427–28, 666 S.E.2d at 515–16.

51. *Id.*

52. The town filed a declaratory judgment action in circuit court, and then appealed the county zoning administrator's determination to the county BZA. Similarly, the county appealed a determination by the town zoning administrator that both localities needed to seek commission permits for the school to the town BZA. *Id.* at 427–33, 666 S.E.2d at 515–18.

53. *Id.* at 432–33, 666 S.E.2d at 518.

54. *Id.* at 437, 666 S.E.2d at 521 (quoting City of Richmond v. Bd. of Supervisors, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958)).

55. *Id.* at 438, 666 S.E.2d at 521.

56. *Id.* (quoting VA. CODE ANN. § 15.2-2223 (Repl. Vol. 2008)).

tion for all parts of the specified annexation area until the land is actually annexed by the town, the court held that the county had sole zoning authority to advance the school construction.[57] The court set out one caveat: the county still had to apply for a commission permit from its own zoning administrator because the proposed construction site was over two miles from the site proposed in the original joint comprehensive plan.[58] That distance, the court held, was too great for the site to be in the "general or approximate location" of the proposed site in the comprehensive plan, as required by Virginia Code section 15.2-2232.[59]

2. BZA Powers

Boards of zoning appeals are "creatures of statute possessing only those powers expressly conferred."[60] This principle was tested in *Board of Zoning Appeals v. Board of Supervisors*.[61] In *BZA v. BOS*, the Fairfax County BZA brought a declaratory judgment action seeking a declaration that the BZA was entitled to have the BOS pay litigation expenses in the defense of all certiorari proceedings against it.[62] In response, the BOS argued that since no statute gave the BZA the power to initiate suit against the BOS or any other entity, the declaratory judgment action must be dismissed.[63] Citing Dillon's Rule, the Supreme Court of Virginia agreed.[64] The court outright rejected the BZA's argument that it had the ability to sue on its own behalf because it was "necessary and essential to enable the BZA to exercise the powers expressly granted it."[65] Instead, the powers of the BZA are strictly limited to those expressly granted it, and do not include auxiliary powers the BZA perceives as necessary to effect those express powers.[66]

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57. *See id.*

58. *Id.* at 440–41, 666 S.E.2d at 523.

59. *Id.* at 441, 666 S.E.2d at 523.

60. Bd. of Zoning Appeals v. Cedar Knoll, Inc., 217 Va. 740, 743, 232 S.E.2d 767, 769 (1977); Lake George Corp. v. Standing, 211 Va. 733, 735, 180 S.E.2d 522, 523 (1971).

61. 276 Va. 550, 666 S.E.2d 315 (2008).

62. *Id.* at 552, 666 S.E.2d at 316. The BOS had previously stated that it would no longer permit the county attorney to represent the BZA, and it would no longer pay for private legal counsel. *Id.* at 551–52, 666 S.E.2d at 315–16.

63. *Id.* at 552, 666 S.E.2d at 316.

64. *See id.* at 553–54, 666 S.E.2d at 316–17.

65. *Id.* at 553, 666 S.E.2d at 316.

66. *See id.* at 554, 666 S.E.2d at 317.

3. Vested Rights

In *Alexandria City Council v. Mirant Potomac River, LLC*, the Supreme Court of Virginia held that certain zoning amendments impaired the vested rights of a coal-fueled power plant owner and were therefore invalid.[67] Mirant was the current owner and operator of a power plant, which had been located in the city of Alexandria since 1949, for which two special use permits ("SUPs") had previously been granted for building additions.[68] Throughout the 1990s, the city approved residential and commercial construction in the vicinity of the plant, and, unsurprisingly, two private residents complained to the city about possible health effects from the plant's emissions in 2003.[69] After further investigation, the city council determined that the plant's operations were not compatible with the city's long-term plan, and it resolved to shut the plant down.[70] To accomplish these goals, the city adopted an amendment to its zoning ordinance, which would change the plant's designation to nonconforming use, subject to abatement.[71] The city also revoked the two SUPs based on alleged emissions law violations.[72]

The circuit court held that the ordinance amendment was invalid because it violated the vested rights statute, and it invalidated the SUP revocations, holding that such action required a "nexus between the 'violation of law' relied upon and the subject matter of the permits in issue."[73] On the vested rights argument, the Supreme Court of Virginia affirmed, holding that because the amendment requires Mirant to cease operations and because seeking a comprehensive SUP to address its new nonconforming use would be futile, the amendment violated the vested right of the plant owner and was invalid.[74] The court then went on to address the revocation of Mirant's two previous SUPs. The relevant ordinance allowed revocation or suspension of SUPs "upon proof

67. 273 Va. 448, 453–55, 643 S.E.2d 203, 206–07 (2007).

68. *Id.* at 451, 643 S.E.2d at 204–05.

69. *Id.*, 643 S.E.2d at 205.

70. *Id.* at 451–52, 643 S.E.2d at 205.

71. *Id.* at 452–53, 643 S.E.2d at 205–06.

72. *Id.* at 452, 643 S.E.2d at 205.

73. *Id.* at 453, 643 S.E.2d at 206.

74. *Id.* at 454–55, 643 S.E.2d at 207 ("[T]ermination of the use allowed by virtue of an established vested right impairs the vested right and therefore violates Code § 15.2-2307.").

that the holder . . . failed to comply with any law, including, without limitation, the conditions subject to which the special use permit was granted."[75] The city argued that the ordinance should be given its plain meaning—that is, the phrase "any law" should be interpreted literally, allowing SUP revocation for traffic or tax laws completely unrelated to land use.[76] The court declined to follow such a bizarre interpretation, instead upholding the circuit court's imposition of a "nexus between the law violated and the purpose of the SUP."[77]

In *Hale v. Board of Zoning Appeals*, the Supreme Court of Virginia considered two consolidated appeals of a determination of the BZA in Blacksburg and subsequent affirmance of that determination by the Montgomery County Circuit Court.[78] One of the two appeals was filed by the Town of Blacksburg itself; the second was filed by a group of private citizens residing in immediate proximity to the property affected by the determination.[79] The property at issue consisted of a 39.63 acre parcel located in the center of the town.[80] In 2006, a group of developers who had acquired the land applied to the town for rezoning of a portion of the parcel to General Commercial from its previous Low-Density Residential zoning classification.[81] In connection with the proposed rezoning, the developers submitted proffers that restricted certain features of the property's development in exchange for a conditional rezoning to General Commercial.[82] Introductory language to the proffers and the developers' application for rezoning described an appealing mixed-use development with commercial, residential, and recreational applications, occupying a "pedestrian-friendly, tree-lined boulevard" to create "a cohesive development that provides a distinctive appearance and true sense of

75. ALEXANDRIA, VA., ZONING ORDINANCE § 11-506(A) (Supp. 2008).
76. *Mirant*, 273 Va. at 456, 643 S.E.2d at 207.
77. *Id.* at 456–57, 643 S.E.2d at 207–08.
78. 277 Va. 250, 256–57, 673 S.E.2d 170, 172 (2009).
79. *Id.* at 265, 673 S.E.2d at 177.
80. *Id.* at 257, 673 S.E.2d at 172.
81. *Id.*
82. *Id.*

space."[83] The proffers were accompanied by a "preferred illustrative plan" with conceptual drawings consistent with this description.[84]

The proffers themselves placed limitations on building heights, setbacks, and buffer zones, thereby defining a "buildable envelope" for the property.[85] The proffers also encompassed the construction of a multi-use path along one border of the property and limited the number of residential units to an amount below that which would otherwise be allowed in a general commercial district.[86] The proffers did not, however, specify or limit the use or uses to which the property could be put.[87] The town approved the application for rezoning on May 9, 2006, incorporating the developers' proffers and application into the ordinance rezoning the property, Ordinance 1412.[88]

After the passage of the ordinance rezoning the property, the developers began submitting preliminary plans to the town zoning administrator for review to determine compliance with the proffers.[89] None of the draft plans submitted, including the formal preliminary site plans, conformed completely to the proffers, and the zoning administrator notified the developers of the deficiencies.[90] Moreover, while the plans continued to evolve, the proposals began to feature a single structure of 176,000 square feet in size.[91] As the Blacksburg community began to express concerns with regard to the construction of such a structure in the midst of downtown, the town passed a new ordinance—Ordinance 1450—that created a new use category of "Retail Sales, Large Format."[92] The ordinance required a special use permit for the construction of any retail sales use in excess of 80,000 square feet.[93] After Ordinance 1450 passed on May 29, 2007, the developers sought a determination from the zoning administrator that their rights to develop a large-format retail use was not affected by the new or-

83. *Id.* at 258, 673 S.E.2d at 173.
84. *Id.* at 259, 673 S.E.2d at 173.
85. *Id.* at 273, 673 S.E.2d at 181.
86. *Id.* at 258–59, 673 S.E.2d at 172–73.
87. *Id.* at 259, 673 S.E.2d at 173.
88. *See id.* at 260, 673 S.E.2d at 173.
89. *Id.*, 673 S.E.2d at 174.
90. *Id.*
91. *Id.* at 260–61, 673 S.E.2d at 174.
92. *Id.* at 261, 263, 673 S.E.2d at 174–76.
93. *Id.* at 261–63, 673 S.E.2d at 175–76.

dinance, claiming that two Virginia statutes—sections 15.2-2307 and 15.2-2298(b) of the Virginia Code—gave the developers vested rights to develop such a use.[94] The town zoning administrator disagreed and determined that the developers were subject to the requirements of Ordinance 1450.[95]

The developers appealed the zoning administrator's determination to the BZA, which conducted public hearings and ultimately determined unanimously that the developers had a vested right to develop the property for retail sales as that term was defined prior to the passage of Ordinance 1450.[96] In response, the town council and a group of private citizens filed separate petitions for a writ of certiorari in the Montgomery County Circuit Court to challenge the BZA's determination that Ordinance 1450 did not apply to the developers.[97] In response to the petitions, the developers again claimed that sections 15.2-2307 and 15.2-2298(B) vested their right to develop the property, notwithstanding Ordinance 1450.[98] The developers argued that the approved proffers "specif[ied] use," and that the property was rezoned for a specific use or density, both triggering application of section 15.2-2307.[99] They further argued that the proffered conditions for construction of a multi-use path and a $25,000 payment for traffic calming measures triggered application of section 15.2-2298(B) as dedications of "'real property of substantial value'" and "'substantial cash payment[ ] for. . . substantial public improvements.'"[100] Neither condition, they claimed, was necessitated by the rezoning itself.[101]

After a hearing, the circuit court entered an order finding that section 15.2-2307 vested the developers' rights and exempted the property from application of Ordinance 1450.[102] The trial court made no findings with regard to Section 15.2-2298(B), finding only that the conditional rezoning of the property on May 9, 2006,

94. *Id.* at 262, 264, 673 S.E.2d at 175–76.
95. *Id.* at 263, 673 S.E.2d at 176.
96. *Id.* at 264–65, 673 S.E.2d at 176–77.
97. *Id.* at 265, 673 S.E.2d at 177.
98. *Id.*
99. *Id.*
100. *Id.* at 266, 673 S.E.2d at 177 (quoting VA. CODE ANN. § 15.2-2298(B) (Repl. Vol. 2008)).
101. *Id.* at 266, 673 S.E.2d at 177.
102. *Id.* at 267, 673 S.E.2d at 178.

constituted a significant affirmative governmental act as defined by Section 15.2-2307.[103]

Both the town and the private citizens appealed the decision of the trial court to the Supreme Court of Virginia, which consolidated the appeals.[104] The court, reviewing the trial court's legal conclusions de novo, unanimously found that the trial court had erred in determining that the conditional rezoning constituted a significant affirmative governmental act.[105] The court reiterated that no landowner has the right to expect that the current zoning classification of his land will continue and noted that the exception to this general rule—vesting—is narrow.[106] The court rejected the developers' argument that the design features in the proffers, such as reduced building height and increased setbacks, specified use as required to trigger section 15.2-2307.[107] In seeking flexibility to develop the property, the developers proffered conditions that did not specify use.[108] The proffered residential density limitation was related to the "overall scheme of the project," and did not vest in the developers the right to unrestricted, commercial development.[109] Further, the court concluded that section 15.2-2298(B) was not triggered, as neither the proffered multi-use path nor the $25,000 payment met the requirements of that statute.[110] Accordingly, the court entered final judgment for the town and the private citizens and reinstated the determination of the town zoning administrator.[111]

The *Hale* case stands firmly for the proposition that specificity of use is required during the land use application process if a property owner seeks the safe harbor protections of the vested rights exception to the general rule that one does not have a right to expect that the current zoning classification of his land will continue.

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103. *Id.*
104. *Id.* at 268, 673 S.E.2d at 178.
105. *See id.* at 268, 279, 673 S.E.2d at 179, 185.
106. *Id.* at 271, 673 S.E.2d at 180.
107. *Id.* at 274, 673 S.E.2d at 182.
108. *Id.*
109. *Id.* at 275–76, 673 S.E.2d at 183.
110. *Id.* at 278, 673 S.E.2d at 184.
111. *Id.* at 279, 673 S.E.2d at 185.

4. Initiating Zoning Amendments

In *Ace Temporaries, Inc. v. City Council*, the Supreme Court of Virginia held that a zoning ordinance amendment does not need to be in writing when adopted, but such amendments most strictly adhere to the procedural requirements enumerated in the Virginia Code.[112] Ace Temporaries ("Ace") operated a day labor agency in Alexandria when the city's Planning Commission approved a zoning amendment that included an eighteen-month abatement period for nonconforming day labor agencies.[113] The zoning ordinance amendment was well accepted by the city council; it recommended further amendment to reduce the abatement period from eighteen to twelve months.[114] Intending to pass the twelve-month abatement version of the zoning amendment, the city council instead passed the eighteen-month abatement version.[115] To correct its mistake, the city council passed a second amendment that would reduce the abatement period to twelve months.[116] Ace was subsequently notified that its agency was considered a nonconforming use and was required to cease operations within twelve months.[117]

In response, Ace alleged (1) that the original zoning ordinance amendment was invalid because it was not in written form when the planning commission passed it and (2) that the second, abatement-shortening amendment was invalid because it was not initiated by motion or resolution as required by law.[118] In dismissing the petitioner's first argument, the court quoted Virginia Code section 15.2-2286(A)(7)[119] and stated that because the legislature did not include a "written form" requirement, it would not impose one.[120] Regarding the second argument, the court sided with the petitioner and held the amendment invalid for lack of

112. 274 Va. 461, 466–68, 649 S.E.2d 688, 690–91 (2007).

113. *Id.* at 463, 649 S.E.2d at 689.

114. *Id.*

115. *Id.* at 464, 649 S.E.2d at 689.

116. *Id.*

117. *Id.*

118. *Id.* at 465, 649 S.E.2d at 690.

119. Section 15.2-2286(A)(7) governs when and how "a governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or classifications of property." VA. CODE ANN. § 15.2-2286(A)(7) (Supp. 2009).

120. *Ace Temporaries*, 274 Va. at 466, 649 S.E.2d at 690 ("'Courts cannot add language to the statute the General Assembly has not seen fit to include.'" (quoting Janvier v. Arminio, 272 Va. 353, 366, 634 S.E.2d 754, 761 (2006))).

proper initiation.[121] It stated: "Code § 15.2-2286(A)(7) requires that each time an amendment to the Zoning Ordinance is made, the amendment must be properly initiated [by motion or resolution]."[122] As such, the procedural requirements of the abatement-shortening amendment were insufficient,[123] and Ace would be given an additional six months before its forced cessation.

5. Challenged Rezoning

In *Board of Supervisors v. Greengael, L.L.C.*, the Supreme Court of Virginia held that a BOS can rezone property from residential to light industrial even if a developer has a vested right to develop his proposed subdivision.[124] The developer in this case, Greengael, bought an approximately ninety-six acre parcel zoned residential.[125] The property was located just outside the Culpeper town limits, and Greengael ran into problems securing approval from town water and sewer systems to proceed with the subdivision and development.[126] Nearly one year later, the county denied Greengael's subdivision efforts and rezoned the area to light industrial.[127] Soon thereafter, Greengael filed suit against the county BOS, the county water and sewer authority, the county planning commission, and the town council.[128] The circuit court held that the subdivision plat should be approved and invalidated the rezoning because Greengael had a vested right to develop the property under the old, residential zoning classification, and the BOS appealed to the Supreme Court of Virginia.[129]

On appeal, the Supreme Court of Virginia reversed.[130] It held that the BOS had not acted in an arbitrary and capricious manner in denying the subdivision application, noting that Greengael had failed to secure the requisite approval letter from the water and sewage authority.[131] Instead of focusing on the "bureaucratic

121. *Id.* at 467, 649 S.E.2d at 691.
122. *Id.*
123. *Id.*
124. 271 Va. 266, 282, 626 S.E.2d 357, 366 (2006).
125. *Id.* at 271–72, 626 S.E.2d at 360.
126. *Id.* at 272–74, 626 S.E.2d at 360–61.
127. *Id.* at 275, 626 S.E.2d 361–62.
128. *Id.* at 275, 626 S.E.2d at 362.
129. *Id.* at 276–77, 626 S.E.2d at 362–63.
130. *Id.* at 288, 626 S.E.2d at 369.
131. *Id.* at 278, 626 S.E.2d at 363–64.

nightmare" of seeking approval from the town and county as the circuit court had,[132] the supreme court relied on the strict interpretation given procedural requirements in the zoning ordinances.[133] "Because Greengael's application did not contain the utility letter required for approval of a preliminary subdivision application, the Board acted in compliance with the applicable subdivision ordinance in denying approval, and its decision was not arbitrary and capricious."[134]

Likewise, on the rezoning challenge, the supreme court reversed. It held that Greengael had no vested right since there was no affirmative governmental act allowing the development to proceed.[135] In particular the court held that (1) because it had reversed the lower court's subdivision approval, that order could not qualify as a sufficient affirmative act and (2) because the general rezoning was not enacted at Greengael's request or specifically directed at its project, that could not qualify as a significant government act either.[136] Finally, the court noted that, even if Greengael had a vested right, it would only enable the company to continue with this project, not challenge the rezoning ordinance in its entirety.[137] The case was further litigated in federal court, and the county BOS prevailed there as well.[138]

6. Contempt Order

In *Mitchell L. Phelps, Inc. v. Board of County Supervisors*, the trial court ordered a junkyard owner to comply with various county code provisions, including the creation of a twenty-foot setback of all property uses and buildings from property lines, the erection of a solid fence around the setback area, and planting two rows of evergreens in the setback area.[139] He was given ninety

132. In fact, the circuit court suspected some collusion between the town and the county to procedurally default Greengael's subdivision. *See id.* at 276, 626 S.E.2d at 362–63.

133. *Id.* at 281, 626 S.E.2d at 365.

134. *Id.* at 282, 626 S.E.2d at 366.

135. *Id.* at 283–84, 626 S.E.2d at 366–67 (citing VA. CODE ANN. § 15.2-2307 (Repl. Vol. 2003)).

136. *Id.* at 283, 626 S.E.2d at 366–67.

137. *Id.* at 282–83, 626 S.E.2d at 366.

138. *See* Greengael, LC v. Bd. of Supervisors, No. 07-1878, 2008 U.S. App. LEXIS 19218, at *7, *9 (4th Cir. Sept. 5, 2008) (per curiam) (unpublished decision) (dismissing federal constitutional claims and Fair Housing Act claims as barred by res judicata).

139. No. 1785-06-4, 2007 Va. App. LEXIS 262, at *2–3 (Va. Ct. App. July 3, 2007).

days to comply with those provisions, but failed to do so.[140] Finding the junkyard owner in contempt of its prior order, the trial court allowed the county to enter the junkyard to remove all unpermitted structures, create the required setback, construct a fence, and plant a double-staggered row of evergreens.[141] The court's contempt order mirrored the requirements in Prince William County Code section 32-601.50, except that the order required the evergreens be planted a *maximum* of fifteen feet apart, where the code required a *minimum* of fifteen feet between plants.[142] The junkyard owner challenged this departure from the ordinance language to the Court of Appeals of Virginia, contending that such departure required reversal.[143] The court of appeals disagreed and noted that the trial court was "free to [so depart] as a part of its inherent power to fashion an appropriate punishment."[144] The court also held that the county would be indemnified for its work to enforce the court's order on the junkyard owner's property.[145]

C. *Review & Procedural Issues*

1. Sufficiency of Public Notice

Compliance with general notice requirements is an indispensible precursor to most land use actions, including variance applications and appeals to the local BZA.[146] The Supreme Court of Virginia has previously held that published notice of a zoning ordinance amendment must include a "descriptive summary" that covers the main points of the amendment concisely.[147] A similar standard applies to proposed plans and ordinances, amendments to the same, proposed comprehensive plans, and special exception applications.[148] Generally speaking, notice of public hearings must be advertised in a local newspaper once a week for two successive

140. *Id.* at *3.
141. *Id.* at *3–4.
142. *See id.* at *2–4; *see also* PRINCE WILLIAM COUNTY, VA., CODE OF ORDINANCES § 32-601.50 (Supp. 2009).
143. *Mitchell L. Phelps, Inc.*, 2007 U.S. App. LEXIS 262, at *5.
144. *Id.* at *6.
145. *Id.* at *8.
146. *See* VA. CODE. ANN. §§ 15.2-2204 to 15.2-2205 (Repl. Vol. 2008 & Supp. 2009).
147. Glazebrook v. Bd. of Supervisors, 266 Va. 550, 554–55, 587 S.E.2d 589, 591 (2003).
148. VA. CODE ANN. § 15.2-2204(A), (C) (Repl. Vol. 2008 & Supp. 2009).

weeks and must specify the time and place of public hearing on the matter.[149]

In *Rohr v. Fauquier County Board of Supervisors*, a landowner sought invalidation of a previously approved special exception permit.[150] The special exception in question was earlier approved by the Fauquier County BOS, authorizing the construction of a large shopping center with accompanying signage.[151] The developer, Cross Creek Investments, LLC, planned to allot over half of the shopping center to construction of a Costco Store building, characterized as a "big box" store in the pleadings.[152] The plaintiff owned nearly seven acres of improved real estate approximately two thousand feet from the Cross Creek project.[153] In challenging the special exception granted by the Fauquier County BOS, the plaintiff alleged that the exception was inconsistent with the comprehensive plan and that notice was inaccurate, defective, and failed to give a sufficiently descriptive summary as required by statute.[154]

The developer had, in fact, advertised notices in the *Fauquier Times-Democrat*, but one of the parcel identification numbers ("PIN") contained a typographical error.[155] The circuit court addressed two issues: first, whether the published notice contained a sufficiently descriptive summary as a matter of law and second, whether the typographical error rendered notice defective.[156] Citing *Glazebrook v. Board of Supervisors*[157] and *Gas Mart Corp. v. Board of Supervisors*,[158] the court stated "a descriptive summary must 'cover the main points concisely, but without detailed explanation, in a manner that serves to describe [a parcel] for the knowledge and understanding of others.'"[159] The court restated the test it would use as whether "the average citizen could . . . reasonably determine from reading the ad whether he or she was

149. *See, e.g.*, *id.* § 15.2-2204(A).
150. 75 Va. Cir. 167, 167–68 (Cir. Ct. 2008) (Fauquier County).
151. *Id.*
152. *Id.* at 168.
153. *Id.*
154. *Id.*
155. *Id.* at 169–70, 172.
156. *Id.* at 170–72.
157. 266 Va. 550, 587 S.E.2d 589 (2003).
158. 269 Va. 334, 611 S.E.2d 340 (2005).
159. *Rohr*, 75 Va. Cir. at 170 (quoting *Glazebrook*, 266 Va. at 554–55, 587 S.E.2d at 591).

affected by the proposed [action] based upon the description provided."[160] The court applied these principles and held that, while the exact size or breakdown of the shopping center was not specified in the notice, the advertisement was not insufficient as a matter of law.[161] It explained that because the ad described (1) the action to be taken by the BOS—the special exception application; (2) the subject of the actions—construction of a shopping center; and (3) the location of the actions—specified by the PINs, it was sufficient to satisfy the statutory notice requirements.[162] The court only briefly addressed the typographical error, holding that even with the error, a citizen of Fauquier County could reasonably determine if he or she was affected by the proposed action.[163] The court added that, while a typographical error could conceivably cause enough genuine confusion to render notice defective, the error in this case was not serious enough to cause confusion.[164]

In an older case, *Northern Virginia Community Hospital v. Loudoun County Board of Supervisors*, Judge Horne found published notice adequate for similar reasons.[165] In *Northern Virginia Community Hospital*, a health care provider sought to construct a hospital on land for which hospitals were a permitted use with special exception from the local BOS.[166] The provider sought special exception to proceed with construction, but the BOS denied the application and amended the locality's comprehensive plan, allegedly to restrict competition and protect a second health care provider in the area.[167] The plaintiffs sought invalidation of the comprehensive plan amendments, arguing that there was not adequate published notice.[168] In finding notice sufficient, the court stated:

> [T]he notice adequately informed the public that the amendments would address, among other things, the location and type of health care facilities in the County. Simply stated, a resident of Loudoun County interested in where health care facilities might be located in

160. *Id.* at 171 (citing *Gas Mart Corp.*, 269 Va. at 347, 611 S.E.2d at 346).
161. *Id.* at 171–72.
162. *Id.* at 171.
163. *Id.* at 172.
164. *Id.*
165. *See* 72 Va. Cir. 174, 177 (Cir. Ct. 2006) (Loudoun County).
166. *See id.* at 174.
167. *Id.* at 174–75.
168. *Id.* at 175.

> the County would need to look no further than the advertisement to embolden their interest in the public debate on the issue.[169]

2. Necessary Parties

As with any other litigation, certain parties are necessary to land use actions, and a matter cannot proceed until the proper parties are before the court.[170] However, the Supreme Court of Virginia has held that, in order to toll the thirty-day appeals period, only the "local governing body" and the contesting party need be named.[171] In order to adjudicate the matter, however, all necessary parties must be joined or must intervene by their own will.[172]

In *Miller v. Highland County*, the Supreme Court of Virginia revisited this principle and held that the appropriate "local governing body" when contesting the decision of the local BOS is the BOS, not the town, the county, or the planning commission.[173] The *Miller* case arose when the Highland County BOS granted a conditional use permit ("CUP") to allow construction of wind turbines that exceeded the height restrictions in an agricultural district.[174] Nearby property owners challenged the CUP issuance, alleging that the BOS acted in an arbitrary and capricious manner and without proper authority.[175] However, in their complaints, the nearby landowners named only "Highland County, Virginia," not the Highland County BOS.[176] On appeal, the locality argued that the landowners' action was barred because they failed to name the appropriate local governing body—the BOS—as a party to the action within the thirty-day appeals period.[177]

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169. *Id.* at 177.

170. *See generally* VA. CODE ANN. § 15.2-2314 (Repl. Vol. 2008 & Supp. 2009) (granting right to seek review to those persons "jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality").

171. *See* Friends of Clark Mountain Found., Inc. v. Bd. of Supervisors, 242 Va. 16, 21, 406 S.E.2d 19, 21–22 (1991).

172. *Id.*, 406 S.E.2d at 22.

173. *See* 274 Va. 355, 367, 650 S.E.2d 532, 537 (2007).

174. *Id.* at 361, 650 S.E.2d at 533–34.

175. *Id.* at 362, 650 S.E.2d at 534.

176. *Id.*

177. *Id.* at 363, 650 S.E.2d at 535 (citing VA. CODE ANN. § 15.2-2285(F) (Repl. Vol. 2003 & Cum. Supp. 2007)). Section 15.2-2285(F) requires that actions in circuit court contesting the decisions of a local government body are filed within thirty days of the decision. VA.

The court agreed and held that "[t]he complete absence of any language in Virginia Code § 15.2-2285(F) referring to a 'locality' indicates a legislative intent that only the 'governing body,' the entity that rendered the contested decision, be a required party defendant in an action challenging that decision."[178] Because the contested decision was issued by the local BOS, the statute required the BOS to be a named defendant within thirty days to toll the appeals time limit.[179] Since the landowners had failed to name the BOS, the court was required to dismiss the appeal.[180]

The *Miller* holding was recently applied in *Rohr v. Fauquier County Board of Supervisors*.[181] In determining whether the county was a proper party defendant, the court stated:

> The recent case of *Miller v. Highland County* dealt directly with this question, ruling that the Board of Supervisors as an entity and not the County is the proper party Defendant in a declaratory judgment action involving a zoning question. Applying Va. Code § 15.2-2285, the Court held that the governing body, to wit the Board of Supervisors is the "entity that rendered the contested decisions," and hence the proper Defendant. Therefore, the demurrer of Fauquier County will be sustained with prejudice and the case dismissed as to the County.[182]

3. Third-Party Standing

In order to maintain a land use action, a litigant must have standing. This means that all parties must have "'such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness.'"[183] This "personal stake" has been generally reduced to whether a party is "aggrieved" by a land use or zoning action.[184] A series of recent decisions have affirmed that the term "aggrieved" is narrowly interpreted by Virginia courts. As these cas-

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CODE. ANN. § 15.2-2285(F) (Repl. Vol. 2008 & Supp. 2009).

178. *Miller*, 274 Va. at 365–66, 650 S.E.2d at 536.

179. *See id.*

180. *Id.* at 368, 650 S.E.2d at 537.

181. 75 Va. Cir. 167, 169 (Cir. Ct. 2008) (Fauquier County). For the facts and background discussion of *Rohr*, see *supra* Part II.C.1.

182. *Rohr*, 75 Va. Cir. at 169 (internal citations omitted).

183. Cupp v. Bd. of Supervisors, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984) (emphasis omitted) (quoting Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978)).

184. *See* VA. CODE ANN. § 15.2-2314 (Repl. Vol. 2008 & Supp. 2009). Many local zoning ordinances couch standing in the economic injury or other aggrieved status of a party. *See, e.g.*, LOUDOUN COUNTY, VA. ZONING ORDINANCE § 6-1909 (Supp. 2008).

es illustrate, perhaps the most difficult issue regarding standing in land use actions concerns the ability of adjacent property owners to bring suit.

In *Mann v. Loudoun County Board of Supervisors*, the Loudoun County Circuit Court held that an adjacent property owner had standing to challenge a zoning decision under the county ordinance so long as he could prove economic injury.[185] In *Mann*, a farm owner sought the opinion of the local zoning administrator to determine if he needed a certificate of appropriateness ("COA") prior to construction of two buildings in a historic district.[186] The administrator was of the opinion that no COA was required under the county ordinance, but the adjacent property owners appealed the administrator's determination to the BOS, alleging that they would suffer harm from the proposed construction.[187] The BOS agreed that no COA was required, and the adjacent landowner appealed to circuit court.[188] There, the BOS challenged the adjacent landowner's standing to pursue the appeal.[189]

Faced with the issue of standing on appeal, the circuit court noted that "[h]ad the County elected to limit appeals to only affected landowners within the historic district, they would have said so rather than expand the limits of standing to include those who are directly or economically aggrieved."[190] Because the issue of standing was before the court on summary judgment, it declined to dismiss on that basis, noting that to proceed, the landowner would need to demonstrate economic injury in the future.[191]

Less than one month later, the *Mann* decision was cited in *Owens v. City Council*.[192] In *Owens*, the Christ and Saint Luke's Episcopal Church, located in a historic district, was issued a COA to construct a fifty-three foot tall addition.[193] A nearby landowner in the historic district challenged the COA and the COA-granting process, alleging, among other things, that she was deprived her

185. 75 Va. Cir. 24, 27 (Cir. Ct. 2008) (Loudoun County).
186. *Id.* at 24.
187. *Id.* at 24–25.
188. *Id.* at 25.
189. *Id.*
190. *Id.* at 26.
191. *Id.* at 27.
192. *See* 75 Va. Cir. 91, 106 (Cir. Ct. 2008) (Norfolk City).
193. *Id.* at 92.

constitutional right to be heard on the matter.[194] The City retorted that the landowner did not have standing to sue, and argued that, pursuant to the city ordinance, only the COA applicant enjoys the right to appeal an adverse decision.[195]

The circuit court declined to dismiss the appeal for lack of standing.[196] It held that, because the landowner had spent well over half a million dollars on improvements to her house and since she adequately alleged "a genuine threat of economic harm to her investment in her residence through damage to her neighborhood's character as protected by zoning district regulations," she had standing to bring suit.[197]

Finally, in *Logan v. City Council*, the Supreme Court of Virginia held that a private landowner does not have third-party standing to challenge actions taken in the *application* of subdivision ordinances.[198] In *Logan*, landowners sought declaratory judgment against the city council and planning commission, alleging that a number of exceptions to the city's subdivision ordinance granted by the subdivision agent would be unsafe and inappropriate.[199] The challenged exceptions included increased street grades and reduced street widths to enable construction of an access road to a future residential development.[200]

Since there was no specific cause of action under the subdivision statutes or ordinances, the city argued that the landowners had no right to challenge the subdivision ordinance as applied to this particular project.[201] In response, the landowners asserted that the Declaratory Judgment Act[202] permitted their challenge to the particular application of the subdivision ordinance.[203] The court agreed with the city and stated that "strangers to the subdivision approval process[ ] [do] not have a third-party right of action to enforce the locality's application of its subdivision ordin-

194. *Id.* at 93. Anne Owens, the landowner, alleged that the COA process violated her due process rights, both procedural and substantive, and her equal protection rights. *Id.*

195. *Id.* at 95; *see* NORFOLK, VA., ZONING ORDINANCE § 9-0.4(m) (Supp. 2009).

196. *Owens*, 75 Va. Cir. at 99.

197. *Id.* at 97–98.

198. *See* 275 Va. 483, 498–99, 659 S.E.2d 296, 304–05 (2008).

199. *Id.* at 488–90, 659 S.E.2d at 298–99.

200. *Id.* at 489, 659 S.E.2d at 299.

201. *Id.* at 497–98, 659 S.E.2d at 303–04.

202. VA. CODE ANN. §§ 8.01-184 to 8.01-191 (Repl. Vol. 2007 & Cum. Supp. 2009).

203. *Logan*, 275 Va. at 498, 659 S.E.2d at 304.

ance in a declaratory judgment suit, because no statute grant[s] third parties this right."[204] The court emphasized that, although litigants had previously sought to challenge land use decisions using the Declaratory Judgment Act, it does "'not create or alter any substantive rights, or bring any other additional rights into being.'"[205] Thus, absent a specifically enumerated third-party right of appeal in the Virginia Code, standing will not be found in like cases.

It is important at this point to reconcile the seemingly adverse outcomes of the above cases. Essential to the understanding that these decisions are, indeed, compatible is the differentiation between third-party suits that seek judicial interpretation of a *local ordinance* and those suits that seek judicial review of a locality's *application* of its ordinance.[206] The former—suits seeking pure legal interpretation of a statute or municipal ordinance—are fully contemplated by the Virginia Declaratory Judgment Act.[207] The latter are not, and the Supreme Court of Virginia has made clear, especially with its *Logan* decision, that parties seeking additional judicial review of specific land use actions must find a right of action outside the Declaratory Judgment Act in order to have standing.[208] Such right of action only exists regarding zoning decisions.[209] Therefore, currently, as-applied challenges to subdivision approvals or planning decisions will lack standing.

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204. *Id.* (citing Shilling v. Jiminez, 268 Va. 202, 208, 597 S.E.2d 206, 209–10 (2004)).

205. *Id.* at 499, 659 S.E.2d at 304 (quoting Miller v. Highland County, 274 Va. 355, 370, 650 S.E.2d 532, 539 (2007)).

206. *See generally* Robert Jackson Allen, Nothing *in My Back Yard? The Case Against Expanding Third-Party Rights to Challenge Local Land Use Decisions in Virginia*, 39 ENVTL. L. REP. 10110, 10113 (2009).

207. *See* VA. CODE ANN. § 8.01-184 (Repl. Vol. 2007 & Cum. Supp. 2009) ("Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be [adjudicated by circuit courts], and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.").

208. *Logan*, 275 Va. at 499, 659 S.E.2d at 304–05 ("Because the declaratory judgment statutes do not create [substantive] rights, and in the absence of statutory authority granting . . . a right of appeal to actions taken under the Subdivision Ordinance, Logan remained a stranger to the subdivision approval process and was not authorized to challenge . . . actions [taken] under that Ordinance.").

209. *See* VA. CODE ANN. § 15.2-2311(A) (Repl. Vol. 2008) (granting a right of action to appeal zoning decisions to the local BZA to "any person aggrieved."). No similar provisions exist for planning or subdivision challenges.

Applying this distinction to the cases discussed above, it would seem that both *Mann* and *Owens* fall into the latter category, in which a party is challenging the application of a municipal zoning ordinance. However, statutory standing was found because the plaintiffs had a right of action under Virginia Code section 15.2-2285(F).[210] Conversely, in *Logan*, the plaintiffs sought review of the locality's *application* of a *subdivision* ordinance.[211] In *Logan*, the plaintiffs mistakenly relied on the Declaratory Judgment Act for review of an "as applied" challenge to a subdivision approval.[212] Again, this is insufficient to sustain third-party standing in an "as applied" subdivision or planning challenge.

4. Timeliness

The provisions of Virginia Code section 15.2-2314 govern appeals from a BZA decision to circuit court. The statute states that any person aggrieved by a BZA decision may file a petition specifying grounds for appeal within thirty days of the BZA's final decision.[213] Until recently, it was unclear whether a violation of the thirty-day time limitation could be raised post-circuit court disposition.

In *Board of Supervisors v. Board of Zoning Appeals*, the Supreme Court of Virginia held that the thirty-day filing requirement in Virginia Code section 15.2-2314 does not involve the subject matter jurisdiction of a circuit court to adjudicate the matter in controversy, so a claim of procedural deficiency on that basis cannot be raised on appeal.[214] The court stated that the thirty-day filing requirement is an "'other "jurisdictional" element[ ]' subject to waiver if not properly raised [in the circuit court]."[215] The court clarified in a footnote:

> The 30-day filing requirement could also be viewed as "notice jurisdiction, or effective notice to a party." The purpose of a time limitation for filing an appeal "is not to penalize the appellant but to pro-

210. *See id.* § 15.2-2285(F) (Repl. Vol. 2008); Owens v. City Council, 75 Va. Cir. 91, 98–99 (Cir. Ct. 2008) (Norfolk City); Mann v. Loudoun County Bd. of Supervisors, 75 Va. Cir. 24, 26–27 (Cir. Ct. 2008) (Loudoun County).

211. *Logan*, 275 Va. at 489–90, 659 S.E.2d at 299.

212. *Id.* at 497–98, 659 S.E.2d at 303–04.

213. VA. CODE ANN. § 15.2-2314 (Repl. Vol. 2008).

214. 271 Va. 336, 347–48, 626 S.E.2d 374, 381 (2006).

215. *Id.* at 347, 626 S.E.2d at 381 (quoting Morrison v. Bestler, 239 Va. 166, 169, 387 S.E.2d 753, 755 (1990)).

> tect the appellee. If the required papers are not [timely] filed . . . the appellee is entitled to assume that the litigation is ended, and to act on that assumption."[216]

5. Limits of Mandamus

When a landowner has submitted a rezoning application or site plan that complies with the requirements of a local ordinance, its approval can be compelled through mandamus.[217]

In *Umstattd v. Centex Homes, G.P.*, the Supreme Court of Virginia held that mandamus was not an appropriate remedy to compel the town to accept a subdivision application because the determination of whether to accept or reject such an application is a discretionary function.[218] In *Umstattd*, Centex Homes sought to have a tract it owned rezoned to allow for more dense development.[219] In pursuit of that goal, Centex submitted an application with a preliminary plat attached to town authorities as required by the town ordinances.[220] The town rejected the application because of deficiencies in the preliminary subdivision plat, including the absence of deed book and tax map references, inadequate information concerning street coordination, and breaches of the town's Design and Construction Manual.[221] In response, Centex filed a complaint in circuit court seeking a writ of mandamus to compel the town to accept and process the application to final decision.[222] The circuit court granted the writ of mandamus, and the town appealed to the Supreme Court of Virginia.[223]

The supreme court reversed, holding that mandamus as a remedy is limited to the enforcement of ministerial duties—those duties that an official must carry out without the exercise of discretion—alone.[224] Because the town officials in this case engaged in "considerable investigation of the submitted plans . . . and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations," mandamus was inappro-

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216. *Id.* at 345 n.3, 626 S.E.2d at 379 n.3 (citations omitted).
217. *See* VA. CODE ANN. § 15.2-857 (Repl. Vol. 2008).
218. *See* 274 Va. 541, 546–48, 650 S.E.2d 527, 530–31 (2007).
219. *Id.* at 543, 650 S.E.2d at 529.
220. *Id.* at 543–44, 650 S.E.2d at 529.
221. *Id.* at 544, 650 S.E.2d at 529.
222. *Id.*
223. *Id.* at 545, 650 S.E.2d at 530.
224. *Id.* at 545–46, 650 S.E.2d at 530.

priate.[225] It would seem, then, that a town's duty to act on an application within a reasonable amount of time, for example, is purely ministerial and thus subject to mandamus.[226] However, here, the town officials acted in accordance with those time limitations by rejecting the application promptly.[227] Mandamus was denied because Centex was not challenging the ministerial procedures but the discretionary substance of the town's actions and reasoning.[228]

6. Presence of a Quorum

Under Virginia law, a majority of the governing body's members must be present to conduct a valid meeting.[229] Unless an exception to this quorum requirement is created by a separate, supervening statute, a valid meeting of the governing body cannot be conducted when a quorum is not present.[230]

In *Jakabcin v. Town of Front Royal*, the Supreme Court of Virginia resolved a question of first impression regarding the interplay of the traditional quorum requirements and the provisions of the State and Local Government Conflict of Interests Act ("COIA") in the context of a regularly scheduled town council meeting.[231] Specifically, the court considered whether certain governing body members could convene a valid meeting without a quorum of its members present in order to meet its statutory mandate to consider and act on certain rezoning and special use permit applications.[232]

The Front Royal Town Council was composed of six members, and the town charter set a quorum at four members.[233] Before the council could approve and adopt any zoning ordinance or amendment thereof, the council was required to hold at least one public

225. *Id.* at 546, 548, 650 S.E.2d at 530, 531.

226. *Id.* at 547, 650 S.E.2d at 531.

227. *Id.*

228. *Id.* at 547–48, 650 S.E.2d at 531.

229. "Unless otherwise specially provided, a governing body may exercise any of the powers conferred upon it at any meeting of the governing body, regular, special or adjourned at which a quorum is present. A majority of the governing body shall constitute a quorum . . . ." VA. CODE ANN. § 15.2-1415 (Repl. Vol. 2008).

230. Jakabcin v. Town of Front Royal, 271 Va. 660, 666, 628 S.E.2d 319, 322 (2006).

231. *See id.* at 666–68, 628 S.E.2d at 322–23.

232. *See id.* at 663, 628 S.E.2d at 320.

233. *Id.* at 664, 628 S.E.2d at 320.

hearing on the matter and convene two subsequent meetings to conduct two readings and votes.[234] At a duly noticed regular meeting of council, only three members of the council met in an attempt to convene a valid meeting to consider the town's business.[235] The agenda for the regular meeting featured many different items of significance to the town for the council's consideration and action, including the public hearing on the rezoning and special use permit applications.[236]

Despite three members of the town council being absent and over the objections of citizens in attendance, the remaining three members determined that a regular meeting of the council could be convened to consider and act upon the town's business.[237] Two of the absent councilmen determined their presence was not required because of their previously duly noted disqualifications under the COIA.[238] As to the third absent councilman, he was simply absent by recusal.[239] Nevertheless, the three members present did convene the regular meeting, conducted the one required and only advertised public hearing on the rezoning and special use permit applications, and considered and acted upon all of the other unrelated items on the meeting agenda.[240]

At the conclusion of the public hearing, the Mayor scheduled a subsequent special meeting of the council to conduct the first of two required readings and votes on the applications.[241] The same three members of the council then met for the first of two votes on the rezoning and special use permit applications, which they approved.[242] At the second vote-meeting, the two COIA-citers rejoined the council.[243] One of the two left the room when the rezoning and special use applications came before the council, and

234. VA. CODE ANN. § 15.2-2285 (Repl. Vol. 2003 & Cum. Supp. 2006); FRONT ROYAL, VA., CODE § 4-4 (Supp. 1995).
235. *Jakabcin*, 271 Va. at 664, 628 S.E.2d at 320–21.
236. *See id.* at 663–64, 628 S.E.2d at 320–21.
237. *Id.* at 664, 628 S.E.2d at 321.
238. *Id.*, 628 S.E.2d at 320.
239. *Id.*, 628 S.E.2d at 320–21.
240. *Id.*, 628 S.E.2d at 321.
241. *See id.*
242. *Id.*
243. *Id.* at 665, 628 S.E.2d at 321.

the second did not participate but "remained present . . . to avoid further quorum problems."[244]

Local residents filed a bill of complaint seeking a declaratory judgment invalidating the town council's actions approving the rezoning and special use permit applications for lack of the requisite quorum.[245] The trial court rendered a bench ruling that the COIA, particularly section 2.2-3112(C), reduces the required number of governing members necessary to establish a quorum sufficient to convene a regular meeting pursuant to Virginia Code section 15.2-1415.[246] The trial court concluded that COIA eliminates the need for local officials to physically attend and be counted for quorum requirements at regular and special meetings when a conflict of interest disqualifies them from acting on a particular agenda item.[247]

The Supreme Court of Virginia reversed and invalidated the application's approval.[248] In holding that the COIA did not supersede the traditional quorum requirements of section 15.2-1415, the court opined:

> In our system of representative government, the voters must of necessity rely on their elected legislative representatives to protect their interests, to defend their freedoms, to advocate their views and to keep them informed.
>
> . . . .
>
> [T]he physical presence of a majority of the members is necessary in order that a valid meeting of a governing body may be convened and that their continuing presence is necessary in order that the governing body may exercise the powers conferred upon it by law, except that a number less than a quorum may adjourn the meeting to a later time. When a quorum is present, however, and members are disqualified from acting on a particular matter pursuant to the provisions of COIA, the remaining member or members may validly act on the matter by majority vote.[249]

Thus, the way for a member of a local governing body to ensure compliance with the requirements of the COIA while maintaining

244. *Id.*
245. *Id.*
246. *Id.*
247. *See id.*
248. *Id.* at 669, 628 S.E.2d at 323.
249. *Id.* at 666–68, 628 S.E.2d at 322–23.

a legal quorum to convene a valid meeting of the governing body is to remain *physically present* but refuse to vote on the matter.

7. Petition for Referendum

A referendum is "an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest."[250] The referendum process amounts to a veto power over elected representatives.[251]

In *Committee of the Petitioners for Referendum* ex rel. *Kerry v. City of Norfolk*, the city passed four ordinances to allow only single-family homes and townhouses to be constructed in the Ocean View area of Norfolk.[252] Many Norfolk residents opposed the planned residential development of that property, and they decided to utilize the referendum process to repeal the ordinances by popular vote.[253] The Norfolk City Charter allows residents to submit a petition, with the requisite number of signatures, to the circuit court for placement on a ballot and the setting of an election date.[254] Once the Norfolk residents secured the required signatures and submitted their petition for referendum, the city and housing authority intervened in circuit court and had the petition invalidated because "it presented all four ordinances in a single petition."[255]

On appeal, the Supreme Court of Virginia reversed and held that separate petitions were not required to challenge each ordinance.[256] The court distinguished between the petition for referendum and the referendum itself, stating that while the referendum would need to address each of the four ordinances separately, there is no similar requirement for the petition.[257] Finding that "the language of the Petition . . . does not require the circuit court

250. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 678 (1976) (quoting S. Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970)).

251. R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13, 239 Va. 484, 489, 391 S.E.2d 587, 589 (1990) (quoting *City of Eastlake*, 426 U.S. at 673).

252. 274 Va. 69, 71–72, 645 S.E.2d 464, 465 (2007).

253. *Id.* at 72, 645 S.E.2d at 465.

254. NORFOLK, VA., CITY CHARTER §§ 35–36 (Supp. 2009).

255. *Kerry*, 274 Va. at 72, 645 S.E.2d at 465–66.

256. *Id.* at 74–75, 645 S.E.2d at 466–67.

257. *Id.* at 74, 645 S.E.2d at 467.

to structure the ballot to require a single vote on the combined ordinances," the court reversed and remanded the case to the circuit court to order the referendum.[258]

D. *Zoning Flexibility Devices*

1. The Nature of a Variance

Variances are defined as reasonable deviations from provisions of a zoning ordinance which regulate the size or area of a parcel or buildings thereon.[259] Variances are generally granted to alleviate a particularized hardship arising from the strict enforcement of zoning ordinances.[260]

In *Goyonaga v. Board of Zoning Appeals*, the Supreme Court of Virginia held that a variance pertaining to specific nonconforming building features does not render the building in conformity for other purposes of the ordinance.[261] The landowners in *Goyonaga* owned a nonconforming structure on a nonconforming lot: the width and area of the lot did not comply with local ordinances and neither did the home's setback.[262] The landowners sought an addition to the home and secured a variance to enlarge and extend the home by adding a second story.[263] The proposed addition would not alter the nonconforming setback of the home, so the BZA approved the variance.[264]

Once construction had commenced, it became apparent that a large portion of the home would need to be demolished.[265] Upon the destruction of seventy-five percent of the home, the zoning administrator issued a stop work order, directing that current construction must cease and any new construction would need to fully comport with all zoning provisions.[266] She did so in reliance

258. *Id.* at 74–75, 645 S.E.2d at 467.

259. VA. CODE. ANN. § 15.2-2201 (Repl. Vol. 2008).

260. *See id.* § 15.2-2309 (Supp. 2009).

261. 275 Va. 232, 245, 657 S.E.2d 153, 160 (2008).

262. *Id.* at 236, 657 S.E.2d at 155.

263. *Id.* at 237, 657 S.E.2d at 155.

264. *Id.* This determination was in accord with a local ordinance providing that a structural addition to a nonconforming structure is permissible provided that "[n]o portion of the addition would be closer to the front or side lot line than the existing structure." FALLS CHURCH, VA., CODE § 38-6(c)(3) (Supp. 2007).

265. *See Goyonaga*, 275 Va. at 237–38, 657 S.E.2d at 156.

266. *Id.* at 238, 657 S.E.2d at 156.

on a separate ordinance section that required any nonconforming building that is removed, demolished, or destroyed to an extent equal to seventy-five percent of its value to be discarded and eliminated the right of such nonconforming use to continue.[267] The landowners challenged the application of that ordinance, asserting that the variance they had obtained served to exempt them from all aspects of the zoning ordinance, including the "seventy-five-percent-destruction rule."[268] They claimed that the variance created a whole new set of zoning regulations specific to their property.[269]

The Supreme Court of Virginia disagreed with the landowners' argument and held that while the variance permitted the landowners to build within the existing nonconforming setbacks, it did not relieve them from other aspects of the local zoning ordinance.[270] The court reiterated prior law, stating "variances exist to relieve . . . hardship resulting from strict application of zoning provisions," not to carve out unlimited, property-specific zoning regulations.[271]

2. Additional Variances

In *Horner v. Zoning Appeals Board*, the circuit court ruled that no additional variance is required when new construction is proposed to be attached to an existing structure built pursuant to a variance, so long as the new construction does not encroach upon that portion of the existing structure which required the original variance.[272] The petitioners in *Horner* challenged their neighbors' proposed home office addition to their existing garage.[273] Years before, the neighbors had been granted a variance to build the garage, which reduced the size of side yard setback from twelve feet to five.[274] Now they wanted to build a second story onto the garage to be used as a home office, but they planned to maintain the

267. *Id.* at 236–37, 657 S.E.2d at 155.
268. *Id.* at 240–41, 657 S.E.2d at 157–58.
269. *Id.* at 241, 657 S.E.2d at 158.
270. *Id.* at 242, 657 S.E.2d at 158.
271. *Id.* at 241, 657 S.E.2d at 158 (quoting Adams Outdoor Adver., Inc. v. Bd. of Zoning Appeals, 261 Va. 407, 415, 544 S.E.2d 315, 319 (2001)).
272. 74 Va. Cir. 124, 129 (Cir. Ct. 2007) (Fairfax County).
273. *Id.* at 126.
274. *Id.* at 125.

twelve-foot setback for the second floor.[275] The county zoning administrator determined that because there was no further departure from the zoning ordinance (the required setback would be observed for the new construction), no additional variance or amendment was required.[276] The petitioners challenged that decision to the BZA and, when that challenge failed, to the circuit court.[277]

Essentially, the petitioners argued that because the new construction altered the dimensions and proposed use of the structure, it no longer complied with the variance.[278] The circuit court disagreed and affirmed the BZA's decision that "an amendment to the variance was not required because the home office was to be located on a portion of the [landowners'] property where they enjoyed a by-right to build."[279] The court stated that had the garage owners sought to add the home office within that portion of their property to which the original variance applied, it would have reached a different result: "[T]his Court would . . . find that the [property owners] were required to obtain an amendment to the [original] variance."[280] So, the circuit court concluded that additions or alterations to structures permitted by variances would be allowed "provided the alterations or additions themselves conform to the [ordinance] requirements by not increasing the specific feature of the structure that required the variance."[281]

3. Overlapping Setbacks

In *Cherrystone Inlet, LLC v. Board of Zoning Appeals*, the Supreme Court of Virginia determined that overlapping setback requirements did not interfere with all reasonable beneficial uses of a waterfront property, so a variance was properly denied.[282] The controversy arose when Cherrystone Inlet, LLC ("Cherrystone") purchased five parcels of land located between a state highway and the waters of the Cherrystone Inlet.[283] At the time of pur-

275. *Id.*
276. *Id.*
277. *Id.* at 125–26.
278. *Id.* at 126.
279. *Id.* at 130.
280. *Id.* at 130–31.
281. *Id.* at 131.
282. 271 Va. 670, 675, 628 S.E.2d 324, 326 (2006).
283. *Id.* at 672, 628 S.E.2d at 324–25.

chase, Cherrystone knew that variances would be required for residential construction because the property was subject to overlapping setbacks.[284] On the waterfront side of the lots, the Chesapeake Bay Preservation Act (the "Bay Act")[285] imposed a 110-foot landward setback from the shoreline.[286] On the opposite side, a local ordinance imposed a sixty-foot setback from the road.[287] Since most of the five lots had less than 170 feet between the road and the shoreline and only one had sufficient space on which to build, residential construction was largely impossible without setback variances.[288] Cherrystone was denied its variances by the zoning administrator, the BZA, and the circuit court, and the Supreme Court of Virginia granted certiorari.[289]

Cherrystone argued that the setbacks subjected it to exceptional hardship and interfered with all reasonable beneficial uses of the property.[290] The court disagreed on both theories. It held that relief by variance was, in this case, conditioned upon the requirement that the lots be in existence on the effective dates of the Bay Act and the local ordinance.[291] Second, the court disagreed that the overlapping setbacks precluded all reasonable beneficial use of the land: Cherrystone "could have treated the [five lots] as a single . . . parcel. A residential structure could have been erected, as a matter of right, on that part of the parcel . . . which is unaffected by overlapping setbacks, with the remaining land used as a valuable waterfront amenity appurtenant to that structure."[292] Since the lots were not in existence as of the effective dates of the Bay Act and local ordinances, and at least one beneficial use of the property remained, the court held that the variances were properly denied.[293]

284. *Id.* at 672–73, 628 S.E.2d at 325.
285. VA. CODE ANN. §§ 10.1-2100 to 10.1-2115 (Repl. Vol. 2006).
286. *Cherrystone Inlet*, 271 Va. at 673, 628 S.E.2d at 325.
287. *Id.*
288. *Id.*
289. *Id.* at 673–74, 628 S.E.2d at 325–26.
290. *Id.* at 674–75, 628 S.E.2d at 326.
291. *Id.* at 674, 628 S.E.2d at 326.
292. *Id.* at 675, 628 S.E.2d at 326.
293. *Id.*

III. LEGISLATION

The legislation passed in the 2008 and 2009 General Assembly Sessions affects a wide variety of land use and zoning issues, from development rights and conditional zoning to more modern means of disseminating comprehensive plans. In addition, some introduced legislation pertaining to these issues were either defeated outright or died in committee. Still others remain pending. A summary of this legislation is below.

A. *Passed Legislation: 2009*

The conditional zoning process, encompassed in section 15.2-2302, was amended by Senate Bill 1335 to allow local governing bodies to waive the requirement for a public hearing when a profferor has requested to amend the proffered conditions, but only if the amendment does not affect use or density.[294]

Comprehensive plans, as governed by sections 15.2-2225, 15.2-2226, and 15.2-2223.1, have also been affected. On March 27, 2009, the Governor approved Senate Bill 1064, which requires that local planning commissions post any comprehensive plan under consideration for recommendation on a publicly-available website.[295] Once approved, the comprehensive plan—or any approved portion—must similarly be posted online.[296] The plan must be posted at both the planning commission stage and at the time of its approval by the governing body.[297] In addition, under Senate Bill 1487, comprehensive plans that have required urban development areas under section 15.2-2223.1 may now "provide for a mix of residential housing types, including affordable housing, to meet the projected family income distributions of future residential growth."[298] House Bill 2322 further amended this requirement to allow counties until July 1, 2011 to amend their comprehensive

294. S.B. 1335, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 315, 2009 Va. Acts ___).

295. *See* S.B. 1064, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 605, 2009 Va. Acts ___).

296. *Id.*

297. *Id.*

298. S.B. 1487, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 327, 2009 Va. Acts ___).

plans in accordance with section 15.2-2223.1, and cities and towns have until July 1, 2012 to do so.[299]

Through the passage of House Bill 1735, section 15.2-1129.1 has been amended to reflect that any locality, rather than those on an enumerated list, may now create an arts and cultural district within its boundaries "for the purpose of increasing awareness and support for the arts and culture in the locality."[300] The Virginia Code section has retained its other provisions, including the creation of tax incentives and the retention of regulatory flexibility.[301]

The passage of House Bill 2071 and Senate Bill 1033 have amended section 15.2-2288.3 to recognize the agricultural nature of licensed Virginia farm wineries, and places an additional requirement on localities to acknowledge the agricultural nature of activities and events at farm wineries when considering reasonable restrictions on activities and events that are not usual and customary for farm wineries.[302]

This additional requirement adds to one of the most unique code sections in Virginia land use law. Enacted in 2007, section 15.2-2288.3 represents a comprehensive restriction on a local government's regulatory authority over farm wineries operating in their locality. The law expressly prohibits a locality from regulating multiple facets of a farm winery operation,[303] and in the context of activities and events at farm wineries, the law shifts the burden of proof to localities to demonstrate that a particular activity or event is not usual and customary for farm wineries throughout the Commonwealth, and that the activity or event has a "substantial impact" on the health, safety, or welfare of the public, prior to any local regulation.[304]

The requirement that a locality must demonstrate a substantial impact is apparently unique and appears nowhere else in

299. H.B. 2322, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 469, 2009 Va. Acts ___).

300. H.B. 1735, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 30, 2009, ch. 738, 2009 Va. Acts ___).

301. *See* VA. CODE ANN. § 15.2-1129.1 (Supp. 2009).

302. *See* H.B. 2071, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 416, 2009 Va. Acts ___); S.B. 1033, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 546, 2009 Va. Acts ___).

303. VA. CODE ANN. § 15.2-2288.3(E) (Supp. 2009).

304. *See id.* § 15.2-2288.3(A) (Supp. 2009).

Virginia land use law. The requirement curtails a locality's generalized land use authority to enact regulations "to improve the public health, safety, convenience and welfare of its citizens,"[305] and places a considerably higher burden squarely on a locality when attempting to demonstrate the reasonableness of its proposed regulation of a farm winery's activities and events.

Other legislation reflects attention to "green" development of sustainable fuels. House Bill 2165 has added section 15.2-2288.01, which provides that localities may not require a special use permit in order to allow the conversion of biomass—agricultural-related materials such as vineyard, grain and crop residues, and other materials—to alternative fuel on a small scale, so long as at least fifty percent of the feedstock contributing to the biomass is grown on site, the structure used to convert the biomass is less than 4000 square feet in size, and the farm owner notifies the locality's administrative head of the process.[306] While localities are permitted to make reasonable requirements for hours of operation, noise, lot area, and setbacks, they may not be more restrictive than they would be for other agricultural activities.[307]

While certain powers of localities have been curtailed, they have now been provided the power to bill property owners for the cost of correcting defacement—like graffiti—on private buildings and structures after complying with notice requirements (in this case, a minimum of fifteen days' notice prior to the removal of the defacement).[308] Unpaid charges constitute a lien on the property that functions in the same way as unpaid local taxes.[309]

The General Assembly also reflected recognition of the impact of recent economic factors on development. The bond requirement for acceptance of a public right-of-way within a subdivision has been reduced from twenty-five percent of the total estimated construction cost to ten percent.[310] Also, House Bill 207 created sec-

305. *See id.* § 15.2-2200 (Repl. Vol. 2008).

306. H.B. 2165, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 363, 2009 Va. Acts ___).

307. *Id.*

308. Act of Mar. 27, 2009, ch. 319, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-908 (Cum. Supp. 2009)).

309. *Id.*

310. Act of Mar. 27, 2009, ch. 193, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2241 (Supp. 2009)).

tion 15.2-2209.1, titled "Extension of Approvals to Address Housing Crisis," which extends the validity of subdivision plats, recorded plats, and final site plans outstanding as of January 1, 2009 until July 1, 2014.[311] Permits and plans associated with those developments must similarly be extended.[312] The new code section also extends the validity of valid special exceptions, special use permits, conditional use permits, and approved rezoning actions outstanding as of July 1, 2009 to July 1, 2014 so long as they are related to new residential or commercial development, but only if they do not themselves contain a termination date or time period limitation.[313] In order for the extensions for plats, site plans, and special exceptions to apply, performance bonds, agreements, and other guarantees of public improvements associated with the development must continue in full force.[314]

Expiration dates for special use permits outstanding as of January 1, 2009 have been extended to July 1, 2011 by passage of Senate Bill 1533, which adds section 15.2-2288.4, regardless of the operation of any statute, proffer, permit, local ordinance, or local custom.[315] In noting this lack of limitation, this extension goes further than that provided by the new section 15.2-2209.1.

The right to repair, rebuild, or replace a nonconforming residential or commercial building damaged by an act of God has been further defined by House Bill 1680, which amends section 15.2-2307 to define the natural disasters or phenomena that qualify as "acts of God" and also extends the act of God provision to damage by accidental fire (though expressly omitting commission of arson in an effort to secure vested rights).[316]

Vested rights are also implicated by the passage of Senate Bill 1524, which amends section 15.2-2286 to broaden the power of a zoning administrator to determine whether rights have accrued under subsection C of section 15.2-2311—which provides for ap-

311. H.B. 2077, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 196, 2009 Va. Acts ___).

312. *Id.*

313. *Id.*

314. *Id.*

315. S.B. 1533, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 636, 2009 Va. Acts ___).

316. H.B. 1680, Va. Gen. Assembly (Ex. Sess. 2009) (enacted as Act of Apr. 8, 2009, ch. 782, 2009 Va. Acts ___).

peals to the local board of zoning appeals—in addition to section 15.2-2307.[317]

In order to be valid under section 15.2-2308, as amended by House Bill 1637, actions taken by BZAs must now be supported by a majority vote of those members that are present and voting.[318] In addition, BZAs have a new standard to follow in determining whether a variance can be granted. House Bill 2326 has amended section 15.2-2309 to remove the requirement that a property owner's "clearly demonstrable hardship" extend so far as to "approach confiscation."[319] BZAs must now only determine that the "granting of [a] variance will alleviate a clearly demonstrable hardship," but the bill continues to distinguish such a hardship from a special privilege or convenience and retains the three-prong undue hardship requirement.[320]

B. *Passed Legislation: 2008*

In 2008, Senate Bill 791 amended section 15.2-2201 to expand the definition of "incentive zoning" to encompass not only features and amenities, but also design elements, uses, services, ad designs incorporating new urbanism, traditional neighborhood development, environmentally sound and sustainable design, affordable housing, and historical preservation.[321]

Section 15.2-2287.1 was added, and section 2.2-3100 amended, by the passage of Senate Bill 532, which applies to Loudoun County.[322] This bill added section 15.2-2287.1 to those statutes that are not superseded by the State and Local Government Conflicts of Interest Act, as members of the BOS, Planning Commission, and BZA in the County of Loudoun must now make a full public disclosure of any current or recent (within 12 months) business or financial interest prior to any hearing involving a

317. S.B. 1524, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 30, 2009, ch. 721, 2009 Va. Acts ___).

318. H.B. 1637, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 30, 2009, ch. 734, 2009 Va. Acts ___).

319. H.B. 2326, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 206, 2009 Va. Acts ___).

320. *Id.*

321. S.B. 791, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 12, 2008, ch. 635, 2008 Va. Acts 1024).

322. S.B. 532, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 10, 2008, ch. 532, 2008 Va. Acts 785).

special use permit, variance, or amendment to a zoning ordinance map.[323] The new statute defines "business or financial relationship," describes the circumstances under which it applies, and makes the knowing and willful failure to disclose a business or financial interest a Class One misdemeanor.[324]

The approval of plats and the duration of plat validity as governed by sections 15.2-2259, 15.2-2260, and 15.2-2261 have been amended through House Bills 721 and 1177. House Bill 721 added considerable language to section 15.2-2259, which now includes two new subparts, (A)(2) and (A)(3).[325] The first added subpart requires that, in localities with populations greater than 90,000 as of the 2000 Census, plat, site plan, and development plan approval be governed by this statute in developments for purely commercial real estate.[326] In such localities, a mandatory sixty-day review period between the plan or plat's submission and the time that it is either approved or disapproved has been imposed upon local planning commissions.[327] The planning commission must also submit any portion of the plan that requires review by a state agency to that agency within ten business days of receiving the plan.[328]

Continuing these additions, it is also now incumbent on local planning commissions reviewing the plan or plat to identify in good faith all deficiencies to the greatest extent possible and to describe those deficiencies with particularity (including references to ordinances and statutes) when disapproving the plan or plat.[329] When the plan or plat is resubmitted after a prior disapproval, the planning commission is limited in its review to only those deficiencies identified in the initial plan or plat review, and new deficiencies cannot be identified.[330] The second period of review after an initial disapproval is limited to forty-five days; any non-identified deficiencies of plans or plats not responded to within forty-five days are deemed waived, and the plat or plan is

323. *Id.*

324. VA. CODE ANN. § 15.2-2287.1 (Repl. Vol. 2008).

325. H.B. 721, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Apr. 23, 2008, ch. 855, 2008 Va. Acts 2246).

326. *See* VA. CODE ANN. § 15-2259(A)(2) (Repl. Vol. 2008 & Supp. 2009).

327. *Id.* § 15.2-2259(A)(3) (Repl. Vol. 2008 & Supp. 2009).

328. *Id.*

329. *Id.*

330. *Id.*

deemed approved.[331] However, where a non-corrected deficiency would violate local, state, or federal law or mandatory Department of Transportation or other engineering and safety requirements, the deficiency may continue to be considered.[332] Deficiencies not previously discovered due to omission, change, or errors by the submitter are also open to consideration.[333]

Under section 15.2-2261, as amended by House Bill 1177, when a final subdivision plat is approved and recorded that covers all or a portion of a multiphase development, the underlying preliminary plat is now valid for five years from the date of recording of the latest plat.[334] A recorded final subdivision plat for a portion of property conveyed to a third party is now valid indefinitely unless vacated by sections 15.2-2270 through 15.2-2278.[335]

In addition, House Bill 195 redefined and expanded the definition of "preliminary subdivision plat," "plat," and "plat of subdivision" to encompass not only the "schematic representation of land divided or to be divided," but also information gathered in accordance with sections 15.2-2241, 15.2-2242, 15.2-2258, 15.2-2262, 15.2-2264, and other applicable statutes.[336]

With regard to the development of Urban Development Areas as directed by the 2007 Session of the Virginia General Assembly as part of its Transportation Financing Package, the 2008 Session resolved, through Senate Joint Resolution 70 and House Joint Resolution 178, that a joint subcommittee be established to comprehensively study development and land use tools to determine if additional legislation is necessary to aid localities in the development of Urban Development Areas.[337]

The fine for conviction of a violation of a zoning ordinance relating to the total number of unrelated persons in a single-family dwelling remains $2,000 under section 15.2-2286.[338] However, as

331. *Id.*

332. *Id.*

333. *Id.*

334. H.B. 1177, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 16, 2008, ch. 426, 2008 Va. Acts 615).

335. *See* VA. CODE ANN. §§ 15.2-2270 to 15.2-2278 (Repl. Vol. 2008).

336. H.B. 195, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 27, 2008, ch. 718, 2008 Va. Acts 1167).

337. *See* S.J. Res. 70, Va. Gen. Assembly (Reg. Sess. 2008); H.J. Res. 178, Va. Gen Assembly (Reg. Sess. 2008).

338. VA. CODE ANN. § 15.2-2286(A)(5) (Supp. 2009).

amended by House Bill 1107, failure to correct the condition within the specified time frame will result in a $5,000 fine (increased from $2,000), and continued failure for each succeeding ten-day period constitutes a separate misdemeanor and a potential fine of $7,000 (increased from $5,000).[339] Jail terms for such violations remain unavailable as a punishment.[340] In addition, under section 15.2-2286 as amended by House Bills 663 and 350, all zoning administrators, rather than just those zoning administrators in District 8, are now authorized to ask the locality's attorney to file a petition to enforce a zoning ordinance with regard to residence in single-family housing by non-related persons.[341]

Zoning administrators may also, under section 15.2-2286 as amended by Senate Bill 428, present sworn testimony to a magistrate or court of competent jurisdiction in order to obtain an inspection warrant to enable entry of a building to determine if zoning violations exist.[342] Reasonable efforts to obtain consent of the owner are required.[343]

Under section 15.2-2209, as amended by House Bill 679, when civil penalties for violations of a zoning ordinance amount to $5,000 or more, the violation can be pursued as a criminal misdemeanor.[344] In addition, upon admission or finding of liability for a violation, unless good cause is shown, the court may order the violator to abate or remedy the violation to comply with the ordinance within a time period determined by the court, but no longer than six months.[345] Each day during which the violation continues to exist after that period has ended constitutes a separate offense.[346]

House Bill 190 and Senate Bill 230 amended section 15.2-2244 to count stepchildren as "family members" in order to make them

339. H.B. 1107, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 12, 2008, ch. 593, 2008 Va. Acts 884).

340. VA. CODE ANN. § 15.2-2286(A)(5) (Supp. 2009).

341. H.B. 350, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 12, 2008, ch. 581, 2008 Va. Acts 857); H.B. 663, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 4, 2008, ch. 297, 2008 Va. Acts 442).

342. S.B. 428, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 4, 2008, ch. 343, 2008 Va. Acts 504).

343. *Id.*

344. H.B. 679, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 27, 2008, ch. 727, 2008 Va. Acts 1292).

345. VA. CODE ANN. § 15.2-2209 (Repl. Vol. 2008).

346. *Id.*

subject to this code section, which governs the subdivision of a lot for conveyance to a family member.[347]

House Bill 1078 amended section 15.2-2307 to govern vested rights with regard to building permits and payment of taxes.[348] While zoning ordinances may continue to require nonconforming structures to conform to regulations when the structure is enlarged, the statute now invokes the Uniform Statewide Building Code in defining whether the structure has been "structurally altered" and adds that zoning ordinances may provide that no nonconforming *use* (as opposed to just a nonconforming structure or building) may be expanded (or that the structure may not be moved, as provided in the previous version of the statute).[349] Detailed language has been added by the bill to provide that, when a building has been completed in accordance with a building permit and a certificate of occupancy has been issued or when the owner of a nonconforming structure has paid local taxes for more than fifteen years, the zoning ordinance is not permitted to define the structure as illegal or to require its removal solely due to its nonconformity.[350]

Section 15.2-2307 was also amended by Senate Bill 393, which now allows the owner of a residential or commercial building that is otherwise nonconforming to repair, rebuild, or replace it after a natural disaster or other act of God.[351] During the 2009 Session, the term "act of God" was expressly defined in the statute.[352]

In situations where a variance permits a structure, section 15.2-2309 has been amended by House Bill 1079 to provide that the structure may not be expanded unless it is within the same site area or portion of the structure where a variance is not required.[353] If it is within an area or portion of the site where a

347. H.B. 190, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 27, 2008, ch. 717, 2008 Va. Acts 1167); S.B. 230, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 4, 2008, ch. 340, 2008 Va. Acts 502).

348. H.B. 1078, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 5, 2008, ch. 377, 2008 Va. Acts 552).

349. *Id.*

350. *Id.*

351. S.B. 393, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 5, 2008, ch. 411, 2008 Va. Acts 596).

352. *See supra* note 316 and accompanying text.

353. H.B. 1079, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 4, 2008, ch. 318, 2008 Va. Acts 481).

variance is required, then an additional variance must be applied for.[354]

Section 15.2-2303 was amended by House Bill 1084, which provides that, when a locality that has accepted proffers which include pedestrian improvements, the Virginia Department of Transportation shall allow construction of those improvements so long as the Department did not object to the improvement during rezoning and so long as the improvement does not violate local, state, or federal laws, regulations, or required engineering and safety standards.[355]

House Bill 1086 amended section 15.2-2311 to specify that notice of the thirty-day period for appeals to the BZA must be included in the order of a zoning administrator or notice of zoning violation and must be sent via registered or certified mail to, or posted at, the last known address of the property owner as reflected by tax assessment records.[356] Importantly, the thirty-day appeal period may now be shortened to no less than ten days under section 15.2-2286 as amended by House Bill 1061, not only in situations involving temporary or seasonal commercial uses or parking of commercial trucks in residential zoning districts (as under the previous versions of the statute), but, in addition, with regard to violations of maximum occupancy limitations of a residential dwelling unit or similar short-term, recurring violations.[357]

Zoning administrators may also now record a memorandum of *lis pendens* to enforce zoning ordinances through section 15.2-2208 as amended by House Bill 466.[358] The memorandum is required to expire after 180 days, under both section 15.2-2208 and section 8.01-268 as amended by House Bill 80 and Senate Bill 427.[359] The memorandum still continues if the owner of the pro-

354. VA. CODE ANN. § 15.2-2309 (Supp. 2009).

355. H.B. 1084, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 27, 2008, ch. 733, 2008 Va. Acts 1296).

356. H.B. 1086, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 5, 2008, ch. 378, 2008 Va. Acts 553).

357. *See* H.B. 1061, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 14, 2008, ch. 317, 2008 Va. Acts 479).

358. H.B. 466, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 12, 2008, ch. 583, 2008 Va. Acts 859).

359. *Id.*; H.B. 80, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 2, 2008, ch. 60, 2008 Va. Acts 60); S.B. 427, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 3, 2008, ch. 204, 2008 Va. Acts 301).

perty transfers it to another entity, but only if the transferor holds an ownership interest in the entity of greater than fifty percent.[360]

IV. CONCLUSION

Gertude Stein once wrote: "In the United States there is more space where nobody is than where anybody is. That is what makes America what it is."[361] As we carry on in the new millennium, that assessment continues to lose veracity; and, looking forward, reasonable planning and zoning—along with a balanced respect for private property interests—will be a touchstone to the success of the Old Dominion.

360. VA. CODE ANN. § 15.2-2208 (Repl. Vol. 2008 & Supp. 2009).

361. GERTRUDE STEIN, THE GEOGRAPHICAL HISTORY OF AMERICA OR THE RELATION OF HUMAN NATURE TO THE HUMAN MIND (1936), *reprinted in* GERTRUDE STEIN: WRITINGS 1932–1946, at 367 (Catharine R. Stimpson & Harriet Chessman eds., 1998).

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