



**APPOMATTOX COUNTY
COMMUNITY DEVELOPMENT DEPARTMENT**

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JOINT PLANNING COMMISSION
HISTORIC COURTHOUSE
333 COURT STREET
APPOMATTOX, VIRGINIA 24522

AGENDA

WEDNESDAY, AUGUST 12, 2026

6:00 PM

- A. Call To Order**
- B. Circulation of Attendance Sheet/Determination of Quorum**
- C. Review/Approval of Minutes (page 2-3)**
Minutes for the July 8, 2026 meeting are available for your review and approval.
- D. Public Hearing-Zoning Ordinance Amendments (page 4)**
 - 1) Manufactured Homes (pages 5-15)
 - 2) Utility-Scale Solar Energy Farm (page 16-24)
- E. Discussion-Future Land Use and Zoning Ordinance Land Uses (page 25-49)**
- F. Learning Opportunities for Commissioners (page 50-81)**
- G. Informational Items**
- H. Adjourn**

MINUTES

APPOMATTOX COUNTY PLANNING COMMISSION MEETING BOARD OF SUPERVISORS MEETING ROOM 333 COURT STREET APPOMATTOX, VIRGINIA

Wednesday, July 8, 2026

Members Present: (Quorum)

Sarah Blackwell, Chairman
George Almond
Annie Trent
Cathryn Mobley
Kevin O'Brien
Tom Adams
Derek Lee

Members Absent:

Also Present:

Johnnie Roark, Director of Community Development

Ms. Blackwell called the meeting to order and circulated the attendance sheet. Mr. O'Brien was late arriving to the meeting. He arrived at approximately 6:25 p.m.

Ms. Blackwell determined that a quorum was present.

Review/Approval of Minutes

Ms. Mobley motioned, with a second by Mr. Adams, to approve the May 13, 2026 minutes. The motion carried unanimously (O'Brien absent).

Discussion-Zoning Ordinance Amendments related o General Assembly Action

Mr. Roark provided an overview of the Zoning Ordinance Amendments required based on the actions of the General Assembly. Mr. Roark stated that the Manufactured Home land use would need to be added to the R-1, R-3, B-1 and H-1 zoning districts as a Permitted Use. The Planning Commission briefly discussed the implications of the changes in areas that have traditionally not allowed manufactured homes.

Mr. Roark continued with the overview of the Utility-Scale Solar Energy Farm changes to Section 19.6-97. These changes are a little more extensive and touch on several areas including setbacks, buffering, height limitations, fencing, decommissioning, wildlife passages, and battery energy storage facilities (BESS). The BESS change will allow this use as an accessory use to an approved solar facility. The setbacks changes will dramatically lower the setbacks that the Planning Commission and Board adopted in March of this year. The buffer changes will lower the buffer ranges. The height amendment will increase the allowable height by five feet. Mr. Roark stated that the changes to the decommissioning portion will require a written agreement between the locality and the developer and codifies the time limits on updating the surety.

Several members expressed their dismay with having the state interfere with local zoning decisions. The Planning Commission felt the changes adopted in March were appropriate for Appomattox County and how do politicians in Richmond know what is best for Appomattox. Mr. Almond stated that there is not much that the locality can do and the changes must be adopted. Ms. Mobley agreed and stated that in the public notice, that staff should mention that the changes are required by state code.

Mr. Almond motioned, with a second by Ms. Mobley, to advertise the proposed amendments for a public hearing

at the August Planning Commission meeting. The motion passed unanimously. (O'Brien absent).

Discussion-Zoning Ordinance Amendment-Outdoor Shooting Range

Mr. Roark stated that Mr. O'Brien had requested that the Planning Commission consider an amendment to the Zoning Ordinance to add a regulation in the additional regulations Section 19.6-81 Outdoor Shooting Range that would limit any new shooting range within one mile of a residential structure.

Mr. Roark noted that he had tried finding such an area using the County's GIS and had not found an area that would meet this regulation other than some of the larger forestry tracts. Mr. Almond stated that he understood what Mr. O'Brien was trying to accomplish regarding sound, etc., but he was not sure this type of regulation would help. Several members agreed with Mr. Almond.

Mr. O'Brien arrived. Mr. O'Brien stated that he was disappointed in the Planning Commission's and Board of Supervisors' decisions to support the petition on Wildway Road (Rifleman's Resort). He stated that many of the residents did not know about it and most of the folks that came to support it did not live in the immediate area. He stated that none of the Planning Commissioner's would want it near their homes.

Mr. Almond and Ms. Mobley both discussed putting more conditions on such uses if needed. They both mentioned being more specific with the conditions, such as conditions related to fencing.

A general discussion among the members continued. By consensus, the Planning Commission decided to not make any changes to Section 19.6-81. Mr. O'Brien reiterated that he stands alone in supporting this amendment.

Adjournment

Having no further business, Ms. Blackwell asked for a motion to adjourn.

Ms. Mobley made a motion, with Ms. Trent seconding, that the meeting be adjourned. The motion carried unanimously. The meeting adjourned at 6:40 p.m.

Approved As Written,

Sarah Blackwell, Chairman
Appomattox County Planning Commission

Attest:

Johnnie Roark, Clerk
Director of Community Development

ITEM D

PUBLIC HEARING-ZONING ORDINANCE

MANUFACTURED HOME

UTILITY-SCALE SOLAR ENERGY FARM

§19.6-68 R-1, Low-Density Residential District

A. Purpose

This district is composed of certain low concentrations of residential uses plus certain open areas where similar development is expected to occur. The regulations for this district are designed to stabilize and protect the essential characteristics of the district, to promote and encourage, insofar as compatible with the intensity of land use, a suitable environment for family life and to prohibit commercial uses and other uses likely to generate noise, crowds, large concentrations of traffic, light, dust, odor, smoke and other obnoxious influence.

B. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Administrative Services
- Amateur Radio Tower
- Cemetery, Family or Church
- Community Recreation
- Crisis Center
- Domestic Chickens
- Family Day Care Home
- Home Beauty/Barber Salon
- Home Occupation, Type I
- Manufactured Home*
- Park & Ride Facility
- Post Office
- Public Maintenance and Service Facility
- Public Parks and Recreational Areas
- Safety Services, Public
- Single-Family Dwelling
- Small Scale or Residential Solar Energy Farm
- Utility Services

C. Conditional Uses

- Cemetery, Private, Association, For-Profit
- Day Care Center
- Educational Facilities, Primary/Secondary
- Golf Course
- Home for Adults
- Kennel, Private
- Outdoor Gatherings
- Planned Unit Development
- Religious Assembly
- Safety Services, Private

Wind Energy System
Wireless Communication Facility

D. Site Development Regulations

a. Minimum Lot Requirements

- i. Lots not served by public water or sewer
 - 1. Area: 30,000 square feet (0.69 acre)
 - 2. Frontage: 125 feet on a publicly owned and maintained street
- ii. Lots served by either public water or sewer
 - 1. Area: 20,000 square feet
 - 2. Frontage: 110 feet on a publicly owned and maintained street

b. Minimum Setback Requirements

- i. Principal Structure
 - 1. Front 35 feet from property line or 60 feet from center of public road, whichever is greater
 - 2. Side 15 feet
 - 3. Rear 35 feet
- ii. Accessory Structure
 - 1. Front 35 feet from property line or behind the front building line, whichever distance is less
 - 2. Side 15 feet
 - 3. Rear 15 feet
- iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

c. Maximum Height of Structures

- i. All structures: 35 feet

d. Maximum Coverage

- i. Building Coverage: 15 percent
- ii. Lot Coverage: 35 percent

§19.6-70 R-3, High-Density Multi-Family Residential District

A. Purpose

The purpose of this district is to provide areas in the county within the suburban service area where existing middle to high density residential development (typically four to twelve units per acre) has been established and land areas which generally appear to be appropriate for such development. The R-3 district is designated based on access to major streets, public water and/or sewer, and schools with suitable capacity to accommodate development at the stated density. A variety of housing densities and styles is encouraged in order to permit a diversity and flexibility in design and layout.

B. Permitted Uses

- Accessory Uses/Structures
- Amateur Radio Tower
- Cemetery, Family or Church
- Community Recreation
- Condominium
- Domestic Chickens
- Family Day Care Home
- Home Occupation, Type I
- Manufactured Home*
- Multi-Family Dwelling
- Park & Ride Facility
- Post Office
- Public Maintenance and Service Facility
- Public Parks and Recreational Areas
- Residential Human Care Facility
- Safety Services, Public
- Single-Family Dwelling
- Small Scale Solar Energy (Residential)
- Townhouse
- Two-Family Dwelling
- Utility Services

C. Conditional Uses

- Boarding House
- Cemetery, Private, Association, or For-Profit
- Cultural Services
- Day Care Center
- Educational Facilities, Secondary/Primary
- Hospital
- Outdoor Gatherings
- Planned Unit Development

Religious Assembly
Safety Services, Private
Wind Energy System
Wireless Communication Facility

D. Site Development Regulations

a. Minimum Lot Requirements

- i. Lots not served by public water or sewer
 - 1. Area: 25,000 square feet (0.57 acre)
 - 2. Frontage: 100 feet on a publicly owned and maintained street
- ii. Lots served by either public water or sewer
 - 1. Area: 15,000 square feet (0.34 acre)
 - 2. Frontage: 80 feet on a publicly owned and maintained street
- iii. Lots served by both public water and public sewer
 - 1. Area: 10,000 square feet (0.23 acre)
 - 2. Frontage: 80 feet on a publicly owned and maintained street
- iv. Minimum lots size and permitted densities for multi-family dwellings and town homes are referenced in Additional Regulations section.

b. Minimum Setback Requirements

- i. Principal Structure
 - 1. Front 35 feet from property line or 60 feet from centerline of public road, whichever is greater
 - 2. Side 15 feet
 - 3. Rear 35 feet
- ii. Accessory Structure
 - 1. Front 35 feet from property line or behind the front building line, whichever distance is less
 - 2. Side 15 feet
 - 3. Rear 15 feet
- iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

c. Maximum Height of Structures

- i. All structures: 35 feet

d. Maximum Coverage

- i. Building Coverage: 50 percent

ii. Lot Coverage: 85 percent

§19.6-72 B-1, General Commercial District

A. Purpose

The purpose of this district is to provide locations for a variety of commercial and service related activities within the suburban service area serving larger neighborhoods and the county in general. This district is intended for general application throughout the county. General Commercial Districts are most appropriately found along major arterial thoroughfares which serve large segments of the county's population. This district provides a wide variety of retail and service related uses.

B. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Administrative Services
- Agricultural Services
- Amateur Radio Tower
- Antique Shops
- Automobile Dealership
- Automobile Parts/Supply Retail
- Automobile Repair Services
- Automobile Rental/Leasing
- Bed and Breakfast
- Business or Trade School
- Business Support Services
- Campground
- Carwash
- Cemetery, Family or Church
- Cemetery, Private, Association, For-Profit
- Civic Clubs
- Clinic
- Commercial Indoor Amusement
- Commercial Indoor Entertainment
- Commercial Indoor Sports & Recreation
- Commercial Outdoor Entertainment
- Commercial Outdoor Sports & Recreation
- Communications Services
- Community Recreation
- Construction Sales and Services
- Construction Yard
- Contractor Yard
- Consumer Repair Services
- Convenience Store
- Crisis Center
- Custom Manufacturing

Dance Hall
Day Care Center
Domestic Chickens
Educational Facilities, College/University
Educational Facilities, Primary/Secondary
Equipment Sales and Rental
Family Day Care Home
Financial Institutions
Funeral Services
Garden Center
Gasoline Station
General Office
Guidance Services
Home Beauty/Barber Salon
Home Occupation, Type I
Home Occupation, Type II
Hospital
Hotel/Motel/Motor Lodge
Landscaping & Lawn Care Services
Laundry
Manufactured Home
Manufactured Home Sales
Medical Office
Micro-Brewery
Mini Warehouse
Parking Facility
Park & Ride Facility
Pawn Shop
Personal Improvement Services
Personal Services
Post Office
Public Maintenance and Service Facility
Public Parks and Recreational Areas
Recreational Vehicle Sales and Service
Religious Assembly
Residential Human Care Facility
Restaurant, General/Drive-In/Fast Food
Retail Sales
Safety Services, Private
Safety Services, Public
Single-Family Dwelling
Small Scale Solar Energy (Residential)
Studio, Fine Arts
Surplus Sales
Truck Stop
Utility Services

Veterinary Hospital/Clinic
Wayside Stand
Wireless Communication Facility

C. Conditional Uses

Adult Entertainment
Automobile Graveyard
Brewery
Distillery
Fish Hatchery
Flea Market
Halfway House
Home for Adults
Industrial Manufacturing
Kennel, Commercial
Laboratories
Multi-Family Dwelling
Outdoor Gathering
Planned Unit Development
Public Assembly
Recycling Center
Scrap & Salvage Services
Stable, Commercial
Transfer Station
Transportation Terminal
Truck Terminal
Two-Family Dwelling
Wind Energy System

D. Site Development Regulations

a. Minimum Lot Requirements

i. Lots not served by public water or sewer

1. Area: 1 acre (43,560) square feet
2. Frontage: 100 feet on a publicly owned and maintained street

ii. Lots served by either public water or sewer

1. Area: 15,000 square feet (0.34 acre)
2. Frontage: 80 feet on a publicly owned and maintained street

iii. Lots served by both public water and public sewer

1. Area: 10,000 square feet (0.23 acre)

2. Frontage: 80 feet on a publicly owned and maintained street

b. Minimum Setback Requirements

i. Principal Structure

1. Front 35 feet from property line or 60 feet from centerline of public road, whichever is greater
2. Side None, except when adjacent to a residential use, then 10 feet
3. Rear 15 feet

ii. Accessory Structure

1. Front 35 feet from property line or behind the front building line, whichever distance is less
2. Side 15 feet
3. Rear 5 feet

- iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

c. Maximum Height of Structures

- i. All structures: 45 feet

d. Maximum Coverage

- i. Building Coverage: 50 percent
- ii. Lot Coverage: 90 percent

§19.6-75 H-1, Historic Overlay District

A. Purpose

The purpose of this district is to recognize, preserve, and encourage the continued appropriate development of historic resources in designated areas by establishing standards for development and allowable uses that will insure such development. While much of the area in these districts may remain virtually unchanged other sections may need to change to serve the best interest of the area and its environs and the surrounding property owners. Typical uses within this district include restoration and reconstruction of historic structures, related residential, educational, administrative, maintenance, public assembly, festival activities, and limited supporting commercial activities.

B. Existing Structures and Land Uses

The provisions of this article shall apply only to structures constructed and land uses established or modified after the effective enactment date of this ordinance.

C. Permitted Uses

Museums, visitor centers and learning centers
Restoration and reconstruction of historic structures
Shops and facilities associated with the historic nature of the property
Administrative and maintenance facilities related to the historic property
Agriculture
Accessory Structures related to a permitted use
Domestic Chickens
Interpretive or other educational structures related to the historic property
Manufactured Home
Public activities, promotions, festivals, celebrations
Staff housing
Single-Family Dwelling

D. Conditional Uses

Cemeteries
Religious Assembly

E. Site Development Regulations

- a. The site development regulations in the district shall be the same as those regulations in the A-1, Agricultural Zoning District.
- a. To provide for adequate screening from adjacent properties, any new structure development, restoration of existing structures, or access to facilities such as roads, parking facilities, or walking path, within fifty (50) feet of any property line shall be screened with a natural vegetative buffer. The buffer shall contain a mixture of deciduous and evergreen trees and shrubbery.

- b. Signage shall meet the requirements of the A-1, Agricultural Zoning District and should directly relate to the historic nature of the property.

§19.6-97 Utility Scale Solar Energy Farm*

*Amended March 13, 2026

§19.6-97.1 Applicability, permitting

The requirements set forth in this section govern the siting, development, construction, installation, operation, and decommissioning of Utility Scale Solar Energy Facilities in the county. A Conditional Use Permit (CUP) is required for each utility scale solar energy farm proposed to be constructed, installed, or operated in the county. Small scale solar energy arrays and associated apparatus, used for individual residential dwellings, not connected to the electrical grid, shall be considered an accessory use to the principal dwelling and permitted as such. A Battery Energy Storage Facility may be constructed in association with a Utility Scale Solar facility ~~with a Conditional Use Permit~~ *as an accessory use*. A Battery Energy Storage Facility constructed in association with an electrical substation, wholly contained within the secure perimeter of the substation or immediately adjacent on property owned by the utility company, shall not constitute a separate land use and therefore is not subject to the Conditional Use Permit requirement. A standalone Battery Energy Storage Facility is not permitted in any zoning district.

§19.6-97.2 Applications and Required Information for a Utility Scale Solar Energy Farm

In addition to the material required for a Conditional Use Permit petition, applications for Utility Scale Solar Energy Facilities (farms) and/or Battery Energy Storage Facilities associated with Utility Scale Solar Energy Facilities shall include the following information:

- A. Project Narrative: A narrative identifying the applicant, facility owner, property owner, and the operator of the facility. The narrative should include an overview of the project and its location, the size of the site and the project area; the current use of the site, the estimated time for construction, including a proposed date for commencement of construction; the maximum rated capacity of the facility; the approximate number, types and expected footprint of the solar and/or battery storage equipment to be constructed to include photovoltaic panels, ancillary facilities, fencing, buffering, where the electricity generated at the facility will be transmitted, and the location of the proposed electrical grid interconnection.
- B. Site Development Plan: A site development plan of a scale and specification, in accordance with the requirements found in the Conditional Use Permit application shall be submitted with the application. Additional information may be required, as determined by the Zoning Administrator, such as scaled elevation view or other supporting drawings, photographs of the site, photographic simulations or modeling of the proposed solar energy facility,

specifically from sensitive locations, as deemed necessary by the Zoning Administrator, aerial imagery or other mapping of the site or any other technical report necessary for the proper review of the Conditional Use Permit petition. If the petition is granted, then a full site development plan shall be required in accordance with the regulations found elsewhere in this ordinance.

Additional required information and/or studies to be submitted at the time of Conditional Use Permit application:

- a. A natural heritage and wildlife management study, consistent with the Virginia Division of Wildlife Resources Solar Energy Facility Guidance that identifies any threatened or endangered species and wildlife travel patterns, together with any necessary mitigation measures to ensure compatibility of the project. *The facility shall provide for wildlife passage where needed by limiting fencing to the areas in reasonable proximity to arrays and interconnection equipment to the extent practicable and consistent with safety and security requirements. The facility shall prioritize open wildlife access to riparian areas, wetlands, streams, and other areas not in proximity to panels.*
- b. Virginia Cultural Resource Information System report. A report by the Virginia Department of Historic Resources, Virginia Cultural Resource Information System, must be submitted to identify historical, architectural, archeological, or other cultural resources on or near the proposed facility. A copy of the cultural resources review conducted in conjunction with the Virginia Department of Historic Resources for the permit by rule process shall be submitted by the applicant prior to issuance of a building permit, shall be in addition to the initial report required above, and shall further identify historical, architectural, archeological, or other cultural resources on or near the proposed facility.
- c. A Construction Plan to be approved prior to the issuance of a Building Permit, which shall include a proposed construction schedule, proposed hours of construction, and how the applicant plans to effectively mitigate dust, noise, and other nuisances commonly associated with large construction projects.
- d. A Glint and Glare Study. This study shall demonstrate either that the panels will be sited, designed, and installed to eliminate glint and glare effects on roadway users, nearby residences, commercial areas, or other sensitive areas. The applicant will use reasonably available mitigation techniques to reduce glint and glare to the lowest achievable levels. The study will assess and quantify potential glint and glare effects and address potential health, safety, and visual impacts associated

with glint and glare. Any such assessment must be conducted by qualified individuals using appropriate and commonly excepted engineering methods.

- e. A Water Resource Plan. This plan shall identify the availability of and proposed usage of private and/or public water and sewer services. This plan shall include a plan for continuous monitoring of groundwater quality during the life of the facility. Monitoring stations shall be placed within fifty (50) feet of any property line adjacent to existing residential uses. Monitoring Stations shall be placed at a minimum of one (1) station per 500 foot interval. For Utility-Solar projects, the applicant shall submit annual monitoring reports to the Zoning Administrator throughout the life cycle of the project. For Battery Energy Storage Facility projects, the applicant shall provide baseline groundwater quality information prior to commencement of construction, then the applicant shall submit monitoring reports once every three (3) years, starting from the time the Certificate of Occupancy is issued, to the Zoning Administrator throughout the life cycle of the project.
 - f. Fire, Rescue, Law Enforcement (Emergency Services) assessment. Applicant shall submit a detailed assessment of impacts to local Fire, Rescue and Law Enforcement and any mitigation techniques that will be used to reduce these impacts. Specifically, the assessment should detail training of local resources and methods to be used in the event of a fire or accident requiring local emergency services response, specifically addressing fire, rescue, and emergency services access to the site.
 - i. Facility shall have a monitoring system for continuous 24 hour/7 days a week automated fire detection.
 - ii. National Fire Protection Association (NFPA) 855 signage requirements shall be utilized along signage with emergency contact information placed in a high-visibility location near the entrance to the facility.
 - iii. Emergency Services personnel shall be provided with a key, code, or other means (ex. Knox Box) to access the property in the event of an emergency.
- C. Documentation of right to use property for the proposed facility: Documentation shall include proof of control over the proposed site or possession of the right to use the proposed site in the manner requested. Any sensitive financial or confidential information may be redacted.
- D. Decommissioning Plan for Utility-Scale Solar Energy Farm; Security

1. The applicant shall provide a detailed decommissioning plan that provides procedures and requirements for removal of all parts of the solar energy generation facility and its various structures, and any and all hazardous residuals found to be present in the environment, confirmed by pre- and post-development contamination testing, at the end of the useful life of the facility or if it is deemed abandoned or unsafe. The plan shall include the location, size, number, and type of PV modules; identification of any per- and polyfluoroalkyl substances (PFAS) associated with the project; whether the PV modules are likely to be characterized as hazardous waste upon decommissioning; and certifications that (i) no child or forced labor have contributed to the manufacturing of any component of the project, and (ii) no decommissioned component will be disposed of in any landfill, current or future, or transfer station, current or future, located within Appomattox County. The plan shall include the anticipated life of the facility, the estimated overall cost of decommissioning the facility in current dollars, the methodology for determining such estimate, and the manner in which the project will be decommissioned. The decommissioning plan and the estimated decommissioning cost shall be update every five (5) years, from the date of the certificate of occupancy or upon request of the Zoning Administrator; however, the updated costs shall be no more than twice every ten (10) years. Estimated decommission costs shall be for the total cost of restoration and shall not exclude net salvage value of the facility's equipment, devices, panels, wiring, steel support structures, concrete or any other improvement. Additionally, the estimated decommission costs shall include a reasonable allowance for the estimated administrative costs related to a default of the owner, lessee, or developer, and include an annual inflation factor that will ensure the return of the property to its pre-development land use. *The project developer shall provide an up-to-date decommissioning plan to the locality any time there is project ownership outside of the current developer. Notice shall be provided to the local government within thirty (30) days of the sale or transfer of the lease or property, and a new financial guarantee shall be provided by the new leaseholder or property owner.*
2. **Security:** Prior to receiving a certificate of occupancy to begin operation, the applicant must provide security, with the County as primary obligee and all participating landowners serving as additional obliges, in the amount of the estimated cost of the decommissioning. Options for security shall include a cash escrow, Certified check(s), or an Irrevocable Letter of Credit. The security must remain valid until the decommissioning obligations have been met and no surety instrument will be released until another is deemed acceptable, as a substitution.

The security may be adjusted up or down by the County if the estimated cost of decommissioning the facility changes. The security must be renewed or replaced, if necessary, to account for any changes in the total estimated cost of decommissioning if deemed by the updated estimates. Security is a mandatory condition of all conditional use permits for utility scale solar energy farms.

The Operator and Lessor must provide a Parent Company Guarantee (PCG), otherwise known as a downstream guarantee, in a form and substance reasonably acceptable to the County Attorney, ensuring fulfillment of any financial obligations related to the decommissioning and clean-up of the project that is not paid in full by the cash escrow, Certified Check(s) or Irrevocable Letter of Credit. The Parent Company Guarantee must be provided prior to the issuance of any permit or approval for said project. A draft version of the Parent Company Guarantee shall be submitted as part of the Conditional Use Permit application or site plan review process for a Battery Energy Storage Facility associated with an electrical substation. The Parent Company Guarantee must clearly outline the financial obligations covered, including but not limited to, the costs of removing all equipment, restoring the land, and any environmental remediation required. The Parent Company Guarantee must include a provision that is binding upon the Operator and the Lessor and any successors or assigns. Failure to provide the required Parent Company Guarantee shall result in the suspension of any proceedings and/or approval processes underway related to the project. The Operator and Lessor shall also be liable for any costs incurred by Appomattox County in review, approval, and enforcement of this agreement, including any associated attorney's fees and/or court costs.

3. The decommissioning plan, cost estimates, and all updates to plans and estimates shall be sealed by a professional engineer licensed to do business in the Commonwealth of Virginia.
4. Liability Insurance: The owner, operator, lessee, or applicant shall propose a reasonable amount of liability insurance that the applicant deems adequate to cover operations at the facility. The applicant shall provide proof of such reasonable and adequate liability insurance for the facility prior to the issuance of a building permit.
5. *The current owner shall enter into a written agreement to decommission equipment, facilities, or devices pursuant to Code of Virginia §15.2-2241.2.*

E. Economic Analysis: An economic impact analysis, prepared by a qualified third-party that reports any expected change in the value of the subject property, expected employment

during the construction of the facility, any expected impact on the county's tax revenues, the estimated costs to the county associated with the facility in the form of additional services, and information on any other economic benefits or burdens from the project.

- F. Environmental Protection and Product Safety: All utility scale solar energy farms shall incorporate generally accepted national environmental protection and product safety standards for the use of solar panels and battery technologies for solar photovoltaic (electric energy) projects, such as those developed for existing product certifications and standards including the National Sanitation Foundation/American National Standards Institute No. 457, International Electrotechnical Commission No. 61215-2, Institute of Electrical and Electronics Engineers Standard 1547, and Underwriters Laboratories No. 61730-2.
1. Certification that no per-and poly-fluoroalkyl substances (PFAS) are utilized on any component, part, or panel associated with this project.
 2. Virginia Department of Environmental Quality Compliance: Any and all fines levied by the Virginia Department of Environmental Quality (VDEQ) for Erosion and Sediment Control or Stormwater Management violations, specifically applied to any project approved and constructed in Appomattox County, shall be matched 100%, and made payable to Appomattox County at the same time, as prescribed by VDEQ.
- G. Review fees: The county may retain qualified third-parties to review portions of the conditional use permit petition or the site development plan that are outside of the county's areas of expertise and do not have adequate state and federal review. Any costs incurred by the county for such review by qualified third-parties shall be bill to the applicant and must be paid in full prior to the issuance of a certificate of occupancy.
- H. Community meeting: A public meeting shall be held prior to the county's public hearing with the Planning Commission to give the community the opportunity to hear from the petitioner and ask questions regarding the proposed facility. The meeting shall be held at a location within a reasonable distance to the project and must be advertised in a newspaper with local circulation for two consecutive weeks prior to the meeting. The petitioner shall provide the Zoning Administrator with the date, time and place of the meeting, a copy of the advertisement, and a summary of any input/comments received from members of the public. Such information shall be provided to the Zoning Administrator no less than seven (7) business days prior to the Planning Commission public hearing.

§19.6-97.3 Visual Impacts, Setbacks, and Buffering

The petitioner shall demonstrate through project siting, and if necessary, through mitigation, that the solar project minimizes impacts to viewsheds from all residential areas, and any areas of

scenic, historical, cultural or recreational significance. The following should be adhered to in placement, buffering and/or setback:

1. A vegetative buffer sufficient to mitigate the visual impact of the facility is required along all areas adjacent to public roadways. For Utility-Scale Solar projects, the buffer shall consist of a ~~three hundred (300)~~ *fifty (50)* foot wide landscaped strip to include trees, shrubs and other vegetation considered native to the area *or other manmade visual barriers*. The landscaped strip may be located within the setback area and should run around or near the perimeter fence. Tree plantings in the buffer strip shall be a minimum of ~~five (5)~~ *three (3)* feet in height at the time of planting, no more than fifteen (15) feet between trees. Trees may be staggered. Existing trees and vegetation may be maintained within the buffer areas and may supplement and satisfy landscaping requirements. An alternative to tree plantings is to construct an earthen berm, minimum height of ~~six (6)~~ *three (3)* feet high. Berm must be stabilized with native grasses and/or plantings. The landscaped buffer must be maintained in good condition for the life of the project.
2. The solar panel arrays shall be set back a minimum of ~~five hundred (500)~~ *seventy-five (75)* feet, as measured from all *external* property lines, ~~internal and external~~, to the project. *Setbacks, as measured from the nearest edge of the equipment, to the nearest point on the outer wall of an existing community building or existing dwelling on a non-participating property shall be two-hundred (200) feet; and one-hundred (100) feet from the outside edge of the roadbed of any road abutting the property.* All other structures or infrastructure shall meet the minimum setback for the underlying zoning district. All equipment associated with battery energy storage facilities shall be set back a minimum of seventy-five (75) feet, as measured from all *external* property lines, ~~internal and external~~, to the project. Solar panel arrays and battery storage facilities shall be set back a minimum of ~~five hundred (500)~~ *fifty (50)* feet from the edge of water for any stream, creek, pond, lake or wetland *for projects 25 megawatts or less, or one hundred (100) feet for projects greater than 25 megawatts, or three hundred (300) feet from the 100-year floodplain, whichever is greater.* Existing wells shall be abandoned in accordance with current Virginia Department of Health regulations. Ground-mounted solar arrays and associated battery energy storage facilities and equipment shall not exceed a height of ~~twenty (20)~~ *twenty-five (25)* feet above ~~average grade~~ *above ground when the arrays are at full tilt.* This limit does not apply to utility poles and interconnection equipment associated with connection to the electrical grid.
3. The solar panel array area shall be enclosed by a security fence. The fence shall not be less than six (6) feet in height and should be equipped with appropriate anticlimbing devices such as strands of barbed wire at the top. Fencing should be installed on the interior of the buffer area so that it is screened from adjacent property. The fence shall be maintained in good repair for the life of the project. *Fencing shall comply with Code of Virginia §55.1-2804, the*

latest version of the National Electrical Safety Code or any applicable successor standard regarding requirements for limiting access to facilities, and the Uniform Statewide Building Code (§36-97 et seq).

4. Pollinator Habitats: The facility area will utilize, as reasonably practical, seeds with appropriate pollinator-friendly native plants, shrubs, trees, grasses, forbs, and wildflowers. The facility must be seeded promptly following completion of construction in such a way as to reduce invasive weed growth. This requirement does not alter or negate any requirements of proper Erosion and Sediment Control measures as required by other local and state law.

§19.6-97.4 Processing of Application

The conditional use permit petition will follow the normal and customary process for such petitions, meaning, a duly advertised public hearing before the Planning Commission, followed by a recommendation, and then a duly advertised public hearing before the Board of Supervisors, followed by final consideration. Petitions are subject to any action afforded any other conditional use permit as enumerated elsewhere in the zoning ordinance.

§19.6-97.5 2232 Review For Utility Scale Solar Energy Farm

In accordance with the Code of Virginia §15.2-2232 *et seq*, utility scale solar energy farm petitions and associated Battery Energy Storage Facility petitions are subject to review against the county's Comprehensive Plan. Prior to the petition being considered by the Planning Commission, the Planning Commission shall make a determination as to conformity with the Comprehensive Plan, unless a valid siting agreement has been executed as stated in Code of Virginia §15.2.2316.9. The 2232 review may be advertised and approved concurrently with the rezoning and conditional use permit petition.

§19.6-97.6 Unsafe or Abandoned Projects; Decommissioning

1. If the utility scale solar energy facility and/or battery energy storage facility is determined to be unsafe by the Building Official, then the facility shall be required to be repaired by the facility owner, site owner, or operator. Repairs shall be made in a timely manner as established by the Building Official. Should the repairs not be completed in the timeframe provided, then the owners or operators will be instructed to commence decommissioning in accordance with the approved decommissioning plan.
2. If the facility is not operated for a continuous period of twelve (12) months, then the county may notify the owner/operator by registered mail and provide forty-five (45) days for the owner/operator to respond. If no response is provided, then the owner/operator will be

instructed to commence decommissioning in accordance with the approved decommissioning plan.

3. If the facility is abandoned, the owner/operator is required to notify the Zoning Administrator in writing.
4. Within 365 days of the date of said notification, or if determined to be abandoned by the Zoning Administrator in accordance with the above subsections, then the county may pursue legal action to have the facility removed at the expense of the facility owner, site owner, or operator, each of whom shall be jointly and severally liable for the expense of removing or repairing the facility. The county may also call upon the decommissioning security to remove the facility.
5. Within 365 days of the date abandonment has been determined, whether as declared by the County, or as scheduled by the owners or operator, the facility owner, site owner, or operator shall complete the physical removal of the facility in compliance with decommissioning plan established for such facility. This period may be extended at the request of the owners or operator, upon approval of the Board of Supervisors.

ITEM E

DISCUSSION-

FUTURE LAND USES

AND

ZONING ORDINANCE LAND USES

Chapter 19.6-Zoning

DISTRICT REGULATIONS

§19.6-67 A-1, Agricultural District

A. Purpose

Generally this district covers portions of Appomattox County which are occupied by various open uses such as farms, forests or lakes. This district is established for the specific purpose of protecting existing and future farming operations, conservation of water and natural resources, reducing soil erosion, protection of watersheds and reducing hazards from flood, fire and traffic. While it is recognized that certain desirable rural areas may logically be expected to develop residentially, it is the intent, however, to discourage the random scattering of residential, commercial or industrial uses in this district. Non-farm residents should recognize that they are located in an agricultural environment where the right-to-farm has been established as a county policy. This district is intended to minimize the demand for unanticipated public improvements and services, such as public sewer, public water, and new roadways, by reducing development densities and discouraging large scale development.

B. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Agriculture
- Agricultural Services
- Amateur Radio Tower
- Bed and Breakfast
- Cemetery, Family or Church
- Club, Hunt
- Club, Private
- Commercial Feedlots
- Composting
- Family Day Care Home
- Farm Employee Housing
- Forestry Operations
- Garden Center
- Home Beauty/Barber Salon
- Home Occupation, Type I
- Home Occupation, Type II
- Intensive Farming Facility
- Kennel, Commercial
- Kennel, Private
- Livestock Sales/Auction
- Manufactured Home
- Manufactured Home, Accessory
- Park and Ride Facility
- Post Office

Chapter 19.6-Zoning

Public Parks and Recreation Areas
Religious Assembly
Residential Human Care Facility
Single-Family Dwelling
Small Scale or Residential Solar Energy Collection System
Stable, Commercial
Stable, Private
Utility Services
Veterinary Hospital/Clinic
Wayside Stand
Winery

C. Conditional Uses

Abattoir
Aviation Facility, Private
Camps
Campgrounds
Cemetery, Private, Association, or For-Profit
Day Care Center
Farm Brewery, Limited
Golf Course
Landscaping & Lawn Care Services
Manufactured Home Park
Outdoor Gatherings
Public Assembly
Resource Extraction
Retreat/Lodge
Sawmill
Scrap & Salvage Services
Second Dwelling
Shooting Range, Indoor
Shooting Range, Outdoor
Storage of Sewage Sludge
Transfer Station
Wind Energy System
Wireless Communication Facility

D. Site Development Regulations

a. Minimum Lot Requirements

- i. All lots regardless of sewer and water provisions
 1. Area: 1 acre (43,560 square feet)
 2. Frontage: 150 feet on a publicly owned and maintained street.

Chapter 19.6-Zoning

§19.6-68 R-1, Low-Density Residential District

A. Purpose

This district is composed of certain low concentrations of residential uses plus certain open areas where similar development is expected to occur. The regulations for this district are designed to stabilize and protect the essential characteristics of the district, to promote and encourage, insofar as compatible with the intensity of land use, a suitable environment for family life and to prohibit commercial uses and other uses likely to generate noise, crowds, large concentrations of traffic, light, dust, odor, smoke and other obnoxious influence.

B. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Administrative Services
- Amateur Radio Tower
- Cemetery, Family or Church
- Community Recreation
- Crisis Center
- Domestic Chickens
- Family Day Care Home
- Home Beauty/Barber Salon
- Home Occupation, Type I
- Park & Ride Facility
- Post Office
- Public Maintenance and Service Facility
- Public Parks and Recreational Areas
- Safety Services, Public
- Single-Family Dwelling
- Small Scale or Residential Solar Energy Farm
- Utility Services

C. Conditional Uses

- Cemetery, Private, Association, For-Profit
- Day Care Center
- Educational Facilities, Primary/Secondary
- Golf Course
- Home for Adults
- Kennel, Private
- Outdoor Gatherings
- Planned Unit Development
- Religious Assembly
- Safety Services, Private
- Wind Energy System

Chapter 19.6-Zoning

Wireless Communication Facility

D. Site Development Regulations

a. Minimum Lot Requirements

- i. Lots not served by public water or sewer
 1. Area: 30,000 square feet (0.69 acre)
 2. Frontage: 125 feet on a publicly owned and maintained street
- ii. Lots served by either public water or sewer
 1. Area: 20,000 square feet
 2. Frontage: 110 feet on a publicly owned and maintained street

b. Minimum Setback Requirements

- i. Principal Structure
 1. Front 35 feet from property line or 60 feet from center of public road, whichever is greater
 2. Side 15 feet
 3. Rear 35 feet
- ii. Accessory Structure
 1. Front 35 feet from property line or behind the front building line, whichever distance is less
 2. Side 15 feet
 3. Rear 15 feet
- iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

c. Maximum Height of Structures

- i. All structures: 35 feet

d. Maximum Coverage

- i. Building Coverage: 15 percent
- ii. Lot Coverage: 35 percent

Chapter 19.6-Zoning

§19.6-69 R-2, Medium-Density Residential District

A. Purpose

This district is composed of medium-density residential areas plus certain open areas where similar development is expected to occur. The regulations for this district are designed to stabilize and protect the essential characteristics of the district, to promote and encourage, insofar as compatible with the intensity of the land uses, a suitable environment for family life and to permit certain commercial uses of a character unlikely to develop general concentration of traffic, crowds of customers and general outdoor advertising. To these ends, retail activity is sharply limited and this district is protected against the encroachment of general commercial and industrial uses.

B. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Administrative Services
- Amateur Radio Tower
- Cemetery, Family or Church
- Community Recreation
- Crisis Center
- Domestic Chickens
- Family Day Care Home
- Home Beauty/Barber Salon
- Home Occupation, Type I
- Kennel, Private
- Manufactured Home
- Park & Ride Facility
- Post Office
- Public Maintenance and Service Facility
- Public Parks and Recreational Areas
- Safety Services, Public
- Single-Family Dwelling
- Small Scale or Residential Solar Energy Farm
- Utility Services

C. Conditional Uses

- Boarding House
- Cemetery, Private, Association, For-Profit
- Condominium
- Cultural Services
- Day Care Center
- Educational Facilities, Primary/Secondary
- Golf Course

Chapter 19.6-Zoning

Hospital
Manufactured Home Park
Outdoor Gatherings
Planned Unit Development
Religious Assembly
Safety Services, Private
Safety Services, Public
Second Dwelling
Two-Family Dwelling
Wind Energy System
Wireless Communication Facility

D. Site Development Regulations

a. Minimum Lot Requirements

- i. Lots not served by public water or sewer
 1. Area: 25,000 square feet (0.57 acre)
 2. Frontage: 125 feet on a publicly owned and maintained street
- ii. Lots served by either public water or sewer
 1. Area: 15,000 square feet (0.34 acre)
 2. Frontage: 80 feet on a publicly owned and maintained street
- iii. Lots served by both public water and public sewer
 1. Area: 10,000 square feet (0.23 acre)
 2. Frontage: 80 feet on a publicly owned and maintained street

b. Minimum Setback Requirements

- i. Principal Structure
 1. Front 35 feet from property line or 60 feet from centerline of public road, whichever is greater
 2. Side 15 feet
 3. Rear 35 feet
- ii. Accessory Structure
 1. Front 35 feet from property line or behind the front building line, whichever distance is less
 2. Side 15 feet
 3. Rear 15 feet
- iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

Chapter 19.6-Zoning

§19.6-70 R-3, High-Density Multi-Family Residential District

A. Purpose

The purpose of this district is to provide areas in the county within the suburban service area where existing middle to high density residential development (typically four to twelve units per acre) has been established and land areas which generally appear to be appropriate for such development. The R-3 district is designated based on access to major streets, public water and/or sewer, and schools with suitable capacity to accommodate development at the stated density. A variety of housing densities and styles is encouraged in order to permit a diversity and flexibility in design and layout.

B. Permitted Uses

- Accessory Uses/Structures
- Amateur Radio Tower
- Cemetery, Family or Church
- Community Recreation
- Condominium
- Domestic Chickens
- Family Day Care Home
- Home Occupation, Type I
- Multi-Family Dwelling
- Park & Ride Facility
- Post Office
- Public Maintenance and Service Facility
- Public Parks and Recreational Areas
- Residential Human Care Facility
- Safety Services, Public
- Single-Family Dwelling
- Small Scale Solar Energy (Residential)
- Townhouse
- Two-Family Dwelling
- Utility Services

C. Conditional Uses

- Boarding House
- Cemetery, Private, Association, or For-Profit
- Cultural Services
- Day Care Center
- Educational Facilities, Secondary/Primary
- Hospital
- Outdoor Gatherings
- Planned Unit Development
- Religious Assembly

Chapter 19.6-Zoning

Safety Services, Private
Wind Energy System
Wireless Communication Facility

D.

Site Development Regulations

a. Minimum Lot Requirements

i. Lots not served by public water or sewer

1. Area: 25,000 square feet (0.57 acre)
2. Frontage: 100 feet on a publicly owned and maintained street

ii. Lots served by either public water or sewer

1. Area: 15,000 square feet (0.34 acre)
2. Frontage: 80 feet on a publicly owned and maintained street

iii. Lots served by both public water and public sewer

1. Area: 10,000 square feet (0.23 acre)
2. Frontage: 80 feet on a publicly owned and maintained street

iv. Minimum lots size and permitted densities for multi-family dwellings and town homes are referenced in Additional Regulations section.

b. Minimum Setback Requirements

i. Principal Structure

1. Front 35 feet from property line or 60 feet from centerline of public road, whichever is greater
2. Side 15 feet
3. Rear 35 feet

ii. Accessory Structure

1. Front 35 feet from property line or behind the front building line, whichever distance is less
2. Side 15 feet
3. Rear 15 feet

iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

c. Maximum Height of Structures

- i. All structures: 35 feet

d. Maximum Coverage

- i. Building Coverage: 50 percent
- ii. Lot Coverage: 85 percent

Chapter 19.6-Zoning

§19.6-71 V-1, Village Center District

A. Purpose

Purpose of this district is to establish areas which will serve as the focal point for cultural and commercial activity for the rural service areas of the county. The density recommended for these areas is intended to average between one and three units per acre. Small country stores, family restaurants, and similar small service and personal service businesses, in addition to public and institutional buildings such as schools, post offices, and places of religious assembly, are commonly found at these crossroads locations. This district brings a sense of community to the surrounding rural areas, with an emphasis on providing essential goods and services to rural residents, but is not intended to be an employment destination. New developments should be carefully considered for its compatibility with the surrounding area and the purpose of the V-1 district. Any expansion of the district should be contiguous to an existing V-1 district to avoid leap-frog commercial development and excessive spreading of community services such as water and sewer.

B. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Administrative Services
- Amateur Radio Tower
- Antique Shops
- Automobile Rental/Leasing
- Business or Trade School
- Business Support Services
- Cemetery, Family or Church
- Civic Clubs
- Commercial Indoor Entertainment
- Communications Services
- Community Recreation
- Construction Sales and Services
- Consumer Repair Services
- Convenience Store
- Cultural Service
- Custom Manufacturing
- Domestic Chickens
- Educational Facilities, Primary/Secondary
- Family Day Care Home
- Financial Institutions
- Funeral Services
- Garden Center
- Gasoline Station
- General Office
- Home Occupation, Type I

Chapter 19.6-Zoning

Hospital
Hotel/Motel/Motor Lodge
Kennel, Private
Landscaping & Lawn Care Services
Manufactured Home
Medical Office
Micro-Brewery
Park & Ride Facility
Personal Improvement Services
Personal Services
Post Office
Public Maintenance and Service Facility
Public Parks and Recreational Areas
Religious Assembly
Residential Human Care Facility
Restaurant, Family
Restaurant, General
Retail Sales
Safety Services, Private
Safety Services, Public
Single-Family Dwelling
Small Scale Solar Energy (Residential)
Studio, Fine Arts
Utility Services
Veterinary Hospital/Clinic
Wayside Stand

C. Conditional Uses

Automobile Dealership
Automobile Parts/Supply, Retail
Automobile Repair Services
Aviation Facility, Private
Bed and Breakfast
Boarding House
Campground
Car Wash
Cemetery, Private, Association, For-Profit
Clinic
Commercial Indoor Amusement
Commercial Indoor Sports & Recreation
Commercial Outdoor Entertainment
Commercial Outdoor Sports & Recreation
Condominium
Construction Yard
Contractor Yard

Chapter 19.6-Zoning

Dance Hall
Day Care Center
Educational Facility, College/University
Equipment Sales and Rental
Flea Market
Golf Course
Halfway House
Home for Adults
Industrial Manufacturing
Kennel, Commercial
Laboratories
Life Care Facility Nursing Home
Mini-Warehouse
Multi-Family Dwelling
Outdoor Gathering
Parking Facility
Planned Unit Development
Public Assembly
Recreational Vehicle Sales and Service
Recycling Center
Restaurant
Two-Family Dwelling
Winery
Wireless Communication Facility

D. Site Development Regulations

a. Minimum Lot Requirements

i. Lots not served by public water or sewer

1. Area: 1 acre (43,560 square feet)
2. Frontage: 125 feet on a publicly owned and maintained street

ii. Lots served by either public water or sewer

1. Area: 25,000 square feet (0.57 acre)
2. Frontage: 100 feet on a publicly owned and maintained street

iii. Lots served by both public water and public sewer

1. Area: 15,000 square feet (0.34 acre)
2. Frontage: 80 feet on a publicly owned and maintained street

Chapter 19.6-Zoning

b. Minimum Setback Requirements

i. Principal Structure

1. Front 50 feet from property line or 75 feet from centerline of public road, whichever is greater
2. Side 15 feet
3. Rear 35 feet

ii. Accessory Structure

1. Front 50 feet from property line or behind the front building line, whichever distance is less
2. Side 15 feet
3. Rear 15 feet

- iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

c. Maximum Height of Structures

- i. All structures: 35 feet

d. Maximum Coverage

- i. Building Coverage: 35 percent
- ii. Lot Coverage: 75 percent

Chapter 19.6-Zoning

§19.6-72 B-1, General Commercial District

A. Purpose

The purpose of this district is to provide locations for a variety of commercial and service related activities within the suburban service area serving larger neighborhoods and the county in general. This district is intended for general application throughout the county. General Commercial Districts are most appropriately found along major arterial thoroughfares which serve large segments of the county's population. This district provides a wide variety of retail and service related uses.

B. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Administrative Services
- Agricultural Services
- Amateur Radio Tower
- Antique Shops
- Automobile Dealership
- Automobile Parts/Supply Retail
- Automobile Repair Services
- Automobile Rental/Leasing
- Bed and Breakfast
- Business or Trade School
- Business Support Services
- Campground
- Carwash
- Cemetery, Family or Church
- Cemetery, Private, Association, For-Profit
- Civic Clubs
- Clinic
- Commercial Indoor Amusement
- Commercial Indoor Entertainment
- Commercial Indoor Sports & Recreation
- Commercial Outdoor Entertainment
- Commercial Outdoor Sports & Recreation
- Communications Services
- Community Recreation
- Construction Sales and Services
- Construction Yard
- Contractor Yard
- Consumer Repair Services
- Convenience Store
- Crisis Center
- Custom Manufacturing

Chapter 19.6-Zoning

Dance Hall
Day Care Center
Domestic Chickens
Educational Facilities, College/University
Educational Facilities, Primary/Secondary
Equipment Sales and Rental
Family Day Care Home
Financial Institutions
Funeral Services
Garden Center
Gasoline Station
General Office
Guidance Services
Home Beauty/Barber Salon
Home Occupation, Type I
Home Occupation, Type II
Hospital
Hotel/Motel/Motor Lodge
Landscaping & Lawn Care Services
Laundry
Manufactured Home Sales
Medical Office
Micro-Brewery
Mini Warehouse
Parking Facility
Park & Ride Facility
Pawn Shop
Personal Improvement Services
Personal Services
Post Office
Public Maintenance and Service Facility
Public Parks and Recreational Areas
Recreational Vehicle Sales and Service
Religious Assembly
Residential Human Care Facility
Restaurant, General/Drive-In/Fast Food
Retail Sales
Safety Services, Private
Safety Services, Public
Single-Family Dwelling
Small Scale Solar Energy (Residential)
Studio, Fine Arts
Surplus Sales
Truck Stop
Utility Services
Veterinary Hospital/Clinic

Chapter 19.6-Zoning

Wayside Stand
Wireless Communication Facility

C. Conditional Uses

Adult Entertainment
Automobile Graveyard
Brewery
Distillery
Fish Hatchery
Flea Market
Halfway House
Home for Adults
Industrial Manufacturing
Kennel, Commercial
Laboratories
Multi-Family Dwelling
Outdoor Gathering
Planned Unit Development
Public Assembly
Recycling Center
Scrap & Salvage Services
Stable, Commercial
Transfer Station
Transportation Terminal
Truck Terminal
Two-Family Dwelling
Wind Energy System

D. Site Development Regulations

a. Minimum Lot Requirements

i. Lots not served by public water or sewer

1. Area: 1 acre (43,560) square feet
2. Frontage: 100 feet on a publicly owned and maintained street

ii. Lots served by either public water or sewer

1. Area: 15,000 square feet (0.34 acre)
2. Frontage: 80 feet on a publicly owned and maintained street

iii. Lots served by both public water and public sewer

1. Area: 10,000 square feet (0.23 acre)
2. Frontage: 80 feet on a publicly owned and

Chapter 19.6-Zoning

maintained street

b. Minimum Setback Requirements

i. Principal Structure

1. Front 35 feet from property line or 60 feet from centerline of public road, whichever is greater
2. Side None, except when adjacent to a residential use, then 10 feet
3. Rear 15 feet

ii. Accessory Structure

1. Front 35 feet from property line or behind the front building line, whichever distance is less
2. Side 15 feet
3. Rear 5 feet

- iii. Where a lot fronts on more than one street, front yard setbacks shall apply to all streets.

c. Maximum Height of Structures

- i. All structures: 45 feet

d. Maximum Coverage

- i. Building Coverage: 50 percent
- ii. Lot Coverage: 90 percent

Chapter 19.6-Zoning

§19.6-72.1 B-2, Limited Commercial District

A. Purpose

The purpose of this district is to provide locations for a limited segment of commercial and service related activities within the suburban service area serving larger neighborhoods. This district is intended for application along the major thoroughfares and near existing residential zoning districts. Limited Commercial Districts are most appropriately found along major arterial thoroughfares which serve large segments of the county's residential population and provides a variety of small retail and service related uses that are meant to be compatible with nearby residential uses. They typically will generate minimal light, noise, and other nuisances. They do not involve the constant traffic flows associated with larger retail/commercial activities.

A. Permitted Uses

- Accessory Apartment
- Accessory Uses/Structures
- Administrative Services
- Amateur Radio Tower
- Antique Shops
- Automobile Rental/Leasing
- Business or Trade School
- Business Support Services
- Civic Clubs
- Clinic
- Consumer Repair Services
- Day Care Center
- Domestic Chickens
- Educational Facilities, Primary/Secondary
- Financial Institutions
- Funeral Services
- General Office
- Guidance Services
- Home Beauty/Barber Salon
- Medical Office
- Park & Ride Facility
- Pawn Shop
- Personal Improvement Services
- Personal Services
- Post Office
- Religious Assembly
- Retail Sales
- Small Scale Solar Energy (Residential)
- Studio, Fine Arts
- Utility Services

Chapter 19.6-Zoning

Veterinary Hospital/Clinic
Wayside Stand

B. Conditional Uses

Automobile Dealership
Automobile Parts/Supply Retail
Automobile Repair Services
Automobile Graveyard
Bed and Breakfast
Commercial Indoor Entertainment
Commercial Indoor Amusement
Commercial Indoor Sports & Recreation
Commercial Outdoor Entertainment
Commercial Outdoor Sports & Recreation
Equipment Sales and Rental
Public Assembly
Recycling Center
Stable, Commercial
Two-Family Dwelling
Wind Energy System
Wireless Communication Facility

C. Site Development Regulations

a. Minimum Lot Requirements

iv. Lots not served by public water or sewer

- 3. Area: 1 acre (43,560) square feet
- 4. Frontage: 100 feet on a publicly owned and maintained street

v. Lots served by either public water or sewer

- 3. Area: 15,000 square feet (0.34 acre)
- 4. Frontage: 80 feet on a publicly owned and maintained street

vi. Lots served by both public water and public sewer

- 3. Area: 10,000 square feet (0.23 acre)
- 4. Frontage: 80 feet on a publicly owned and maintained street

b. Minimum Setback Requirements

i. Principal Structure

Chapter 19.6-Zoning

§19.6-73 M-1, Industrial District

A. Purpose

The purpose of this district is to provide areas within the county which are suitable for less intensive industrial activities. M-1 areas are primarily designated based on the suitability of the land in terms of slope and freedom from flooding, as well as, the availability of public services, access to arterial road network, and proximity to rail and airport facilities or the interstate highway system. Distributing these areas throughout the county in a planned manner to create employment centers within close proximity to residential growth areas and reduce heavy traffic generation of industrial uses is encouraged. Since this district promotes uses that generally will conflict with most others, a high degree of protection to adjoining properties is strongly encouraged.

B. Permitted Uses

- Accessory Uses/Structures
- Administrative Services
- Amateur Radio Tower
- Brewery
- Business or Trade School
- Business Support Services
- Communications Services
- Composting
- Construction Sales and Services
- Construction Yard
- Consumer Repair Services
- Contractor Yard
- Convenience Store
- Custom Manufacturing
- Distillery
- Equipment Sales and Rental
- Financial Institutions
- Garden Center
- General Office
- Hotel/Motel/Motor Lodge
- Industrial Manufacturing
- Kennel, Commercial
- Laboratories
- Landscaping & Lawn Care Services
- Manufactured Home Sales
- Micro-Brewery
- Mini Warehouse
- Medical Office
- Park & Ride Facility
- Parking Facility

Chapter 19.6-Zoning

Pawn Shop
Personal Improvement Services
Personal Services
Post Office
Public Maintenance and Service Facility
Public Parks and Recreational Areas
Recreational Vehicle Sales & Service
Restaurant
Retail Sales
Safety Services, Public
Sawmill
Studio, Fine Arts
Truck Terminal
Veterinary Hospital/Clinic
Warehouse and Distribution
Winery

C. Conditional Uses

Automobile Graveyard
Aviation Facility, Private
Aviation Facility, Public
Flea Market
Gasoline Station
Outdoor Gathering
Planned Unit Development
Public Assembly
Recycling Center
Resource Extraction
Scrap & Salvage Services
Transfer Station
Truck Stop
Utility Scale Solar Energy Farm (Large Scale)
Wireless Communication Facility

D. Site Development Regulations

a. Minimum Lot Requirements

i. Lots not served by public water or sewer

1. Area: 25,000 square feet (0.57 acre)
2. Frontage: 100 feet on a publicly owned and maintained street

ii. Lots served by either public water or sewer

Chapter 19.6-Zoning

§19.6-74 IP, Planned Industrial District

A. Purpose

The Planned Industrial (M-IP) District is established primarily for light to medium industrial uses. Supporting accessory uses and facilities, such as office and commercial establishments, are also permitted. The M-IP district is intended to be designed with a park-like atmosphere that complements surrounding land used by means of appropriate siting of buildings, controlled access points, attractive and harmonious architecture, and effective landscape buffering. The M-IP district is intended to provide flexibility in design and site layout, allow latitude in combining different use types within a single development, and provide the developer with incentives to create an aesthetically pleasing and functional planned development. Important in determining the location and size of an M-IP district is the accessibility of the location, the availability of public utilities, public safety services, and the suitability of the topography for industrial purposes.

B. Permitted Uses

- Accessory Uses/Structures
- Administrative Services
- Agricultural Services
- Amateur Radio Tower
- Automobile Parts/Supply, Retail
- Business or Trade School
- Business Support Services
- Communications Services
- Construction Sales and Services
- Community Recreation
- Consumer Repair Services
- Convenience Store
- Crises Center
- Educational Facility, College/University
- Educational Facility, Primary/Secondary
- Financial Institution
- Garden Center
- General Office
- Industrial Manufacturing
- Laboratories
- Landscaping and Lawn Care Services
- Medical Office
- Park & Ride Facility
- Parking Facility
- Personal Improvement Services
- Personal Services
- Post Office
- Public Maintenance and Service Facility

Chapter 19.6-Zoning

Public Parks and Recreational Areas
Railroad Facilities
Safety Services, Public
Utility Services
Warehouse and Distribution

C. Conditional Uses

Accessory Apartment
Asphalt Plant
Automobile Dealership
Automobile Repair Services
Automobile Rental/Leasing
Aviation Facility, Private
Aviation Facility, Public
Brewery
Custom Manufacturing
Distillery
Fish Hatchery
Gasoline Station
Landfill, Sanitary
Meat Packing Plant
Outdoor Gathering
Planned Unit Development
Public Assembly
Recycling Center
Resource Extraction
Safety Services, Private
Scrap and Salvage Yard
Transfer Station
Transportation Terminal
Truck Terminal
Utility Scale Solar Energy Farm (Large Scale)
Wind Energy Systems
Winery
Wireless Communication Facility

D. Uses Specifically Prohibited

Fuel Storage Yards
Contractor Yards
Lumber Yards
Sawmills
Stonework
Abattoirs (Slaughter House)

Chapter 19.6-Zoning

§19.6-75 H-1, Historic Overlay District

A. Purpose

The purpose of this district is to recognize, preserve, and encourage the continued appropriate development of historic resources in designated areas by establishing standards for development and allowable uses that will insure such development. While much of the area in these districts may remain virtually unchanged other sections may need to change to serve the best interest of the area and its environs and the surrounding property owners. Typical uses within this district include restoration and reconstruction of historic structures, related residential, educational, administrative, maintenance, public assembly, festival activities, and limited supporting commercial activities.

B. Existing Structures and Land Uses

The provisions of this article shall apply only to structures constructed and land uses established or modified after the effective enactment date of this ordinance.

C. Permitted Uses

- Museums, visitor centers and learning centers
- Restoration and reconstruction of historic structures
- Shops and facilities associated with the historic nature of the property
- Administrative and maintenance facilities related to the historic property
- Agriculture
- Accessory Structures related to a permitted use
- Domestic Chickens
- Interpretive or other educational structures related to the historic property
- Public activities, promotions, festivals, celebrations
- Staff housing
- Single-Family Dwelling

D. Conditional Uses

- Cemeteries
- Religious Assembly

E. Site Development Regulations

- a. The site development regulations in the district shall be the same as those regulations in the A-1, Agricultural Zoning District.
- b. To provide for adequate screening from adjacent properties, any new structure development, restoration of existing structures, or access to facilities such as roads, parking facilities, or walking path, within fifty (50) feet of any property line shall be screened with a natural vegetative buffer. The buffer shall contain a mixture of deciduous and evergreen trees and shrubbery.
- c. Signage shall meet the requirements of the A-1, Agricultural Zoning District and should directly relate to the historic nature of the property.

Chapter 19.6-Zoning

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ITEM F

LEARNING OPPORTUNITIES

LAND USE LAW BOOK

CHAPTER 4-THE SCOPE OF ZONING POWER

CHAPTER 5-THE DILLION RULE AND ITS LIMITATIONS
ON A LOCALITY'S LAND USE POWERS

CHAPTER 6-CONSTITUTIONAL PRINCIPLES AFFECTING
A LOCALITY'S LAND USE POWERS

Chapter 4

The Scope of the Zoning Power

4-100 Introduction

If effectively used, the zoning power is broad, but it is not unlimited. This chapter explores the reach of that power. Chapters 5, 6 and 7 examine the limitations on the zoning power.

4-200 The extent of the zoning power over uses, structures and areas of use

Virginia Code § 15.2-2280 is the key enabling statute that establishes the scope of the zoning power over uses, structures, and areas of use. It authorizes a locality to regulate, restrict, permit, prohibit, and determine the following:

- *Uses*: The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses.
- *Physical characteristics of structures*: The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures.
- *Areas of use*: The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used.
- *Excavation*: The excavation or mining of soil or other natural resources.

The Virginia Supreme Court has described the authority delegated to localities in Virginia Code § 15.2-2280 as “broad authority.” *Trible v. Bland*, 250 Va. 20, 24, 458 S.E.2d 297, 299 (1995). Under a Dillon Rule analysis, Virginia Code § 15.2-2280 authorizes a locality to zone and regulate the territory within its jurisdiction, but does not delineate how the locality is supposed to implement the broad powers granted. In this situation, the choice of implementation by the locality will be upheld as long as the method selected is reasonable. *Advanced Towing Company, LLC v. Fairfax County Board of Supervisors*, 280 Va. 187, 193, 694 S.E.2d 621, 624 (2010) (county enabled to impose territorial restriction in towing regulation); *Arlington County Board of Supervisors v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (county not enabled to extend coverage to the newly defined category of domestic partners under its self-funded health insurance benefits plan). This is known as the “reasonable selection of method rule,” discussed in section 5-522.

Understanding the scope of a locality’s zoning powers under Virginia Code § 15.2-2280 and other sections is critical.

4-300 The physical reach of the zoning power: territory and airspace

A county has jurisdiction over all of the unincorporated territory in the county; a city or town has jurisdiction over all of the territory within that municipality. *Virginia Code § 15.2-2281*; see *Board of Supervisors of Loudoun County v. Town of Purcellville*, 276 Va. 419, 438, 666 S.E.2d 512, 521 (2008) (although planning processes may be extra-territorial between counties and towns under Virginia Code § 15.2-2231, a locality’s zoning authority is limited to its own territory).

A zoning ordinance also extends to the superjacent airspace of any privately-owned land. *Virginia Code § 15.2-2293(A)*. *Superjacent airspace* includes any use or structure on top of (e.g., a structure) or above (e.g., an antenna affixed to a pole) the ground. For publicly owned land, a zoning ordinance applies to:

- *Fees:* Collecting fees to cover the cost of making inspections, issuing permits, advertising notices and other expenses incident to the administration of the zoning ordinance or to filing or processing any appeal or amendment thereto. *Virginia Code § 15.2-2286(A)(6)*. Virginia Code § 15.2-108.1 prohibits localities from charging any fee, other than fire prevention inspection fees, “to any church, synagogue, or other place of worship unless authorized by general law or special act of the General Assembly.” The fees enabled by Virginia Code § 15.2-2286(A)(6) are fees authorized by general law and, therefore, would not be subject to the prohibition in Virginia Code § 15.2-108.1.
- *Amending or repealing zoning text and maps:* Amending or repealing the regulations or district maps from time to time. *Virginia Code § 15.2-2286(A)(7)*.
- *Plans of development:* Requiring the submission and approval of a plan of development prior to issuing building permits to assure compliance with regulations contained in the zoning ordinance. *Virginia Code § 15.2-2286(A)(8)*.
- *Mixed use and planned unit districts:* Designating areas and districts for mixed use or planned unit developments. *Virginia Code § 15.2-2286(A)(9)*.
- *Incentive zoning:* Administering incentive zoning. *Virginia Code § 15.2-2286(A)(10)*. *Incentive zoning* means using bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features or amenities desired by a locality, including but not limited to, site design incorporating principles of new urbanism and traditional neighborhood development, environmentally sustainable and energy-efficient building design, affordable housing creation and preservation, and historical preservation, as part of the development. *Virginia Code § 15.2-2201*. Incentive zoning is different from conditional (proffered) zoning.
- *Consensual downzoning:* Entering into a voluntary agreement with a landowner that would result in a downzoning of undeveloped or underdeveloped lands in exchange for a tax credit equaling the amount of excess real estate taxes paid because of the higher zoning classification. *Virginia Code § 15.2-2286(A)(11)*.
- *Clustering single family dwellings to preserve open space:* Requiring localities to allow clustering of single family dwellings and the preservation of open space developments in at least 40% of its undeveloped territory, subject to standards, conditions and criteria established by the locality, and which must be approved by the locality’s staff as a ministerial decision. Clustering regulations in effect on June 1, 2004 that allowed by-right clustering are grandfathered. *Virginia Code § 15.2-2286.1*.
- *Airport safety zoning and airport noise attenuation:* Localities having an airport or which are within the approach slope or safety zone of an airport must regulate the height of structures and natural growth in accordance with the rules of the Virginia Aviation Board. *Virginia Code § 15.2-2294; see Virginia Code § 15.2-2295 for airport noise attenuation*.
- *Mountain ridge construction:* Localities having mountain ridges over a certain elevation may regulate the height and location of tall buildings on those ridges. *Virginia Code § 15.2-2295.1*. Note that localities also have this authority under Virginia Code § 15.2-2280 (express authority to regulate the height of structures).
- *Conditional zoning:* The rezoning of land with proffers is referred to in Virginia Code § 15.2-2296 as *conditional zoning*. *Virginia Code §§ 15.2-2296 through 15.2-2303.3*. Proffers consist of reasonable conditions that are in addition to the regulations of the zoning district. *See, e.g., Virginia Code § 15.2-2298(A)*.
- *Affordable dwelling units:* Establish an affordable housing dwelling unit program. *Virginia Code §§ 15.2-2304 (applicable to a limited number of localities, including Albemarle County) and 15.2-2305*. Under both sections, the program must address housing needs, promote a full range of housing choices, and encourage the construction and continued existence of moderately priced housing by providing for optional increases in density in order to

- *Collection of delinquent fees and charges before processing application.* Virginia Code §§ 15.2-2286 and 58.1-3700 authorize localities to require an applicant to pay all nuisance charges, stormwater management utility fees, and any other charges that constitute a lien on the subject property before issuing a local business license or initiating an application for a rezoning, special use permit, special exception, building permit, erosion and sediment control permit, or any other land disturbing permit.

A zoning ordinance that includes matters not included in sections 4-200, 4-300 and 4-400 may be subject to a claim that the regulation is not enabled.

4-500 Overlay districts

A zoning ordinance may provide for overlay districts. An overlay district is a zoning district in which the requirements of the overlay district must be complied with, as well as the requirements of the underlying “base” zoning district; thus, one district overlays another. *Beacon Hill Farm Associates v. Loudoun County*, 875 F.2d 1081, *fn. 1* (4th Cir. 1989).

The following are four common elements of an overlay district: (1) it affects lands that have common characteristics or features for which regulation beyond that provided by the underlying zoning district is desired; (2) it is a product of a long study and careful consideration to identify lands to be subject to the requirements of the overlay district; (3) it imposes requirements that are additional to those already required by the underlying zoning district; and (4) it may involve amendments to the ordinance text and/or the zoning map. These elements are similar to those of a comprehensive downzoning, discussed in section 10-320.

Albemarle County has established several overlay districts including the Airport Impact Area Overlay District (*Albemarle County Code § 18-30.2*), the Flood Hazard Overlay District (*Albemarle County Code § 18-30.3*), the Natural Resource Extraction Overlay District (*Albemarle County Code § 18-30.4*), and the Entrance Corridor Overlay District (*Albemarle County Code § 18-30.6*).

4-600 Statutory limitations on the zoning power

The Dillon Rule (chapter 5), the United States and Virginia Constitutions (chapter 6), and preemptive federal and state laws (chapter 7) impose limitations on a locality’s zoning power. In addition, the Virginia Code imposes a number of statutory limitations on the zoning power. Every zoning regulation pertaining to the subject matter below must be analyzed to be certain that the regulation complies with the applicable state law.

4-610 Uses that must be allowed by right; special use permit prohibited

The General Assembly has created a number of classes of uses or structures which a locality must allow by right rather than by special use permit or, in some cases, any other restrictions, provided that the use or structure meets the statutory requirements for eligibility. Some of these classes of protected uses are designed to further broad public policies, such as policies against discrimination in housing. Another group of classes exist solely to promote a particular industry or to exempt it from some or all local regulation.

4-611 Production agriculture or silviculture activity

A locality may not require a special use permit for any production agriculture or silviculture activity in an agricultural zoning district. *Virginia Code § 15.2-2288*; see also *Virginia Code § 3.2-300 et seq. (the Right to Farm Act)*. *Production agriculture and silviculture* is the bona fide production or harvesting of agricultural or silvicultural products. This term does not include the processing of agricultural or silvicultural products or the above-ground application or storage of sewage sludge. *Virginia Code § 15.2-2288*.

A locality may impose setback requirements, minimum area requirements and other requirements that apply to land used for agricultural or silvicultural activity. *Virginia Code § 15.2-2288*.

4-621 Group homes and small assisted living facilities of eight or fewer persons

Virginia Code § 15.2-2291(A) requires that a zoning ordinance consider a group home in which no more than eight persons with mental illness, mental retardation, or developmental disabilities reside with one or more resident counselors or other staff persons as a single family residential occupancy. To qualify for this treatment, the group home must be licensed by the Department of Behavioral Health and Developmental Services. *Virginia Code § 15.2-2291(A)*. *Mental illness* and *developmental disability* do not include the current illegal use of or addiction to a controlled substance as defined in Virginia Code § 54.1-3401. *Virginia Code § 15.2-2291(A)*. A zoning ordinance may not impose any conditions on a group home that are more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. *Virginia Code § 15.2-2291(A)*. A group home serving eight unrelated adults who do not meet these criteria does not qualify under Virginia Code § 15.2-2291(A) for treatment as a single-family residence insofar as zoning is concerned. *1995 Va. Op. Atty. Gen. 286*.

Virginia Code § 15.2-2291(B) requires that a zoning ordinance consider an assisted living facility in which no more than eight aged, infirm or disabled persons with one or more resident counselors or other staff persons to be residential occupancy as a single family residential occupancy. To qualify for this treatment, the assisted living facility must be licensed by the Department of Social Services. *Virginia Code § 15.2-2291(B)*. Like group homes, a zoning ordinance may not impose any conditions on an assisted living facility that are more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. *Virginia Code § 15.2-2291(B)*.

4-622 Family day homes of five or fewer children

Virginia Code § 15.2-2292 requires that a zoning ordinance consider a family day home serving up to five children, exclusive of the provider's own children and any children who reside in the home, as residential occupancy by a single family. A *family day home* is a child day program for children under the age of thirteen offered in the residence of the provider or the home of any of the children in care, exclusive of the provider's own children and any children who reside in the home, when at least one child receives care for compensation. *Virginia Code § 63.2-100* (also providing that only family day homes serving more than six children, who do not otherwise reside in the home, must be licensed). A zoning ordinance may not impose conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. *Virginia Code § 15.2-2292(A)*.

4-623 Temporary family healthcare structures

Virginia Code § 15.2-2292.1 requires that a zoning ordinance allow by right *temporary family healthcare structures* of no more than 300 gross square feet as accessory uses in any zoning district permitting single family detached dwellings if the statutory prerequisites are satisfied. These structures are permitted to be used by a caregiver in providing care for a mentally or physically impaired person who occupies the structure, either alone or with his or her spouse, and may be located only on property owned or occupied by the caregiver as his residence.

4-630 Farm wineries, limited breweries, limited distilleries, and activities at agricultural operations

A locality's regulation of the activities and events of licensed farm wineries designed to market and sell their products must be *reasonable*. *Virginia Code § 15.2-2288.3(A)*. The regulations must take into account the *economic impact* the regulations will have on the farm wineries, the *agricultural nature* of the activities and events, and whether the activities and events are *usual and customary* throughout the Commonwealth. *Virginia Code § 15.2-2288.3(A)*. If the events and activities are usual and customary throughout the Commonwealth, they may be regulated only if they impose a substantial impact on the health, safety or welfare of the public. *Virginia Code § 15.2-2288.3(A)*.

A locality may regulate noise, other than amplified music, arising from events or activities at a farm winery, only to the extent that the locality otherwise regulates noise. *Virginia Code § 15.2-2288.3(A)*. The regulation of amplified music at a farm winery must consider the effect on adjacent property owners and nearby residents. *Virginia Code § 15.2-2288.3(A)*.

Chapter 5

The Dillon Rule and Its Limitations on a Locality's Land Use Powers

5-100 Introduction

A locality's governing body has only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from the express powers, and powers that are essential and indispensable. *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 516, 708 S.E.2d 841, 844 (2011) (“a locality’s zoning powers are ‘fixed by statute and are limited to those conferred expressly or by necessary implication’”); *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008); *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004). The principle, known as the Dillon Rule (also referred to as “Dillon’s Rule”), is a rule of strict construction – if there is a reasonable doubt whether the legislative power exists, the doubt must be resolved against the local governing body. *Sinclair v. New Cingular Wireless*, 283 Va. 198, 204, 720 S.E.2d 543, 546 (2012).

5-200 Who was Dillon and where did his rule come from?

John Forrest Dillon was the chief justice of the Iowa Supreme Court in the mid-1800’s. In their article *Why Does Dillon Rule? Or Judge John’s Odd Legacy* appearing in *Nice & Curious Questions*, Edwin S. Clay III and Patricia Bangs explain that Dillon’s perspective was the result of the rise of the city as a service provider that resulted from the shift from an agrarian to a more urbanized society in the post-Civil War era and the corruption that consumed many city governments. The rule itself is the result of Dillon’s distrust of city government. Clay and Bangs write:

By the 1860s, cities had become not only inefficient, but corrupt. Graft, in the form of kickbacks, was rampant for many public works and public utility projects, including the railroads. It was the era of “Boss Tweed” and the Tammany Hall gang who reportedly swindled between \$75 and \$200 million from New York City between 1861 and 1875.

Dillon understandably did not trust local government and wrote, “Those best fitted by their intelligence, business experience, capacity and moral character” did not go into local public service. He felt local government was “unwise and extravagant” (“Dillon’s Rule,” Clay L. Witt, *Virginia Town and City*, August 1989).

Virginia is one of a limited number of states that follow the Dillon Rule and the rule continues to stir debate. Clay and Bangs note that some complain that the rule continues to bind the ability of Virginia’s localities to respond to the priority needs of their localities and regions. The Dillon Rule limits a local governing body’s ability to address local issues using local strategies exercised under its police power. As a result, a locality’s ability to address local issues is at the mercy of the General Assembly unless a means to address the issue has already been enabled. A locality’s governing body does not have broad general authority to adopt whatever ordinance it deems appropriate or desirable. *Lawless v. County of Chesterfield*, 21 Va. App. 495, 465 S.E.2d 153 (1995). On the other hand, the Dillon Rule has the effect of assuring, at least to some extent, a certain amount of consistency for those who deal with Virginia’s localities. The Virginia Chamber of Commerce has stated that the Dillon Rule “represents a positive tradition of legislative oversight” and encourages economic growth through a consistency in laws throughout the state.”

States that do not follow the Dillon Rule are sometimes referred to as “home rule” states, in which localities are determined to have the inherent authority to exercise powers that promote the public health, safety or welfare, even if they are not expressly enabled.

5-300 The nature and purpose of the Dillon Rule

The Dillon Rule is a rule of statutory construction that was first recognized in Virginia in *City of Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896), a decision in which the Virginia Supreme Court quoted with approval

This is the most difficult part of a Dillon Rule analysis. “To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied.” *Arlington County*, 217 Va. at 577, 232 S.E.2d at 42. “Questions concerning implied legislative authority of a local governing body are resolved by analyzing the legislative intent of the General Assembly.” *Tabler v. Board of Supervisors*, 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980). “Legislative intent is determined from the plain meaning of the words used.” *City of Richmond v. Confre Club of Richmond*, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990). Thus, the “central focus of [a Dillon Rule analysis] is to ascertain and give effect to the General Assembly’s intent in enacting provisions.” *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008).

The existence of another means to achieve a particular legislative goal may mean that a power may not be necessarily implied. *Lawless v. County of Chesterfield*, 21 Va. App. 495, 502, 465 S.E.2d 153, 156 (1995) (county did not have the implied power to criminally punish each day’s continuing violation of the zoning ordinance because the General Assembly had expressly provided other enforcement options to abate the violation). If there is a reasonable doubt as to whether a legislative power exists, the doubt must be resolved against the local governing body. *Schefer v. City Council of Falls Church*, 279 Va. 588, 593, 691 S.E.2d 778, 780 (2010); *Board of Supervisors v. Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995).

When considering whether a power exists under the State subdivision laws, the search for the enabling authority likely will need to find an express grant of the specific power being challenged because localities have not been granted broad powers in that area. See *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999), discussed in section 5-520.

5-420 Step 2: If it is determined that the local governing body is enabled to act as it did, whether it properly executed the power

If it is determined that the local governing body is enabled to act as it did, the second step in a Dillon Rule analysis considers whether it properly executed the power granted to it. There are two alternative rules that determine whether the governing body properly executed its power.

5-421 When the enabling authority specifies the manner to execute the power

If a power is granted and the enabling authority specifies the manner in which the authority is to be exercised, a local governing body may not select any other method. *Marble Technologies v. City of Hampton*, 279 Va. 409, 421, 690 S.E.2d 84, 90 (2010) (city’s zoning regulations that included lands in its resource protection areas on the basis of federal law were void where State law required that localities use the criteria developed by the Chesapeake Bay Local Assistance Board to determine the extent of the Chesapeake Bay Preservation Area within its jurisdiction); *Kansas-Lincoln, L.C. v. Arlington County Board*, 66 Va. Cir. 274 (2004) (affordable housing guidelines that required cash contributions to the county’s affordable housing fund or the contribution of affordable housing units as a condition of approval of the county’s unique “special exception site plan process” was a mandatory affordable housing program not enabled under Virginia Code §§ 15.2-2286(A)(3), 15.2-2286(A)(10) or 15.2-2304 (enabling a voluntary affordable housing program)); *Logie v. Town of Front Royal*, 58 Va. Cir. 527 (2002) (Virginia Code § 36-105 enables localities to enforce a property maintenance code and prescribes prosecution as a misdemeanor and fines as the method of enforcement; as a result, town regulation authorizing termination of electric service as a method of enforcement violated the Dillon Rule).

There are a number of statutes where the General Assembly has specified the manner in which the local governing body may exercise its zoning power with great specificity. These include: (1) clustering single-family dwellings under Virginia Code § 15.2-2286.1; (2) conditional zoning (proffers) under Virginia Code § 15.2-2296 *et seq.*; (3) affordable housing programs under Virginia Code § 15.2-2305 (compare Virginia Code § 15.2-2305 to the enabling authority for affordable housing programs in certain localities under Virginia Code § 15.2-2304); and (4) transfer of development rights under Virginia Code § 15.2-2316 *et seq.* Under the State Subdivision Law, the General Assembly has specified the required and optional provisions of a subdivision ordinance under Virginia Code §§ 15.2-2241 and 15.2-2242, often with great precision.

authority for the board of supervisors to delegate what the Court characterized as a “departure” from the zoning ordinance that was legislative in nature. The Court rejected the county’s argument that the broad authority granted to localities in Virginia Code §§ 15.2-2280 and 15.2-2286(A)(4) allowed the board to delegate this task to the planning commission, and rejected the argument that the board had delegated an administrative task under prescribed standards, as authorized in prior opinions of the Court (*see section 8-400*).

In *Marble Technologies v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84 (2010), the city’s zoning ordinance used a federal criterion for designating lands to be included in a resource preservation area under the Chesapeake Bay Preservation Act. The issue was whether the city was authorized to use this criterion under the State enabling authority. The General Assembly had given localities broad authority in former Virginia Code § 10.1-2108 to “exercise their police and zoning powers to protect the quality of state waters consistent with the provisions” of the Act. However, that authority was limited because former Virginia Code §§ 10.1-2100(A)(ii) and 10.1-2109 required that localities use the criteria established by the State. Therefore, the Virginia Supreme Court concluded that the city’s reliance on a federal criterion exceeded the authority granted by the Chesapeake Bay Preservation Act.

In *Kenyon Peck v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969), a zoning ordinance was upheld that had the effect of prohibiting advertising by means of outdoor moving signs or devices such as pennants, even though there is no specific mention of such a regulation in the Virginia Code. Thus, the failure of the zoning enabling legislation to mention specifically a particular subject that a local governing body wants to regulate is not necessarily fatal to the governing body’s exercise of its zoning power. *1984-85 Va. Op. Atty. Gen. 34*.

A locality has a substantial governmental interest in preserving its aesthetic character. *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993). Nevertheless, under Virginia law, absent enabling authority, a local governing body cannot limit or restrict the use a person makes of his property under the guise of its police power where the exercise of the power is justified *solely* on aesthetic considerations. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). The ordinance considered by the Virginia Supreme Court in *Rowe* required that preliminary site plans within a particular zoning district be subjected to an architectural design review of the elevations of each façade, materials, colors, texture, light reflecting characteristics and other special features intended for each building. Each building was reviewed to determine whether it furthered the stated purposes for the review: to protect property values, to promote the general welfare by insuring buildings in good taste, proper proportion, and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture which was distinct from the Colonial Williamsburg architecture. The landowners challenging the ordinance asserted that the enabling legislation did not delegate authority to local government to impose restrictions on architectural design. In finding the ordinance to be invalid, the *Rowe* court relied on its earlier decision in *Kenyon Peck*, *supra*. *Rowe* is still the controlling law in Virginia on the question of whether a local governing body may consider solely aesthetic factors in rezoning matters or zoning restrictions. However, since *Rowe* the General Assembly has enabled localities to regulate aesthetics within historic districts established under Virginia Code § 15.2-2306.

In *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989), the Virginia Supreme Court held that the express authority given to localities to prohibit a use of land included, by implication, the authority to prohibit landfills as a use of land. The Court said that even under the Dillon Rule of strict construction, “such specificity [*i.e.*, identifying each type of use that may be prohibited] is not necessary.” *Resource Conservation Management*, 238 Va. at 20, 380 S.E.2d at 882.

In *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984), the Virginia Supreme Court found that the express authority given to localities to grant special use permits “under suitable regulations and safeguards” did not imply the power to require a citizen to turn land over to the county and build roads for the benefit of the public. Similarly, in *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979), the Virginia Supreme Court held that localities had neither express nor implied authority to require a subdivider to construct off-site roads as a condition of plat approval. In *National Realty Corp. v. City of Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968), the Virginia Supreme Court found that an ordinance that imposed a fee for the examination and approval of final subdivision plats and made payment of the fee a

damage to property as a result of zoning actions was not among the powers enumerated); *Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc.*, 217 Va. 740, 232 S.E.2d 767 (1977) (zoning administrator, who is charged with the administration and enforcement of the zoning ordinance, and not the BZA, could revoke a special use permit; BZA could consider the matter only on appeal of the zoning administrator's decision).

5-700 Working with the Dillon Rule in its daily application

Following are the phrases that every local officer or employee hates hearing from its attorney: "You can't do that," "That's not enabled," and "There's no enabling authority for us to do that." When a locality's attorney says those things, he or she has researched the enabling authority to determine whether the locality is enabled to do something and has determined that there is no express or necessarily implied enabling authority. In other words, the attorney has concluded that the proposed action is not enabled.

5-710 When the locality's attorney determines that the proposed action is not enabled

If one assumes that laws are intended to promote the public health, safety and general welfare, the failure to find enabling authority means that the General Assembly has not (or has not yet) determined that the proposed action promotes these interests.

Once a determination is made that the necessary enabling authority is missing and the Dillon Rule applies, the locality's attorney is obligated to proceed in the best interests of the locality. Rule 1.13(b) of the *Virginia Rules of Professional Conduct* states in part:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . .

Among other things, this rule means that once the attorney has determined that the locality has no authority to take the proposed action, he or she may decline to assist an officer or employee in violating the law by circumventing a prohibitory law or ignoring the absence of enabling authority.

5-720 When "other localities are doing it"

When word is received from the locality's attorney that the locality is not enabled to take a proposed action, an officer or employee may be aware that "other localities are doing it." When such a claim is made, the attorney will inquire to find out which localities are doing it, and what if any authority there is for doing it. Following is a list of the typical findings from such an inquiry:

- The person claiming that other localities are doing something doesn't know what the other localities are actually doing.
- Other localities are not doing it, but are doing something similar that is enabled.
- The other localities that are doing it are either enabled through their charter, or have special legislation applicable to a class of localities of which your locality is not a member.
- The other localities are not enabled either, but haven't been sued yet.
- The other localities are small rural localities, and the particular matter was never reviewed by their attorneys.

Chapter 6

Constitutional Principles Affecting a Locality's Land Use Powers

6-100 Introduction

The power to regulate the use of land is a legislative power, residing in the state, which must be exercised in accordance with constitutional principles. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). A locality's exercise of its land use powers, particularly the zoning power, invokes numerous constitutional principles:

Constitutional Principles That May Be Affected By the Exercise of Local Land Use Powers	
• Procedural due process • Substantive due process • Equal protection • Just compensation or takings • Establishment of religion	• Free exercise of religion • Free speech • The right to bear arms • Search and seizure (see section 27-400) • Supremacy (preemption) (see chapter 7)

The numerous constitutional principles that may be affected by local land use regulations may have inspired a United States Supreme Court justice to ask in a dissenting opinion: “[I]f a policeman must know the Constitution, then why not a planner?” *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661, 101 S. Ct. 1287, 1309, 579 fn. 26 (1981) (Brennan, J.).

At bottom, in the land use context these constitutional principles seek to ensure: (1) fairness in the procedures; (2) fairness in the regulations; (3) fairness in the implementation of the regulations; (4) protection of certain individual activities; and (5) freedom from certain governmental activities.

6-200 The due process clause

The Fifth Amendment to the United States Constitution provides in part that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” The Fourteenth Amendment to the United States Constitution provides in part “. . . nor shall any State deprive any person of life, liberty, or property without due process of law. . .” Article I, Section 11 of the Virginia Constitution provides in part “[t]hat no person shall be deprived of his life, liberty, or property without due process of law . . .”

In the context of a zoning ordinance, the due process clause ensures fairness in the way in which a zoning regulation is adopted or a zoning decision is made (procedural due process), and fairness in the scope and implementation of the zoning regulation (substantive due process).

6-210 Procedural due process

Procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991). Procedural due process does not apply to legislative matters.

To establish a violation of procedural due process, plaintiffs must show: (1) they had property or a property interest; (2) of which the defendant deprived them; (3) without due process of law. *Sunrise Corp. v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005) (no procedural due process violation where plaintiffs received multiple hearings, and successfully obtained remedy in state court which resulted in the city ultimately issuing the land use permits plaintiffs sought); *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995).

In delineating the scope of a landowner's property interests, state law will play a key factor, and all property is taken subject to certain State law principles (in this case, the principle of public nuisance law) that ultimately

statutory time requirements; and (3) the requirement that regulations not be uncertain or vague. These are each addressed below.

6-211 The right to notice and the right to be heard in adjudicative or quasi-judicial proceedings

One strand of procedural due process involves the *right to notice and the right to be heard*. It is a constitutional right that applies to individuals in adjudicative or quasi-judicial proceedings. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991). Thus, principles of procedural due process apply to appeals of official determinations to the BZA and zoning enforcement actions, but not to legislative matters such as zoning text amendments, rezonings, and special use permits, to which only the statutory notice and public hearing requirements in Virginia Code § 15.2-2204 apply. *Southern Iron Works, supra*.

Procedural due process generally requires that a deprivation of property or a property right be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950), cited in *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) (no procedural due process violation in denial of building permit). To determine whether a procedural due process violation has occurred, the courts will consult the entire panoply of pre-deprivation and post-deprivation process provided by the state. *Tri-County Paving, Inc., supra*. The procedures due in zoning cases, and by analogy due in other cases involving the regulation of land use through general police powers, are not extensive. *Tri-County Paving, Inc., supra*.

In *Ihnken v. Gardner*, 927 F. Supp. 2d 227 (D. Md. 2013), a concert promoter rented land from the owner of a farm for a 4-day music and arts festival. The landowner obtained a zoning permit from the county's zoning administrator for the festival. On the first night of the concert, the police received numerous noise complaints. The next morning, a county commissioner received an angry email from a constituent about the noise the night before. After a meeting between the sheriff and the zoning administrator, and with the endorsement of the county commissioners, the zoning administrator revoked the permit and the remainder of the festival was cancelled. The promoter sued various county officials alleging, among other things, a violation of his procedural due process rights because the permit was revoked without a hearing. In rejecting the county's request to dismiss the promoter's complaint, the court found that the county officials had violated the promoter's procedural due process rights when it revoked the permit without a hearing, because: (1) the revocation occurred in the morning when there was no violation of the noise ordinance; (2) the noise ordinance did not authorize summary revocations; instead it only provided that a violation of the noise ordinance was a misdemeanor; (3) although the zoning ordinance authorized the zoning administrator to revoke a permit for violating a condition of a permit, this provision addressed only the *legal authority* to revoke, but not the *process* to revoke; and (4) the zoning ordinance provided no summary process before revoking the permit.

6-212 The obligation to adhere to statutory time requirements

A second strand of procedural due process arises from the failure to adhere to *statutory time requirements*. See *Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000). For example, the failure of a governing body to act on a rezoning request, or the failure of the BZA to act on an appeal of an official determination, within the statutory time periods may violate procedural due process if the claiming party demonstrates that the unreasonable delay resulted in prejudice or harm. *Tran, supra* (although Virginia Code § 15.2-2312 required that a decision be rendered within 90 days, there was no due process violation even though 550 days passed before the BZA rendered a decision on an appeal because plaintiffs presented no evidence of harm or prejudice and failed to object to continuances).

Note, however, that the failure to adhere to statutory time requirements is not a *per se* violation of procedural due process. "The use of the word 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent." *Wilks v. Commonwealth*, 260 Va. 194, 199, 530 S.E.2d 665, 667 (2000) (Virginia Code § 19.2-386.3(A)'s requirement that the Commonwealth's attorney "shall" file a notice of seizure for forfeiture with the clerk of the circuit court within 21 days was directory and procedural rather than mandatory and jurisdictional). "[A] statute directing the mode of proceeding by public officers is to be deemed

that considering the term in the context of the sign ordinance as a whole was part of the vagueness analysis, the court concluded that the definition was not unconstitutionally vague.

6-220 Substantive due process

Land use regulations and actions must substantially advance legitimate governmental interests. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (explaining that takings jurisprudence has not supplanted substantive due process in this context, and noting that a governmental action that does not substantially advance a legitimate governmental interest is a substantive due process claim, not a takings claim); *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008); see *Clarke v. Warren County Board of Commissioners*, 150 Ohio App. 3d 14, 21, 778 N.E.2d 1116, 1122 (2002) (observing that an economic feasibility analysis has a role not only in a takings analysis, but also in a substantive due process analysis; “[w]here zoning essentially permits only one kind of development, and such development is not economically feasible, there is strong evidence that the designation bears no substantial relationship to the purposes proffered by the government”).

The Due Process Clause: Substantive Due Process	
Right Protected	How to Ensure Compliance
Regulation or decision may not be arbitrary or irrational, so unjustified by any circumstance, governmental interest, or facts	Confirm that zoning regulations and zoning decisions advance at least one of the purposes of zoning in Virginia Code § 15.2-2283 and are supported by at least one of the relevant factual considerations in Virginia Code § 15.2-2284 including, in particular, the comprehensive plan Ensure that specific zoning actions are based on evidence in the record and are not arbitrary and capricious

Substantive due process does not forbid reasonable regulation of the use of private property. *Alford v. City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979). However, a legitimate exercise of the zoning power requires that “the means employed [must be] reasonably suited to the achievement of [the] goal.” *Alford*, 220 Va. at 586, 260 S.E.2d at 243. The boundaries of permissible action by localities are set by the law. *First Virginia Bank - Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983).

Substantive due process requires that a zoning action *not arbitrarily or capriciously deprive a person of the legitimate use of his or her property*. The mere power to enact an ordinance does not carry with it the right to arbitrarily or capriciously deprive a person of the legitimate use of his property. *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). Substantive due process is a far narrower concept than procedural due process; it is an absolute check on certain governmental actions notwithstanding “the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665 (1986). Thus, its protection covers only an action that is “so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or by any post-deprivation state remedies.” *Rucker v. Hartford County*, 946 F.2d 278, 281 (4th Cir. 1991). Stated another way, the deprivation must fall “so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.” *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002).

Substantive due process claims are decided under different and higher standards than procedural due process claims and are more difficult to prove. In order to show that one’s substantive due process rights have been violated, plaintiffs must show that: (1) they had a protected property interest; (2) defendants deprived them of that interest; and (3) defendants’ actions were so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency. *Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810 (4th Cir. 1995); *Gum Springs, LC v. Loudoun County Supervisors*, 59 Va. Cir. 509 (2001) (upholding demurrer because contract purchaser failed to allege property interest in denied zoning classification and failed to allege that rezoning denial was so unjustified by any circumstance or governmental interest). Following is a brief examination of the three elements.

- *The first element – a protected property interest*: Whether a property owner possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the locality lacks *all* discretion to deny issuing the permit or withholding approval. *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992).

A single facility may provide the impetus for a general zoning enactment, but that does not mean the enactment is aimed solely at that facility. Nor does every loser in a zoning dispute have by virtue of the unfavorable outcome a so-called ‘targeting’ claim. . . . Siena makes hay of the fact that no other developer was planning to build a self-storage facility near a public school, but that is hardly dispositive. What matters is that the zoning text amendment applied to all developers – both present and future – who might entertain plans similar to Siena.

The court concluded by stating that, while Siena did not relish the result of the city council’s zoning text amendment, “displeasure with state democratic outcomes does not ordinarily rise to the level of a federal constitutional violation.”

In *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621, 2007 WL 4322321 (4th Cir. 2007) (unpublished), the court held that the plaintiffs failed to establish a substantive due process violation where, after the plaintiffs’ land was annexed to the village under the representation that the property’s zoning would not change, the village adopted a zoning ordinance one year after annexation and established a density on plaintiffs’ land that was less than what was allowed prior to annexation. The court noted that, at the public hearing on the adoption of the ordinance, concerns regarding density were discussed. The fact that “those concerns did not carry the day cannot constitute the basis for a claim of government conduct so egregious as to amount to a violation of the Adamses’ substantive due process rights.” *Adams*, 2007 U.S. App. LEXIS at 13.

In *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984), the Virginia Supreme Court found that Fairfax County’s zoning distinction between “plant nurseries” (allowed by special use permit in a residential district) and “garden centers” (prohibited in a residential district where, in addition to plant stock, accessories such as garden tools, hoses, pottery, statues and bird baths were sold) was constitutional because the distinction was based on the county’s legitimate effort to limit commercial encroachments into residential areas.

In *Dawson, LC v. Board of Supervisors of Loudoun County*, 59 Va. Cir. 517 (2001), the court rejected the landowner’s claim that the board’s denial of its rezoning application violated substantive due process. Even assuming that the landowner had a property interest in a reasonable zoning classification, the court held that it did not follow that the board’s “denial of the particular zoning request constituted a deprivation of that interest.” *Dawson*, 59 Va. Cir. at 527.

However, the Virginia Supreme Court also has, on multiple occasions, found that zoning regulations that are socio-economic in nature violate substantive due process. In *Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973), the court held invalid a regulation that required certain developments having 50 or more dwelling units to build at least 15% of the dwelling units for low and moderate income housing. The court stated: “We conclude that the legislative intent was to permit localities to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group.” In *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653, 661, 107 S.E.2d 390, 396 (1959), the court held invalid a zoning ordinance that established a minimum lot size of two acres in the western two-thirds of Fairfax County. The court held that the practical effect of the ordinance was to exclude low and middle income groups from the western areas of Fairfax County. The court said that this “would serve private rather than public interests. Such an intentional and exclusionary purpose would bear no relation to the health, safety, morals, prosperity and general welfare.”

Boggs v. Board of Supervisors of Fairfax County, 211 Va. 488, 178 S.E.2d 508 (1971) deserves some discussion because it would likely be analyzed as a substantive due process case under current case law (assuming no state court remedy was available). The Virginia Supreme Court found that the R-10 zoning classification attached to plaintiff’s land rendered the land economically unfeasible for development, and not saleable at any price. The Court held that the board’s refusal to rezone the land from the single-family classification to another classification was clearly unreasonable and arbitrary. In holding that the plaintiff’s property should be rezoned to a reasonable use, the Court stated that “[a] zoning of land for single family residences is unreasonable and confiscatory and therefore illegal where it would be practically impossible to use the land in question for single family residences.” *Boggs*, 211 Va. at 491, 178 S.E.2d at 510.

6-300 The equal protection clause

The Fourteenth Amendment to the United States Constitution provides in part “. . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” There is no specific equal protection clause in the Virginia Constitution. *Buchanan v. City of Chesapeake*, 237 Va. 50, 375 S.E.2d 736 (1989). Equal protection rights are found in the anti-discrimination clause of the Virginia Constitution’s due process clause in Article I, Section 11, which provides that persons are guaranteed “the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin” Under the zoning enabling statutes, Virginia Code § 15.2-2282 captures equal protection concepts by requiring that all zoning regulations be uniform for each class or kind of buildings and uses throughout each district. In other words, zoning classifications must treat similarly situated property similarly. See *Schefer v. City Council of the City of Falls Church*, 279 Va. 588, 691 S.E.2d 778 (2010), discussed in section 6-310.

The equal protection clause of the United States Constitution “limits all state actions, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations.” *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998). Some classifications, such as those based on race and gender, are deemed inherently suspect and are subject to varying degrees of heightened scrutiny. *Phyllis v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982). However, “the vast majority of governmental action,” especially that regarding subjects of a state’s plenary police power, such as local economics and social welfare, “enjoys a strong presumption of validity and must be sustained against a constitutional challenge so long as it bears a rational relation to some legitimate end.” *Van Der Linde Housing, Inc. v. Rivanna Solid Waste Authority*, 507 F.3d 290 (4th Cir. 2007). “It is emphatically not the function of the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” *Van Der Linde Housing, supra*.

“The burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 382, 121 S. Ct. 955, 972 (2001); see also *Sowers v. Powhatan County*, 2009 WL 3359204 (4th Cir. 2009) (unpublished). The relevant inquiry is “whether local officials reasonably could have believed that their action was rationally related to a legitimate governmental interest.” *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002); *Town of Front Royal, supra*. The actual motivation for the locality’s actions is constitutionally irrelevant. *Tri-County Paving, supra*. In the absence of a claim that a fundamental right has been infringed or a claim of suspect classification, the locality need only show that the challenged action is rationally related to a legitimate state interest in order to satisfy the equal protection clause. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249 (1985), cited in *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621, 2007 WL 4322321 (4th Cir. 2007) (unpublished); *Advanced Towing Company, LLC v. Fairfax County Board of Supervisors*, 280 Va. 187, 191, 694 S.E.2d 621, 623 (2010) (“Unless a suspect classification or a fundamental constitutional right is involved, considerable deference must be accorded by the courts to legislative policy”).

In the zoning context, an equal protection challenge is reviewed in accordance with the following principles:

The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. *The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare.* The [C]ourt will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.

Board of Supervisors of Fairfax County v. Carper, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959), quoted in *Schefer, supra*.

The table below shows that a zoning regulation or decision may face an equal protection challenge under three typical scenarios: (1) the zoning regulations are discriminatory in the manner in which they classify uses; see *Bell v. City Council of City of Charlottesville*, 224 Va. 490, 297 S.E.2d 810 (1982); *County Board of Arlington v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989); *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982); *Board of Supervisors of Fairfax*

Because no fundamental right (*e.g.*, Free Speech) or suspect classification (*e.g.*, a classification based on race or religion) was in issue, the Equal Protection Clause allowed the city council “wide latitude in drawing classifications.” The test applied by the Fourth Circuit Court of Appeals was “whether the governmental end is legitimate and whether the means chosen to further that end are rationally related to it.” The court concluded that “the state interest in protecting schoolchildren is readily apparent.” *Siena Corp.*, 873 F.3d at 465. The court also concluded that the zoning text amendment was rationally related to protecting schoolchildren because it prevented the danger arising from increased traffic and it “helps ensure that the many undeniably legitimate uses of self-storage do not serve as a cover for those who might stash the illegal or hazardous materials that the Council wished above all to keep away from students.” *Siena Corp.*, 873 F.3d at 465.

Lastly, the court said that, although the zoning text amendment affected only the perceived dangers of self-storage facilities, “whether some alternative commercial use might present similar safety concerns is beside the point.” *Siena Corp.*, 873 F.3d at 465. The court added that a state (or locality) “is perfectly within its rights to chip away at a problem piece-by-piece, so long as it does not unlawfully discriminate in the process.” *Siena Corp.*, 873 F.3d at 465. *Siena Corp.*, 873 F.3d at 465.

In *Schefer v. City Council of the City of Falls Church*, 279 Va. 588, 691 S.E.2d 778 (2010), the plaintiff owned 12 lots in the city, all of which were created prior to the then-current 7,500 square foot minimum lot size in the R1-B zoning district. The R1-B zoning district allowed a maximum building height of 35 feet on standard lots, and a maximum building height of between 25 and 35 feet on substandard lots as determined by applying a formula in the zoning regulations. The court upheld the different height standards by concluding that residential buildings on standard lots were different *uses* than residential buildings on substandard lots. Therefore, the height regulations did not violate the uniformity requirement of Virginia Code § 15.2-2282.

In *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982), the Virginia Supreme Court rejected the plaintiff’s claim that a Manassas regulation prohibiting home occupations from having outside employees discriminated against widows, the unmarried and those without immediate families. The Court first concluded that the regulation was reasonable because it was designed to control the infiltration of commercial activity in a residential zoning district. The Court then found that the regulation was rationally related to a permissible state objective because it was designed to facilitate the creation of a convenient, attractive, and harmonious community.

In *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982), the Virginia Supreme Court upheld the county’s requirement that free-standing quick-service food stores be allowed only by special use permit, where many other commercial uses were allowed by right in commercial zoning districts. The Court found a rational relation between the use distinction because the county demonstrated that, unlike many other commercial uses, the free-standing quick-service food stores had unique traffic impacts and they typically were on small lots with little flexibility in locating entrances and curb cuts.

In *Owens v. City Council of the City of Norfolk*, 78 Va. Cir. 436 (2009), the court upheld the city council’s issuance of a certificate of appropriateness for a building in a historical district where the city council had granted a height variance under the city’s certificate of appropriateness procedure enabled by Virginia Code § 15.2-2306. The court held that the city’s zoning scheme of flexible building heights in its historic districts was not unreasonable, arbitrary, capricious or otherwise lacking a reasonable basis. The court found that the city had demonstrated the legislative bases for its regulations.

6-320 Drawing zoning district boundary lines

Boundary lines of zoning districts must be struck somewhere, and a line drawn by the most impartial arbiter is, to some unavoidable degree, arbitrary. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). In deciding where a district boundary line should be drawn, the governing body must consider the general boundary guidelines set forth in the comprehensive plan, the location of property lines, the physical characteristics of the land, and other factors affecting optimum geographical alignment. *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983); *Town of Vienna Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978).

Quinn claimed that the sewer extension plan and the merger provision violated his equal protection rights. The Fourth Circuit Court of Appeals rejected Quinn's claim, holding that the County "plainly" had a rational basis for difference in treatment, explaining:

The County will provide sewer service to streets with homes with failing septic systems and, in order to comply with a state statute, all vacant lots on those streets as well. The County will not provide sewer service to streets with only vacant lots for two reasons: one, in order to obtain state funding for and lower the cost of the aforementioned sewer extension; and two, to alleviate the threat of overdevelopment brought about by the earlier sewer expansion. Moreover, the County enacted the Grandfather/Merger Provision to limit development on sub-sized lots.

Quinn, 862 F.3d at 44. Therefore, the court said, any difference in treatment Quinn suffered was rationally related to a legitimate state interest.

In *Sunrise*, *supra*, the developer claimed that equal protection was denied because its application for a high rise building was disapproved while other high rises were approved. The court disagreed, stating that plaintiffs had failed to show that the classification – a high rise – was the basis for the city's decision. Instead, the court found that the project was denied because of its failure to discourage monotonous, drab or unsightly development, to conserve natural beauty, to give proper attention to exterior appearance, and properly relate to its site. In addition, the court held that the developer had failed to show purposeful discrimination:

If disparate treatment alone was sufficient to support a Constitutional remedy then every mistake of a local zoning board in which the board mistakenly treated an individual differently from another similarly situated applicant would rise to the level of a federal Constitutional claim.

Sunrise, 420 F.3d at 329.

In *Sowers v. Powhatan County*, 2009 WL 3359204 (4th Cir. 2009) (unpublished), a developer whose application to rezone his property was first denied by the board of supervisors in January 2006, but thereafter approved by the board in May 2006. Sowers sued the county, alleging that the board's failure to consider his late non-cash proffers, defer consideration of his application, or remand the application to the planning commission, when it instead denied his application in January 2006, deprived him of Equal Protection. One of the key issues in the application was that although the applicant had revised his application and his non-cash proffers during the application process, he had declined to increase his cash proffer to match board's increased suggested cash proffer per residential unit. The suggested cash proffer had been increased while the applicant's application was pending.

On appeal from the district court's grant of summary judgment for the county, Sowers argued that he was similarly situated with other rezoning applicants whose applications had been approved and was therefore denied Equal Protection. The Fourth Circuit Court of Appeals disagreed and concluded that Sowers' rezoning application was not similarly situated with other rezoning applications, noting that: (1) this application generated significant citizen opposition; (2) this application presented unique traffic concerns; (3) the applicant was a "tough negotiator"; (4) the applicant elected to "skirt typical procedures"; and (5) the recusal by one board member created a unique situation in which the residents most directly impacted by the proposed project were deprived of expected representation.

In *County of Lancaster v. Cowardin*, 239 Va. 522, 527, 391 S.E.2d 267, 270 (1990), the board denied special use permits for two boathouses. One of the landowners claimed that the denial of his permit was discriminatory because the board had approved a permit for a boathouse for a neighbor several months earlier. The Virginia Supreme Court rejected this argument, noting that a "claim of unlawful discrimination cannot prevail if there is a rational basis for the action alleged to be discriminatory." The Court found a rational basis for the board's decision, stating that the board could properly consider the effect of boathouses on local waters and distinguish the landowner's request from that of his neighbors because the neighbor's boathouse was on a different body of water and that there were no boathouses on the body of water this landowner sought to establish his boathouse.

Takings		
Type	Key Elements	Circumstances When Takings Claim Typically Raised (Not Necessarily Successful)
Taking by physical invasion	Government requires an owner to submit to a permanent physical invasion	Law requiring landowners to allow cable companies to install cable facilities; waters behind government dam that flood private property
Regulatory taking	Regulation or decision deprives an owner of all or substantially all economically beneficial use of the property; generally, the diminution in value may need to exceed 90%	Regulations or decisions that thwart landowners plans to develop or use their property or significantly reduce the value of the property, <i>e.g.</i> , denied upzonings
Temporary taking	Regulation or decision temporarily deprives an owner of all or substantially all economically beneficial use of the property	Moratoria that prohibit development; lengthy delays to obtain approvals
Categorical taking	Regulation or decision completely deprives an owner of “all economically beneficial use” of the property	Environmental regulations such as sand dune protection laws that prohibit all development and use of the property
Exaction	Locality requires dedication of land or fees as a condition of approval; the condition lacks a nexus and rough proportionality to the impacts	Conditions (proffers) associated with a rezoning or a condition to a special use permit, variance, site plan or subdivision plat

When the government requires an owner to suffer a permanent physical invasion of her property, however minor, it must provide just compensation. *Loretto Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). Likewise, when a regulation completely deprives an owner of “all economically beneficial use” of his property, the government must provide just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992) (referred to as “categorical” takings). As explained in *Lingle, supra*, outside these two relatively narrow categories (and the special context of land-use exactions), regulatory takings challenges are governed by the three-pronged takings analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

Takings Compared to Substantive Due Process Violations	
Takings	Substantive Due Process Violation
Governmental action that substantially advances a legitimate governmental interest, but deprives a landowner of all or substantially all economically beneficial use of the property, is a taking that requires just compensation.	Governmental action that does not substantially advance a legitimate governmental interest but, instead, arbitrarily and capriciously deprives a person of the use of her property is a substantive due process violation that may entitle the landowner to damages.

Generally, takings jurisprudence has not supplanted substantive due process and a governmental action that does not substantially advance a legitimate governmental interest is a substantive due process claim, not a takings claim. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005); *but see Acorn Land, LLC v. Baltimore County*, 2010 U.S. App. LEXIS 19582, 2010 WL 3736258 (4th Cir. 2010) (unpublished), where the court’s takings analysis considers the arbitrary and capricious actions of the county council in evaluating the factors for whether a regulatory taking has occurred.

Article I, Section 11 of the Virginia Constitution prohibits the government from taking or damaging private property for public uses without just compensation. Property is considered taken for constitutional purposes if the government’s action deprives the property of all economic use. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997). “Property is damaged for Virginia constitutional purposes when an appurtenant right connected with the property is directly and specially affected by a public use and that use inflicts a direct and special injury on the property which diminishes its value.” *Omni Homes*, 253 Va. at 72, 481 S.E.2d at 467; *City of Lynchburg v. Peters*, 156 Va. 40, 157 S.E. 769 (1931). Virginia law holds partial diminution in the value of property compensable only if it results from dislocation of a specific right contained in the property owner’s bundle of property rights. *Omni Homes, supra*; *Lambert v. City of Norfolk*, 108 Va. 259, 61 S.E. 776 (1908). A risk or an

The three-pronged takings analysis in *Penn Central* was explored in Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001), and her analysis was adopted by the majority in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002). Thus, a survey of the recent case law provides some useful benchmarks that may identify the parameters of the relevant analysis for each of the *Penn Central* factors. These factors are considered in terms of the "parcel as a whole." *Penn Central*, *supra*. A survey of the case law, particularly the more recent case law, reveals some prevailing themes which are analyzed in subsections 6-411, 6-412 and 6-413 below.

6-411 The regulation's economic effect on the landowner

A regulation's economic effect on the landowner under *Penn Central* is perhaps best understood in juxtaposition to the categorical taking under *Lucas*. If a regulation does not completely deprive the property of *all* economically beneficial use in order to establish a categorical taking under *Lucas*, how severe must the economic effect be in order to establish a taking under *Penn Central*? Based upon the cases below, the simple answer is that the diminution in value must be at least 90% and the residual uses must be little or none.

1. Diminution in value, standing alone, does not establish a taking

Diminution in value is measured by the difference between the fair market value of the land before and after the alleged taking. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997). Contingencies to development must be excluded from the calculation. *Omni Homes, supra* (improper to consider access to property that was not a right but a "hope" or a mere "expectation" in pre-purchase value of property).

Mere diminution in value does not establish a taking. "Not all regulatory deprivations amount to regulatory takings, and a regulatory deprivation that causes land to have 'less value' does not necessarily make it 'valueless.'" *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) (diminution in value was less than one half of one percent where industrial park's basis was \$407,000, comprised of the \$107,000 purchase price plus the "approximately \$300,000" spent in preparing the land for use as an industrial park, compared to the land's fair market value of land without sewer service of \$405,000; even if the diminution was calculated from the \$810,000 fair market value of the land with the sewer service provided, the reduction was still only 50 percent); *Henry v. Jefferson County Commission*, 673 F.3d 269 (4th Cir. 2011) (no diminution in value from approval of conditional use permit allowing less density than requested where, among other things, appellant and his family sold parcels for \$1.3 million); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991) (neither diminution in property value nor even a substantial reduction of the attractiveness of the property to potential purchasers establishes a taking); *Vacation Village, Inc. v. Clark County, Nevada*, 497 F.3d 902 (9th Cir. 2007) (economic impact of height and use restrictions on portion of owners' property near airport was minimal because the property in the RPZ accounted for only 5% of the owners' property, and that small portion could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot).

"Disparity in values between residential and commercial uses will always exist, yet the government is not required to maintain zoning so that a landowner may enjoy the most beneficial use of her property." *Reagan v. County of St. Louis*, 211 S.W.3d 104 (2006) (rezoning from industrial to residential zoning district imposed an insufficient economic impact to constitute a taking where the reduction in value of owner's land was \$65,300, or 30%) citing *Dorman v. Township of Clinton*, 269 Mich. App. 638 (2006); *K & K Const. v. Department of Environmental Quality*, 267 Mich. App. 523 (2005) (diminution in value of approximately 24 to 33 percent, though significant, "certainly does not weigh in favor of a finding" that the state's denial of a permit to fill in the wetland was a compensable regulatory taking); *FIC Homes of Blackstone, Inc. v. Conservation Commission*, 41 Mass. App. Ct. 681 (1996) ("A reduction in the number of houses that an owner may build is a diminution in value and not a taking"); *Carolinas Cement Co. v. Board of Zoning Appeals of Warren County*, 50 Va. Cir. 502 (1999) (BZA's denial of a variance to expand the non-conforming use of a roadway merely diminished the potential economic value of the owner's land; "such a reduction in economic value – even if dramatic – does not constitute a taking because the mere diminution in the value of the property does not constitute a taking"); *Carney v. Town of Framingham*, 2012 WL 1552964, at 2 (D. Mass. 2012) (town's limitation on plaintiff's ability to clear trees on a portion of his property under its wetlands regulations did not constitute a regulatory taking where plaintiff lived in the house he built on the property, and the plaintiff alleged

A taking was found in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), where the diminution in value was 99.5%. A taking was also found in *Matter of Friedenburg v. New York State Department of Environmental Conservation*, 2003 NY Slip Op 18838 (N.Y. App. Div. 11/24/2003), where there was a diminution in value of 92 to 95%, almost the entire parcel was designated as tidal wetlands, and it was likely that a number of recreational uses would be denied.

In *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997), Omni alleged that Prince William County's purchase of property adjoining its proposed subdivision constituted an uncompensated taking. In order for Omni to develop its property as it desired, its development plan included providing road, sewer and water access through and in conjunction with the adjoining property. Omni and the prior owner of the adjoining property had an informal understanding that if Omni developed its property as a subdivision (the property was already zoned R-10), the prior owner of the adjoining property would allow Omni to piggyback on its plans so that the road access and public sewer and water could run through the adjoining property to Omni's property. Omni obtained neither a written agreement pertaining to these understandings nor easements over the adjoining property. While Omni's preliminary plat was pending, the county purchased the adjoining property and Omni's desired plan for development was thwarted.

The *Omni Homes* court considered the first two prongs of the *Penn Central* analysis. In considering the economic impact of the county's action, the Court said that a taking may occur only if there is a *significant* diminution in the value of the land. Omni paid \$436,000 for the land. It was later valued at \$450,000. If the access through the adjoining property was included, the land was valued at \$1,200,000. After the county purchased the adjoining property, Omni's property was valued at \$360,000. The Court held that the economic impact of the county's action had to be measured by the difference between the land before and after the alleged take, and that the value of the land before the county's action was based on the value of the land itself, and did not include Omni's mere "contingency" that it might have access through the adjoining property. "To base a property value on a factor which is required to develop the property, but which never existed in fact or in law, distorts the fair market value analysis." *Omni Homes*, 253 Va. at 71, 481 S.E.2d at 466. The Court then concluded that the county's action did not result in a significant diminution in value because, at most, it resulted in a decrease of approximately \$100,000.

6-412 The extent to which the regulation interferes with reasonable investment-backed expectations

The degree of interference with *reasonable investment-backed expectations* is the second factor considered in determining whether a governmental regulation "goes too far." *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001) (O'Connor, concurring). The factors that shape an owner's reasonable expectations include the state of regulatory affairs at the time of acquisition, the purposes served, as well as the effects produced, by a particular regulation, and the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant. *Palazzolo*, *supra*. Despite *Penn Central*'s use of the term "investment-backed" expectations, a takings claim should not be defeated simply because of the lack of a personal financial investment by one who acquires the property after the adoption of the regulations, such as a donee, heir, or devisee. *Palazzolo*, *supra*. Instead, the analysis focuses on those circumstances which are probative of what fairness requires in a given case. *Palazzolo*, *supra*.

In order to understand what "reasonable investment-backed expectations" may be, one must go well beyond what the owner expects to do with the property.

1. Reasonable investment-backed expectations are not necessarily frustrated when land use regulations and policies are amended and become more restrictive

Reasonable investment-backed expectations are subject to the government's power to regulate for the public interest. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997). Investment-backed expectations are not frustrated when an owner buys a piece of land expecting to develop it in a certain manner and the locality subsequently enacts a zoning regulation seriously restricting those plans. See *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138 (1980) (holding that regulation did not diminish a property owner's reasonable

the limits of the ordinance. In *G.W.G. Development Corp. v. City of Norfolk*, 13 Va. Cir. 274 (1988), the owners alleged that a zoning amendment constituted an illegal downzoning, and thus a taking of their property without compensation, because it not only conflicted with the city's comprehensive plan but also because there were no changed circumstances that might justify the downzoning. The court stated that no facts were alleged to show that an illegal downzoning had occurred and that no facts showed a conflict with the city's comprehensive plan. The court held that zoning "restrictions as to density of units per acre" were not a taking of property without just compensation. In *Rodehorst Brothers v. City of Norfolk Board of Adjustment*, 287 Neb. 779, 798, 844 N.W.2d 755, 770 (2014), the plaintiffs did not have a reasonable investment-backed expectation to continue the use of its nonconforming quadplex indefinitely where the use was discontinued for more than one year, where the law that terminated nonconforming status if the nonconforming use was discontinued for more than one year was in place when the plaintiffs bought the property. The only reasonable investment-backed expectation was that the quadplex could continue indefinitely if the use was not discontinued for more than one year, and that expectation was met.

Some state courts will dismiss an owner's claim of frustrated reasonable investment-backed expectations if they owned the property for an extended period of time before the locality adopted the more restrictive regulations. See, e.g., *W.R. Grace & Co. v. Cambridge City Council*, 56 Mass. App. Ct. 559 (2002). However, two commentators have observed that there does not appear to be any basis in federal law for the "delay building and you lose your expectations" rule. Breemer and Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. Rev. 101 (2005).

2. Reasonable investment-backed expectations are not necessarily frustrated when land use regulations are not amended or land use applications are denied that would enhance the value of the property

The government is under no obligation to *enhance* the value of an owner's property through its regulations or land use decisions. Thus, an owner's reasonable investment-backed expectations are not frustrated when the government merely refuses to enhance the value of real property. *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) (reversing grant of summary judgment to plaintiff industrial park and dismissing claim; town's refusal to install sewer collector lines, even under court order, was not a taking because nothing prevented the owner from installing the lines itself and seeking recovery of the costs from the town); *Henry v. Jefferson County Commission*, 637 F.3d 269 (4th Cir. 2011) (where appellant had received a significant return on his and his family's investment even though the planning commission approved a conditional use permit for less density than the appellant requested, the court saw "no warrant for requiring the Planning Commission to exercise its discretion so as to most profit" the appellant). The *Henry* court added that the planning commission's approval of a conditional use permit at a lesser density than what the appellant requested lacked the characteristics of a true regulatory taking, stating:

The Planning Commission's decision, based as it was on density and other traditional zoning concerns, did nothing like [where the government directly appropriates private property or ousts the owner]. The Planning Commission was legitimately concerned about the project's density compared to that of nearby parcels, its potential impact on a stream, and its possible harms to an adjacent park. In response to these concerns, the Planning Commission simply 'adjust[ed] the benefits and burdens of economic life to promote the common good' in a way that incidentally impact Henry's ability to maximize the profit from the development of his land.

Henry, 637 F.3d at 277.

In *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587 (2007), the appellate court affirmed a jury verdict in favor of the city, holding that the city's denial of the owner's application to rezone property to more than double the permitted density did not frustrate the owner's reasonable investment-backed expectations where the land had been zoned for 1-acre minimum lots for more than 30 years before the owner purchased the property. In *Martin v. Board of Supervisors of Hanover County*, 57 Va. Cir. 546 (2001), the board of supervisors' denial of a rezoning of a portion of a 31.3 acre tract from A-1 to AR-1 to allow an approximately 8.248 acre portion to be divided into 6 lots was not a taking where, under its present zoning, the 31.3 acre tract could be developed into three 10-acre lots. The court said

landowner about the property before it was purchased and how it reacted to the owner's plans during and immediately after the land use application process; (2) whether the proposed land use is consistent with the general zoning and planning scheme; (3) whether the projected rate of growth for the subject locality suggests that development will be possible; (4) whether the government allowed the landowner to take concrete steps toward the desired use before stepping in and prohibiting it; and (5) whether the property owner is permitted to continue an existing, profitable use of property.

Breemer and Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. Rev. 101 (2005).

One who buys with knowledge of a restraint must assume the risk of economic loss. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997); see *LaSalle National Bank v. City of Highland Park*, 344 Ill. App. 3d 259, 799 N.E.2d 781 (Ill. App. 2003) ("while knowledge of a regulation at the time of ownership is not an absolute bar to a zoning challenge, it is proper to consider that the zoning restriction existed at the time of the plaintiff's acquisition in determining whether the plaintiff's investment-backed expectations have been met").

In *Omni Homes, Inc.*, *supra*, Omni alleged that Prince William County's purchase of property adjoining its proposed subdivision constituted an uncompensated taking. In order for Omni to develop its property as it desired, its development plan included providing road, sewer and water access through and in conjunction with the adjoining property. Omni and the prior owner of the adjoining property had an informal understanding that if Omni developed its property as a subdivision (the property was already zoned R-10), the prior owner of the adjoining property would allow Omni to piggyback on its plans so that the road access and public sewer and water could run through the adjoining property to Omni's property. Omni obtained neither a written agreement pertaining to these understandings nor easements over the adjoining property. While Omni's preliminary plat was pending, the county purchased the adjoining property and Omni's desired plan for development was thwarted.

In considering whether Omni's reasonable investment-backed expectations were frustrated by the county's action, the Virginia Supreme Court first noted that the primary purpose of this factor was to ensure that owners seeking compensation for an alleged taking bought their property in reliance on a state of affairs that did not include the challenged governmental action. *Omni Homes, supra*. The Court said that the state of affairs relative to Omni's development of its property as it desired always included the requirement that it have adequate road and utility access. However, the Court said that securing this access was not an expectation under the state of affairs, but a *risk*, and Omni's mere hope of its informal understanding with the prior owner of the adjoining land could not transform that risk into an investment-backed expectation. The Court concluded that the state of affairs existing when Omni purchased its property included the risk of not securing adequate road and utility access, and that this risk was not imposed by the county.

In *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357, (2006), the Virginia Supreme Court held that the board's denial of a preliminary subdivision plat because the developer failed to provide a letter from a utility that water and sewer would be provided as required by the subdivision ordinance was not an unconstitutional taking. The Court said that there was no taking because the developer did not allege that it lost all economic use of its property, and from the time the developer acquired an interest in the property to the present, the property was subject to the utility letter requirement:

To establish an unconstitutional taking, a landowner must suffer either a categorical or a regulatory taking. . . . A regulatory taking deprives owners of less than all economic value, but interferes with their "investment-backed expectations;" in other words, owners bought the property "in reliance on a state of affairs that did not include the challenged regulatory regime." *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 68, 481 S.E.2d 460, 465 (1997) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994)). Greengael did not allege that it lost all economic use of its Property, and its pleadings show that the Property was zoned R-4 at the time Ashmeade Company, L.L.C., purchased it and when Greengael became the contract

2004 UT App 135 (2004) (denial of a conditional use permit to operate a gravel permit may be a taking if the effect of denying the permit is to leave the property economically idle).

“A party may not undertake a calculated business risk and then seek reimbursement from the Government when the party’s gamble does not result in its favor.” *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 69, 481 S.E.2d 460, 465 (1997) quoting *Atlas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704 (1995). Thus, hope or optimism that a landowner could secure the required access to its property cannot transform a risk of development into an investment-backed expectation supported by the state of regulatory affairs existing at the time of purchase. *Omni Homes, supra* (landowner’s knowledge that the requirement of adequate road and utility access was not an expectation but a risk the landowner was aware of and accepted when it purchased the property; there was no assurance that access would be available); *but see Deyeso v. City of Alamo Heights*, 594 S.W.2d 123 (1979) (owner’s hope to receive variances similar to those granted in favor of a previous owner of the property or neighboring property owners qualifies, in and of itself, as a distinct investment-backed expectation).

However, when a landowner obtains a permit and then the locality thereafter reverses its position, its reasonable investment-backed expectations will be found to have been frustrated. In *Lockaway Storage v. County of Alameda*, 216 Cal. App. 4th 161, 185-186 (2013), the court found that a taking had occurred where the plaintiff purchased the property only after the county expressly confirmed that it could rely on a conditional use permit to develop a storage facility, the county worked closely with the plaintiff for a few years, plaintiff spent significant resources committing the property to a storage facility use, and then the county changed its position based on a voter-approved growth control measure that also generally prohibited storage facilities in the area and shut down the use) (under Virginia law, this case would be approached from the vested rights issue).

6-413 The character of the government regulation

In her concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 634, 121 S. Ct. 2448, 2466 (2001), Justice O’Connor explained the *character of the government regulation* prong as follows:

The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. [citation omitted] (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner’s use of the property”).

“[G]arden-variety zoning based on the need to control growth, preserve small-town atmosphere, and maintain a low tax rate” is a legitimate use of the zoning power. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776 (1995), cited in *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621, 2007 WL 4322321 (4th Cir. 2007) (unpublished) (affirming summary judgment for village).

An amendment to a comprehensive plan does not significantly diminish an owner’s investment-backed expectations where the owner was able to develop its property under the existing zoning, which was unchanged. *AEL Realty Holdings, Inc. v. Board of Representatives of the City of Stamford*, 82 Conn. App. 613 (2004). Similarly, an announcement by a state agency that the owner’s property was one of three sites for a proposed use was not a taking because the announcement was not a physical invasion of the property; it was merely a first step towards what might eventually result in a physical taking of the property, and the announcement was quickly withdrawn. *Santini v. Connecticut Hazardous Waste*, 342 F.3d 118 (2^d Cir. 2003).

Showing possible future street alignments on various public documents such as a comprehensive plan is not a taking, provided that the government does not correspondingly restrict the use of the affected lands. *See, e.g., Auerbach v. Department of Transportation for the State of Florida*, 545 So. 2d 514 (1989) (state department of transportation’s administrative planning actions, which of necessity required public hearings, did not constitute a taking sufficient to enable the property owner to maintain an inverse condemnation action); *City of Chicago v. Loitz*, 61 Ill.2d 92 (1975) (the general rule followed in Illinois and most other jurisdictions is that mere planning or plotting in anticipation of a public improvement does not constitute a taking or damaging of the property affected).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992). *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002). In *Tahoe-Sierra*, the Tahoe Regional Planning Agency decided that a comprehensive land-use plan was needed to address environmental concerns stemming from development around Lake Tahoe. While formulating a comprehensive plan, the Planning Agency enacted two moratoria on development in order to prevent further construction until the Planning Agency could study the impact of development on Lake Tahoe and design a plan that would implement “environmentally sound growth.” The moratoria lasted for a total of 32 months. The landowners affected by the moratoria claimed that the temporary prohibition on development amounted to a categorical taking, but the Supreme Court disagreed and held that a temporary taking had to be analyzed under the *Penn Central* analysis, not the categorical taking rule in *Lucas*. The focus is not exclusively on the property during the period during which the owner is unable to develop it because to do so would ignore the United States Supreme Court’s admonition in *Penn Central* to focus on the parcel as a whole. *Tahoe-Sierra*, *supra* (when considering the “parcel as a whole,” both the geographic and temporal aspects of the restriction must be considered).

There are two types of temporary takings: (1) retrospective temporary takings; and (2) prospective temporary takings. A retrospective temporary taking occurs when a new regulation is enacted and is then repealed when it is determined to be a taking. When the government repeals the regulation, it must compensate the landowner for the time the regulation was in effect. An example of this type of temporary taking is *First English*, where the United States Supreme Court found a temporary taking where a Los Angeles County regulation prevented a church from rebuilding its recreational campground after a flood destroyed it. The regulation denied all use of the property for years and the Court held that “invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.” When *First English* was remanded to the California Court of Appeals, that court held that the county was not required to pay compensation because the regulation was adopted for reasons of public safety. *For more on the takings issue in the context of floodplain regulations*, see Mandelker, *Land Use Law*, 5th ed., §§ 12.08 and 12.09 (2003). The value of the temporary taking is the difference between the fair market value of the property with and without the regulation multiplied by a rate of return for the period of time the property was taken.

A prospective temporary regulation is either explicitly temporary or is in the form of governmental delay during the development process. When conducting a *Penn Central* analysis for a prospective temporary taking, duration should be considered as part of the analysis and compensation is necessary only if a taking results from that analysis.

A temporary taking also may be claimed to have occurred either as a result of the locality’s adoption of unlawful regulations or as a result of an unlawful land use decision. However, the mere denial of a particular development application, whose effect is to merely fail to enhance the value of real property, is not compensable. *Front Royal*, *supra*. Indeed, most courts have concluded that a temporary taking does not occur when a land use regulation or decision is held by a court to be unconstitutional or invalid, and the landowner is unable to make use of the land during the time the court action is pending. Mandelker, *Land Use Law*, 5th ed., § 2.22 (2003). This conclusion is consistent with the distinction between substantive due process and takings jurisprudence discussed in section 6-400. Governmental action that does not substantially advance a legitimate governmental interest (*i.e.*, is unlawful) may create a substantive due process claim, but not a takings claim.

Unreasonable delays in the land use approval process may constitute a temporary taking if the delay is “extraordinary.” There is no bright-line test to determine whether a delay is extraordinary, and the determination is made on a case-by-case basis. Mandelker, *Land Use Law*, 5th ed., § 2.22 (2003). Delays of two to seven years have been held not to be extraordinary. *Sunrise Corporation v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005) (nearly seven year delay from date of city’s decision (held to be lawful) on its application until resolution by appellate court was not extraordinary where application made it through the city review in three to four months, and there was no evidence that the city could control or attempted to delay the judicial process); *Philric Associates v. South Portland*, 595 A.2d 1061 (Me. 1991) (two years to consider subdivision application); *1902 Atlantic Limited v. United States*, 26 Cl. Ct. 575 (1992) (five year delay held to be cost of doing business in regulated society). In most cases, prolonged governmental decision-making that temporarily deprives a landowner of the use of its property has been held not to be an extraordinary delay. Mandelker, *Land Use Law*, 5th ed., § 2.22 (2003).

acquired title, stating that “a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law [*i.e.*, part of the bundle of rights acquired with the title to the property] by mere virtue of the passage of title.” *Palazzolo*, 533 U.S. at 629-30, 121 S. Ct. at 2464. In *Bell*, after the city had adopted an ordinance implementing the Coastal Primary Sand Dune Protection Act, the owners acquired two lots from the dissolved corporation in which they had a 50% interest. Although the Virginia Supreme Court held that the Act precluded the owners from developing their lots, that result is less certain after *Palazzolo*, which was decided three years after *Bell*.

6-440 Exactions: ensuring that proffers and other conditions are reasonable conditions¹

Justice Roberts, writing for the majority in *Koontz v. St. Johns River Water Management District*, 570 U.S. ___, 133 S. Ct. 2586, 2595 (2013) stated:

[I]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and [the Court has] long sustained such regulations against constitutional attack and conditions are permissible so long as there is a ‘nexus’ and ‘rough proportionality’ between the property that the government demands and the social costs [*i.e.*, impacts] of the applicant’s proposal.

Stated another way, “the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development; but it may not leverage its legitimate interests in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” *Koontz*, 570 U.S. at ___, 133 S. Ct. at 2595.

The statutory framework for proffers in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 requires that proffers be *reasonable conditions*, and sections 15.2-2297 and 15.2-2298 also expressly require that the *rezoning give rise to the need for the conditions*, and that the proffers have a *reasonable relation* to the rezoning. There is little Virginia case law shedding light on what each of these provisions means. However, these provisions have parallels in the body of Takings Clause jurisprudence pertaining to *exactions* which requires that conditions imposed in conjunction with land use approvals: (1) have an *essential nexus* that is related to the impact of the proposed development; and (2) be *roughly proportional* to the extent of the impact. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) (essential nexus); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) (rough proportionality). The exactions analysis applies to all types of conditions.

The table below shows the relationship between the statutory requirements for proffers in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 and the Takings Clause principles related to exactions.

The Relationship Between State Law Requirements for Proffers and the Takings Clause Principles Related to All Conditions	
State Law Requirements Applicable to Proffers	Parallel Constitutional Principles Related to All Conditions
Proffers must be <i>reasonable conditions</i> that are in addition to the applicable zoning regulations	Conditions must be <i>constitutional conditions</i> which means that there must be an essential nexus and rough proportionality between the conditions and the impacts they seek to address
The rezoning itself must <i>give rise to the need</i> for the proffers	A condition must have an <i>essential nexus</i> to the impact it seeks to address
Proffers must have a <i>reasonable relation</i> to the rezoning	A condition must have <i>rough proportionality</i> to the impact it seeks to address

Although the essential nexus and rough proportionality tests provide a helpful guide for evaluating whether any condition (hereinafter in section 6-440, all references to *conditions* include *proffers*) is lawful under State law, whether a

¹ Virginia Code § 15.2-2303.4 establishes standards of reasonableness for proffers pertaining to new residential developments and new residential uses. Sections 6-440, 6-441, 6-442, and 6-443 apply to proffers that pertain to other types of rezonings, *e.g.*, those that pertain to commercial rezonings. See Chapter 11 for a discussion of Virginia Code § 15.2-2303.4.

Comparison of the Invalid Condition in <i>Nollan</i> to Appropriate Conditions Having an Essential Nexus to the Impact Sought to be Addressed		
Impacts Identified by the Commission Resulting from the New, Larger House	Condition Imposed by the Commission, Lacking a Nexus to the Identified Impacts	Conditions that would have Protected the Public's Ability to see the Beach
The house would increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would prevent the public psychologically from realizing that a stretch of coastline exists nearby that they have every right to visit. The house would increase private use of the shorefront, and this increase, along with neighboring development, would cumulatively burden the public's ability to traverse to and along the shorefront.	Dedicate a public easement laterally across the beachfront of their property.	• A height limitation on the house. • A width restriction on the house. • A ban on fences on the property. • Provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.

What resources may a locality rely on to establish a nexus? They may be as broad as State statutes or as narrow as site-specific studies, including the following:

- The comprehensive plan.
- The six-year secondary road plan.
- The capital improvements program.
- Capital needs assessments.
- Local regulations, such as stormwater regulations.
- Traffic impact studies and analyses, including project-specific analyses.
- Environmental assessments of the site.
- Impacts identified by the locality's planning or other staff and by members of the public.

However, it is not enough for any of the foregoing to merely articulate a public purpose or public need so as to justify a condition. If challenged in a lawsuit, the locality has the burden to establish an essential nexus by identifying the policy, rule, specific impact or some other identified legitimate public purpose creating the need for a condition, and ensuring that the condition directly addresses it. This link is vital, and should be made in the staff report or at least be part of the record for the application.

6-442 Ensuring that conditions have a reasonable relation to the application by establishing that they have rough proportionality to the impacts to be addressed

As summarized in section 6-441, in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), the city conditioned the property owner's proposed reconstruction and expansion of her commercial building on her dedicating land for a bicycle path and a greenway within the floodplain, and the United State Supreme Court found that the city had established an essential nexus between the conditions and the impacts. The Court continued its constitutional analysis to evaluate the nature and extent to which the conditions addressed the identified impacts. In settling upon an appropriate standard, the Court examined the body of state court decisions and settled on the *rough*

address. The policy used a methodology designed to calculate the average impact of new residential development on the county's cost of providing new capital facilities such as schools, roads, libraries and parks. The policy also placed a cap on the maximum per unit cash proffer the county would accept. The district court held that the county's policy survived a facial attack on its constitutionality because there was "no reason apparent on the face of the policy why any proffer could not be determined in an amount roughly proportional to the impact of the proposed development." *National Association of Home Builders*, 907 F. Supp. at 169. On appeal, the home builders contended that the rough proportionality test required the county to make more stringent individualized determinations before calculating a cash proffer amount. The court of appeals rejected this argument because such a requirement approached "exact proportionality," which was not required under the Constitution.

- *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984) (special exception conditions). This case precedes *Dolan* by 10 years, pertains to a special exception, not a rezoning, and it did not expressly consider the issue as an exaction issue. However, the Virginia Supreme Court's analysis is illuminating. The applicants sought a special exception to expand their plant nursery. One of the conditions of approval required them to dedicate 100 feet of right-of-way from the centerline of Route 7 for a third eastbound lane and a standard service drive, and to construct those improvements when the site redeveloped. The evidence established that Route 7 handled approximately 35,000 vehicles per day, while the plant nursery average approximately 25 customers per day. Assuming that the county had the power to impose the conditions, the Court concluded that the county's condition was not imposed as the result of any problem generated by the Cupp property, but because of general conditions prevailing on Route 7 and, therefore, the need for the condition was not substantially generated by the proposed project. *Cupp*, 227 Va. at 594, 318 S.E.2d at 414.

6-443 A locality may always deny an application on legitimate grounds, but that may not insulate it from a constitutional challenge

In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 133 S. Ct. 2586 (2013), the issue was whether a water management district acted unconstitutionally under the Takings Clause when it *denied* a permit, where the applicant refused to consent to the district's proposed conditions of approval.²

Coy Koontz was the owner of 14.9 acres of land in Florida at the intersection of two highways. He desired to develop his property and was required to obtain two water resources related permits from the water management district. To address impacts to water resources, the owner proposed to develop only the northern 3.7 acres and to install a dry-bed pond and gradually slope the land to the elevation of the southern portion, and offered to place the southern 11.2 acres in a conservation easement dedicated to the district. The district said it would approve the permits only if the owner either: (1) would develop only 1 acre, replace the dry-bed pond with a subsurface stormwater management system under the building, replace the slope with retaining walls, and dedicate a conservation easement over the remaining 13.9 acres to the district; or (2) develop the 3.7 acres as proposed with the dry-bed pond, the slope and the 11.2-acre conservation easement, and hire contractors to make \$150,000 worth of improvements to district-owned land several miles away. The owner refused to accept either of the district's demands and the district denied the permits because the owner refused to accede to either of the demands.³ The

² *Koontz* decided two key issues: (1) it extended the exactions analysis of *Nollan* and *Dolan* to monetary conditions; and (2) it extended the application of the exactions analysis to those cases when a public body denies a permit and the applicant refused to accede to conditions lacking an essential nexus and rough proportionality. The Court concluded its opinion stating that it expressed no view on the merits of the petitioner's claim that the water management district's actions failed to satisfy the *essential nexus* and *rough proportionality* tests under *Nollan* and *Dolan*, and remanded the case to the State court.

³ This summary is based on the facts summarized in the United States Supreme Court's majority opinion. The facts summarized in the dissenting opinion, as well as in the Florida Supreme Court's summary of the facts at 77 So. 3d 8 (2011), paint a different picture and should be read for a broader understanding of the case. The Florida Supreme Court's summary includes the following: "Koontz agreed to deed his excess property into conservation status but refused St. Johns' demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. Consequently, St. Johns denied his permit applications. In its orders denying the permits, [St. Johns] said that Mr. Koontz's proposed development would adversely impact Riparian Habitat Protection Zone ["RHPZ"] fish and wildlife, and that the purpose of the mitigation was to offset that impact."

whether state or federal – on which the landowner relies.” *Koontz*, 570 U.S. at ___, 133 S. Ct. at 2597. The State remedy in Virginia is Virginia Code § 15.2-2208.1, effective July 1, 2014. *See section 10-540 for a discussion of Virginia Code § 15.2-2208.1.*

Can Cash Proffer Policies Satisfy <i>Nollan</i> , <i>Dolan</i> and <i>Koontz</i> ?	
•	<i>Nexus</i> . Cash proffer policies may satisfy the essential nexus test in <i>Nollan</i> if the policy is part of the comprehensive plan, the need for capital improvements are part of the capital improvement program, and the impacts resulting from new development are based on fiscal impact reports, studies and analyses.
•	<i>Rough proportionality</i> . Cash proffer policies may satisfy the rough proportionality test in <i>Dolan</i> if, for example, the policy has established the fiscal impact that each new dwelling unit has on public facilities, provided that the policy provides for an <i>individualized assessment</i> by, for example, allowing for different per unit cash proffer amounts depending on the type of dwelling unit (single family detached, townhouse, multi-family, senior) and by allowing credits and offsets for specific reasons.

6-500 The establishment and free exercise clauses

The First Amendment to the United States Constitution mandates that “Congress shall make no law respecting an establishment of Religion or prohibiting the free exercise thereof . . .” Article I, Section 16 of the Virginia Constitution contains a similar prohibition. *See also Virginia Code §§ 17.1-406 and 57.2-02* (restating an individual’s freedom of religion and prohibiting a locality from unduly burdening that right). The protections under the Virginia Constitution are parallel to those of the United States Constitution. *Glassman v. Arlington County*, 628 F.3d 140 (4th Cir. 2010); *see College Building Authority v. Lynn*, 260 Va. 608, 538 S.E.2d 682 (2000).

The *establishment* and *free exercise* clauses each present a separate framework for analyzing religious freedom issues. These clauses need to be considered when zoning regulations are adopted and applied to religious institutions and religious activities.

The Establishment and Free Exercise Clauses		
Constitutional Principle	Rights Protected	How to Assure Compliance
Establishment clause	Regulation may not prefer one religious denomination over another, or sponsor or interfere in a religion	Confirm that the regulations applicable to religious institutions and activities pertain to the purposes of zoning and that they regulate secular land use issues rather than religion Confirm that the regulations treat religious and nonreligious assemblies and institutions equally, and do not discriminate against assemblies and institutions on the basis of religion
Free exercise clause	Regulation may not burden the free exercise of religion by prohibiting all religious uses in the locality, preventing the use of certain property having particular religious significance, or curtailing particular uses having special religious significance	Confirm that the regulations applicable to religious institutions and activities pertain to the purposes of zoning and that they regulate secular land use issues rather than religion. Confirm that the regulations do not make religious exercise effectively impracticable; and do not totally exclude religious assemblies, or unreasonably limit religious assemblies

Every land use regulation or decision that may affect the establishment or free exercise of religion must also be considered in light of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). If applicable, RLUIPA imposes more stringent standards on the permissible regulation of religious institutions by localities.

6-510 The establishment clause

The establishment clause was designed to stop the government from asserting a preference for one religious

The Free Speech Clause		
Constitutional Principle	Rights Protected	How to Ensure Compliance
Free speech	Regulations pertaining to signs may regulate the time, place and manner in which a sign is established, but may not regulate the content of the sign	Confirm that sign regulations are content neutral by imposing only reasonable time, place and manner restrictions that: (1) further a substantial governmental interest (<i>i.e.</i> , aesthetics, safety); (2) are narrowly tailored to further the interest; and (3) leave open ample alternative channels of communication
Free expression	Regulations pertaining to adult-oriented businesses may regulate the time, place and manner of the activities, but may not regulate the content of the activities that are considered expression, or the content of materials other than obscene materials and expression, which are not entitled to constitutional protection	Confirm that regulations are content neutral time (<i>e.g.</i> , hours of operation), place (<i>e.g.</i> , certain zoning districts; spatial requirements) and manner (<i>e.g.</i> , licensing requirements)

6-610 Signs

Signs take up space, obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2231 (2015), quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994). Localities may regulate signs to improve traffic safety and to improve their aesthetics. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981) (traffic safety); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118 (1984) (aesthetics).

With respect to aesthetics, localities “have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.” *Taxpayers for Vincent*, *supra*. As explained by Edward T. McMahon, “More enlightened communities recognize that community appearance is important. . . . [C]ontrolling outdoor signs is probably the most important step a community can take to make an immediate visible improvement in its physical environment. . . . Almost all of America’s premier tourist destinations have strong sign ordinances because they understand that attractive communities attract more business than ugly ones.” Edward T. McMahon, *Responsible Tourism: How to Preserve the Goose that Lays the Golden Egg, Virginia Town & City*, May 2015.

6-611 The First Amendment’s Free Speech Clause and the important terms and concepts that apply to the governmental regulation of signs

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The federal courts have identified two key functions of the First Amendment’s Free Speech Clause: (1) to preserve an *uninhibited marketplace of ideas* in which truth will ultimately prevail; and (2) to ensure that the government has *not regulated speech based on hostility – or favoritism –* towards the underlying message expressed. Under the First Amendment’s Free Speech Clause, a locality “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286 (1972).

The federal courts also have created concepts that apply to the analysis of the government’s regulation of signs and the application of those concepts guides how the government may regulate signs, and how it must justify its regulations. The most relevant concepts pertain to: (1) whether the regulations apply to *commercial speech* or *noncommercial speech*; (2) whether the regulations apply depending on the content of the speech or some other criterion

discussion of an entire topic.’ [citation omitted] Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. [citation omitted].” *Reed*, 135 S. Ct. at 2230 (under the town of Gilbert’s sign regulations, ideological signs were given more favorable treatment than political signs, and both were given more favorable treatment than temporary directional signs).

6-613 *Reed v. Town of Gilbert*

In *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015), the town’s sign ordinance regulated the duration and size of a number of noncommercial signs differently depending on their content. For example, temporary directional signs for a religious event could be up to 4 square feet in size and be posted no more than 12 hours before the event or 1 hour after the event; an ideological sign could be up to 20 square feet in size and be posted for an unlimited duration. When a small church was cited for zoning violations because its signs were being posted more than 12 hours before church events, it challenged the town’s zoning regulations, arguing that the town’s sign regulations violated the First Amendment.

The issue in *Reed* was whether the town’s sign ordinance was invalid as content based because it created categories of noncommercial signs that were based on the message of the sign. The Court held that the town’s sign regulations were content based on their face because, for example, temporary directional signs were defined on the basis of whether a sign conveyed the message of directing the public to church or some other “qualifying event”; ideological signs were defined on the basis of whether the signs “communicat[e] a message or ideas” that did not fit within the sign regulations’ other categories. Because the town’s sign regulations were content based, they were “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226. The town failed to prove that its regulations were either narrowly tailored or served a *compelling* governmental interest.

Content based regulations must satisfy *strict scrutiny* by the courts, and will be upheld only if the regulations are *narrowly tailored* to serve *compelling governmental interests*. A *compelling governmental interest* is an interest of “the highest order.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566, 113 S. Ct. 2217, 2244 (1993) (regarding the free exercise of religion). Traditional examples of compelling governmental interests include the allocation and collection of taxes, maintaining the integrity of the social security system, eradicating racial discrimination in education, the operation of military conscription laws, enforcing child labor laws, and protecting public health and safety. *Testimony of Steven K. Green, Legal Director, Americans United for Separation of Church and State, before the House Committee on the Judiciary, Subcommittee on the Constitution, July 14, 1998*. Promoting traffic safety and aesthetics are generally considered to be *substantial*, but not *compelling*, governmental interests. *Brown*, 706 F.3d at 305.

In *Reed*, the town relied on aesthetics and traffic safety as justifications for its regulations. As for aesthetics, the Court said that temporary directional signs were “no greater an eyesore” than ideological and political signs, yet the town allowed unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller, temporary directional signs. The Court said, “The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.” *Reed*, 135 S. Ct. at 2231. As for traffic safety, the Court concluded that the town had failed to show that limiting temporary directional signs was necessary to eliminate threats to traffic safety, but limiting other types of signs was not. The Court observed that a “sharply worded” directional sign seemed more likely to distract a driver than a sign directing traffic to a church meeting. *Reed*, 135 S. Ct. at 2232.

The majority opinion in *Reed* indicated that it may find certain content based sign distinctions to satisfy strict scrutiny:

[The] presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers – such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses – well might survive strict scrutiny.

Governmental Regulation of Signs After <i>Reed</i>				
Type of speech	Regulation type	Examples	When justified	Justifications
Commercial (e.g., advertising)	Content based ¹	"... a sign that advertises the sale, lease, rental, or development of the lot on which the sign is located ..."	Substantial governmental interest	Preserve aesthetics; promote traffic safety; protect property values
	Content neutral	"... a sign that advertises an upcoming auction ..." "... a sign located on a lot that is for sale, lease, rental, or development ..." "... a permanent sign that is supported from the ground and not attached to another structure ..." "... the sign area shall not exceed 32 square feet ..." "... the sign height shall not exceed 16 feet above the ground ..." "... a sign with flashing lights or moving parts is prohibited ..."		
Noncommercial (e.g., protest signs, political signs, ideological signs)	Content based	"... a sign that advocates for a candidate for elected office or for an issue to be voted on in an upcoming election ..." "... a sign that protests the action of the county government or any elected official ..."	Compelling governmental interest	Protect public safety by guiding vehicular and pedestrian traffic; identifying hazards
	Content neutral	"... a sign containing copy this is exclusively noncommercial speech ..." "... a permanent sign that is supported from the ground and not attached to another structure ..." "... the sign area shall not exceed 32 square feet ..." "... the sign height shall not exceed 16 feet above the ground ..." "... a sign with flashing lights or moving parts is prohibited ..."	Substantial governmental interest	Preserve aesthetics; promote traffic safety; protect property values

¹Unlike noncommercial signs, under the current law, content based regulations that apply to commercial signs may be justified by a substantial, rather than a compelling, governmental interest.

6-615 How content neutral commercial or noncommercial sign regulations are evaluated

Whether content neutral sign regulations applicable to commercial or noncommercial signs survive a First Amendment challenge depends on whether they:

- *Further a substantial governmental interest:* Whether the government has a *substantial* interest in regulating the speech. A locality has a substantial governmental interest in preserving its aesthetic character and promoting traffic safety. *Brown v. Town of Cary*, 706 F.3d 294, 305 (4th Cir. 2013); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001).
- *Narrowly tailored to further that interest:* Whether the regulation is narrowly tailored to serve that compelling governmental interest. A regulation is narrowly tailored if the governmental interest promoted would be achieved less effectively absent the regulation. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989), cited in *American Legion Post 7* (preserving aesthetic character would be undermined by exempting flags or noncommercial entities from regulations).
- *Leave open ample alternative channels of communication:* Whether a regulation leaves open ample alternative channels of communication. Whether this factor is satisfied depends on the scope of the regulation and the nature and location of the sign. See *American Legion Post 7*, comparing the permissible regulation of signs on public property, on private property, and residential private property.

Numerous studies have identified increased crime as a secondary effect of adult-oriented businesses, and these studies have provided the justification for regulating these businesses. Adult-oriented businesses are typically regulated through content neutral zoning and licensing regulations. A content neutral regulation is one whose “justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside the adult movie theaters . . .” *Boos v. Barry*, 485 U.S. 312, 320, 108 S. Ct. 1157, 1163 (1988). For example, an ordinance that prohibits public nudity regulates conduct alone; it does not target nudity that contains a particular message (*e.g.*, an erotic message). *City of Erie, supra*.

There is no doubt that a content neutral regulation will have an incidental impact on expression that is protected by the First Amendment. *See, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176 (1981). Because of this impact, a regulation must satisfy the four-part test announced in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968) in order to comply with the First Amendment: (1) the regulation must be within the constitutional power of the government; (2) the regulation must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

Generally, the locality’s power to control crime and to create a safe, attractive and harmonious community supports the first three prongs of this test. The fourth prong requires that the locality address the problem through *time, place, and manner* regulations. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). *Time* regulations limit the hours of operation. *Place* regulations restrict the use to certain zoning districts and typically require that the adult-oriented business be separated by a specified distance from other sexually oriented businesses and from delineated protected uses such as residences, churches, and schools. *Manner* regulations impose licensing requirements and restrictions on how the business may be conducted (*e.g.*, if video viewing booths are allowed, they must have at least one open side which is visible from the manager’s office).

6-630 Noise (loud music)

Music, as a form of expression and communication, is protected under the First Amendment. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989). Even in a public forum (*e.g.*, public streets, sidewalks and parks), the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information.

In *Hellbender, Inc. v. Town of Boone*, 2013 WL 1349286 (W.D.N.C. 2013), the plaintiffs were downtown food and beverage establishments that also were venues for live and recorded music. They challenged the town’s noise regulations, contending that the decibel levels set in the regulations were chosen “to silence the ability of bar and restaurant owners within the Town of Boone to play live and recorded music during their peak hours.”

The issue for the district court was whether the town’s noise regulations, which imposed limits on the permissible decibel levels produced by live and recorded music in various zoning districts depending on the day of the week and the time of day, violated the First Amendment. Because the noise regulations applied to particular zoning districts within the town, including those parts of the town that were considered traditional public forums and where the plaintiffs were located, the court analyzed the ordinance as though it applied in a traditional public forum, which imposes the most exacting standard on the analysis of the ordinance.

The court first concluded that the ordinance was a content neutral “time, place or manner” regulation because it can be justified without reference to the content of, in this case, the music. The court rejected the plaintiffs’ argument that the noise regulations were content based because they provided exemptions for certain sporting events and non-recurring community events. The court also rejected the plaintiffs’ argument that by singling out music, the town’s regulations were content based because the town was not restricting any particular viewpoint. The court concluded that the regulations furthered a substantial governmental interest because controlling noise levels in order to retain the character of a particular area and its more sedate activities, and to avoid the undue intrusion of noise into residential areas, was a legitimate justification or governmental interest. The court next concluded that the regulations were narrowly tailored to further the town’s interest because the permissible decibel levels were

as a requirement to obtain a permit. The court held that the complete ban on shooting ranges was incompatible with the Second Amendment.

6-720 Zoning regulations must accommodate the exercise of Second Amendment rights, and regulations restricting those rights must be justified by evidence

In response to the court's holding in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (*"Ezell I"*) discussed in section 6-710, the city adopted zoning regulations that allowed shooting ranges as special uses in manufacturing districts and prohibited them within 100 feet of another shooting range, or within 500 feet of a residential district, school, place of worship, and other specified uses. As a result of these regulations, only 2.2% of the city's area was even theoretically available for shooting ranges and the commercial viability of those areas was "questionable." To justify its regulations, the city asserted that they served important public health and safety interests, and the city cited three concerns: shooting ranges attract gun thieves, cause airborne lead contamination, and carry a risk of fire.

In *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) (*"Ezell II"*), the Seventh Circuit Court of Appeals invalidated these zoning regulations. The court stated that when a challenged law regulates activity protected by the Second Amendment, the government "bears the burden of justifying its actions under some heightened standard of judicial review." *Ezell II*, 846 F.3d at 893. *The city offered no evidentiary support for its assertion that its regulations served the important public health and safety interests that it identified.* The city's own witnesses admitted that they knew of no data or empirical evidence to support the city's claims. Summarizing in its concluding remarks, the court said that the city "cannot defend its regulatory scheme with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. To borrow from the free-speech [First Amendment] context, *there must be evidence to support the city's rationale for the challenged regulations*; lawyers' talk is insufficient. Here, . . . *the City's defense of the challenged zoning rules rests on sheer speculation about accidents and theft. That's not nearly enough to satisfy its burden.*" *Ezell II*, 846 F.3d at 896 (internal citations and quotation marks omitted).

6-800 Search and seizure

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. Article I, Section 10 of the Virginia Constitution contains a similar prohibition. These constitutional protections apply to zoning inspections even when zoning violations are enforced in a civil, rather than criminal, proceeding.

Search and seizure in the context of zoning enforcement is discussed in section 27-400.

6-900 Preemption

Preemption derives from the constitutional principle that the federal law is the supreme law of the land and trumps any laws of a state or locality that are inconsistent with a federal law. *United States Constitution, Article VI.*

Under Virginia law, no "ordinance, resolution, bylaw, rule, regulation, or order" of a locality may be inconsistent with the "Constitution and laws of the United States or of the Commonwealth." *Virginia Code* § 1-248.

Preemption is discussed in chapter 7.