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SUBDIVISION REGULATION

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2-1 INTRODUCTION

2-1.01 Scope of Chapter

This chapter outlines the enabling authority for subdivision regulation in Virginia. See Va. Code §§ 15.2-2240 to 15.2-2279. Every local government is required to have a subdivision ordinance, see Va. Code § 15.2-2240, but the enabling legislation allows a certain degree of latitude in the drafting of such ordinances. See *Bd. of Sup'rs of Loudoun Cnty. v. Georgetown Land Co.*, 204 Va. 380, 131 S.E.2d 290 (1963) (“The legislature left much to the discretion of the locality in . . . [regulating subdivisions], relying upon the local governing body’s knowledge of local conditions and the needs of its individual community.”)

As a result, subdivision ordinances and subdivision review practices vary widely. This latitude is not without limits, however, particularly given the constraints of the Dillon Rule.² See *Cnty. of Chesterfield v. Tetra Assocs., LLC*, 279 Va. 500, 689 S.E.2d 647 (2010) (subdivision ordinance may not negate land use authorized by zoning ordinance); *Bd. of Sup'rs of Augusta Cnty. v. Countryside Inv. Co.*, 258 Va. 497, 522 S.E.2d 610 (1999) (finding no authority for a subdivision ordinance provision permitting county officials to approve or disapprove a subdivision based on size, shape and dimension of proposed subdivision lots and to consider the suitability of the land for subdivision); *Nat'l Realty Corp. v. City of Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968) (holding that, under the Dillon Rule, city had no authority to charge fee for subdivision plat review, because enabling statutes at the time did not specifically authorize such a fee); *Strong v. Orange Cnty. Bd. of Sup'rs*, 85 Va. Cir. 396 (Orange Cnty. 2012) (Dillon Rule prohibits locality from requiring “time-phased” development of a subdivision); 2000 Op. Va. Att’y Gen. 75 (finding no authority to prescribe a minimum time period for lot to be in existence before it may be (re)divided). *But see* 1997 Op. Va. Att’y Gen. 70 (stating that “the Dillon Rule does not require that the [subdivision] statutes be interpreted in so narrow a manner that the interpretation would defeat the intent of the legislature in enacting the statutes”).

Note: This chapter does not address the Virginia Subdivided Land Sales Act of 1978, Va. Code §§ 55.1-2300 to 55.1-2306, which applies to subdivisions of 100 lots or more, and to smaller subdivisions in some instances.

¹ Shared credit for this chapter goes to previous author William M. Hackworth, former City Attorney for the City of Roanoke. As the author until the 2007 edition, he is responsible for much of the analysis and text.

² For a comprehensive analysis of the Dillon Rule (in the context of an emergency curfew order), see *Commonwealth v. Brown*, CR20-745, Letter Opinion (Fredericksburg Cir. Ct. Sept. 14, 2020), available on the [LGA website](#). See also *Dumfries-Triangle Rescue Squad, Inc. v. Bd. of Sup'rs of Prince William Cnty.*, 299 Va. 226, 849 S.E.2d 117 (2020) (applying Dillon rule and holding County lacked authority to dissolve rescue squad’s corporate status).

2-1.02 Historical Background

In colonial days, the subdivision process was used to stimulate development and growth of towns, thus promoting trade and commerce. In the various acts creating many Virginia localities—particularly those with ports, such as Norfolk, Hampton, and Warwick (Newport News)—the General Assembly provided not only for the purchase of land in strategic areas but also for surveying and dividing land into lots, often with the provision that the lots had to be developed within a certain period for title to pass. *See, e.g., Town of Stephens City v. Zea*, 204 Va. 88, 129 S.E.2d 14 (1963); *Shield v. Peninsula Land Co.*, 147 Va. 736, 133 S.E. 586 (1926) (creation of Yorktown in 1691). The 1699 act establishing a new capital at Williamsburg was a detailed planning law that specified such things as minimum lot sizes, setbacks, and types of fencing. Over the course of the nineteenth century, various statutory procedures were adopted to control the subdivision of land. Initially, these regulations were principally in the form of self-executing statutes (including various municipal charter provisions) and were not applicable to counties. This early legislation provided that subdivision plats would have the same effect as deeds for evidentiary purposes. *See Va. Code § 5222a* (1930).

By 1930, subdivision plats were required to be recorded and were subject to a number of fairly sophisticated requirements within municipalities. In an effort to provide for orderly expansion of cities, the General Assembly enacted statutes to require municipal approval of subdivisions in counties near the corporate limits of cities, including those up to ten miles from the corporate limits in the case of a city having a population over 100,000. These extraterritorial provisions continued to apply in counties until 1979; they now may apply in only five counties (Giles, Clarke, Culpeper, Loudoun, and Mecklenburg). *See Va. Code §§ 15.2-2248 to 15.2-2250; see also Logan v. City Council of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008). Any other locality may exert subdivision control on land outside its territorial limits only if the subdivision involves a dedication of streets, roads, or alleys to the locality. 1991 Op. Va. Att’y Gen. 71.

In 1946, the General Assembly adopted the Virginia Land Subdivision Law. 1946 Va. Acts ch. 369. This was the first attempt at a comprehensive statute dealing with subdivision regulation. Unlike its predecessors, it delegated the police power of the Commonwealth to localities, allowing them to adopt subdivision “regulations.” While the principle of extraterritorial review by municipalities continued, this Act also provided authority for review of subdivisions by counties. Unlike later statutes, this one provided that it was to be “liberally construed.” It remained in effect until replaced in 1962 by the predecessor to the existing statutory scheme.

2-1.03 Subdivision Regulation as a Delegation of Police Power

As with zoning, the authority of localities to regulate subdivisions is grounded in a delegation of the general police power of the Commonwealth by enabling legislation. *Nat’l Realty Corp. v. City of Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968); *see also Bd. of Sup’rs of Loudoun Cnty. v. Georgetown Land Co.*, 204 Va. 380, 131 S.E. 2d 290 (1963); *Bd. of Sup’rs of Augusta Cnty. v. Countryside Inv. Co., L.C.*, 258 Va. 497, 522 S.E.2d 610 (1999). The establishment of subdivision regulations is a legislative function that must be accomplished through ordinances adopted by a local governing body, *see Va. Code § 15.2-2251*, and a governing body may not delegate this function to a planning commission or other administrative officer, official, or employee, unless specifically authorized by the enabling legislation.³ *Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983); *see also Helmick*

³ By statute, a governing body may authorize the local board of zoning appeals to hear and decide applications for “special exceptions” to the general regulations in a zoning district. *See Va. Code §§ 15.2-2286(A)(3), 15.2-2309(6)*. While such decisions are zoning decisions involving the exercise of legislative power, they do not entail rezoning (i.e., amending the zoning classification of property). *See Luck Stone Corp. v. Cnty. of Loudoun*, 31 Va. Cir. 391 (Loudoun Cnty. 1993). For more explanation, *see Chapter 1, Planning and Zoning, section 1-10.01*.

v. Town of Warrenton, 254 Va. 225, 492 S.E.2d 113 (1997). On the other hand, the act of reviewing and approving subdivision plats (and site plans, see Va. Code § 15.2-2258), is an administrative/ministerial function, and the General Assembly has expressly authorized local governing bodies to delegate responsibility for administration of a subdivision ordinance (including approval of plats) to a local planning commission or other agent. Va. Code §§ 15.2-2255, 15.2-2259, 15.2-2260. For detailed discussions of legislative versus administrative/ministerial functions, see *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 727 S.E.2d 40 (2012), and *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997); see also *KSS One, LLC v. Henrico Cnty.*, 76 Va. App. 770, 883 S.E.2d 700 (2023). Although a locality may combine its zoning and subdivision ordinances into a single “unified development ordinance,” the two functions must remain distinct. 1992 Op. Va. Att’y Gen. 51.

2-2 THE SUBDIVISION ORDINANCE

2-2.01 Enabling Legislation; Enactment of Ordinance

The subdivision enabling statutes are set forth within Va. Code Title 15.2, Chapter 23, §§ 15.2-2240 to 15.2-2279. Virginia Code § 15.2-2241 sets out certain provisions that are mandatory, while § 15.2-2242 sets out provisions that are optional; most ordinances contain additional, supplementary provisions. It should also be noted that several significant definitions, for terms such as “development,” “plat of subdivision,” and “subdivision,” are set forth within Va. Code § 15.2-2201, and that these statutory definitions may contain substantive grants of authority (e.g., the definition of “subdivision” acknowledges the authority of a locality to create its own definition of a subdivision—even though such authority is not set out in Va. Code §§ 15.2-2241 or 15.2-2242).

Review of the exercise of local subdivision authority will be conducted by a court through application of the Dillon Rule of statutory construction: a subdivision ordinance may not include any requirement that is not expressly or implicitly authorized by the enabling legislation. See *Bd. of Sup’rs of Fairfax Cnty. v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975) (holding temporary moratorium on filing of site plans and preliminary plats void). Applying this rule, the Supreme Court of Virginia held that a locality is not permitted to use a subdivision ordinance to prohibit a use of property that is permitted by the property’s zoning classification. *Cnty. of Chesterfield v. Tetra Assocs., LLC*, 279 Va. 500, 689 S.E.2d 647 (2010). The Court in *Tetra* relied on *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999), in which it held there is no enabling authority—in either the mandatory provisions of Va. Code § 15.2-2241 or the optional provisions of § 15.2-2242—for a subdivision ordinance to dictate the size, shape and dimension of proposed subdivision lots or to prohibit a subdivision that “is not conducive to the preservation of a rural environment.” *Id.*; see also *Strong v. Orange Cnty. Bd. of Sup’rs*, 85 Va. Cir. 396 (Orange Cnty. 2012) (applying the Dillon Rule, the court found no authority for a locality to require “time-phased” development of a subdivision); 2009 Op. Va. Att’y Gen. 38 (no authority under subdivision statutes for locality to require review and approval of boundary survey plats or physical survey plats prior to recordation because they do not involve the addition or alteration of property lines).

The procedures for the adoption and amendment of a subdivision ordinance are set out in Va. Code §§ 15.2-2251 to 15.2-2253. The ordinance formally originates with the local planning commission, which recommends it to the governing body for adoption. See Va. Code § 15.2-2251. Whether initiated by the planning commission or the governing body, any amendment to the ordinance must go through the planning commission. A subdivision ordinance can be adopted or amended only after public notice and hearing in compliance with Va. Code § 15.2-2204. That statute previously required, among other things, that any public hearing be preceded by public notice that contains a “descriptive summary of the proposed action.” In two decisions—both involving zoning ordinance amendments—the Virginia Supreme Court applied this requirement strictly. See *Gas Mart Corp. v. Bd. of Sup’rs*

of Loudoun Cnty., 269 Va. 334, 611 S.E.2d 340 (2005); *Glazebrook v. Bd. of Sup'rs of Spotsylvania Cnty.*, 266 Va. 550, 587 S.E.2d 589 (2003) (holding that the notice is defective if it "does not cover the main points of the proposed amendment and does not accurately describe the proposed amendment"). However, Va. Code § 15.2-2204(A) was amended in 2023 to delete the "descriptive summary" requirement; the statute now requires only that the advertisement shall "identify the place or places within the locality where copies of the proposed plans, ordinances or amendments may be examined."

Although the enabling authority is not a model of clarity, see Va. Code § 15.2-2255, the Virginia Supreme Court has held that it does expressly authorize a governing body to delegate to an agent the "administration and enforcement" of its subdivision regulations. See *Logan v. City Council of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008). These delegable responsibilities include the carrying out of authority under Va. Code §§ 15.2-2241 to 15.2-2245. In more specific terms, Va. Code §§ 15.2-2259 and 15.2-2260 clearly authorize (and arguably require) delegation of plat-approval authority. Any delegation of subdivision authority, however, "must prescribe sufficient standards to guide the administrator in exercising the delegated authority." *Logan, supra*.

2-2.02 Definition of "Subdivision"

Each locality is empowered to adopt, as part of its subdivision ordinance, its own definition of "subdivision." Va. Code § 15.2-2201. In the absence of a local definition, however, the enabling legislation provides one by default:

"Subdivision," unless otherwise defined in an ordinance adopted pursuant to § 15.2-2240, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.2-2258.

Id. In 2022, the definition was amended to add text (1) recognizing certain boundary line changes and (2) exempting certain court-ordered partitions from subdivision and zoning restrictions.⁴ See 2022 Va. Acts ch. 271. Under the revised definition, a local subdivision ordinance may not prohibit "owners of adjacent parcels from entering into a valid and enforceable boundary line agreement with one another" under certain conditions. Va. Code § 15.2-2201.⁵

The Virginia Supreme Court has elaborated that "the creation of a new lot 'is a legal separation of property because it results from action by the owner, and involves, at a minimum, a change in the legal description of the property, either by metes and bounds or by plat, which is duly recorded in the appropriate land records.'" *W&W P'ship v. Prince William Cnty. Bd. of Zoning Appeals*, 279 Va. 483, 689 S.E.2d 739 (2010) (quoting *Chesterfield Cnty. v. Stigall*, 262 Va. 697, 554 S.E.2d 49 (2001)). Thus, the mere

⁴ The effect of this amendment on partition orders is discussed in section [2-3.03\(c\)](#).

⁵ In particular, such an agreement is permitted when it is used to resolve a bona fide property line dispute; the boundary adjustment does not move by more than 250 feet from the center of the current platted line or alter either parcel's resultant acreage by more than 5 percent of the smaller parcel size; and the agreement does not create an additional lot, alter the existing boundary line of any locality, result in greater street frontage, interfere with a recorded easement, or result in any nonconformity with local ordinances and health department regulations. Va. Code § 15.2-2201. The zoning administrator must be given notice of the boundary adjustment for review, presumably to confirm whether it meets the terms of the statute.

condemnation or dedication of a right-of-way that bisects a parcel does not result in a subdivision. *Id.*

In *Board of Sup'rs of Loudoun Cnty. v. Georgetown Land Co.*, 204 Va. 380, 131 S.E.2d 290 (1963), the Virginia Supreme Court held that any reasonable definition of the term "subdivision" is permissible and that any adopted definition enjoys a presumption of legislative validity. *Id.* Given this latitude, local governing bodies have defined the term "subdivision" in various ways, even to the point of including lot consolidations. See, e.g., *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010). Some localities also define what a subdivision is not, by exempting from regulation certain divisions that would otherwise be considered subdivisions. *But see* 1982–83 Op. Va. Att'y Gen. 374 (opining that too many exemptions in a definition is not reasonable).

Similarly, what constitutes a "lot" can vary, not only among jurisdictions, but also between the same locality's zoning and subdivision ordinances. Thus, a lot shown on a recorded subdivision plat is not necessarily a lot for zoning purposes, and a zoning lot might be comprised of multiple subdivided lots. See 1984–85 Op. Va. Att'y Gen. 297.

2-2.03 Mandatory Provisions of a Subdivision Ordinance

Virginia Code § 15.2-2241 requires that a subdivision ordinance include reasonable regulations concerning the matters paraphrased below (the subsections are generally paraphrased here, but they are numbered as they are in the statute):⁶

1. *For plat details that meet the standards for plats adopted pursuant to § 42.1-82 of the Virginia Public Records Act.*

These standards are set out in 17 VAC 15-61-10 through 15-61-60.

2. *For the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage, including, for ordinances and amendments adopted on or after January 1, 1990, for the coordination of such streets with existing or planned streets in existing or future adjacent or contiguous to adjacent subdivisions.*

As discussed below in connection with Va. Code § 15.2-2241(A)(5), VDOT regulations place a premium on the interconnection of subdivision streets. The effect will likely be to reduce or prohibit the use of cul-de-sacs in future subdivisions.

3. *For adequate provisions for drainage and flood control, for adequate provisions related to the failure of impounding structures and impacts within dam break inundation zones, and other public purposes, and for light and air, and for identifying soil characteristics.*

The term "drainage" is broad and may encompass a number of different development-specific issues. In *Sansom v. Board of Supervisors of Madison County*, 257 Va. 589, 514 S.E.2d 345 (1999), the Virginia Supreme Court upheld a locality's decision to disapprove a subdivision application which proposed development/land-disturbing activity within a "substantial surface drainage course." Although the county's subdivision ordinance contained no specific definition of the term "substantial surface drainage course," the Court found that the term was capable of reasonable interpretation and ruled that the locality's decision was properly based on its ordinance and was not arbitrary and capricious.

⁶ The issue of ensuring completion of subdivision infrastructure improvements is discussed in detail in section [2-2.04](#).

For localities that assumed responsibility for administration of the state's stormwater program (VSMP) requirements, stormwater management falls within the general purview of "drainage." They must now coordinate VSMP approvals with other approvals required before issuing building permits or land-disturbing permits (such as subdivision and site plan approvals, E&S approvals, floodplain approvals, etc.). See Va. Code § 62.1-44.15:27(E)(3). VSMP regulations at 9 VAC 25-870-55 also specify that a stormwater management plan must apply technical criteria to the entire land-disturbing activity and that individual lots within new developments, including those developed under subsequent owners, cannot be considered as separate land-disturbing activities. See also 9 VAC 25-870-48, which provides for grandfathering only in relation to land-disturbing activities that were the subject of preliminary or final subdivision or site plans approved prior to July 1, 2012, and only if those subdivision or site plans specifically included a stormwater layout as defined in 9 VAC 25-870-10. See *also* Chapter 5, Environmental Law, section [5-2.04\(a\)](#), Stormwater Management.

The reference to "impounding structures" (i.e., dams) and "dam break inundation zones" is a 2008 addition. Under related amendments, a locality must conduct additional review for any proposed development in such an inundation zone; require the subdivider to submit an engineering study for review by the Department of Conservation and Recreation (DCR); and, where appropriate, require the subdivider to pay certain costs for upgrading the dam. See Va. Code §§ 10.1-606.3, 15.2-2243.1. If DCR determines that a subdivision plan triggers the need for dam upgrades, the subdivider must alter its plan or make the required payment; otherwise, the locality is prohibited from approving the subdivision. Va. Code § 10.1-606.3(A). In the latter case, the locality may elect to (1) require that the subdivider make this payment to the state-administered Dam Safety, Flood Prevention and Protection Assistance Fund or (2) directly receive these payments (which it must maintain in a separate account and refund if the dam owner does not use them), along with an administrative fee. See Va. Code § 15.2-2243.1.

The last clause of this third paragraph, concerning "soil characteristics," presumably addresses the problem of shrink-swell soils. Although soil characteristics also affect the feasibility of subsurface sewage disposal systems, localities also have separate enabling authority to require a health official's opinion regarding the suitability of such systems. See Va. Code § 15.2-2242(2).⁷

4. *For the extent and the manner in which streets shall be graded, graveled or otherwise improved and water and storm and sanitary sewer and other public utilities or other community facilities are to be installed.*

Localities—especially those whose streets are maintained by VDOT⁸—typically incorporate into their local ordinances VDOT standards for street construction and acceptance.⁹ In *Serra v. Board of Supervisors for County of Fairfax*, Ch. No. 155584 (Fairfax Cnty. Cir. Ct. Aug. 18, 1999) (unpublished letter opinion granting plea in bar), the court rejected a challenge to a local requirement that proposed subdivision streets meet state requirements for VDOT acceptance. The court reasoned that Va. Code § 15.2-2241(A)(2), (4) and (5), viewed in light of Fairfax County's limited statutory authority to maintain roads, necessarily implied authority for the local requirement. Because the proposed street would not meet VDOT's continuity requirement (it was separated from the state system by a federally maintained parkway), it was not arbitrary or capricious for the county to disapprove the subdivision plat. See *also* 2023 Op. Va. Att'y Gen. S-10 (VDOT's Access

⁷ See section [2-2.05](#).

⁸ This includes the unincorporated areas of all counties except Arlington and Henrico.

⁹ Some localities have made their design and construction standards for roads (and other public facilities) available online. See, e.g., [Henrico County](#) standards; [Fairfax County](#) standards.

Management Design Standards for Entrances and Intersections apply to highway access points associated with family subdivision lots; any modification to those standards would require action by the Commissioner of Highways).

Localities are authorized to adopt standards for water, sewer, and other utilities installed within subdivisions. See Va. Code §§ 15.2-2121, 15.2-2242(2); 1997 Op. Va. Att’y Gen. 70 (locality may enact regulations requiring that each lot in a new subdivision receive adequate water, even if from individual wells). The Attorney General opined earlier that a locality may not require a developer to guarantee the construction or installation of private water and sewer systems that are to be privately owned, operated and maintained. 1987-88 Op. Va. Att’y Gen. 204. *But* see Va. Code § 15.2-2242(2) (localities authorized to require a health official’s preliminary opinion regarding the suitability of a subdivision for any proposed subsurface sewage disposal systems).

5. *Subsection (A)(5) has four distinct requirements:*

- a. *For the acceptance of dedication for public use within a subdivision of such improvements as streets, curbs, gutters, sidewalks, bicycle trails, drainage or sewerage systems, and waterlines as part of a public system or other improvement dedicated for public use and maintained by the locality, the Commonwealth, or other public agency. In addition, this subsection requires that local ordinances provide for the acceptance of dedication of other required site-related improvements for vehicular ingress and egress, including traffic signalization and control, for public access streets, for structures necessary to ensure stability of critical slopes, and for stormwater management facilities.*

The local governing body of any county that has not withdrawn from the state secondary highway system, or of any town within which VDOT maintains the streets, may request the Commonwealth Transportation Board to take any new street into the secondary system of state highways for maintenance if the street has been developed and constructed in accordance with the Board’s secondary street acceptance requirements. Only streets constructed in compliance with those requirements will be taken into the state secondary highway system for maintenance. No locality is obligated to approve any subdivision plat or subdivision construction plans that are inconsistent with the regulations establishing secondary street acceptance requirements. Va. Code § 33.2-334(C).

For requirements and procedures for streets to be taken into the secondary system of state highways, see Va. Code § 33.2-335 and 24 VAC 30-92-10 to 30-92-140.¹⁰ See also 2005 Op. Va. Att’y Gen. 117 (opining that VDOT may refuse to accept older, substandard roads under the rural addition provision of Va. Code § 33.2-336, if a county’s subdivision ordinance does not require that all subdivision streets meet the qualifying acceptance standards). Changes to these regulations took effect in 2009 and again in 2011.¹¹ The most substantial change in 2009 was to the “public benefit” analysis found in 24 VAC 30-92-60. Historically, a road could be accepted into the state secondary highway system if it was constructed to VDOT standards and it served three or more residences. See notes at 25 Va. Reg. 2776-77 (Mar. 30, 2009). The 2009 regulations, however, required VDOT to calculate a “connectivity index” to determine whether proposed roads met a threshold for integration with the existing road network and future development. A proposed road with a deficient connectivity index would be excluded from the state system for lack of public benefit, absent

¹⁰ The regulations grandfather certain plats and plans initially submitted before February 1, 2012, from the application of the current street acceptance standards. See 24 VAC 30-92-20.

¹¹ For more detailed information on the secondary street acceptance requirements, see VDOT’s [website](#).

some mitigating circumstance. The 2009 regulations were expected to result in the reduced use of cul-de-sacs. The regulations were revised in 2011 to delete the "connectivity index," although they still include connectivity as part of the determination of public benefit.

- b. *The facilities listed in (a) may be accepted only if the owner or developer (i) certifies that the construction costs have been paid, or, at the locality's option, provides satisfactory evidence that the time period for filing mechanics liens has elapsed or indemnity with adequate surety for any contested construction debt; (ii) furnishes a certified check or cash escrow in the amount of the estimated costs of construction or a personal, corporate, or property bond, with satisfactory surety, in an amount sufficient for and conditioned upon the construction for such facilities, or a contract for the construction of such facilities and the contractor's bond, with surety, or (iii) furnishes an acceptable letter of credit.*

A locality will typically enter into a development agreement with the developer of each project. The agreement should describe (typically by reference to a construction plan) the public improvements the developer is responsible for completing and the time within which they are to be completed. Specificity is crucial both to ensuring adequate security and to enforcing the obligations if the developer should fail. For a more detailed discussion of this issue, see section [2-2.04](#).

- c. *A developer may record a final subdivision plat that covers only a portion of the approved preliminary plat and, after posting security for the first plat, have at least five years to record the first of the remaining sections shown on the preliminary plat, subject to certain conditions (including the engineering and construction standards and zoning requirements in effect at the time that each remaining section is recorded). Each time a new section is recorded, the five-year clock for the next section restarts.*

The five-year period of validity of a preliminary subdivision plat restarts each time the final plat for a new phase is recorded. Va. Code § 15.2-2241. The current statute supersedes an Attorney General's opinion that a preliminary plat remains valid only for five years, regardless of the phasing of the development. See 1989 Op. Va. Att'y Gen. 105. Under Va. Code § 15.2-2241.1, the developer of a multi-section subdivision cannot be required to post security to cover the public improvements for any section until he submits construction plans for that section.

- d. *A locality may require that a subdivider maintain, and post security to ensure maintenance of, roads that have been dedicated but, for reasons other than the quality of construction, not yet accepted into the secondary system of state highways [essentially, this is an optional provision for jurisdictions that do not maintain their roads].*

For a discussion of so-called "maintenance bonds," see section [2-2.04\(c\)](#). State traffic laws can be enforced even on a street that has not been constructed to VDOT standards and accepted into the secondary system of state highways. A locality would be immune from liability for failure to erect or maintain traffic control devices on subdivision streets that do not comply with VDOT standards and have not been accepted into the state system. 2000 Op. Va. Att'y Gen. 77.

6. *For the conveyance, by reference on the final plat to a recorded declaration of their terms and conditions, of common or shared easements to franchised*

- cable television operators and public service corporations furnishing cable television, gas, telephone, and electric service to a subdivision.*
7. *For monuments of specific types to be installed establishing street and property lines.*
 8. *For the withdrawal (invalidation) of a subdivision plat if it is not recorded within six months after final approval, or such longer period as the governing body might approve, unless surety is posted or construction of facilities to be dedicated to the public has commenced, in which case the time may be extended to one year or more.*
 9. *For the administration and enforcement of the ordinance and the imposition of reasonable fees and charges for the same.*
 10. *For "family subdivisions" pursuant to Va. Code § 15.2-2244. Section 15.2-2244 requires only counties to provide for such family subdivisions, subject only to Code requirements, and to an optional requirement that lots of less than five acres have right-of-way access of at least ten and not more than twenty feet providing access to a public street.*

The General Assembly enacted Va. Code § 15.2-2244 to permit landowners in most localities to divide existing parcels by a single transfer to a member of the immediate family without being subject to the normal formalities and expenses attendant to compliance with local subdivision regulations. 1989 Op. Va. Att'y Gen. 100. Virginia Code § 15.2-2244 has three subsections, applicable to different but overlapping groups of localities. Note that subsections (A) and (B) define "immediate family" differently (subsection A is broader and includes siblings, stepchildren and spouses), and that subsection (C) does not define the term at all.

Virginia Code § 15.2-2244 does not exempt family subdivisions from the provisions of local zoning regulations. See *Crestar Bank v. Martin*, 238 Va. 232, 235-36, 383 S.E.2d 714, 716 (1989). With some exceptions, however, it does prevent localities from imposing road improvement requirements on family subdivisions, by way of subdivision or zoning regulations that require an individual property owner, as a condition to developing his parcel, to improve a private road that will serve only a limited number of dwellings. See 1985-86 Op. Va. Att'y Gen. 83. Subsection 15.2-2244(A), which applies to all counties, requires that every subdivision ordinance permit division of a lot or parcel for the purpose of sale or gift to a member of the owner's immediate family. There can be no more than one division for each family member. The locality may require that any lot smaller than five acres have reasonable right-of-way, from ten feet to twenty feet wide, providing ingress and egress to a dedicated recorded public street or thoroughfare. Lots remain subject to all express requirements of the Code of Virginia (although the statute does not identify any such requirements).

Subsection 15.2-2244(B) authorizes Fairfax County to require not just right-of-way, but ten to twenty feet of frontage on a public street or thoroughfare for any lot smaller than five acres. Subsection 15.2-2244(C), which applies to certain high-growth localities and their neighbors (including qualifying cities and towns), authorizes "reasonable provisions" permitting family subdivisions. Apart from extending family subdivision authority to qualifying cities and towns, this subsection differs in other respects from subsections (A) and (B). It leaves lots subject to all requirements of the Code of Virginia, not just express requirements. Lots created under subsection (C) are also subject to any requirements imposed by the local governing body, with no statutory guidance as to what limitations there might be on such local requirements.

The Attorney General has opined that “family divisions” of a parcel must not be for purposes of circumventing the intent of the statute, but that they must be for purposes consistent with the objectives of enhancing the values society places upon the inter vivos disposition of family estates free from government regulation—such as keeping the family estate within the immediate family and passing real property interests from one generation to another (e.g., preserving the family farm), rather than for the purpose of short-term investment. This opinion concerned a proposed husband-to-wife transfer attempted because the subject parcel could not otherwise economically be subdivided in compliance with the locality’s subdivision regulations; the couple lived in another state and had no intention of living on the property. See 1986-87 Op. Va. Att’y Gen. 121.

The family subdivision exception is subject to abuse. Some landowners have tried to circumvent subdivision regulation by transferring lots to family members with the purpose of then selling them to third parties. To curb such abuses, the Attorney General concluded, a locality might require that any proposed family subdivision be submitted to the local subdivision agent for review. See 1989 Op. Va. Att’y Gen. 100. If the agent determines that the purpose of the subdivision is to circumvent the normal requirements of the subdivision ordinance, he can deny approval. Among the factors the agent can consider is the period of time the owner has held title to the property. A locality can also require submission of affidavits from the owner and the recipient family member(s) affirming that the proposed family subdivision is not for the purpose of circumventing the requirements of the subdivision ordinance. *Id.* Although post-subdivision restrictions on the transferee’s rights to convey a family lot could prevent abuse, the Attorney General concluded that any absolute requirement that a family member retain ownership for a specific period after the subdivision would be unenforceable. *Id.* This opinion also concludes that the number of lots that can be created by a family subdivision is limited only by the number of members of the subdivider’s “immediate family” to whom the subdivider intends to convey lots. The Attorney General has also opined that a property owner who completes a family subdivision in one county is not prohibited from undertaking a family subdivision in another county. 2000 Op. Va. Att’y Gen. 73.

In addition to Va. Code § 15.2-2244, a locality may also include in its subdivision ordinance provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the owner’s immediate family, if the property has been owned for at least fifteen consecutive years by the current owner or member of the immediate family and the owner agrees to place a restrictive covenant on the subdivided property that would prohibit its transfer to a nonmember of the immediate family for a period of fifteen years. Va. Code § 15.2-2244.1. A locality may require that the subdivided lot be no more than one acre and meet other express requirements contained in the Code of Virginia or imposed by the local governing body. The statute offers no insight into what such “express requirements” might be. A locality may also reduce or provide exceptions to the fifteen-year covenant period when changed circumstances require. Given its non-exclusive language, § 15.2-2244.1 arguably extends family subdivision authority to every locality, including cities and towns that do not qualify under any part of § 15.2-2244.

Virginia Code § 15.2-2244.2 similarly authorizes any locality to provide for single division of a lot for conveyance to a family member, if the land is held in trust. All trust beneficiaries must be immediate family members and must agree that the property should be subdivided. The beneficiaries must also agree to a restrictive covenant prohibiting transfer of the property to a nonmember of the immediate family for fifteen years, although the locality may reduce or provide exceptions to this period. A locality must execute and record a writing reflecting any such modification. A locality invoking this statute may require that the subdivided lot meet any express state or local requirements and not exceed one acre. Both the remainder parcel and the subdivided parcel are exempt under § 15.2-2244(A) from otherwise applicable subdivision requirements. The corollary is that a county may

impose the access requirement on the remainder parcel if it contains less than five acres. 2004 Op. Va. Att’y Gen. 65.

Sale or gift of a portion of land in accordance with Va. Code § 15.2-2244 will not, alone, constitute a withdrawal or removal of land from an agricultural and forestal district. See Va. Code § 15.2-4314(B). In addition, at the option of the locality, roll-back taxes under local use value assessment ordinances need not apply to a family subdivision that results in parcels that do not meet minimum acreage requirements, if the property is held by the immediate family member for five years after the subdivision. Va. Code § 58.1-3241(B)(2).

11. *For the periodic partial and final release of performance guarantees.*

Virginia Code § 15.2-2245 contains specific provisions governing the release of performance guarantees. For a detailed discussion of this topic, see section [2-2.04\(e\)](#).

2-2.04 Ensuring Completion of Public Improvements

A key element of subdivisions is securing and enforcing a developer’s obligations to provide the infrastructure for his project. No performance guarantee can be required for any facility or improvement not shown or described on the approved plat or plan. Va. Code § 15.2-2241(B). In addition, the terms, conditions, and specifications in the underlying development agreement can include only items depicted or provided for in the approved plan, plat, permit application, or similar document. *Id.* A couple of open issues regarding these explicit restrictions on a locality’s authority are: (1) whether they will be applied retroactively (probably not) and (2) whether they will negate a locality’s ability to enforce otherwise ultra vires contract requirements to which a developer voluntarily agreed. See *Bd. of Cnty. Sup’rs of Prince William Cnty. v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985) (holding that developer’s voluntary agreement estopped it from contesting legality of required offsite road construction).

2-2.04(a) Forms of Security

As a condition to approval of a final subdivision plat (or a site plan), the owner or developer must guarantee completion of the public and other site-related improvements associated with the development. See Va. Code § 15.2-2241(A)(5); see also 2015 Op. Va. Att’y Gen. S-1 (informal opinion) (when a developer fails to complete public streets in a subdivision, the locality has the discretionary power, but not the duty, to complete them). Whatever the security, the underlying agreement must clearly establish what is required for those improvements to be considered complete. Typically, the agreement will provide that improvements are not complete until they have been accepted into the appropriate public system (e.g., streets and sidewalks, water lines, sewer lines). See Michael M. Shultz & Richard Kelley, *Subdivision Improvement Agreements that Limit the Developer’s Exposure to Liability*, 2 PRAC. REAL EST. LAW 39 (1986). Each locality should adopt form documents for the development agreement and various forms of security, to protect the public interest and to ensure even administration of the subdivision requirements.¹²

The security can take one of several forms (commonly referred to as “bonding”): (1) a certification by the owner or developer that the construction costs have been paid to the person constructing the facilities, or, at the locality’s option, satisfactory evidence that the time period for filing mechanics liens has elapsed or provision of indemnity with adequate surety for any contested construction debt; (2) a certified check or cash escrow; (3) a personal, corporate or property bond, with surety; (4) a contract for construction and contractor’s bond, with surety; or (5) a letter of credit. The 2010 amendment adding the “mechanics lien” clause was presumably intended to mitigate a locality’s risk in accepting a certification of payment to a contractor. Any security should provide the locality with funds

¹² Some localities have made various forms they use available online. See, e.g., [City of Roanoke](#); [City of Virginia Beach](#); [Fairfax County](#).

to complete the required subdivision improvements if the owner/developer fails to do so. For reasons explained below, however, the statutory scheme can undermine this goal.

2-2.04(a)(1) Letters of Credit

Apart from a certified check or cash, generally the safest forms of security are the letter of credit and the surety bond.¹³ An irrevocable letter of credit represents an obligation by the issuing bank.¹⁴ That obligation is independent of any underlying agreement between the developer, whose performance is being secured, and the local government, the beneficiary on the letter of credit. Except in the case of a beneficiary's fraud or forgery, the bank must honor a draft that conforms to the terms of the letter of credit. See *In re Printing Dept., Inc.*, 20 B.R. 677 (Bankr. E.D. Va. 1981) (holding that a letter of credit is not part of a debtor's estate and can be enforced despite the automatic stay imposed upon bankruptcy). For this reason, standby letters of credit are generally preferable to surety bonds. A letter of credit must be satisfactory to the locality with regard to the issuing institution, the amount, and the form. These determinations should be made systematically, not ad hoc. See section 2-2.04(a)(3).

2-2.04(a)(2) Surety Bonds

With a bond, the surety (i.e., a third-party insurer) must be satisfactory to the governing body or its designated subdivision agent.¹⁵ The locality's right to sue a surety in case of the developer's default is independent of its right to sue the principal (developer). See *Bd. of Sup'rs v. Sentry Ins.*, 239 Va. 622, 391 S.E.2d 273 (1990). A word of caution: a surety can give notice requiring the locality to sue the developer; however, if the locality fails to do so within thirty days, the surety is released. See Va. Code §§ 49-25, 49-26; see also Michael J. Herbert, *Twisting Slowly, Slowly in the Wind: The Effect of Delay on a Surety's Obligations in Virginia*, 18 U. RICH. L. REV. 781 (1984). And unlike letters of credit, surety bonds often require litigation to collect.

Because the purpose of the bond is to ensure performance, not to punish non-performance, the measure of damages is the cost to complete the obligations the bond secures. See *Bd. of Sup'rs of Fairfax Cnty. v. Ecology One, Inc.*, 219 Va. 29, 245 S.E.2d 425 (1978). The locality need not incur any expense to complete the project first and will be presumed to use bond proceeds properly. *Bd. of Sup'rs of Stafford Cnty. v. Safeco Ins. Co.*, 226 Va. 329, 310 S.E.2d 445 (1983); see also Va. Code § 15.2-2268 (stating that the subdivision enabling statutes do not obligate any locality to pay for public improvements);

¹³ Because a letter of credit in this context is to be drawn on only in the event of default, it is typically called a "standby" letter of credit.

¹⁴ This is true under the three most common sets of rules governing letters of credit: the Uniform Commercial Code, Va. Code §§ 8.5A-101 to 8.5A-118; [Int'l Standby Practices \(ISP98\)](#) (Annex IV); and the Uniform Customs and Practice for Documentary Credits (UCP600). Copies of ISP98 and UCP600 are available for purchase through the International Chamber of Commerce at this [website](#).

An excellent reference for any attorney working with letters of credit is John F. Dolan's *The Law of Letters of Credit: Commercial and Standby Credits* (Warren, Gorham & Lamont). See also James P. Downey, *The Letter of Credit as Security for Completion of Streets, Sidewalks, and Other Bonded Municipal Improvements*, 23 U. RICH. L. REV. 161 (1988); Richard Kelley & Michael M. Shultz, ". . . or Other Adequate Security": Using, Structuring, and Managing the Standby Letter of Credit to Ensure the Completion of Subdivision Improvements, 19 URB. LAW. 39 (1987). Some more basic online references include Marilyn Klinger, [Unraveling Letters of Credit](#); and Robert J. Spjut, [Documentary and Standby Letters of Credit](#). For another description, see UBS *Standby Letter of Credit*. Despite its narrower focus, Casius Pealer, *The Use of Standby Letters of Credit in Public and Affordable Housing Projects*, 15 J. Affordable Housing Volume 276 (2006), offers a useful comparison of standby letters of credit with surety bonds, as well as a discussion of why a developer might have greater difficulty providing one than the other.

¹⁵ See also a JW Bond Consultant [website](#) offering general information and a weblog about surety bonds.

2015 Op. Va. Att’y Gen. S-1 (informal opinion). While an uncompensated surety is discharged by any change in the obligation underlying the bond, a compensated surety is discharged only if there has been a material variation in the underlying obligation. *Bd. of Sup’rs of Fairfax Cnty. v. Southern Cross Coal Corp.*, 238 Va. 91, 380 S.E.2d 636 (1989). A surety stands in the developer’s shoes as to both liability and defenses. See *Bd. of Cnty. Sup’rs of Prince William Cnty. v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985). A surety typically has the option (rarely invoked) to assume the developer’s obligation and complete the project.

2-2.04(a)(3) Standards for Acceptable Security

With both letters of credit and surety bonds, the security they offer is only as good as the issuing institution. The local governing body needs to identify objective standards for determining whether the security (i.e., the issuer/surety) is satisfactory. There are commercial services that rate financial institutions and insurers.¹⁶ Beyond the express authority to enforce uniform standards as to issuers/sureties, amount, and form, it is doubtful that a locality generally has the discretion to reject any of the enumerated performance guarantees out of hand. Consistent with this view, Fairfax County has specific statutory authority to impose more stringent security requirements on problem developers. See Va. Code § 15.2-851.1.

2-2.04(b) Amount of Security

Virginia Code § 15.2-2241(A)(5) caps the permissible security amount at the estimated cost of construction plus a “reasonable allowance for estimated administrative costs, inflation, and potential damage to existing roads or utilities.” In response to the credit crisis, the General Assembly reduced this allowance from 25 percent to 10 percent, ultimately making a temporary reduction permanent. 2009 Va. Acts ch. 193, 2012 Va. Acts ch. 508; 2015 Va. Acts. Ch. 346. *But* see Va. Code § 15.2-851.1 (authorizing Fairfax County to require an enhancement of up to 50 percent for problem developers). The construction cost must be based on unit prices for new construction. For this reason, a locality should adopt (1) a unit price schedule for common items, adjusted at regular and frequent intervals to keep abreast of construction costs;¹⁷ (2) an objective, uniform basis for calculating the costs of uncommon items; and (3) an objective, uniform basis for calculating enhancements.

Even with a properly calculated level of security, however, the statutory limits create a potential problem: if a developer installs improvements incorrectly or if they deteriorate, the cost of repair or replacement is typically much higher than the cost of new construction. In a worst-case scenario, a 10 percent add-on is grossly inadequate.

2-2.04(c) Maintenance Bonds

In addition to pre-development security, most localities have authority to require a bond or letter of credit to ensure maintenance of a road pending its acceptance by VDOT, if (1) the subdivision ordinance so provides; (2) VDOT maintains the locality’s roads; and (3) the road, for reasons other than its quality of construction, is not acceptable into the secondary system of state highways (e.g., it does not meet VDOT public service requirements). A bond or letter of credit given for this purpose should be assessed according to the same adopted standards applied generally. Presumably in response to the slow housing market, a 2010 statutory change provides that where the majority of the lots on a new street remain undeveloped and construction traffic is expected to continue after acceptance into the

¹⁶ Examples of such services are [Moody’s](#) for financial institutions and AM Best’s [Key Rating Guide](#) for insurers.

¹⁷ Using a current unit price schedule approved by the local governing body, the developer’s engineer should be able to prepare a construction cost estimate on which to base the required security amount. See Fairfax County’s [cost estimate form](#).

secondary highway system, VDOT may extend its bonding requirement for one year beyond the normal time. Va. Code § 33.2-334(D).

2-2.04(d) Enforcing the Developer's Obligation

The enabling statutes are virtually silent regarding how a locality may enforce a developer's obligation to complete the infrastructure improvements and obtain acceptance into the appropriate public system. Examples of some measures available include:

- Requiring recalculation and reassessment of security (and perhaps a new form or issuer) as consideration for extending a developer's time for performance. Once a developer has breached his underlying agreement to complete the project, the locality presumably has much wider discretion to require a more secure performance guarantee (assuming the developer has the ability to obtain it).
- Denying approval of a development agreement for a new project whose developer is in breach on a current project. This restriction effectively requires the developer to complete the first project or obtain an extension.
- Declaring a developer in anticipatory breach. *See Bd. of Sup'rs of Fairfax Cnty. v. Ecology One, Inc.*, 219 Va. 29, 245 S.E.2d 425 (1978) (holding that abandonment of project can give rise to action for anticipatory breach).
- Drawing or making demand on the security. A surety typically has the option to assume the developer's obligation to complete the project. A locality may retain or collect an allowance for administrative costs, whether the facilities are constructed by the locality or by a surety. Va. Code § 15.2-2241(A)(5).
- Assigning to a substitute developer the locality's rights against the original developer or under a bond. *See Transduller Ctr. v. USX Corp.*, 976 F.2d 219 (4th Cir. 1992); *Bd. of Cnty. Sup'rs of Prince William Cnty. v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985) (holding that a county may assign its rights under a performance bond).
- Bringing suit against the developer and/or surety.

Localities are allowed substantial latitude in the use of the proceeds from subdivision security. In the case of surety bonds, such bonds are "performance" bonds, and a locality may use the proceeds to complete the improvements bonded (up to the face amount of the bond, plus interest), even though the subdivider has abandoned the project. *Bd. of Sup'rs of Stafford Cnty. v. Safeco Ins. Co.*, 226 Va. 329, 310 S.E.2d 445 (1983).

2-2.04(e) Bond Release

Virginia Code § 15.2-2245 establishes a general process for the "periodic partial and final complete release" of any bond, escrow, letter of credit, or other performance guarantee required for public improvements within a subdivision. Given the mandatory nature of the requirements and the potentially dire consequences of failure to follow those mandates, every local government should have in place a process for timely and thoroughly responding to any correspondence from a developer.

2-2.04(e)(1) Partial Release

The term "partial release" is probably misleading, since the only apparent effect is on the amount of security being held, not on the developer's underlying obligations. "Reduction" would be a more accurate term. To trigger the release process, a developer must give written notice of completion of part or all of the required public facilities. Va. Code

§ 15.2-2245(A). Within thirty days, the locality must identify any defects in writing or “partial release” is granted. Va. Code § 15.2-2245(B).

The statute mandates partial releases of up to 90 percent of the original security amount, based on the proportion of public facilities completed and approved. Va. Code § 15.2-2245(E). *But see* Va. Code § 15.2-851.1 (authorizing Fairfax County to limit reductions for problem developers to 80 percent). A developer may not receive any partial release, however, before completion of at least 30 percent of the public facilities, and the locality is not required to make more than three partial releases in any twelve-month period. Va. Code § 15.2-2245(E).

2-2.04(e)(2) Final Release

If the thirty-day period expires without a response from the locality, the developer must send an additional release request, by certified mail, to the chief administrative officer of the governing body. If the locality fails to respond within ten working days, the request is deemed approved and final release is granted. Va. Code § 15.2-2245(B). If the developer must then file suit to obtain partial or final release, the locality can be liable for costs and attorney’s fees, unless there exists good cause for the locality’s failure to respond. Va. Code § 15.2-2245(C). Any refusal to make a partial or final release must be directly related to specified defects or deficiencies in construction of the public facilities covered by the security. Va. Code § 15.2-2245(D). But this is somewhat inconsistent with § 15.2-2245(E), which requires final release only “[u]pon final completion *and acceptance* of the public facilities” (emphasis added). What if the deficiency precluding final release is a lack of VDOT road acceptance due to factors other than a construction defect (e.g., failure to meet the public service requirement for a minimum number of users) and the developer has not provided a maintenance bond?

A locality may accept a certificate of partial or final completion of public facilities without requiring any further inspection. The certificate must be from a licensed professional engineer or land surveyor, or from a department or agency designated by the locality. For example, the local water and sanitation authorities might be responsible for certifying completion of facilities that they are accepting for maintenance.

2-2.05 Optional Provisions of a Subdivision Ordinance

Virginia Code § 15.2-2242 sets out several optional provisions that may be included in a subdivision ordinance (the provisions are generalized here, but they are numbered as they are in the statute):¹⁸

1. *Provisions for variations or exceptions to the general regulations “in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship.”*

The Virginia Supreme Court held that the authority to grant such variations and exceptions to subdivision regulations is delegable to an agent of the local governing body. *Logan v. City Council of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008). The standard for subdivision variations and exceptions—“unusual situations” or “substantial injustice or hardship”—is far from clear, but it is not dramatically different from the new standard for zoning variances.¹⁹

¹⁸ Virginia Code §§ 15.2-2244.1 and 15.2-2244.2, discussed earlier, also authorize a locality to permit certain family subdivisions using an alternative to the mandatory provisions of § 15.2-2244. For a discussion of these family subdivision statutes, see section [2-2.03\(10\)](#).

¹⁹ With a 2009 amendment to Va. Code § 15.2-2309(2), zoning variances still require “a clearly demonstrable hardship” that is “not generally shared,” but no longer a “hardship approaching

For a variation or exception to a subdivision ordinance requirement, the locality has substantial leeway that can be built into its subdivision ordinance. See Va. Code § 15.2-2242(2). For example, the Virginia Supreme Court has upheld ordinance language that permitted the subdivision agent to make exceptions to ordinance provisions upon determining that complying with it would be “impractical” for the developer. *Logan v. City Council of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008). On the other hand, it appears that, absent a provision defining the circumstances in which ordinance provisions can be waived, the default rule requires the applicant to show “substantial injustice or hardship.” In *Baum v. Lunsford*, 235 Va. 5, 365 S.E.2d 739 (1988), the Virginia Supreme Court determined that financial loss (even \$100,000), standing alone, was insufficient to justify a variation (called, in that case, a “variance”) from certain provisions of the local subdivision regulations, particularly when the regulations required a finding of undue hardship and specified that “personal loss” could not be considered. The Court assumed, without deciding, that the hardship required before a variation could be authorized meant something less in a subdivision context than in a zoning context. *Id.* Variations to road designs that affect connectivity of roads are now governed by VDOT regulations that supersede local subdivision ordinances. 24 VAC 30-92-40; 25 Va. Reg. 2782 (Mar. 30, 2009).

At issue in *Gladstone v. Bd. of Sup'rs of Fairfax Cnty.*, 38 Va. Cir. 309 (Fairfax Cnty. 1996), was the waiver of the subdivision ordinance’s public street requirement. Under the ordinance, such a waiver required a finding that the ordinance posed an unusual hardship not generally shared by other landowners and that if the variance were granted, the lot would still be harmonious with neighboring properties. The court held that the evidence made the governing body’s decision “fairly debatable” and that the resolution need not specifically find an unusual hardship not generally shared by other landowners. *Id.*

2. *A requirement (i) that the applicable health official furnish an opinion regarding the suitability of proposed subsurface sewage disposal systems and (ii) that all buildings constructed on lots resulting from subdivision of a larger tract that abuts or adjoins a public water or sewer system or main shall be connected to that public water or sewer system or main subject to the provisions of Va. Code § 15.2-2121.*

This provision effectively overturned an earlier opinion by the Attorney General. See 1982-83 Op. Va. Att’y Gen. 489.

3. *A requirement that, if streets within a subdivision are not to be constructed to standards necessary for acceptance into the secondary system of highways or for state street maintenance funding, the plat and the deeds conveying lots within it contain a statement that the streets will not be maintained by VDOT or the locality.*

This provision also specifically authorizes localities to establish minimum standards for construction of such streets and to require developers to post guarantees that the streets will be constructed to those standards. A locality may not require such disclaimers on deeds conveying land in a development that is not in an approved subdivision. See 1985-86 Op. Va. Att’y Gen. 79A.

The Attorney General has opined that a subdivision ordinance may require performance bonding for street improvements built to standards required by the ordinance, even when the streets are to be owned, operated, and maintained by a homeowners’ association, not dedicated for public use. 1987-88 Op. Va. Att’y Gen. 204. A locality may

confiscation.” See 2009 Va. Acts ch. 206. Cf. *Cochran v. Fairfax Cnty. Bd. of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004) (holding, based on the previous stricter standard, that a zoning variance was impermissible unless application of the zoning ordinance would be unconstitutional).

also require a subdivider to create a homeowners' association to own and maintain such streets, but it has no authority to impose particular standards for such maintenance. 1992 Op. Va. Att'y Gen. 53. Especially given the public benefit standard that VDOT promulgated in 2009, see 25 Va. Reg. 2776-2802 (Mar. 30, 2009), it is advisable for the locality to require an HOA to take over maintenance of roads not accepted into the state secondary highway system.

4. *A provision for the voluntary funding by developers of off-site road improvements, and for the voluntary reimbursement by localities of such expenses, subject to certain specified terms and conditions and a finding that such improvements are "generated and reasonably required by the construction or improvement of the subdivision or development."*
5. *A provision for certain localities to require developers to pay a pro rata share of the cost of "reasonable and necessary road improvements, located outside the property limits of the land owned or controlled by him but serving an area having related traffic needs" in order to reimburse an earlier developer who has "front funded" such road improvements.*²⁰
6. *Provisions to encourage the use of solar heating and cooling devices, applicable only when requested by the subdivider.*
7. *Provisions for certain towns to use funds escrowed pursuant to Va. Code § 15.2-2241(A)(5) for improvements similar to, but other than, those improvements for which funds were escrowed.*
8. *Provisions for clustering of single-family dwellings and preservation of open space developments, which provisions shall comply with the requirements and procedures of the zoning statute, Va. Code § 15.2-2286.1.*

Virginia Code § 15.2-2286.1 requires that most high-growth localities (i.e., counties and cities with population growth of at least 10 percent between the two most recent Censuses) provide, in their zoning or subdivision ordinances, for by-right clustering of single-family residences to preserve open space. The statute exempts any county or city with a population density of more than 2000 persons per square mile. The clustering provision must apply to at least 40 percent of the "unimproved" land in residential and agricultural zoning classifications. A locality may, but is not required to, permit greater density for clustered developments either by right or upon approval of a special exception, special use permit, conditional use permit, or rezoning. While applicable land use ordinances of the locality apply to the cluster development, a locality cannot impose more stringent land use requirements than it does on other developments. Neither can a locality prohibit extension of water or sewer from an adjacent property, as long as the cluster development is in an area designated for water and sewer service.²¹ Any land use ordinance in effect on June 1, 2004 is deemed compliant with Va. Code § 15.2-2286.1 if it provides for the by-right clustering of single-family dwellings and preservation of open space in at least one residential zoning classification. The provisions of the statute are optional for all localities not required to comply.

²⁰ For a discussion of the limits of the types of off-site improvements that may be imposed as a condition of subdivision approval, see section 2-4.

²¹ If any part of a proposed cluster subdivision lies outside the area designated by the locality for public water or sewer, extension of such service to that undesignated area is still subject to local planning commission review under Va. Code § 15.2-2232. See *Stafford Cnty. v. D.R. Horton, Inc.*, 299 Va. 567, 856 S.E.2d 197 (2021).

9. *Provisions requiring the extension of a sidewalk where adjacent property on either side has an existing sidewalk or when the provision of a sidewalk, the need for which is substantially generated and reasonably required by the proposed development, is in accordance with the locality's adopted comprehensive plan.*
10. *Provisions for requiring environmental site assessments, based on the anticipated use of the property proposed for subdivision or development.*
11. *Provisions for requiring disclosure and remediation of environmental problems before approval of subdivision and development plans.*
12. *For any town located in the Northern Virginia Transportation District, provisions authorizing the required dedication of land for sidewalk, curb, and gutter improvements.*

The Attorney General has opined that the subdivision statute does not authorize an ordinance provision that prescribes a minimum time period for a lot to be in existence before being subdivided. 2000 Op. Va. Att'y Gen. 75. A number of counties have such provisions in their subdivision ordinances, however, and have been enforcing them for years without difficulty. The Virginia Supreme Court seems to have implicitly accepted them in *Parker v. County of Madison*, 244 Va. 39, 418 S.E.2d 855 (1992).

2-3 PROCEDURAL ISSUES

2-3.01 Plat Preparation, Review, and Appeals

Anyone wishing to subdivide land must submit a plat of the proposed subdivision for review by the local planning commission or other reviewing agent designated by the governing body of the locality where the land is located. Va. Code § 15.2-2258. The requirements and procedures discussed in this section that apply to final subdivision plats also apply to site plans and plans of development. *Id.*; see also Va. Code § 15.2-2246. For the sake of simplicity, the following discussion will generally refer only to subdivision plats.

As noted in section 2-4, the General Assembly enacted a statute authorizing compensatory damages, injunctive relief and (potentially) an award of attorney's fees to aggrieved applicants who can demonstrate that a locality's decision to approve or disapprove a subdivision plat included or was based upon an unconstitutional condition. Va. Code § 15.2-2208.1. This statute reaffirms the importance of ensuring that localities' planning commissions and other agents responsible for making subdivision and site plan decisions are well familiar with applicable processes and procedures, and with basic legal concepts implicated by those decisions. Virginia Code § 15.2-2208.1 applies only to approvals or denials occurring on or after July 1, 2014.

2-3.01(a) Plat Preparation

Virginia Code § 15.2-2262 requires that every plat intended for recordation be prepared by a certified professional engineer or land surveyor, who must endorse on the plat a certificate setting forth the owner's source of title. A certified professional engineer employed solely by a local government may prepare plats for recordation of property owned by the local government when the preparation is incidental to his employment. 1995 Op. Va. Att'y Gen. 225. The owners, proprietors, and trustees of the property must sign a statement consenting to the subdivision. Va. Code § 15.2-2264. Absent compliance with all such statutory requirements, there is no effective dedication of public facilities shown on the plat. See section 2-3.03.

2-3.01(b) Plat Submission and Review

The procedures for submission and review of subdivision plats are set out generally in Va. Code §§ 15.2-2258 to 15.2-2261. These statutes establish timetables for the review of

plats, including referrals to state agencies. They also provide procedures for a subdivider to appeal disapproval or inaction by the local reviewing agent. Virginia Code § 15.2-2260 permits localities to require the submission of a preliminary plat for review and “tentative approval” for plats involving more than fifty lots, but only if the ordinance permits a landowner, at his option, to submit a preliminary plat involving fifty or fewer lots for tentative approval. The locality must act within the time specified by statute after the official submission of a plat. A plat is “officially submitted” within the meaning of § 15.2-2258 when it has been filed in the correct form in the proper office, accompanied by the fee and all pertinent information. *Fairview Co. v. Bd. of Sup’rs of Spotsylvania Cnty.*, 21 Va. Cir. 193 (Spotsylvania Cnty. 1990). Some localities send applicants a letter of official acceptance in order to eliminate any uncertainty.

The statutes are framed in terms of plat review and approval (or disapproval) by the local planning commission or other designated agent, rather than by the governing body. See Va. Code §§ 15.2-2258 to 15.2-2260; *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010) (in approving or disapproving a proposed subdivision plat, planning commission must interpret and apply relevant zoning ordinances and is not obliged to adopt a zoning administrator’s “interpretation”).²² Many localities nonetheless reserve final plat approval authority to the governing body, an arrangement that the Virginia Supreme Court has implicitly endorsed. See *Bd. of Sup’rs of Fauquier Cnty. v. Machnick*, 242 Va. 452, 410 S.E.2d 607 (1991) (holding that, under local subdivision ordinance, planning commission’s role was merely advisory). If, on the other hand, the subdivision agent has final approval authority, the subdivider has a right to appeal its decision to the circuit court, but not to the governing body. See *Folan v. Town of Kilmarnock*, 22 Va. Cir. 227 (Lancaster Cnty. 1990) (subdivision agent a committee of the planning commission). But see *Johnson v. Henrico Cnty. Bd. of Sup’rs*, 18 Va. Cir. 455 (Henrico Cnty. 1990) (governing body, on appeal from planning commission’s approval, could reject a plan of development).²³

The statutory review period varies according to several factors. A locality has at least sixty days to review a preliminary plat. Va. Code § 15.2-2260. The statute contains an outside time limit of ninety days. *Id.* For final plats, the review period is sixty days after the first submission and forty-five days after a resubmission following a disapproval. Va. Code § 15.2-2259. Before petitioning a court for relief because of a locality’s failure to act on any plat or plan, the subdivider/developer must give ten days’ written notice. Va. Code §§ 15.2-2259(C), 15.2-2260(D).

Section 15.2-2260 recognizes that localities often need to refer a preliminary plat for review by a state agency (e.g., VDOT) or a state authorized public authority (e.g., a water or sanitation authority).²⁴ In that event, the locality must make the referral within

²² Under a 2021 amendment to Va. Code § 15.2-2306, Fairfax County may, by ordinance, give the local architectural review board unique authority to deny a subdivision within a certain class of historic district unless the subdivision is compatible with the historic nature of the district. See 2021 Va. Acts ch. 531 (special session I).

²³ The Virginia Supreme Court has ruled that third parties have no standing to challenge approval of a subdivision plat. See, e.g., *Shilling v. Jimenez*, 268 Va. 202, 597 S.E.2d 206 (2004). Because *Johnson* turned largely on the right of a third party to appeal a planning commission’s approval of a plan of development to the local governing body, that decision would not likely stand today. See section 2-3.01(f).

²⁴ Until 2007, the statutes offered no procedure for referrals to state agencies or public authorities. See 2006 Op. Va. Att’y Gen. 75 (opining that while a locality may require referral of a subdivision plat to a water and sanitation authority, such an authority is not subject to the time limits established in Va. Code § 15.2-2259). A subsequent opinion states that water and sewer construction plans are subject to the requirement that a sanitation authority review the plans upon referral from a county, and that the review is subject to the forty-five day statutory time limitation of Va. Code § 15.2-2269(B). 2010 Op. Va. Att’y Gen. 73.

ten days of the official submission of the plat, and the state agency or public authority must act within forty-five days. See Va. Code § 15.2-2260(A). The locality must act within thirty-five days after receiving all state approvals (forty-five days if the local planning commission conducts a public hearing).²⁵ Va. Code § 15.2-2260(B) and (C). The procedure for referral of a preliminary plat to a state agency or public authority applies to final plats as well, except that there is no provision for additional time to accommodate a public hearing. See Va. Code § 15.2-2259(B).

If the decision is to disapprove a plat, whether preliminary or final, the locality must set out in writing the specific reasons for the disapproval, along with the corrections or modifications needed for approval. See Va. Code §§ 15.2-2259 and 15.2-2260(C). For final plats, the statute expressly requires that the reasons given for disapproval “identify deficiencies in the plat . . . by reference to specific duly adopted ordinances, regulations, or policies.” Va. Code § 15.2-2259(A)(1) and (3). Except in situations addressed in the following paragraphs, however, the statutes do not state the consequence of a failure to identify every deficiency.

Where a proposed subdivision includes land used for commercial or industrial uses, a locality’s review of a resubmitted plat will generally be limited to the deficiencies identified in its disapproval of the initial submission and any deficiencies arising because of corrections made to the initial submission. See Va. Code § 15.2-2259(A).²⁶ The locality cannot delay an official submission by requiring presubmission conferences, meetings, or reviews. See Va. Code § 15.2-2259(A); see also Va. Code § 15.2-2260(C) (applying the same review process to preliminary plats involving commercial property). In reviewing a second resubmission, the locality will be limited to the previously identified deficiencies. *Id.* If a locality fails to act on a resubmitted plat within the statutory time, the plat will be deemed approved. *Id.*

These constraints are not absolute. The statute includes the following caveat that appears to mitigate the direst consequences of the commercial/industrial provisions:

Notwithstanding the approval or deemed approval of any proposed plat, site plan or plan of development, any deficiency in any proposed plat or plan, that if left uncorrected, would violate local, state or federal law, regulations, mandatory Department of Transportation engineering and safety requirements, and other mandatory engineering and safety requirements, shall not be considered, treated or deemed as having been approved by the local planning commission or other agent.

Va. Code § 15.2-2259(A). Similarly, if a resubmission contains a “material revision of infrastructure or physical improvements” or otherwise requires a new review by a state agency or public authority, the locality’s review will not be limited to the previously identified deficiencies. *Id.*

Except for plats subject to the commercial/industrial provisions referenced above, the statutes are silent as to how and when a locality can lose jurisdiction to act on a plat. There is case law suggesting that, for this very reason, the statutory review periods probably are not jurisdictional, except where the statute expressly says they are. See *Tran v. Bd. of Zoning Appeals of Fairfax Cnty.*, 260 Va. 654, 536 S.E.2d 91 (2000) (holding that, despite use of the word “shall” in a statute requiring action within ninety days of an appeal, a board

²⁵ The statute does not contemplate disapproval by a state agency; presumably, however, the statutory deadlines run from the receipt of all state decisions, not just approvals.

²⁶ Until a 2018 amendment, the statute expressly did not apply to construction plans or to deficiencies caused by changes, errors or omissions occurring after the initial submission. See 2018 Va. Acts ch. 670.

of zoning appeals did not lose jurisdiction to act after that time, because the statute “contains no ‘prohibitory or limiting language’ concerning action after the passage of 90 days”). *But see* 2006 Op. Va. Att’y Gen. 75 (concluding that the time limits in § 15.2-2259(A) are mandatory).

2-3.01(c) No Authority for Subdivision Moratorium

In *Board of Sup’rs of Fairfax Cnty. v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975), the Virginia Supreme Court determined that there is no express or implied authority for enacting an ordinance imposing a moratorium on the filing of site plans and preliminary subdivision plats.

2-3.01(d) Compliance with Comprehensive Plan; Moratoria

By statute, a locality’s adopted comprehensive plan “control[s] the general or approximate location, character and extent of each feature shown on the plan.” Va. Code § 15.2-2232(A). Unless already shown on the comprehensive plan, any street or street connection, park or other public area, public building or public structure, or (with certain exceptions) public utility facility or public service corporation facility is allowed only if the planning commission (or, on review, the governing body) has approved it as being substantially in accord with the comprehensive plan. *Id.* When reviewing a proposed subdivision or site plan, a locality may deem such a public area, facility, or use a feature shown on the comprehensive plan and thus exempt from planning commission review. Va. Code § 15.2-2232(D). To qualify for this exemption, the public feature must be identified on, but not the entire subject of, the proposed plan, and the local governing body must have either: (1) by ordinance or resolution, defined standards for the construction, establishment, or authorization of the public feature; or (2) approved the feature through acceptance of a proffer under Va. Code § 15.2-2303.

This exemption comes into play most often for public streets. State law requires that every local subdivision ordinance provide “[f]or the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage.” Va. Code § 15.2-2241(A)(2). If the locality has set standards for street construction (e.g., by reference to VDOT standards), § 15.2-2232(D) allows the local subdivision review agency to approve public streets shown on a subdivision plan and thereby exempt them from review for substantial accord with the comprehensive plan. But this authority is permissive, not mandatory. *See Stafford Cnty. v. D.R. Horton, Inc.*, 299 Va. 567, 856 S.E.2d 197 (2021) (applying the same authority to proposed subdivisions relying on public sewer).

While the comprehensive plan serves a statutory role in the siting of public features, it cannot be used more generally as a basis for disapproving a subdivision or site plan. In *Smith v. Board of Sup’rs of Culpeper Cnty.*, 22 Va. Cir. 82 (Culpeper Cnty. 1990), a board of supervisors disapproved a subdivision plat because it did not comply with the comprehensive plan’s density requirements and because the traffic on the main road of access to the subdivision would have been increased beyond its safe carrying capacity. The board conditioned approval of the plat on the developer’s providing off-site improvements to the road or reducing the number of lots. The circuit court enjoined the county to approve the plat and held that the provisions of a comprehensive plan, not implemented by the zoning ordinance, could not serve as a basis to deny a subdivision that otherwise conforms to the zoning and subdivision ordinances. *Id.* The court reasoned that the statutes requiring a comprehensive plan did not make the plan a zoning ordinance, but only a guideline for the ordinance. On the second issue, the court held that the county lacked authority to require off-site improvements as a condition for subdivision plat approval; this issue is discussed further in section [2-4.04](#).

2-3.01(e) Appeal from Disapproval or Inaction

A subdivider may appeal the disapproval of a plat to the circuit court within sixty days. Va. Code §§ 15.2-2259(D), 15.2-2260(E); see *also* section 2-3.01. On appeal, the issue will be whether the disapproval was not properly based on the applicable ordinance or was arbitrary or capricious. Va. Code §§ 15.2-2259(D), 15.2-2260(E); see *also Bd. of Sup'rs of Culpeper Cnty. v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006). When a locality refuses to accept a subdivision application for failure to comply with minimum submission requirements, that decision is not a purely ministerial act subject to mandamus; however, declaratory judgment is available to decide such a dispute. See *Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 650 S.E.2d 527 (2007).

Some localities delegate to an agent final approval authority, but also provide an appeal from the agent to the planning commission or the governing body. Because the statutes clearly provide a right of appeal to the circuit court from the agent's final decision, at least one court has held that such an internal appeal process is impermissible. See *Folan v. Town of Kilmarnock*, 22 Va. Cir. 227 (Lancaster Cnty. 1990). Even assuming the authority exists, it is uncertain whether a disappointed subdivider could be required to exhaust an internal appeal process before resorting to the courts.

If a subdivision agent takes no final action within the statutorily required time (ninety days after submission of a preliminary plat, sixty days after submission of a final plat, or forty-five days after resubmission of a final plat following disapproval), the subdivider may, after ten days' notice, petition the circuit court for relief, which can include an order directing approval of the plat. Va. Code §§ 15.2-2259(C), 15.2-2260(D).

If one reason for disapproval is noncompliance with the local zoning ordinance, may (or must) the subdivider appeal that determination to the board of zoning appeals? Courts addressing this question have typically said no. See *Stafford Lakes Ltd. P'ship v. Bd. of Zoning Appeals of Stafford Cnty.*, No. 05-662 (Stafford Cnty. Cir. Ct. Jan. 10, 2006) (unpublished letter opinion); *Mason v. Bd. of Zoning Appeals of Fairfax Cnty.*, 25 Va. Cir. 198 (Fairfax Cnty. 1991).²⁷

A locality could permissibly disapprove a subdivision application because it called for land-disturbing activity in a "substantial surface drainage course" located on a residual parcel. *Sansom v. Bd. of Sup'rs of Madison Cnty.*, 257 Va. 589, 514 S.E.2d 345 (1999). In *Bertozzi v. Hanover County*, 261 Va. 608, 544 S.E.2d 340 (2001), the Virginia Supreme Court held that consistently applied, though unwritten, administrative rules and interpretations of local zoning and subdivision ordinances were substantive ordinance requirements; as a result, a subdivision application was to be tested against those unwritten rules to determine whether it was grandfathered under a new ordinance. *Id.* In *Board of Supervisors of Culpeper County v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006), the Court held that it was not arbitrary and capricious for a county to disapprove a preliminary subdivision plat where the developer failed to provide the required "utility letter" showing that the county or nearby town would serve the project with water and sewage facilities.

According to at least one circuit court, any proper basis for rejecting a site plan is sufficient. Whether there might have been ulterior motives for rejecting a site plan is inconsequential if one of the reasons for rejection was proper. *VACOM Inc. v. Bd. of Sup'rs of Fairfax Cnty.*, 33 Va. Cir. 39 (Fairfax Cnty. 1993).

It is not proper, however, to disapprove a plat based on zoning considerations. See *Seymour v. City of Alexandria*, 273 Va. 661, 643 S.E.2d 198 (2007) (holding that a city

²⁷ York County, however, is authorized by special statute to have a Board of Zoning and Subdivision Appeals, to which subdivision appeals must be taken. See 1997 Va. Acts ch. 494.

could not consider the anticipated improvements on proposed lots when reviewing a subdivision application); *Bd. of Sup'rs of Augusta Cnty. v. Countryside Inv. Co.*, 258 Va. 497, 522 S.E.2d 610 (1999) (finding no authority for a subdivision ordinance provision permitting county officials to approve or disapprove a subdivision based on size, shape, and dimension of proposed subdivision lots and to consider the suitability of the land for subdivision). Nor may a subdivision ordinance authorize rejection of a subdivision plat on the basis of the proposed land use where the use is permissible under the zoning ordinance. *Cnty. of Chesterfield v. Tetra Assocs., LLC*, 279 Va. 500, 689 S.E.2d 647 (2010).

In *Planning Commission of Falls Church v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971), the Virginia Supreme Court considered a site plan disapproval that was premised not on any noncompliance with subdivision requirements, but on a planning commission's desire to preclude the proposed use. The trial court found that the applicant had complied or was "ready, willing and able to comply" with all requirements. *Id.* The Supreme Court affirmed on the ground that the applicant had fully complied and was entitled to approval. *Id.* Unfortunately, the "ready, willing and able" rationale is often attributed to the Virginia Supreme Court (even in the headnotes to the case) and is offered to excuse noncompliance. See, e.g., *Mountain Venture P'ship Lovettsville II v. Lovettsville Planning Comm'n*, 26 Va. Cir. 50 (Loudoun Cnty. 1991). The precedential value of *Berman* is also questionable because, at that time, site plans were not subject to the same statutory scheme for review and appeal as subdivision plats.

The Virginia Supreme Court has held that mandamus will lie to require approval of a subdivision plat that complies with all applicable requirements, since the process is ministerial. See *Bd. of Sup'rs of Fairfax Cnty. v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975); *Bd. of Sup'rs of Prince William Cnty. v. Hylton Enters., Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976); cf. *West v. Mills*, 238 Va. 162, 380 S.E.2d 917 (1989) (finding mandamus inappropriate to approve a revised plat, when denial of original plat on appeal); *Sterling Land Corp. v. Planning Comm'n of Hamilton*, 51 Va. Cir. 307 (Loudoun Cnty. 2000) (holding mandamus not appropriate remedy, although court has authority to approve preliminary plat). After determining that the denial of a preliminary plat was arbitrary and capricious, the court in *Mountain Venture Partnership Lovettsville II v. Lovettsville Planning Commission*, 26 Va. Cir. 50 (Loudoun Cnty. 1991), ordered that the plat be approved.

On appeal, a subdivider is not entitled to seek approval of any plat other than the one disapproved by the subdivision agent. *Seville Invs. Corp. v. Loudoun Cnty.*, 60 Va. Cir. 63 (Loudoun Cnty. 2002). Neither may a subdivider pursue approval of an alternative plat while his appeal from the disapproval of the original plat is pending. See *West v. Mills*, 238 Va. 162, 380 S.E.2d 917 (1989).

There is no reported decision considering whether a challenge to the disapproval of a subdivision plat can be refiled, after a nonsuit, outside the original sixty-day period. At least one circuit court has ruled that a zoning challenge brought under Va. Code § 15.2-2285(F) cannot be refiled, after a nonsuit, outside the original thirty-day statutory period. See *Ticonderoga Farms, Inc. v. Bd. of Sup'rs of Cnty. of Loudoun*, 72 Va. Cir. 365 (Loudoun Cnty. 2006). This decision relied on the Virginia Supreme Court's earlier holding that the statutory period for contesting a zoning decision under that statute was not a statute of limitations. See *Friends of Clark Mountain Found., Inc. v. Bd. of Sup'rs of Orange Cnty.*, 242 Va. 16, 406 S.E.2d 19 (1991).

Can the disapproval of a plat give rise to a taking of property and a requirement for just compensation? While a single disapproval almost certainly would not—unless the plat represented the most modest development possible—a series of disapprovals leaving the owner with no economically viable use of the property could lead to liability. See *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 106 S. Ct. 2561 (1986). For a more detailed discussion of this issue, see section 2-4.01(c).

2-3.01(f) Third-Party Challenges to Plat Approval

The Virginia Supreme Court has put to rest any question about the ability of third parties to challenge the approval of a subdivision plat or the approval of exceptions to subdivision requirements that facilitate the approval of a plat. In short, they have no such right, either under the subdivision enabling statutes or the Declaratory Judgment Act. See *Logan v. City Council of Roanoke*, 275 Va. 483, 659 S.E.2d 296 (2008); see also *Shilling v. Jimenez*, 268 Va. 202, 597 S.E.2d 206 (2004). The Court concluded that the subdivision enabling statutes create no private right of action against a subdivider to challenge the approval of a subdivision plat or to sue to enforce a subdivision ordinance. The *Shilling* court reasoned that allowing third parties to challenge approval of a plat, perhaps years after the approval, could cast a cloud over the vested rights of innocent purchasers and lenders. *Id.*

Despite this severe limitation, third parties still can bring a facial challenge to a subdivision ordinance, alleging a lack of statutory authority or other grounds. See *Logan, supra*. The Virginia Supreme Court implicitly allowed a third-party owner within an existing subdivision to bring a declaratory judgment action against another owner whose resubdivision of other lots allegedly violated restrictive covenants. See *Fein v. Payandeh*, 284 Va. 599, 734 S.E.2d 655 (2012).²⁸

2-3.02 Effect of Subdivision Plat Approval**2-3.02(a) Vesting and Extinguishing of Title**

Virginia Code § 15.2-2265 provides that once an approved plat is legally recorded, fee simple title to the premises set apart for “streets, alleys, or other public use” becomes vested in the locality, and the locality acquires any easement indicated on the plat to create a public right of passage, and any easements shown for the transmission of stormwater, domestic water, and sewage (conveyance of the latter by deed recorded with the plat, the practice in some localities at one time, is therefore no longer necessary). This statute and its predecessors have replaced the common law requirement of acceptance after an offer of dedication, either by express acceptance or by implication through the exercise of dominion and control.²⁹ See *Brown v. Tazewell Cnty. Water & Sewerage Auth.*, 226 Va. 125, 306 S.E.2d 889 (1983) (recordation vests title in all streets shown on the plat). Before 1946, a “dedication by map,” created by the recordation of a subdivision plat, vested in the public only a right of passage over the areas shown as streets on the plat. See *Barter Found., Inc. v. Widener*, 267 Va. 80, 592 S.E.2d 56 (2004) (pre-1946 subdivision) (distinguishing between right of public passage and acceptance of a dedication). Under the pre-1946 scheme, the underlying fee in the streets remained in the subdivider and passed to the abutting lot owners as the subdivider’s grantees. In *Barter Foundation*, the Court found that if a locality had not exercised sufficient jurisdiction and dominion over the streets it had expressly accepted, there could be no acceptance by implication of the other streets noted on a plat. *Id.*

That situation was changed by the adoption of the Land Subdivision Law in 1946, so that upon recordation of an approved plat, title to streets vests in the locality. *Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass’n*, 240 Va. 221, 396 S.E.2d 661 (1990). In *Ocean Island Inn, Inc. v. City of Virginia Beach*, 216 Va. 474, 220 S.E.2d 247 (1975), the Virginia Supreme Court held that acceptance of some streets on a subdivision plat implies

²⁸ In an unpublished order resolving a subsequent appeal, the Virginia Supreme Court ruled that where restrictive covenants required compliance with the local subdivision ordinance, a third-party owner could indirectly challenge a subdivision approval as a violation of the covenants. *Fein v. Zand 78, LLC*, Rec. No. 140927 (Va. Sup. Ct. July 31, 2015) (unpubl.).

²⁹ For a discussion of implied dedication by the exercise of dominion and control, see *3232 Page Ave. Condo. Ass’n v. City of Va. Beach*, 284 Va. 639, 735 S.E.2d 672 (2012), and *Lynnhaven Dunes Condo. Ass’n v. City of Va. Beach*, 284 Va. 661, 733 S.E.2d 911 (2012). See also *Old Dominion Boat Club v. Alexandria City Council*, 286 Va. 273, 749 S.E.2d 321 (2013) (no implied dedication of private easement of access over public alley).

acceptance of all the streets on the plat (and also imposes potential tort liability on the public). Similarly, in *Board of County Supervisors of Prince William County v. United States*, 48 F.3d 520 (Fed. Cir. 1995), the federal government took a 550-acre tract for which a plat dedicating proposed streets had been recorded. The Federal Circuit ruled that the local governing body was entitled to just compensation for the taking of the area comprising the proposed streets, because under Va. Code § 15.1-478 (the predecessor to § 15.2-2265) the plat recordation had automatically conveyed a fee simple interest in the streets.

Recordation of an approved plat also serves to extinguish most rights of way, easements or other streets of a locality that the plat identifies as being extinguished, unless there is a separate instrument of record and the interest has been condemned or purchased. Va. Code § 15.2-2265. In *Lynnhaven Dunes Condominium Association v. City of Virginia Beach*, 284 Va. 661, 733 S.E.2d 911 (2012), the Court held that an easement for public passage may only be terminated or extinguished if the requirements of Va. Code §§ 15.2-2271 or 15.2-2272 are met. Both sections require either a separate writing or the passage of an ordinance before an easement for public passage may be terminated or extinguished.

Public easements (except those for public passage, easements containing improvements, those containing private utility facilities, and common or shared easements for the use of franchised cable operators and public service corporations) may be relocated by recordation of plat when signed by the owner of the real property and approved by the locality, regardless of the manner of acquisition or the type of instrument used to dedicate the original easement. If the purpose of the easement is to convey stormwater drainage from a public roadway, the entity responsible for the operation of the roadway must first determine that the relocation does not threaten either the integrity of the roadway or public passage. The clerk indexes the locality as grantor of any easement or portion terminated and extinguished. Va. Code § 15.2-2265.

Nebulous captions and notes on plats often cause uncertainty as to whether roads, parks, or other facilities shown on them are intended to be dedicated to the public by recordation of the plat, or are to be reserved by the subdivider or developer for possible dedication at a later time. (Often, such notes are used as a matter of short-term convenience when the grantor does not know to whom to convey utility or other easements, such as to homeowner associations not yet formed, etc.) This can require a very fact-specific determination. See *Laughlin v. Morauer*, 849 F.2d 122 (4th Cir. 1988) (applying Virginia law) (dedication of a park); *Hurd v. Watkins*, 238 Va. 643, 385 S.E.2d 878 (1989) (no dedication of parcel as a roadway takes place when it is marked “reserved” on plat); *Turk v. Cnty. of Spotsylvania*, 56 Va. Cir. 198 (Spotsylvania Cnty. 2001) (markings on plat indicated no dedication of right of way); 1987 Op. Va. Att’y Gen. 199 (case-by-case determination needed to determine whether streets were properly dedicated on plats). In reviewing subdivision deeds and plats, local government attorneys should review dedication language carefully to ensure that the intent is clear, and that the grantee is in existence (for example, to ensure that the homeowners’ association has been incorporated).

In an instructive case, the Virginia Supreme Court found that a subdivision plat notation referring to a “reserved area” was not a sufficiently clear reference to an area marked on the plat as “REMAINING LAND.” *Lovelace v. Orange Cnty. Bd. of Zoning Appeals*, 276 Va. 155, 661 S.E.2d 831 (2008) (reasoning that “[i]f the ‘reserved area’ restriction was intended to refer to Lovelace’s property, it would have been easy to say so and its application would not be left to the uncertainty of inference”). One lesson from *Lovelace* is that the language in a plat should be as clear and unambiguous as possible. Consider this lesson in the context of a common situation, where a plat bears two dates—the one in the title block and the one in the seal. Ideally, a locality should insist on agreement between the dates; at a minimum, though, any deed referring to the plat should use both dates, as well as the complete title of the plat and its date of approval, to avoid any possible confusion. *Lovelace*

may be distinguishable, however, because the Orange County subdivision ordinance in question required recordation of a restrictive covenant or servitude on the reserved area, which was never done. *Id.* Regardless, local officials should insist on clarity in the notations on any subdivision plat.

By contrast, in *City of Chesapeake v. Dominion SecurityPlus Self Storage, L.L.C.*, 291 Va. 327, 785 S.E.2d 403 (2016), the Virginia Supreme Court held that a plat note was a valid contract whose language was clear and unambiguous such that the landowner through the note had waived any damages to the residue as the result of the purchase or condemnation of a specified area, and the waiver was broad enough to include loss of visibility and loss of direct access to a roadway.

Virginia Code § 15.2-2266 validates any subdivision plat that, though otherwise valid, did not meet technical requirements for recordation, if it was recorded before January 1, 1975.

2-3.02(b) Responsibility of Locality upon Recordation

Virginia Code § 15.2-2265 provides that nothing obligates a locality, association or authority, upon recordation of a plat, to install or maintain streets, or stormwater, water, or sewer facilities shown on the plat, unless otherwise agreed to by such entity. 2015 Op. Va. Att'y Gen. S-1 (informal opinion) (existence of surety bond does not obligate locality to install or maintain streets). Prior to this statutory provision, in *Burns v. Board of Supervisors of Fairfax County*, 218 Va. 625, 238 S.E.2d 823 (1977), the Virginia Supreme Court held that the acceptance of dedication of certain improvements by a county for public use could give rise to an implied contract for damages against the county caused by such improvements when improperly designed. Also, in *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993), a subdivision plat conveyed a drainage easement to the county, but the county never maintained it. The drainage ditch repeatedly flooded two properties, rendering them unmarketable, and the landowners brought inverse condemnation suits against the county. The Virginia Supreme Court held that when the county accepted the dedication of the easement, it also accepted the burden of maintaining it in a manner to protect the servient estate.

In a case between private parties, the Virginia Court of Appeals held that a public easement can be transferred by plat under Va. Code § 15.2-2265 only if the plat includes an explicit notation reflecting that the easement is for a public purpose (e.g., a public right-of-way). See *Salunkhe v. Christopher Customs, LLC*, 78 Va. App. 312, 890 S.E.2d 857 (2023).³⁰

Virginia Code § 15.2-2268 provides that nothing in the subdivision enabling statutes creates an obligation upon any locality, upon the recordation of a plat, to pay for grading or paving, or for sidewalks, sewers, or curb and gutters. 2015 Op. Va. Att'y Gen. S-1 (informal opinion). Recordation of a plat also does not guarantee, at least in most counties, that roads on the plat will be maintained, as they may meet local standards, but still not be eligible for state maintenance. See Frank F. Barr, *Virginia Subdivision Law: An Unreasonable Burden on the Unwary*, 34 Wash. & Lee L. Rev. 1223 (1977).

Recordation of a plat may not guarantee access for building purposes to a lot shown on it. Even though a subdivided lot abuts a platted street dedicated to public use, if such a street is unimproved, a local government may require in its zoning ordinance that the street be physically improved and accepted into the street system before a building permit can be issued for the lot. *City of Staunton v. Cash*, 220 Va. 742, 263 S.E.2d 45 (1980).

³⁰ As of February 2024, the *Salunkhe* case is on appeal to the Virginia Supreme Court.

2-3.02(c) Conditional Zoning

If the local governing body itself (not the planning commission or other agent) has specifically determined that a recorded plat or final site plan complies with any proffered zoning conditions, the provisions of the recorded plat or site plan control and the zoning amendment notice requirements are deemed satisfied, even if they otherwise conflict with the proffered conditions. Va. Code § 15.2-2261.1.

2-3.03 Effect of Failure to Obtain Plat Approval

Failure to comply with subdivision plat filing requirements does not inhibit passage of title as between parties. See Va. Code § 15.2-2254(3); *Nejati v. Stageberg*, 286 Va. 197, 747 S.E.2d 795 (2013) (although failure to comply results in significant limitations on the use of the property, it does not prevent conveyance; owners hold as tenants in severalty); see also *Matney v. Cedar Land Farms, Inc.*, 216 Va. 932, 224 S.E.2d 162 (1976) (applying Va. Code § 15.2-473, the predecessor to § 15.2-2254). Nonetheless, there can be a variety of other adverse consequences.

2-3.03(a) Dedication Might Not Occur

As to public facilities shown on a plat, no statutory dedication occurs unless and until the requirements of the applicable subdivision statutes and ordinances have been met. *Brown v. Tazewell Cnty. Water & Sewerage Auth.*, 226 Va. 125, 306 S.E.2d 889 (1983). In *Ryder v. Petrea*, 243 Va. 421, 416 S.E.2d 686 (1992), the Virginia Supreme Court held that because a plat did not comply with the subdivision ordinance in effect at the time of the recording, there was no dedication to the public of a right-of-way shown on the plat. However, in *McNew v. McCoy*, 251 Va. 297, 467 S.E.2d 477 (1996), the Court held that, even absent a subdivision plat, a county may accept a road dedication by means of (1) formal and express acceptance, (2) exercise of "dominion of the way," or (3) long continued public use of the way. It reiterated that the doctrine of implied acceptance applies only in urban areas. See also *E.S. Chappell & Son v. Brooks*, 248 Va. 571, 450 S.E.2d 156 (1994) (setting forth requirements for implied acceptance).

2-3.03(b) It Could Be a Crime

Virginia Code § 15.2-2254 makes it unlawful for anyone to subdivide land, record a plat, or sell land in a subdivision, unless it is done in compliance with the local ordinance and enabling statutes; a fine of up to \$500 per lot can be levied. However, Va. Code § 15.2-2254(3) validates title to land conveyed in violation of the ordinance or statute. Such a conveyance might constitute a violation of the subdivider's general warranty, however, and impair the marketability of title. See *Justus v. Lowell*, 32 Va. Cir. 32 (Loudoun Cnty. 1993).

It is unlawful for the clerk of any court to file or record a plat of subdivision unless it is properly approved. Va. Code § 15.2-2254(3). The Attorney General has opined, however, that this section does not prohibit a clerk from recording a plat of division upon the oral assertion that a subdivision ordinance does not apply to it, unless the locality has by ordinance provided that such a determination be made by a designated agent of the locality, such as the local planning director. 1987-88 Op. Va. Att'y Gen. 208. The Attorney General has also concluded that a local government may prohibit the issuance of a building permit for structures on a lot or parcel that has been illegally subdivided. 1989 Op. Va. Att'y Gen. 100.

2-3.03(c) The Resulting Parcels Might Be Unusable

Questions often arise about land which is subdivided by such means as a court order (as in a partition suit), by foreclosure on part of a parcel, or by a testator's directions in a will. Generally, this results in title passing by virtue of Va. Code § 15.2-2254(3), but it does not guarantee that the resulting parcels are usable, as they might be non-conforming with respect to zoning and other regulations. In *Nejati v. Stageberg*, 286 Va. 197, 747 S.E.2d 795 (2013), an unsubdivided plot was conveyed as two separate parcels, delineated by

survey, to different owners. The Virginia Supreme Court held that the two owners held the property in severalty—not as tenants in common—but because it was transferred in violation of the subdivision ordinance, the undeveloped portion could not be developed. In *Leake v. Casati*, 234 Va. 646, 363 S.E.2d 924 (1988), the Virginia Supreme Court held that a locality's subdivision regulations do not deprive a court of equity of its power to partition land, even if such action results in parcels too small to meet minimum lot sizes required by the locality's zoning regulations. The Court observed, however, that a locality's land use or zoning restrictions still would apply and could render useless lots created through partition that are too small to meet minimum lot size requirements. *Id.* The Court reached a similar result in *Crestar Bank v. Martin*, 238 Va. 232, 383 S.E.2d 714 (1989) (ruling that exemption from subdivision requirements did not obviate need to comply with zoning regulations).

A 2022 amendment to the statutory definition of "subdivision," in Va. Code § 15.2-2201, effectively exempts lots created by partition from subdivision and certain zoning restrictions. See 2022 Va. Acts ch. 271. Specifically, under the revised definition, a division of land resulting from a partition order takes precedence over all subdivision requirements and over any zoning requirement regarding minimum lot area, width, or frontage, so long as the resulting lot or parcel does not vary from such zoning requirements by more than 20 percent. A copy of the final partition order must be provided to the zoning administrator.

2-3.04 "Vesting" and "Grandfathering"

2-3.04(a) Statutory Vesting

In response to the 2008 housing and credit crisis, the General Assembly enacted Va. Code § 15.2-2209.1, which was repeatedly extended. Under the latest version, for any preliminary or final subdivision plat that was valid as of January 1, 2017, the time limits for validity found in Va. Code §§ 15.2-2260 and 15.2-2261 were generally suspended until July 1, 2020. Although the General Assembly allowed that provision to lapse, it adopted and later amended a replacement statute, Va. Code § 15.2-2209.1:1, to retroactively extend similar protections until July 1, 2023. See 2022 Va. Acts chs. 178, 179; 2022 Op. Va. Att'y Gen. 61. Under these statutes, a developer must show good faith by maintaining any unreleased security for its performance obligations (unless the locality has enacted a bonding moratorium or deferral option). The remainder of this section will deal with the provisions that govern subdivision plats irrespective of §§ 15.2-2209.1 and 15.2-2209.1:1.

An approved preliminary plat is valid for five years if the developer submits a final plat within one year (or within a longer period prescribed in the local subdivision ordinance) and then diligently pursues final approval. Va. Code § 15.2-2260(F). If there has been no diligent pursuit of approval of the final plat, the planning commission or other agent, after three years, may revoke approval of the preliminary plat after notice and upon written findings of fact. *Id.* Once an approved final subdivision plat is recorded pursuant to § 15.2-2261, the underlying preliminary plat (which might cover more land area) remains valid for five years from the date of the latest recorded plat of subdivision for the property. Va. Code § 15.2-2260(G). Section 15.2-2260(G) adds to the existing validity period for preliminary subdivision plats for multiple phase developments in circumstances where a final subdivision plat is recorded. However, in cases where the preliminary subdivision plat did not show a phased or sectioned development, the five-year validity period is not cumulative. 2008 Op. Va. Att'y Gen. 52. A preliminary plat is required to show all sections of the proposed development for the developer to benefit from the extended validity provision of Va. Code § 15.2-2241(A)(5). *Id.*

A recorded subdivision plat or final site plan is valid for at least five years. Va. Code § 15.2-2261(A).³¹ During that period, with certain enumerated exceptions, no changes or amendments to any local zoning ordinance or regulation may adversely affect the developer's right to complete the project in accordance with the recorded plat and final site plan, unless the change is to comply with state law or there has been a mistake, fraud, or a change in circumstances substantially affecting public health, safety, or welfare. Va. Code § 15.2-2261(C), (E); *see also Loch Levan Land v. Bd. of Sup'rs of Henrico Cnty.*, 297 Va. 674, 831 S.E.2d 690 (2019). Virginia Code § 15.2-2261 also permits extensions and provides a right of appeal within sixty days of a denial. But this protection extends only to the particular section depicted in the recorded plat, not to the overall development. *See Loch Levan, supra.*

Once an approved final subdivision plat has been recorded, it will be valid indefinitely if any part of the subdivided property is conveyed to a third party (other than the developer or the locality) or if the local jurisdiction or public body has accepted a dedication shown on the plat. Va. Code § 15.2-2261(F).³² This validity continues unless and until any portion of the property is vacated under Va. Code §§ 15.2-2270 through 15.2-2278. *Id.* This provision seems likely to trigger a practice of developers' conveying at least one lot immediately upon plat recordation, possibly giving rise to disputes over whether particular conveyances—for example, to a business entity affiliated with a subdivision developer, perhaps for only nominal consideration—are sham transactions that fall outside the statute's safe harbor.

2-3.04(b) The Nature of Vested Rights

Chapter 1, Planning and Zoning, section 1-15, has an excellent discussion of the concept of "vested rights." Certain rights are deemed to "vest" when there has been some good faith reliance on existing laws, accompanied by financial investments or other obligations, by a developer who has obtained some approval by virtue of a significant, affirmative governmental act. All of the reported cases on vesting in Virginia are zoning cases, although state law clearly identifies the approval of site plans and subdivision plats as acts that may lead to such vesting. *See* Va. Code § 15.2-2307.

One case of significance in the context of subdivision approvals is *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009). In the *Hale* decision, the Virginia Supreme Court shed some light on the question of what rights actually vest based on individual significant governmental acts. At issue was whether proffers specifying retail use of a property, without specifying the nature of that retail use, could give rise to a vested right to any retail use, as against a new zoning ordinance provision requiring a special use permit for "big-box" retail. The Court emphasized that the hallmark of vesting is specificity; and "when vested rights accrue to a landowner as the result of a significant affirmative governmental act, the rights that vest are only those that the government affirmatively acts upon" *Id.* Consequently, the proffers did vest the right to retail use in general, but they did not vest the right to "big-box" retail use without a special use permit.

³¹ A site plan is final once it has been reviewed and approved by the locality if the only requirements remaining to be satisfied in order to obtain a building permit are the posting of any bonds and escrows or the submission of any other administrative documents, agreements, deposits, or fees required by the locality in order to obtain the permit. However, any fees that are customarily due and owing at the time of the agency review of the site plan must be paid in a timely manner. Va. Code § 15.2-2261(A).

³² In 2020, the General Assembly added this latter vesting provision relating to accepted dedications. *See* 2020 Va. Acts ch. 138. This amendment appears to have been in response to the *Loch Levan* decision, where the Virginia Supreme Court held that the indefinite vesting of Va. Code § 15.2-2261(F) did not apply to a road plat that included no lots. *See Loch Levan, supra.*

This ruling casts doubt on an earlier circuit court decision involving vested rights based on the approval of preliminary subdivision plats. There the issue concerned whether the landowner's rights were vested against zoning amendments that did not directly conflict with the specific developments depicted on the plats. The court ruled that the landowners could develop in accordance with the zoning ordinance in effect at the time of vesting, notwithstanding their ability to comply with later-adopted requirements. See *In re Zoning Ordinance Amendments*, 67 Va. Cir. 462 (Loudoun Cnty. 2003) (incorporating the text of an unreported earlier decision). *Hale* breathes new life into the argument that vested rights extend only so far as the approval on which they are based; aspects of the proposed development that were not subject to review are not necessarily protected against amendments to the zoning ordinance.

The same circuit court later ruled (with regard to different properties) that where a vested rights claim is to a proposed subdivision, the earliest approval that can constitute the required "significant affirmative governmental act" for a subdivision under Va. Code § 15.2-2307 is the approval of a preliminary subdivision plat. *In re Zoning Ordinance Amendments*, 66 Va. Cir. 375 (Loudoun Cnty. 2005); *accord* 2006 Op. Va. Att'y Gen. 81 (reaching the same conclusion regarding site plans and plans of development). Prerequisite approvals required for official acceptance of a preliminary subdivision application—e.g., septic drainfield and well approvals—are insufficient. *Zoning Amendments, supra*. This decision followed the principle, laid out by the Virginia Supreme Court in *Board of Zoning Appeals of Bland Cnty. v. CaseLin Sys., Inc.*, 256 Va. 206, 501 S.E.2d 397 (1998), that "the partial processing of a proposed and filed subdivision plat and site plan does not constitute the necessary 'approval.'" Under a 2010 amendment to Va. Code § 15.2-2307, once an improvement has been constructed in accordance with a local permit (other than a building permit), the local zoning ordinance may provide that it is nonconforming, but not illegal. See 2010 Va. Acts ch. 698.

A property owner may not acquire a vested right in the zoning classification or use of neighboring property. *Town of Leesburg v. Long Lane Assocs.*, 284 Va. 127, 726 S.E.2d 27 (2012).

The Virginia Supreme Court found that there was no vested property right in the continuation of a public road once the road is dedicated, which the locality then owned in fee simple. *Loch Levan Land v. Bd. of Sup'rs of Henrico Cnty.*, 297 Va. 674, 831 S.E.2d 690 (2019). However, the General Assembly appears to have altered this rule in 2020, when it amended Va. Code § 15.2-2261(F) to make a recorded plat valid until abandoned once a land dedication is accepted. See 2020 Va. Acts ch. 138. To void a plat under this subsection, the abandonment must be done in accordance with Va. Code §§ 15.2-2270 through 15.2-2278, not an alternative procedure in Title 33.2. See *Loch Levan, supra*.

2-3.04(c) Grandfathering

When substantial amendments are made to a subdivision ordinance, or a new one is adopted, it is common for a local governing body to provide that all or some of the new ordinance requirements will not apply to subdivision applications that, though short of approval, have reached a stated point in the review process. Without such a grandfathering provision, subdivisions still awaiting their first approval on the effective date of a new or revised ordinance must comply with the new requirements. In *Parker v. Cnty. of Madison*, 244 Va. 39, 418 S.E.2d 855 (1992), a developer had filed a preliminary plat to divide an agriculturally zoned tract of land into eleven lots. Subsequently, the county amended its subdivision ordinance to prohibit subdividing any agriculturally zoned tract into more than four lots in any four-year period. The amended ordinance was effective immediately, and did not contain any provision that pending subdivision applications would be governed by prior law. The board of supervisors, invoking an unwritten practice of grandfathering any pending subdivision application, ultimately approved the developer's final plat providing for

eight lots. The Court held that Va. Code § 15.1-473 (now § 15.2-2254) required the plat to comply fully with the amended ordinance limiting subdivision to four lots. *Id.*

However, in another case, the Court required far less than strict compliance with a grandfather clause. See *Bertozzi v. Hanover Cnty.*, 261 Va. 608, 544 S.E.2d 340 (2001). The clause covered only complete final subdivision applications that complied with all substantive requirements of the prior zoning and subdivision ordinances. Although the subject application did not satisfy the requirements of the codified ordinances, the Court ruled that it was nonetheless grandfathered because it satisfied the consistently applied, but unwritten, practices and procedures in effect at the time of submission. *Id.* The governing body had ratified the practices and did not argue that they represented an unauthorized administrative change to the ordinances. *Id.*

In an earlier decision involving the same grandfather clause, the Court held that a note on the application that plats for two other sections would be “forthcoming” was insufficient to grandfather those sections; the other plats were filed the day after the adoption of the ordinance amendments. *Hanover Cnty. v. Bertozzi*, 256 Va. 350, 504 S.E.2d 618 (1998).

See also Chapter 1, Planning and Zoning, section 1-15.11 for a discussion of the distinction between vesting and grandfathering.

2-3.05 Vacating All or Portions of a Plat

2-3.05(a) Procedures

In vacating recorded subdivisions, there are different procedures for subdivisions in which no lots have been sold, see Va. Code § 15.2-2271, and those in which lots have been sold, Va. Code § 15.2-2272; they differ with regard to the type of notice and consent by lot owners required during the vacation process. To vacate drainage easements and rights of way on plats, only the owners of lots affected must consent to such vacation, as opposed to the owners of all lots on a plat; mortgagees must still consent, which sometimes makes the process cumbersome. The effect of vacation is to eliminate the effect of the recording of the plat or part thereof so vacated, including any dedication to public use, and, for vacations pursuant to Va. Code § 15.2-2272, except as necessarily reserved to accommodate existing utility lines. Va. Code § 15.2-2274; see 1980-81 Op. Va. Att’y Gen. 332.

The procedures specified in the Code of Virginia for vacating or altering subdivision lot lines on a recorded plat are mandatory and must be complied with for any such vacation or alteration to be effective. See 1986-87 Op. Va. Att’y Gen. 128; 1985-86 Op. Va. Att’y Gen. 307; 1984-85 Op. Va. Att’y Gen. 297; see also *Presidential Gardens/Duke Street Ltd. P’ship v. Salisbury Slye, Ltd.*, 802 F.2d 106 (4th Cir. 1986).

Vacation of interests granted to a locality as a condition of site plan approval, such as streets, right-of-way easements, and drainage and utility easements, may be accomplished by either of the procedures set out in Va. Code § 15.2-2270. For alternative procedures to vacate and abandon public rights of way, see Va. Code §§ 15.2-2006 and 33.2-901 to 33.2-934. See also *Loch Levan Land v. Bd. of Sup’rs of Henrico Cnty.*, 297 Va. 674, 831 S.E.2d 690 (2019); *Barter Found., Inc. v. Widener*, 267 Va. 80, 592 S.E.2d 56 (2004) (pre-1946 subdivision) (mere nonuse does not suffice to establish abandonment of dedication of street).

2-3.05(a)(1) Exceptions

Not every change in a subdivision plat requires that the plat be vacated to effect the change, such as where one parcel of a subdivision is resubdivided. 1979-80 Op. Va. Att’y Gen. 327. Resubdivisions are to be treated the same as a subdivision. *Id.* Vacation of a recorded plat need not be required for adjustments in the boundary line of individual lots shown on the

plat, where no streets, alleys, easements for public passage or public places shown on the plat are affected. See 1980-81 Op. Va. Att’y Gen. 335. Virginia Code § 15.2-2275 provides that boundary lines of any lot or parcel may be relocated or “otherwise altered” as part of a valid and properly recorded plat of subdivision, provided that the action does not involve the relocation or alteration of streets, alleys, easements for public passage, or other access. The mere acquisition of two contiguous tracts by the same owner has no effect on the subdivision lines of record, nor does the dedication of rights of way through a parcel. See *W&W P’ship v. Prince William Cnty. Bd. of Zoning Appeals*, 279 Va. 483, 689 S.E.2d 739 (2010). Alternatively, a locality may allow the vacating of lot lines by recordation of a deed provided that no easements or utility rights of way located along any lot lines to be vacated are extinguished or altered without the express consent of all interested parties.

Renaming streets, roads, and alleys on previously recorded site plans or subdivision plats does not cause vacation of such plans or plats. The locality may forward a certified copy of the action effecting the name change to the clerk of the circuit court, who shall note the change on the plan or plat and record the certified copy. Va. Code § 15.2-2019.

2-3.05(a)(2) Standards for Vacation

While the statutes do not expressly specify the criteria to be used in deciding whether to adopt an ordinance pursuant to Va. Code § 15.2-2272(2) vacating all or part of a subdivision plat, a governing body should not adopt such ordinance if it is of the opinion that the action would irreparably damage the owner of any lot shown on the plat. See 1984-85 Op. Va. Att’y Gen. 297; 1986-87 Op. Va. Att’y Gen. 128. Virginia Code § 15.2-2272(2) provides for a right of appeal and a nullification by the circuit court of any vacation that irreparably damages the owner of any lot shown on the plat. *Booher v. Bd. of Sup’rs of Botetourt Cnty.*, 65 Va. Cir. 53 (Botetourt Cnty. 2004). The circuit court subsequently held that a claim that the vacation would unreasonably restrict access sufficiently alleged irreparable harm and that the inadequacy of a remedy at law need not be shown under § 15.2-2272(2). *Booher v. Bd. of Sup’rs of Botetourt Cnty.*, 66 Va. Cir. 87 (Botetourt Cnty. 2004).

The decision of a governing body not to vacate a plat is a legislative one requiring a balancing of interests, not an administrative one, and is presumptively valid. *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997). (“[O]nce a subdivision plat is approved and recorded, the governing body and other landowners expect and rely upon development of the property according to that plan.”)

A governing body might not be able to condition a vacation upon the developer’s promise to dedicate property to the municipality. Some courts have held that to require such a condition would violate the “takings” clauses of federal and state constitutions. See *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991). For example, in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), the court held that a city could not require a developer to dedicate geothermal wells to the city as a precondition to vacating a plat, because the dedication was not rationally related to the vacation.

The Attorney General has opined that subdivision plots are not automatically vacated of record when their validity expires. 2022 Op. Va. Att’y Gen. 61.

2-3.05(b) Effect of Vacation

Vacating all or a portion of a plat returns the area vacated to “acreage,” preventing it from being sold as subdivided lots. Since vacations may be initiated by a locality, the process may serve as the ultimate remedy for a problem subdivision, at least until lots are sold. When a governing body records an ordinance of vacation of a street, in accordance with Va. Code § 15.2-2274, fee simple title to the center line of the abandoned street vests in the owners of the abutting lots, at least for streets platted after 1946. *Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass’n*, 240 Va. 221, 396 S.E.2d 661 (1990). Furthermore, absent a contrary intention, a subsequent conveyance of the abutting lots carries with it all

of the grantor's interest in the former road, even if the deed made no specific reference to the strip of land. *Id.* Given the evolution of the governing statutes in Virginia, the issue of who gets title to vacated streets can be confusing. See Richard B. Kaufman, *Title to Vacated Streets in Virginia Cities and Towns*, VA. BAR NEWS, Apr. 1983, at 63; see also *Dotson v. Harman*, 232 Va. 402, 350 S.E.2d 642 (1986) (holding that vacation process cannot be used to extinguish vested access easement to lots shown on plat).

2-4 CONSTITUTIONAL ISSUES—EXACTIONS & DENIALS

Overlaying all constitutional challenges to subdivision approvals, denials, and conditions is Va. Code § 15.2-2208.1, which provides that any applicant aggrieved by the grant or denial of any site plan, plan of development, or subdivision plan, when that decision included or was based upon an unconstitutional condition (federal or state), is entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue approvals without the unconstitutional condition. The applicant may also be entitled to reasonable attorney's fees and court costs. There is a presumption that the unconstitutional condition was the controlling basis for the locality's decision, if the applicant made a prior written objection to the condition. The time limitation for any action pursuant to Va. Code § 15.2-2208.1 related to subdivision approval would be the same as that set forth in § 15.2-2259(C) or (D), or § 15.2-2260(D) or (E), as applicable.

2-4.01 Exactions

When a subdivision plat is recorded and the lots are developed, the local government is burdened with the expense of providing or improving the public infrastructure and providing additional public services such as schools, fire and police protection and parks to those lots. The local government will want the developer to bear his fair share of this increased burden by exacting contributions as a condition of subdivision approval. These exactions might range from the dedication of land, to the construction of public improvements (both on- and off-site, possibly with provision for future reimbursement by other developers), to payment of so-called "impact fees." But the developer might protest that these exactions constitute an unlawful taking of his property without just compensation. In more extreme examples, a locality might reject a development proposal altogether and find itself facing a claim that the denial amounted to a taking of the developer's property. The U.S. Supreme Court has addressed these issues on several occasions summarized below.

2-4.01(a) *Nollan*

The United States Supreme Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), has helped shape public policy in the area of subdivision exactions. There, the California Coastal Commission granted a permit to the Nollans to replace a small bungalow on their beachfront lot with a larger house, subject to the condition that they allow the public an easement to pass along their beach, which was located between two public beaches. The condition was not an unusual one, and in fact all of the forty-three other nearby developed beachfront lots for which the Commission had issued coastal development permits were subject to the same condition.

The Nollans challenged the condition and argued, among other things, that their property rights were being taken unconstitutionally as a result of the Commission's actions. The issue confronting the Supreme Court was whether requiring a beach easement as a condition to development served a public purpose directly related to the requirement of obtaining a coastal development permit and, accordingly, was a reasonable exercise of the Commission's land use regulatory powers, or whether it was not directly related and amounted to a taking.

In a 5-4 decision, the Court reasoned that there would have been a clear taking if the Nollans had been required, apart from the permit process, to make an easement across their beachfront available to the public on a permanent basis simply in order to increase

public access to the beach. Conditioning the permit on their granting such an easement would be permissible, however, the Court stated, if it would substantially further some governmental purpose that otherwise would justify denial of the permit. The government's power to regulate particular land uses in order to advance some legitimate police purpose includes the power to condition such use upon some concession of the owner, even a concession of property rights, the Court said, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use.

Because the permit condition did not serve the same governmental purpose as the development ban—there was no “nexus” between the two—the Court characterized the building restriction as “an out-and-out plan of extortion.” The Court rejected all of the “public purposes” advanced by the Commission to justify its condition, finding them all to be so indirectly related to the Nollans’ rebuilding of their bungalow that the State must pay them compensation for the desired easement, if it were to be insisted upon. The Court did reiterate its long-standing view that the police powers of the states encompass the authority to impose conditions on private development that are rationally related to achieving the states’ objectives. For example, one of the cases cited by the Court for this position was *Gorieb v. Fox*, 274 U.S. 603, 47 S. Ct. 675 (1927), in which it held that a City of Roanoke ordinance requiring lot owners, when constructing new buildings, to set them back a reasonable distance from the street lines of their lots, may have substantial relation to the public safety, health, morals, and general welfare, and not being clearly arbitrary or unreasonable, did not constitute an unconstitutional deprivation of property. The Court also cited *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), a Virginia exaction case, in support of its decision (*Rowe* is discussed in section [2-4.01\(c\)](#)).

One federal circuit court has interpreted *Nollan* as holding that “where there is no evidence of a nexus between the development and the problem that the exaction seeks to address,” a subdivision exaction cannot be upheld. *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991). Because of Virginia’s rather limited (though expanding) enabling legislation vis-à-vis exactions and because of the applicability of the Dillon Rule, a “taking” issue such as that in *Nollan* is much less likely to arise here. In addition, many dedications of land and facilities in Virginia are a result of proffers made during rezonings. Since such proffers must be made voluntarily, the “taking” issue does not arise.

2-4.01(b) *Dolan*

In *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), the United States Supreme Court addressed the required degree of connection between exactions imposed by a local government and the projected impacts of a proposed development. The local government had conditioned a building permit to expand a store and pave a parking lot on the dedication of land for a public drainage system, greenway, and bicycle path. The Court required an individualized determination of whether there was a “rough proportionality” in extent and nature between the exactions and the impact of the proposed development and remanded for such a factual determination. *Dolan* established a “double nexus” requirement: the court must examine both the reasonableness of the type of exaction and the degree to which it is necessary.

2-4.01(c) *Koontz*

In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 133 S. Ct. 2586 (2013), the landowner sought permits to develop on wetlands, the approval of which required wetlands mitigation. The locality demanded that the landowner pay for wetlands improvements on land owned by the locality, or it would deny the permits. The United States Supreme Court first held that the principles that undergird *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. The

Court then held that government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* nexus and proportionality requirements even when its demand is for money, if that monetary demand burdens the ownership of a specific parcel of land.

2-4.02 Denial of Development

Sometimes government regulation takes the form not of exactions, but of an outright denial. Where a regulation places limitations on land that fall short of a categorical taking (i.e., one that eliminates all economically beneficial use of property), "a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001).

2-4.02(a) *MacDonald, Sommer & Frates*

In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561 (1986), the U.S. Supreme Court considered the taking claim of a developer whose proposed subdivision was denied. The Court held that, with only the single denial, the developer had not obtained a final, authoritative determination by the county regarding the nature and extent of permitted development. The Court could not adjudicate the constitutionality of the regulations purporting to limit it.

2-4.02(b) *Del Monte Dunes*

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 119 S. Ct. 1624 (1999), presented the Court with a much more extreme example of local government resistance. That case involved a taking claim brought by a developer whose progressively more modest development proposals were repeatedly denied. The developer ("Del Monte") first applied in 1981 for subdivision approval on land zoned to permit, theoretically, more than 1,000 units. Del Monte's original development plan called for 344 units; after multiple denials by the planning commission and city council, it was down to 190 units, and the vast majority of the land was to be either dedicated to the city or put into open space use. With each rejection, the city asserted more rigorous demands for scaling back the proposed development. Still, Del Monte designed its successive plans to meet the city's stated demands, until Del Monte ultimately determined that the city would not allow any development of the property. After five years and nineteen development plans, staff finally recommended approval. Nevertheless, the planning commission and the city council denied the last set of plans without giving any specific reasons.

By the time the case reached the Supreme Court, there was no issue about finality. The Court decided three issues. First, the Court decided that the "rough proportionality" standard announced in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), applies only in the narrow context of exactions, not to claims involving the denial of development. Second, whether a landowner has been deprived of all economically viable use of his property—a categorical taking—is a proper question for a jury. Third, it was also proper for a jury to decide whether the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications—i.e., whether the city's regulation of the property "went too far." The claimant's right to demand a jury trial on these issues applies in federal court, because the Fourteenth Amendment does not incorporate that provision of the Seventh Amendment, leaving the states free to dispense with the necessity of a jury in civil trials.

In the final analysis, it should be only the most egregious denial that gives rise to a valid takings claim. Categorical takings should be especially rare. One protection against other regulatory takings claims is built into the statutory scheme, requiring that a locality identify its specific ordinance-based reasons for the disapproval of any plat. See Va. Code §§ 15.2-2259 and 15.2-2260.

2-4.03 Mandatory Dedication of Land and On-Site Improvements

Virginia Code § 15.2-2241(A)(5) authorizes the exaction of certain on-site improvements and provides in part that a subdivision ordinance must include reasonable regulations

[f]or the acceptance of dedication for public use of any right-of-way located *within any subdivision or section thereof*, which has constructed or proposed to be constructed *within the subdivision or section thereof*, any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement dedicated for public use . . . and for the provision of other *site-related improvements* required by local ordinance for vehicular ingress and egress, including traffic signalization and control, for public access streets, for structures necessary to ensure stability of critical slopes, and for storm water management facilities.

(Emphasis added). This section requires the subdivider to dedicate parts of his land for public use or to construct at his expense, and in accordance with defined standards, needed facilities serving the subdivision. The mandatory dedication of public facilities will be upheld when the need for them is closely or uniquely related to the development in question, at least when the required improvements are on-site. *See, e.g., Bd. of Sup'rs of James City Cnty. v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

In *Rowe*, the Virginia Supreme Court considered whether a local governing body has the power to enact a zoning ordinance that requires individual landowners, as a precondition to developing their parcels, to dedicate a portion of the fee for the purpose of providing a service road (including curbs, sidewalks, and landscaped median strip) the need for which was substantially generated by public traffic demands, rather than by the proposed development. In addition, the developers were to pay for construction of the road and maintenance of the median strip. While *Rowe* is not a subdivision case, because existing parcels were involved, it is noteworthy. The Court found the ordinance at issue constituted an unconstitutional “taking” of the plaintiff’s property because (1) there was no state enabling authority for the exaction and (2) Article I, § 11 of the Constitution of Virginia (stating “that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation”) would prohibit the enactment of such an ordinance. The “taking” was not so much for the benefit of the properties from which the land was to be acquired as it was for a more general public good. Requiring individual landowners to build a road to benefit the public, therefore, would violate due process guarantees. *See also Cupp v. Bd. of Sup'rs of Fairfax Cnty.*, 227 Va. 580, 318 S.E.2d 407 (1984); *Rackham v. Vanguard Ltd. P'ship*, 34 Va. 478 (Loudoun Cnty. 1994) (rejecting neighboring landowners’ claim that subdivider should have been required to provide for future offsite road improvements across their property).

The Attorney General has opined that subdividers may not be required to dedicate land for public parks, schools, or recreational purposes, or to make cash payments in lieu thereof, as a precondition of plat approval, since these facilities were not specifically authorized by Va. Code § 15.1-466.A(5) (now § 15.2-2241(A)(5)). *See* 1978-79 Op. Va. Att’y Gen. 255. In addition, applying *Rowe*, the Attorney General has opined that a local subdivision ordinance may not include a requirement for the dedication of avigation easements on property near airports. 1990 Op. Va. Att’y Gen. 94. Because the need for such an easement was generated by the existing airport rather than the proposed subdivision, applicable constitutional requirements dictated that the subdividing landowner be justly compensated for the easement. *Id.*

See extensive discussion of onsite proffers in residential developments in Chapter 1, Zoning, section [1-4.06](#).

2-4.04 Mandatory Dedication of Off-Site Facilities

Virginia Code § 15.2-2242(4) and (5) authorize exactions for off-site road improvements, subject to various terms and conditions. Virginia Code § 15.2-2243 permits localities to require payments for off-site improvements to sewers, drainage facilities, and water systems necessitated by a subdivision. It permits local governments to require that a subdivider or developer of land pay

the pro rata share of the cost of providing reasonable and necessary sewerage, water, and drainage facilities located outside the property limits of the land owned or controlled by the subdivider or developer but necessitated or required, at least in part, by the construction or improvement of the subdivision or development.

Va. Code § 15.2-2243(A). An ordinance including such provisions must provide that the subdivider or developer is entitled to reimbursement of a portion of its costs by any subsequent subdivider or developer that utilizes the installed water, sewer, or drainage facilities or from connection fees paid for lots in its development, though the ordinance may limit the duration of the reimbursements. Va. Code § 15.2-2243(B).

The statute contains certain limitations on this requirement, including prohibiting any exaction until the locality has in place a program for such improvements within the area, together with guidelines for calculating the amount of pro rata shares by the local government, based on the amount necessary to protect water quality because of increased pollution caused by the development or the cost of water, sewerage, and stormwater facilities for the development. The locality must give the developer credit for on-site stormwater facilities constructed as part of the project. “[I]n lieu of such payment, the governing body may provide for the posting of a personal, corporate or property bond, cash escrow or other method of performance guarantee satisfactory to it conditioned on payment at commencement of such . . . construction.” Va. Code § 15.2-2243(C). Any such performance guarantees must be released if the facilities are not constructed within twelve years, and the guarantees, with interest, must be applied as a tax credit on the real estate taxes on the property.

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 there was no express or implied authority for local ordinances to require, as a prerequisite to the approval of a subdivision plat, that a subdivider construct improvements to existing off-site public roads, or that they make payments in lieu of the same. *See also Smith v. Bd. of Sup’rs of Culpeper Cnty.*, 22 Va. Cir. 82 (Culpeper Cnty. 1990). The Court has ruled, however, that it is possible for a developer to voluntarily *contract* to provide some types of improvements, such as off-site roads that could otherwise not be required by the locality in the subdivision approval process. *Bd. of Cnty. Sup’rs of Prince William Cnty. v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985). The Attorney General has opined that, because of the Dillon Rule, a county may not require the dedication of sufficient land along state roads to ensure the availability of a certain width of public right of way, unless the required dedication is conditioned upon a finding that the need for the dedication is substantially generated by the proposed development. 1984-85 Op. Va. Att’y Gen. 296. See extensive discussion of offsite proffers in residential developments in Chapter 1, Zoning, section [1-4.06](#).

Relying on *Cupp, Rowe, and Hylton*, the federal court in *Potomac Greens Associates Partnership v. City Council of Alexandria*, 761 F. Supp. 416 (E.D. Va. 1991), *rev’d on other grounds and vacated*, 6 F.3d 173 (4th Cir. 1993), found that localities have no authority to exact off-site improvements to public highways. The city had authority, however, to require elimination of the top level of a proposed parking garage, since safety considerations were within its general police powers. *Id.*

2-4.05 Impact Fees

Impact fees are related to, but different from, traditional subdivision exactions. Such fees, which have become common nationwide, are charges assessed against newly developed property in order to recover a locality's cost of providing the infrastructure needed to serve the new development. Unlike traditional subdivision exactions, impact fees are generally used to finance off-site improvements. See Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 *The Urban Lawyer* 491 (1993) (containing several articles from a symposium on "The Local Government Capital Improvements Financing Game: Who Plays, Who Pays, And Who Stays").

In 1989, the General Assembly enacted Virginia's first impact fee enabling legislation, Va. Code §§ 15.2-2317 to 15.2-2327. The legislation applied only to counties with a population of 500,000 or more; adjacent counties or cities; cities contiguous to those adjacent counties or cities; towns within such a county or adjacent county; and Frederick County. 1989 Va. Acts ch. 485. The impact fees could be assessed for "road improvements," defined to include construction of new roads or improvements or expansion of existing roads to meet increased demand attributable to new development (on-site construction of roads required pursuant to Va. Code §§ 15.2-2241 to 15.2-2245 is specifically excluded). The enabling legislation is quite specific as to the manner in which such impact fees were to be assessed and used, which may explain the reluctance of localities to assess them.³³

As part of wide-ranging legislation enacted in 2007 to address the state's transportation crisis, the General Assembly dramatically expanded the enabling authority for impact fees. See 2007 Va. Acts ch. 896. Localities empowered to impose such fees include any locality that has adopted zoning pursuant to Va. Code §§ 15.2-2280 to 15.2-2316.2 and that either (i) has a population of at least 20,000 and a population growth rate of at least 5 percent or (ii) has population growth of at least 15 percent. Although a locality must adopt an ordinance implementing this enabling authority, it must designate any "road impact fee service area" in its comprehensive plan. A qualifying locality may impose impact fees on new development to fund reasonable road improvements that benefit that development, not only improvements that are substantially attributable to it. See Va. Code §§ 15.2-2319 and 15.2-2322. Where the fees were originally to be collected at the time certificates of occupancy are issued, they are now collectible when building permits are issued. See Va. Code § 15.2-2323. Developers are no longer exempt from any impact fees simply because their projects are subject to proffers committing them to provide off-site road improvements; instead, the locality is to treat as a credit any off-site transportation dedication, contribution, or construction, whether it is a condition of a rezoning or otherwise committed to the locality. See Va. Code §§ 15.2-2323 and 15.2-2324.

³³ Impact fees are discussed in section 1-5 of Chapter 1, Zoning and Planning.