

Chapter 12

Special Use Permits

12-100 Introduction

Under Virginia Code § 15.2-2286(A)(3), a governing body is authorized to grant special exceptions “under suitable regulations and safeguards.” Special exceptions are also known as *special use permits* or *conditional use permits* (the term *special use permit* is used in this chapter, except as otherwise noted), though they may not all necessarily serve the same purpose in a particular locality, as discussed in section 12-200. See *Virginia Code § 15.2-2201 (definition of special exception)*.

A governing body may delegate the authority to grant special use permits to the BZA. *Virginia Code § 15.2-2309(6)*. For example, a BZA could be delegated the authority to consider special use permits for off-site signs. A governing body may also withdraw that authority. *Chesterfield Civic Association v. Board of Zoning Appeals*, 215 Va. 399, 209 S.E.2d 925 (1974) (BZA had no power or authority to consider an application for a special use permit where, after the application was filed but before it was considered by the BZA, the county’s zoning regulations were amended to withdraw the authority of the BZA to consider special use permits and to reserve that power in the board of supervisors).

Key Principles to Know About Special Use Permits

- Whether granted by the governing body or the BZA, special use permits are legislative in nature.
- Uses allowed by special use permit are considered to have a potentially greater impact than those allowed as a matter of right.
- Special use permits must be evaluated under reasonable standards, based on zoning principles.
- Impacts from special uses are addressed through conditions.
- Conditions must be reasonably related to the impacts to be addressed, and the extent of the conditions must be roughly proportional to the impacts.
- Decisions by a governing body granting or denying special use permits are presumed correct and reviewed under the fairly debatable standard; decisions by a BZA granting or denying special use permits are also presumed correct, but the presumption may be rebutted by showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong, was in violation of the purpose and intent of the zoning ordinance, and is not fairly debatable.

12-200 The nature of special use permits

Zoning district regulations typically delineate a number of uses that are allowed as a matter of right, and a number of uses that are allowed by special use permit. Uses allowed only by special use permit are those considered to have a potentially greater impact upon neighboring properties or the public than those uses permitted in the district as a matter of right. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). The special use permit procedure, by its very nature, presupposes that a given use may be allowed in one part of a zoning district, but not in another. *Bell v. City Council of City of Charlottesville*, 224 Va. 490, 297 S.E.2d 810 (1982) (rejecting claim that city’s zoning ordinance violated the uniformity requirement of Virginia Code § 15.2-2282).

Although by definition special exceptions pertain to *uses* (*Virginia Code § 15.2-2201 (definition of special exception)*), it appears that the meaning of *use* in this context may be broader. In *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), the county’s zoning ordinance allowed “deviations” from certain setback regulations with conditions, if approved by the board of supervisors. The deviation was an alternative procedure to obtaining a variance from the BZA. The Virginia Supreme Court classified the deviation as a special exception, “analogous” to a special use permit or a conditional use permit, and analyzed it the same way as it would those types of permits. In *Town of Occoquan v. Elm Street Development, Inc.*, 2012 Va. LEXIS 104 (2012) (unpublished), the Virginia Supreme Court characterized a special exception to disturb steep slopes as a density-related permit.

A special use permit is different from a variance. *See chapter 13*. A special use permit cannot alter the provisions of a zoning ordinance. *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation*, 277 Va. 198, 671 S.E.2d 160 (2009); *see also Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987), discussed in the following paragraph; *Sinclair v. New Cingular Wireless*, 283 Va. 567, 727 S.E.2d 40 (2012) (though not deciding whether a county’s regulations allowing the disturbance of steep slopes was a special exception, the waiver regulations were analogous to a special exception and were legislative in nature).

A special use permit also cannot be granted by implication. *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987). In *Booher*, the landowner obtained a rezoning of his land in 1975 from A-2 to B-2, and informed the board of supervisors of his intention to establish an automobile graveyard and junkyard. Neither of those uses was allowed by right or by special use permit in the B-2 zoning district. In 1981, the county amended its zoning regulations requiring a conditional use permit for those uses, but only in the M-2 zoning district. The board denied Booher’s application to rezone his property to M-2 and ordered him to discontinue the use and remove the vehicles from his property. The Virginia Supreme Court concluded that the Booher’s use did not have nonconforming status, adding that “[i]t may be that the Board intended . . . to grant Booher a special exception. But an automobile graveyard was not then and is not now a permitted use in the B-2 zone. Booher did not apply for a special exception in that zone [and] the Board had no power to grant an exception by implication. . .” *Booher*, 232 Va. at 481-482, 352 S.E.2d at 321.

Whether granted by the governing body or the BZA, special use permits are legislative in nature. *Board of Supervisors of Fairfax County v. McDonald’s Corporation*, 261 Va. 583, 544 S.E.2d 334 (2001); *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990) (when granted by a BZA); *Koebne v. Fairfax County Board of Zoning Appeals*, 62 Va. Cir. 80 (2003).

Although zoning regulations may require that an approved special use begin within a certain period of time, Virginia Code § 15.2-2209.1(B) extends the period of validity for special use permits outstanding on January 1, 2011 until July 1, 2017 if the special use permit is related to “new residential or commercial development.” This statutory extension pertains only to the date by which the use must be started, and does not apply to any requirement that a special use be terminated or ended by a certain date or within a specified number of years (*see discussion of that issue in section 12-510*).

A locality’s special use permit regulations may allow the permit to be revoked if the use is found to be in violation with the permit’s conditions, at least on activities directly connected to the permit. *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007); *see Lawless v. Board of Supervisors of Chesterfield County*, 18 Va. Cir. 230 (1989). In *Mirant*, the Virginia Supreme Court held that the city could not revoke a special use permit for purported violations of certain emission control limits in its state-issued stationary source permit to operate because those purported violations were beyond those having a nexus to the purpose of the special use permit.

BZA’s have express statutory authority to revoke a special use permit under the procedures provide by statute. *Virginia Code § 15.2-2309(7)*.

12-300 Limitations on the uses for which special use permits may be required

A special use permit may *not* be required within an agricultural zoning district for any production agriculture or silviculture activity (*Virginia Code § 15.2-2288*) and qualifying small scale biofuels production (*Virginia Code § 15.2-2288.01*). In the absence of a substantial impact, a special use permit also may not be required within an agricultural zoning district for *usual and customary* activities at farm wineries (*Virginia Code § 15.2-2288.3*), usual and customary activities at limited breweries (*Virginia Code § 15.2-2288.3:1*), usual and customary activities at limited distilleries (*Virginia Code § 15.2-2288.3:2*), and usual and customary activities at agricultural operations (*Virginia Code § 15.2-2288.6*). Activities as farm wineries, limited breweries, limited distilleries and agricultural operations that are not usual and customary may otherwise be subject only to *reasonable restrictions*, which may or may not warrant a special use permit.

A special use permit also may not be required for the following uses, provided that statutorily prescribed circumstances exist: (1) cluster developments (*Virginia Code § 15.2-2286.1*); (2) manufactured housing in agricultural zoning districts (*Virginia Code § 15.2-2290(A)*); (3) group homes of 8 or fewer persons or residential facilities for 8 or fewer aged, infirm or disabled persons, which must be allowed by right in zoning districts where single family residential use is allowed by right (*Virginia Code § 15.2-2291*); and (4) family day homes of five or fewer persons, which must be allowed by right in zoning districts where single family residential use is allowed by right (*Virginia Code § 15.2-2292*).

A special use permit also may not be required as a condition of approval of a subdivision plat, site plan or building permit for the development and construction of residential dwellings at the use, height and density permitted by right under a zoning ordinance. *Virginia Code § 15.2-2288.1*. These limitations do not prevent a locality from requiring a special use permit for: (1) a cluster or town center as an optional form of residential development at a density greater than that permitted by right, or otherwise permitted by local ordinance; (2) a use in an area designated for steep slope mountain development; (3) a use as a utility facility to serve a residential development; or (4) nonresidential uses including, but not limited to, home businesses, home occupations, day care centers, bed and breakfast inns, lodging houses, private boarding schools, and shelters established for the purpose of providing human services to the occupants thereof. *Virginia Code § 15.2-2288.1*.

Summary of the Uses for Which a Locality May Not Require a Special Use Permit
<ul style="list-style-type: none"> • <i>Production agriculture, silviculture and small scale biofuels production, and certain activities at farm wineries, limited breweries, limited distilleries, and agricultural operations</i> in an agricultural zoning district. • <i>Cluster developments</i> except where a cluster or town center is allowed as an optional form of residential development at a greater density than that permitted by right (see discussion of <i>Virginia Code § 15.2-2288.1</i>, below). • <i>Manufactured housing</i> in an agricultural zoning district. • <i>Group homes of 8 or assisted living facilities</i> for 8 or fewer aged, infirm or disabled persons in a zoning district where single family residential use is a by right use. • <i>Family day homes of 5 or fewer persons</i> in a zoning district where single family residential use is a by right use. • <i>Tents</i> serving as a temporary structure for 3 days or less used for activities such as weddings and estate sales. • <i>As a condition of approval of a subdivision plat, site plan or building permit</i> for a residential development where the dwellings meet the use, height and density requirements allowed by right, with exceptions in <i>Virginia Code § 15.2-2288.1</i>. • <i>Temporary family health care structures</i> established in compliance with <i>Virginia Code § 15.2-2292.1</i>. • <i>To address solely aesthetic considerations</i> outside of a historic district established under <i>Virginia Code § 15.2-2306</i>.

In *Town of Occoquan v. Elm Street Development, Inc.*, 2012 Va. LEXIS 104 (2012) (unpublished), the developer was the contract purchaser of a 3.68 acre parcel zoned R-3, which allowed up to 16 multi-family units per acre. Approximately one-half of the parcel had slopes greater than 20% and the town regulations required a special use permit to disturb or develop on those slopes. Although staff recommended approval of the special use permit with 12 conditions, to which the developer agreed, the town council denied the permit. The developer sued. The town contended that *Virginia Code § 15.2-2288.1* did not apply to the town’s steep slopes regulations and that the entire parcel was not developable by right because the by right density could be calculated only in compliance with the steep slopes regulations.

The Virginia Supreme Court rejected the town’s arguments, concluding that *Virginia Code § 15.2-2288.1* “expressly prohibits a locality from requiring a special use permit as a precondition to development that is otherwise permitted under a zoning ordinance,” and that the town’s steep slopes regulations interfere “with residential development that is otherwise permitted within the zoning district.” The Court also rejected the town’s argument that the developer had no right to disturb the steep slopes in the absence of a special use permit, concluding that the town “cannot permit this development by right and simultaneously require an SUP as a condition of development on the property. . . . By requiring an SUP, the Town has politicized what should be a ministerial decision . . . [T]he steep slopes SUP requirement . . . has no bearing on any density calculation in this instance.” To reach that conclusion, the Court characterized the special exception as a density-related permit which was therefore prohibited by the statute. Lastly, the Court rejected the town’s argument that the Chesapeake Bay Preservation Act gave it the power to require a special use permit.

The requirement for a special use permit also may not be based solely on aesthetic considerations. *Allstate Development Co. v. City of Chesapeake*, 12 Va. Cir. 389 (1988) (finding that requirement for special use permit for modular houses in a district, but not for stick-built houses, arose solely because the neighbors did not like the appearance of modular houses); *but see Virginia Code § 15.2-2306*, allowing localities to require architectural compatibility within districts established under that section.

12-400 Procedural requirements prior to and during a hearing on a special use permit application

A number of procedural rules apply to the conduct of a hearing on a special use permit application, but the procedures differ depending on whether the special use permit is granted by the governing body or the BZA.

12-410 Special use permits considered by the governing body

Special use permits considered by the governing body are subject to “suitable regulations and safeguards” established by the governing body. *Virginia Code § 15.2-2286(3)*. These suitable regulations and safeguards should include the requirement that the planning commission, if its review and recommendation is required, and the governing body, take timely action. One approach is to impose the same timelines required for zoning map amendments, e.g., requiring a recommendation from the planning commission within 100 days (*Virginia Code § 15.2-2285(B)*) and requiring the governing body to act within 12 months. *Virginia Code § 15.2-2286(7)*.

In addition, notice must be provided as required by *Virginia Code § 15.2-2204(C)*. *See chapter 34*.

12-420 Special use permits considered by the BZA

Special use permits considered by the BZA are subject to the following procedures:

- *Scheduling the hearing on the special use permit application.* The BZA must “fix a reasonable time for the hearing” on a special use permit. *Virginia Code § 15.2-2312*.
- *Notice of the hearing.* The BZA must “give public notice thereof as well as due notice to the parties in interest.” *Virginia Code § 15.2-2312*. Notice of the hearing must be provided as required by *Virginia Code § 15.2-2204*. *Virginia Code § 15.2-2309(6)*.
- *At the hearing; the right to equal time for a party to present its side of the case.* The BZA must offer an equal amount of time in a hearing on the case to the applicant and the staff of the local governing body. *Virginia Code § 15.2-2308(C)*.
- *Decision.* If the BZA decides to grant a special use permit, it may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. *Virginia Code § 15.2-2309(6)*. *See section 12-500 for a discussion of the minimal standards that must guide the decision-making process; see section 12-600 for a discussion of conditions.*
- *Time for the decision.* The decision must be made within 90 days. *Virginia Code § 15.2-2312*. This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the time period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).
- *Required vote.* The concurring vote of a majority of the BZA’s members present and voting is necessary to grant a special use permit. *Virginia Code § 15.2-2308*.
- *Findings to support the decision.* Findings are not required unless they are required by the zoning ordinance. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013).

12-500 Minimal standards must guide the decision-making process

A use allowed by special use permit is permitted “only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public.” *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 521, 297 S.E.2d 718, 721-722 (1982); *Daniel v. Zoning Appeals Board of Greene County*, 30 Va. Cir. 312 (1993). An application for a special use permit must be examined by public officials, and be guided by standards set forth in the zoning ordinance, to determine the impact the proposed use will have if carried out on the property. *Southland Corp.*, *supra*.

Special use permit regulations adopted pursuant to Virginia Code § 15.2-2286(A)(3) “need not include standards concerning issuance of special use permits where local governing bodies are to exercise their legislative judgment or discretion.” *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 520, 708 S.E.2d 841, 846 (2011), quoting *Bollinger v. Board of Supervisors of Roanoke County*, 217 Va. 185, 186, 227 S.E.2d 682, 683 (1976). Thus, in *Jennings*, the Virginia Supreme Court upheld the county’s granting of “special exception permits” “subject to such conditions as the governing body deems necessary to carry out the intent of this chapter.”

In *Bollinger*, the Court upheld the county’s granting of a conditional use permit for a landfill under a zoning regulation that simply stated: “The location of commercial amusement parks, airports, borrow pits and sanitary fill method garbage and refuse sites shall require a conditional use permit. These permits shall be subject to such conditions as the governing body deems necessary to carry out the intent of this chapter.” In affirming the granting of the permit, the *Bollinger* Court was persuaded by the thorough review conducted by the county, even though the standard for granting the special use permit was broad, stating: “it appears the Board acted only after it had the benefit of thorough studies, numerous tests, and after due deliberation on its part. These studies and tests revealed that the land is suitable for landfill purposes. The terms and conditions imposed by the Board indicate that it was well aware of the uses of surrounding land and the characteristics of the property involved.”

In *Cole v. City Council of City of Waynesboro*, 218 Va. 827, 832, 241 S.E.2d 765, 769 (1978), the city’s zoning regulations allowed the city council to issue special use permits “whenever public necessity and convenience, general welfare or good zoning practice justifies such special exception or use permits which may be granted by the council adopting an ordinance granting the same after considering the recommendations of the city planning and zoning commission.” In holding that a special use permit for a 151-unit apartment complex on a 3/4-acre parcel was invalid, the Virginia Supreme Court said that the above-cited standards in the ordinance were “an open invitation for a special exception to be granted without any consideration being given to certain basic principles of law applicable in the zoning field. It permits a lack of adherence by City Council to a fundamental rule that zoning regulates the use of land.” *Cole*, 281 Va. at 833, 241 S.E.2d at 769. The critical distinction between *Jennings/Bollinger* and *Cole* is that the standard in *Cole* was stated in the disjunctive – the city council could consider “public necessity and convenience, general welfare *or* good zoning practice.” In other words, the city council was not tied to the zoning statutes or good zoning practice when it considered a special use permit, and this rendered the city’s regulations invalid.

At bottom, all that a zoning ordinance must provide is that the governing body’s consideration of a special use permit be taken within the framework of the zoning statutes and the principles that apply to zoning. In granting a special use permit, specific findings are not required unless mandated by the zoning ordinance. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013) (“While a zoning ordinance must set forth standards under which applications for special exceptions are to be considered when local governing bodies delegate that legislative power, the ordinance need not do so when the local governing body has reserved the power unto itself”). Typical standards applicable to special use permits include consideration of: (1) the impacts of the special use on the character of the district; (2) the impacts of the special use on the welfare of the landowners and occupants of land in the district, *see Bell v. City Council of City of Charlottesville*, 224 Va. 490, 297 S.E.2d 810 (1982); and (3) consistency with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986) (upholding denial of special use permit to operate crematory based on the negative impact of the proposed use on neighboring properties and inconsistency with comprehensive plan). Other factors that may be considered include: (1) the character of the property; (2) the general welfare of the public; and (3) the economic development of the community. *Bell*, *supra*. These factors are also akin to those delineated in Virginia Code §§ 15.2-2283 and 15.2-2284.

If specific standards are adopted, deference should be given to the governing body in determining whether the standards were considered when the action was taken. In *Shenandoah Mobile Co. v. Frederick County Board of Supervisors*, 83 Va. Cir. 113 (2011), the applicant challenged the board's denial of a conditional use permit contending that the board failed to give adequate consideration to the standards in the zoning ordinance. The circuit court rejected this argument, noting that the motion maker "touched on" four of the six standards and that it knew "of no requirement that each individual Board Member express the reasons for voting for or against the motion." *Shenandoah*, 83 Va. Cir. at 116. The court otherwise found substantial evidence in the record to support the board's decision. Another circuit court has held that the governing body is not required to make specific findings with respect to each and every potentially relevant clause in the comprehensive plan, nor each and every clause of the purpose and intent section of the zoning ordinance. *Koebne v. Fairfax County Board of Zoning Appeals*, 62 Va. Cir. 80 (2003) (county's special use permit regulations that the proposed special use be "in harmony with the adopted comprehensive plan" and "in harmony with the general purpose and intent of the applicable zoning district regulations"). Part of that analysis will depend on the language of the zoning ordinance.

As shown in *Bollinger*, the courts will look at the decision maker's analysis of the facts and how they are applied to the standards, even if the standards are broad as they were in *Bollinger* and *Jennings*. Compare to *Mutter v. Washington County Board of Supervisors*, 29 Va. Cir. 394 (1992), where a circuit court concluded that a special use permit issued without consideration to the locality's comprehensive plan and whose justification was devoid of any meaningful studies or analysis was unreasonable. In *Mutter*, the court concluded that the county's approval of a solid waste convenience station in an environmentally sensitive location with traffic safety issues was unreasonable, arbitrary and capricious. The court noted that the board failed to consider the county's comprehensive plan, conduct any site testing, consult with various environmental and other state agencies, and failed to even consult with the county's landfill manager for his assessment of the suitability of the site.

Lastly, a proposed special use permit need not necessarily be granted merely because an applicant adheres to the applicable zoning regulations. *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989). Rather, a special use is prohibited unless an applicant obtains a permit. *Amoco Oil Co. v. Zoning Appeals Board of the City of Fairfax*, 30 Va. Cir. 159 (1993) (upholding the denial of special use permit because a number of the applicable special use permit criteria were not met).

12-600 Impacts from special uses are addressed through conditions

If a special use permit is granted, the potential impacts are addressed through reasonable conditions. *Byrum v. Board of Supervisors of Orange County*, 217 Va. 37, 225 S.E.2d 369 (1976). Under Virginia law, the conditions imposed must bear a *reasonable relationship* to the legitimate land use concerns and problems generated by the use of the property. *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). A special use permit may not be denied indirectly by approving the special use permit but imposing unreasonable and impossible conditions on its use. *Byrum, supra*; see also, *Virginia Code* § 15.2-2208.1.

A BZA is authorized to "impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with." *Virginia Code* § 15.2-2309(6).

12-610 Conditions imposed by the governing body are to address impacts and are not voluntary

Unlike proffers that accompany a rezoning considered by the locality's governing body, special use permit conditions are not volunteered by the landowner and need not be developed through negotiation. Conditions may be imposed as the governing body or the BZA determines to be appropriate as "suitable regulations and safeguards" for special use permits. *Virginia Code* § 15.2-2286(A)(3). As explained by John H. Foote, Planning and Zoning, *Handbook of Local Government Law*, § 1-10.03, p. 1-61, (2015), the phrase "suitable regulations and safeguards" is "uniformly understood to mean that the locality may unilaterally impose reasonable conditions on the issuance of such permits or exceptions, in contrast to proffers that must come voluntarily from the applicant." See also *Staples v. Prince George County*, 81 Va. Cir. 308, 320-321 (2010) (condition imposing 14-day limit stay rule on campground was

upheld because there is a reasonable basis to distinguish campgrounds from sites with permanent dwellings; a “local governing body is permitted to impose involuntary conditions on the grant of a special exception”).

Special use permit conditions also may require administrative approvals by others. *Fuentes v. Board of Supervisors of Fairfax County*, 2000 Va. Cir. LEXIS 130, 2000 WL 1210446 (2000) (conditions imposed that required Health Department review and approval of a sewage treatment/disposal system and a groundwater monitoring system were not unlawful delegations of legislative authority; the board was authorized to delegate these administrative functions in a special use permit condition).

In connection with residential special use permits, if a landowner proposes affordable housing, any conditions imposed must be consistent with the objective of providing affordable housing; when imposing conditions on residential projects that specify the materials and methods of construction or specific design features, the governing body must consider the impact of the conditions upon the affordability of housing. *Virginia Code § 15.2-2286(A)(3)*.

Special use permit conditions pertaining to uses involving alcoholic beverages have been the subject of both judicial review and additional legislation. In *County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 200, 559 S.E.2d 627, 628 (2002), the Virginia Supreme Court held that a condition in a special use permit stating “[n]o alcoholic beverages shall be permitted” was not preempted by the Alcoholic Beverages Control Act (see *Virginia Code § 4.1-128*) because it was a “valid zoning ordinance . . . regulat[ing] the location of an establishment selling . . . alcoholic beverages,” as permitted by the Act. Similarly, in *City of Norfolk v. Tiny House*, 222 Va. 414, 281 S.E.2d 836 (1981), the Court held that an ordinance requiring a special use permit for adult uses (such as sellers of alcohol and adult movie theaters) within 1,000 feet of one another did not violate *Virginia Code § 4.1-128*. The governing bodies of the cities of Norfolk and Richmond also are enabled under *Virginia Code § 15.2-2286(A)(3)* to impose other conditions on retail alcoholic beverage control licensees. Norfolk may impose conditions providing that the special use permit will automatically expire upon a change in the ownership, possession, management or operation of the property. Richmond may impose conditions requiring automatic review of the permit upon a change of ownership or possession of the property, or a transfer of majority control of the business, and may revoke the permit after notice and a public hearing.

One recurring issue of interest is whether a governing body may impose limitations on the life of a special use permit. BZAs have express authority to impose limitations on the life of a special use permit (*Virginia Code § 15.2-2309(6)*), local governing bodies do not have such express authority. The governing body of the City of Norfolk is enabled to impose a condition on any special use permit relating to retail alcoholic beverage control licensees which provides that the permit will automatically expire upon the passage of a specific period of time. *Virginia Code § 15.2-2286(A)(3)*. No similar express authority exists for other governing bodies for general purposes, and a number of localities have accordingly concluded that they do not have implied authority to impose such a condition. Some localities conclude otherwise. Under a Dillon Rule analysis, governing bodies are enabled to grant special use permits under “suitable regulations and safeguards.” *Virginia Code § 15.2-2286(A)(3)*. The General Assembly has not directed how or what those suitable regulations and safeguards must be. Therefore, if a time limitation (or the authority in the zoning ordinance to impose such a condition) is reasonable, the condition should be considered to be within a governing body’s authority. An alternative solution to this question is to obtain the agreement of the applicant for such a condition. See *Board of Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985) (subdivider may voluntarily agree to make improvements to existing access roads and will be bound to that agreement, even if the county did not have the authority to otherwise require such improvements as a condition of subdivision approval).

12-620 Conditions must be reasonably and proportionally related to the impacts resulting from the use

When a locality seeks the dedication of land or other property (such as fees) as a condition of a land use approval, such as a condition to a special use permit, it must be certain that these conditions of approval: (1) have a nexus that is related to the impact of the proposed development; and (2) are roughly proportional to the extent of the impact. *Koontz v. St. Johns River Water Management District*, 570 U.S. ___, 133 S. Ct. 2586 (2013); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994); see also *Virginia Code § 15.2-2208.1* (creating monetary remedy for imposition of unconstitutional conditions).

If this two-pronged test is not satisfied, the locality has imposed an unconstitutional *exaction*. This principle applies even when the locality denies the permit because the applicant is unwilling to agree to or accept such a condition. *Koontz, supra. See section 6-440 for further discussion of exactions.*

12-630 Developing condition language

Special use permit conditions typically originate from the locality's staff. Following are some suggestions for writing, reviewing, and revising proposed conditions:

- *State each condition clearly:* Each condition should be a declaratory statement, using clear and concise language as to what must be performed, when it must be performed, when it must be completed, and, if applicable, how it must be performed.
- *Write each condition with the dignity of a zoning regulation:* A condition becomes part of the zoning regulations applicable to the property. Therefore, it should be written with the dignity of a zoning regulation, using terminology found in the zoning ordinance.
- *Select words carefully:* The words in a condition must be carefully selected. Use the word “shall” rather than “should” or “may.” If a condition requires that the owner cannot proceed until the county engineer approves a plan, the condition needs to state that “the owner shall obtain approval of the plan from the county engineer before . . .,” rather than stating that the owner “shall submit a plan.” Never use “etc.” in a condition.
- *Consistently use the same word to refer to the same person, place or thing:* A person, place or thing always should be described or identified by the same word.
- *Use complete sentences:* Conditions should be written in complete sentences.
- *Ensure that each condition is comprehensive:* A condition should be written in comprehensive language that addresses the reasonably foreseeable issues that may arise from the condition.
- *Ensure that each condition imposes standards that are enforceable:* Every condition must be reviewed by the zoning administrator's office to ensure that the condition imposes standards that are enforceable. Part of the issue of enforceability pertains to the clarity of the language used, but the other part pertains to whether the language actually imposes a standard that can be enforced. Because the zoning administrator will have the task of enforcing the conditions, be certain that the zoning administrator has the opportunity to provide comments as to not only the language, but the subject matter (*e.g.*, a condition that restricts a restaurant use to between the hours of 5:00 a.m. and 1:00 a.m. may require a zoning inspector to be in the field between 1:00 a.m. and 5:00 a.m. if the hours of operation become an enforcement issue).
- *Be careful not to make the condition too specific:* In providing clarity, conditions can become too specific so that they become overly restrictive. Examples of being too specific include referring to the applicant by name (because the special use permit runs with the land), providing a specific measurement for height, distance, or something similar in an absolute when you intend to establish a minimum or a maximum.
- *Ensure that each condition imposes only requirements that address identified impacts:* Conditions may only address impacts resulting from the use. Ensure that the conditions do not modify, waive, substitute or relax otherwise applicable zoning regulations.
- *Use similar language for similar situations:* The locality's staff should propose language that is similar to language previously approved for a similar type of condition.
- *Be certain that the time of performance is clearly stated:* Be certain that the language clearly states when the owner must do the promised or required acts.

- *Ensure that the conditions are well-organized.* Ensure that the conditions are well-organized by having conditions that are related to one another located next to one another.
- *Ensure that the conditions do not impose, or would not be perceived to impose, an obligation on the locality, VDOT, or any other public entity.* Conditions address impacts from a special use and they should be drafted so as not to impose, or be perceived to impose, an obligation on the locality, VDOT, or any other public entity. This problem often arises in the context of establishing the timing for performance. For example, a condition stating that the “final site plan shall be approved by the site plan agent prior to commencing the use” could be read to mean that the director must approve the site plan. Alternative wording to address this issue would be, for example, “The applicant is required to obtain approval of the final site plan by the site plan agent prior to commencing the use.”
- *Consider requiring that conditions be satisfied before the application for a needed approval is submitted.* When a permittee requires additional approvals in the process, such as a site plan, there may be some conditions where it is best to require that a condition be satisfied before the permittee even applies for the site plan rather than some later point in the process, such as prior to issuance of a certificate of occupancy.
- *Be certain that referenced documents are properly identified.* References to plats or plans should identify the title, last revision, and the entity preparing the plat or plan. References to ordinances should be identified by section number and include language such as “as the section was in effect on [date of special use permit].” References to letters, memos, staff reports, and similar documents should clearly identify the recipient, the author, and the date.

12-640 Ensure that the conditions make sense

Once a condition has been put to writing, the locality’s staff must make certain that it is understandable, unambiguous, and enforceable:

- *Review draft conditions with a critical eye.* The locality’s planner must ignore his or her insider’s understanding of the application and put himself in the position of a reader who knows nothing about the project and: (1) ask whether the proposed conditions are clear, concise, and comprehensive in a way that a future reader will easily understand; (2) drop all assumptions and preconceived notions and be critical; (3) identify the ambiguities and eliminate them; (4) identify all superfluous text and eliminate it; and (5) ask whether each condition would make sense to somebody ten years from now.
- *Have a peer review the conditions.* The planner should ask others not directly involved with the application to review the conditions. It is important to have someone without an insider’s knowledge of the application to see if he or she can understand the conditions and identify ambiguities.
- *All appropriate departments review the conditions.* The planner must ensure that all departments and the locality’s attorney review and comment on the conditions. Because the zoning administrator will have the task of enforcing the conditions, be certain that the zoning administrator has the opportunity to provide comments as to not only the language, but the subject matter (*e.g.*, a condition that restricts a restaurant use to between the hours of 5:00 a.m. and 1:00 a.m. may require a zoning inspector to be in the field between 1:00 a.m. and 5:00 a.m. if the hours of operation become an enforcement issue).
- *Attach copies of referenced regulations.* Zoning regulations referenced in a condition should be attached so that there is no question about the identified regulation.

12-700 Consideration of a special use permit application; reasonable and unreasonable grounds on which to base a decision

A decision on an application for a special use permit is a legislative act and, as such, the governing body or the BZA has wide latitude in making a decision. The cases discussed below discuss reasonable and unreasonable grounds on which to base a decision.

12-710 Reasonable grounds to deny a special use permit

The decision to deny a special use permit is reasonable if the landowner fails to meet all of the requirements of the zoning ordinance for the granting of a permit. *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990), *discussed below*. Adverse impacts on the character of the neighborhood resulting from a proposed use are a common reason to deny a special use permit. *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989), *discussed below*. Even if the landowner satisfies all of the technical requirements for the issuance of the special use permit, the decision-making body nonetheless retains discretion to approve or deny the permit. *Bratic, supra*. A special use permit also may be denied because the proposed use is inconsistent with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986). The decision-maker also should consider the factors delineated in Virginia Code § 15.2-2284.

In *Board of Supervisors of Rockingham County v. Stickleby*, 263 Va. 1, 556 S.E.2d 748 (2002), the board of supervisors denied a special use permit that would have allowed the applicant to raise and release game birds on his farm. The board was concerned about the risk posed by these birds carrying contagious diseases and transmitting them to poultry. In what boiled down to a battle of conflicting expert witnesses, the Virginia Supreme Court held that the board's denial of the special use permit was proper because its evidence demonstrated a "significant risk" to poultry from the release of pen-raised game birds, and that this evidence was amply sufficient to make that issue fairly debatable.

In *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), the board of supervisors denied a special exception that would have allowed the applicant to construct three houses within a 200-foot setback on his property. The applicant was required to submit a study addressing *projected* noise levels or projected traffic. The purpose for the study was to identify impacts and how to address them. The applicant's acoustical engineer based his conclusions on a noise study performed in 1997, but the study failed to address projected (future) noise levels. As a result, the applicant's proposed conditions failed to include measures to reduce exterior noise on the property. The county's acoustical engineer analyzed future noise levels and concluded that on some parts of the applicant's property, future noise levels would exceed those provided in the comprehensive plan by 2010. Not surprisingly, the Virginia Supreme Court found sufficient evidence of reasonableness to make the board's denial of the special use permit fairly debatable.

Five Reasonable Grounds to Deny a Special Use Permit

- The landowner fails to meet all of the requirements for the granting of the permit; even if all of the requirements satisfied, the decision-maker retains authority to deny the permit if sound zoning principles justify the decision.
- The proposed use is inconsistent with the comprehensive plan.
- The proposed use would have adverse impacts on the character of the neighborhood.
- The proposed use would have adverse impacts on roads or create a hazardous traffic situation.
- The proposed use would have an adverse impact on the abutting property.

In *Cowardin*, one of the county's prerequisites to obtaining a special use permit for two boathouses was the issuance of a certificate of occupancy for the structures. Since the certificates had not been issued, the Virginia Supreme Court concluded that the board had established a reasonable basis to justify its denial of the permit.

In *Bratic*, the landowner claimed that he had satisfied all of the technical requirements for the granting of a special use permit to allow a two-family dwelling on his property and, therefore, the county board could not deny his application. The Virginia Supreme Court rejected this argument, stating that a governing body "is not stripped of all

discretion in the issuance of a use permit merely upon a showing that the technical requirements of a zoning ordinance have been met.” *Bratic*, 237 Va. at 226, 377 S.E.2d at 370 (1989). In reaching that decision, the Court emphasized the legislative nature of special use permits. The Court found that even if the county’s technical requirements were satisfied, the board’s denial was supported by probative evidence that the area in question in the interior of a neighborhood was predominantly single family, though there was a mix of single family, two-family, triplexes, and even commercial, on the edge. The board’s evidence also explained that the area in question was “fragile,” meaning that it was subject to change, because of requests for two-family dwellings.

In *Gittins v. Board of Zoning Appeals*, 55 Va. Cir. 495 (2000), a neighbor’s testimony that a proposed playground structure was an “eyesore” that detracted from the value of her property, and that a realtor had told her that the existence of the structure would affect the marketability of her home, was sufficient for the circuit court to sustain the BZA’s denial of a special use permit. In order to grant the permit, the BZA would have had to find that the structure would have had no detrimental impact on other properties in the immediate vicinity.

In *In re Hurley*, 2001 Va. Cir. LEXIS 64, 2001 WL 543793 (2001), the circuit court held that the BZA properly denied the applicants’ special use permit for a home business on the ground that the proposed use would be disruptive to a low density residential neighborhood. The home business was a commercial label-printing business with six employees that produced between 100,000 and 500,000 mailing labels per day on 30 computers. The court held that the BZA properly determined that the home business did not meet the requirements for a special use permit, including the requirement that the use not “constitute sufficient non-residential activity as might modify or disrupt the predominantly residential character of the area.”

Adverse impacts on roads resulting from the proposed use also may be a reasonable basis to deny a special use permit. In *Freezeland Orchard Co. v. Warren County*, 61 Va. Cir. 548 (2001), the circuit court upheld the board of supervisors’ denial of a special use permit. The circuit court held that the fact that the applicant obtained VDOT approval of its entrances onto a public road did not preclude the board from exercising its legislative judgment in determining that the proposed use of the road would be “hazardous or in conflict with the existing and anticipated traffic in the area,” one of its criteria for evaluating special use permits. The court noted that the board received extensive public input at the public hearings. Similarly, in *Heater v. Warren County Board of Supervisors*, 59 Va. Cir. 487 (1995), the circuit court upheld the board of supervisors’ denial of a special use permit for a small subdivision in an agricultural zoning district on the ground that the proposed use would be hazardous or in conflict with the existing and anticipated traffic in the area. The fact that the applicant had obtained VDOT approval for the proposed entrances onto a public street because they met the minimum standards for sight distance did not preclude the board from exercising its legislative judgment.

12-720 Unreasonable grounds to deny a special use permit

The denial of a special use permit will be reversed if the governing body or BZA ignores its standards and then fails to present any evidence to justify its decision. In *Daniel v. Zoning Appeals Board of Greene County*, 30 Va. Cir. 312 (1993), the circuit court reversed the BZA’s denial of a special use permit for a mobile home park where the applicant produced evidence that the county’s applicable standards were satisfied and the county presented virtually no evidence and failed to demonstrate that the BZA’s decision was consistent with the applicable standards. Apparently, the only “evidence” to support the BZA’s decision was the opposition of the citizens, but the court said that although the opponents “may be justified in their fears, . . . angry complaints and vague concerns cannot, standing alone, be enough. The [BZA] must be able to point to some evidence of its own to confront [the applicant’s] uncontroverted presentation.”

The denial of a special use permit is arbitrary if the decision is not related to any zoning interest, but is instead motivated principally by the heavy opposition of neighbors expressing concerns not related to any zoning interest. *See, e.g., Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (where city council denied permit to allow palmistry and fortune telling solely to placate neighborhood opposition, which was based on religious and moral grounds, rather than zoning grounds, its decision was arbitrary).

12-730 The claim of discrimination based on prior approvals

If it is shown that the standards are being applied in an inconsistent and discriminatory manner, a court may find that the denial of a special use permit does not have a rational basis. *Board of Supervisors of Fairfax County v. McDonald's Corporation*, 261 Va. 583, 544 S.E.2d 334 (2001). However, the Virginia Supreme Court has rarely found a rational basis to be lacking. Because special use permits are evaluated on a case-by-case basis and the facts in each case are unique, the bar for a party challenging a decision to establish that a decision lacks a rational basis is high. *See section 6-300 for a discussion of the equal protection clause.*

In *EMAC, LLC v. County of Hanover*, 291 Va. 13, 781 S.E.2d 181 (2016), EMAC, the owner of land that would be part of a proposed development, challenged the board of supervisors' denial of the extension of a conditional use permit for a sign along Interstate 95 at the southern end of a proposed outlet mall on its property, but extended the portion of the same conditional use permit for a sign on a separate parcel owned by another developer (Northlake) at the northern end of the proposed outlet mall. EMAC claimed that the denial was discriminatory. The Virginia Supreme Court rejected EMAC's claims because EMAC and Northlake were not similarly situated since: (1) Northlake was an applicant for the conditional use permit but EMAC was not, even though EMAC was a landowner on which one of the signs would be located; (2) the county code required that an application for a conditional use permit include permission from the owner to owner grant permission for county, which EMAC, not being the applicant, never granted and, as a result, the conditional use permit was void *ab initio* as to the southern sign that was to be on EMAC's property; and (3) unlike Northlake, EMAC did not have an agreement with the outlet mall developer to operate the sign on its property.

In *McDonald's*, the restaurant sought a special use permit to allow a drive-through window; the board had granted special use permits for drive-through windows at other businesses in the area. Nevertheless, the Virginia Supreme Court concluded that there was a rational basis for the board to deny McDonald's permit because: (1) the McDonald's property was much smaller than the other properties; (2) the McDonald's property was a single-use site; the other properties were in shopping centers; (3) the McDonald's property was directly accessed from public roads; the other properties were not; (4) the McDonald's property had a single access; the other properties had multiple access points; (5) the access point on the McDonald's property was much closer to an intersection than the access points on the other properties; and (6) the estimated vehicle trips per day were much higher on the McDonald's property.

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

In *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989), the board denied a special use permit to establish a two-family dwelling. The landowner claimed that the denial of the permit was discriminatory because the governing body had previously granted permits for two-family dwellings in situations "similar" to the landowner's case. The Virginia Supreme Court rejected this argument, first noting that a claim of unlawful discrimination cannot prevail if there is a rational basis for the decision and finding a rational basis in that case in the board's "effort to preserve the single-family character of the interior of the Neighborhood."

In *Hopkins v. Council of the City of Norfolk*, 2014 WL 8187041, the petitioner challenged the city council's decision denying his application for a special exception that would have allowed him to re-establish an apartment use for his 8-unit building that had, over the years, become nonconforming. If allowed by special exception, the petitioner's building would be subject to new development standards. Although the city council had recently approved two special exceptions for other nonconforming apartment buildings, the circuit court concluded that the city council's denial of the special exception in this case was fairly debatable and not discriminatory. The key distinction between

the petitioner's application and those of the two special exceptions that were approved was that the two special exceptions approved reduced the density otherwise allowed, where the petitioner's application would not have reduced the density.

12-740 Reasonable grounds to approve a special use permit

A review of the Virginia case law reveals that very few approved special use permits have been challenged. In *Campbell v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 155 (1996), one of the requirements at issue for a special use permit to allow a club to establish a swimming pool and increase its size and boat slips was whether the club's membership was "limited to residents of nearby residential areas." Both the objecting neighbors and the county presented evidence of the makeup of the club's membership, and the court concluded that because there was no established definition of "nearby residential areas," the meaning of the term was fairly debatable and the BZA's approval of the special use permit was upheld.

12-750 Unreasonable grounds to approve a special use permit

Of course, a governing body cannot approve a special use permit if the underlying zoning district regulations do not authorize the proposed use.

In *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation*, 277 Va. 198, 671 S.E.2d 160 (2009), the board granted a special use permit for a condominium development and, under the zoning ordinance, "Condominium-type ownership (VA Code)" was allowed by special use permit. The zoning administrator disapproved the site plan because the landowner proposed apartment buildings, a prohibited use in the zoning district. The BZA affirmed. The landowner argued that the special use permit for the "condominium" use referred to multiple unit structures such as apartment buildings. The Court analyzed the district regulations and rejected the landowner's argument, finding that the purpose of the zoning district was to limit residential density and that various prohibited classifications, which included apartment buildings, referred to the physical structure of buildings. By contrast, the special use that allowed "Condominium-type ownership (VA Code)" applied to the legal form of land tenure to be adopted. Thus, the Court concluded that the board of supervisors could not have granted a special use permit that would allow apartment buildings, stating: "Although the board of supervisors might have amended the zoning ordinance after following the proper procedure, it was not at liberty to disregard it. Acts of a local governing body that are in conflict with its own ordinances exceed its statutory authority and are void and of no effect. Thus, the County's granting of a special use permit was not effective to alter the provisions of the zoning ordinance." *Northampton*, 277 Va. at 203, 671 S.E.2d at 163. In other words, the county's and the BZA's interpretation of the zoning ordinance was correct – the special use permit granted by the board of supervisors allowed "Condominium-type ownership (VA Code)," not apartment buildings, because the board did not have the authority under its own regulations to grant a special use permit for apartment buildings.

In *Bennett v. Nelson County Board of Supervisors*, 75 Va. Cir. 474 (2004), the board approved a conditional use permit for a vegetative rubbish recycling facility to allow the grinding of stumps by a stump-grinding machine on property in an agricultural zoning district. The staff report noted that the proposed use was contrary to the comprehensive plan and that it was "an industrial use and is not permitted by right or by a conditional/special use permit" in the district. Nonetheless, the board granted the permit. Not surprisingly, the court found that the board's action was invalid, explaining that not only was the use not allowed by permit, but also that the use would create noise, smoke, particulate matter, and the possibility of spontaneous combustion that was incompatible with the surrounding residential and business properties, and that the proposed industrial use in an agricultural district was surrounded by single-family residential properties, multi-family residential properties, businesses and a resort. The court concluded by stating that "[r]easonable minds cannot differ that this is inappropriate."

12-800 Appeals of decisions to the circuit court

Decisions to grant or deny a special use permit may be appealed to the circuit court.

12-810 Timeliness, standing, and compliance with applicable zoning regulations

A person aggrieved by a decision of the governing body may appeal the decision to the circuit court within 30 days. *Virginia Code* § 15.2-2285(F). A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA's decision to the circuit court by filing a petition for writ of certiorari within 30 days. *Virginia Code* § 15.2-2314.

Persons challenging a decision as a person aggrieved must allege that they are aggrieved within the meaning of the Virginia Supreme Court's decision in *Friends of the Rappahannock v. Caroline County*, 286 Va. 38, 743 S.E.2d 142 (2013).

Once timeliness and standing are addressed, the next issue is whether the decision was made in compliance with the applicable zoning regulations. If the decision was made in violation of the zoning regulations (e.g., there was an express prerequisite for eligibility to obtain the permit, such as having a specific pre-existing underlying zoning designation), the action will be found to be arbitrary and capricious and not fairly debatable, thereby rendering the decision void and of no effect. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013), quoting *Renkey v. County Board of Arlington County*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006).

12-820 Evaluating a special use permit decision under the fairly debatable test

If it is shown that the decision was made in compliance with the applicable zoning regulations, the decision to grant or deny a special use permit is valid if the decision is *reasonable*, i.e., whether there is any evidence in the record sufficiently probative to make a fairly debatable issue of the decision to approve or deny a special use permit. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013) (upholding approval of a special exception for a transit authority bus maintenance facility even though, among other arguments, the applicant failed to submit a list of hazardous or toxic substances as required by the county's application requirements; the zoning regulations did not require the board to consider hazardous or toxic substances when considering a special exception); *Board of Supervisors of Rockingham County v. Sticklely*, 263 Va. 1, 556 S.E.2d 748 (2002) (upholding denial of special use permit), followed in *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003) (upholding denial of special exception); *CAH Holdings LLC v. City Council of the City of Chesapeake*, 89 Va. Cir. 389 (2014) (upholding denial of conditional use permit for a car wash even though the city's planning staff and planning commission recommended approval, and the applicant's noise expert stated that the car wash could comply with the city's noise regulations, where the city council based its decision on the conclusion that the proposed use was incompatible with the nearby residential neighborhoods). This standard applies even if an applicant has produced evidence that a denial was unreasonable. *Robertson, supra*.

As applied to a denied special use permit, the courts will assume that the request for the special use permit is an appropriate use of the property and that the denial of the application is probative evidence of unreasonableness. *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003); *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990); *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989). At that point, "the dispositive inquiry is whether the [locality] produced sufficient evidence of reasonableness" to make the governing body's denial of the permit fairly debatable. *Robertson*, 266 Va. at 533-534, 587 S.E.2d at 576; *Cowardin, supra*; *Bratic, supra*.

The fairly debatable test should be relatively easy to satisfy since the determination is not whether the applicant or the locality had more evidence supporting its position, but simply whether the locality's decision was based on *probative evidence*. It is critical, therefore, that the legislative record contain evidence supporting the decision, and that the decision be based on probative evidence rather than opinion, fears, desires, speculation or conjecture.