Chapter 10

Zoning Map Amendments and Zoning Text Amendments

10-100 Introduction

The uses that may be allowed on land may be changed either by amending the regulations of the zoning district in which the land is situated (a *zoning text amendment*) or by amending the zoning map and changing the zoning district in which the land is situated (a *zoning map amendment*, more commonly referred to as a *rezoning*). This chapter primarily addresses zoning map amendments (rezonings).

The zoning and rezoning of land are wholly legislative acts and cannot be accomplished in any way other than by an appropriate ordinance or map amendment. *See Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983).

One who owns land always faces a possibility of it being rezoned. *Cole v. City Council of City of Waynesboro*, 218 Va. 827, 241 S.E.2d 765 (1978). There is "no vested property right in the continuation of the land's existing zoning status. [citations omitted]." *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 160, 677 S.E.2d 283, 287 (2009). However, the policy that permissible land use should be reasonably predictable assures a landowner that the uses will not be changed suddenly, arbitrarily, or capriciously, but only after a period of investigation and community planning, and only where circumstances substantially affecting the public interest have changed. *Cole, supra.* This "stability and predictability in the law serve the interest of both the landowner and the public." *Board of Supervisors of Fairfax County v. Snell Construction Corp.*, 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

Typically, a zoning map amendment either *upzones* or *downzones* the land. An *upzoning* is the rezoning of land that increases the permitted intensity of use or development by right, and it may include an increase in permitted density. A *downzoning* is the rezoning of property that reduces the permitted intensity of use or development by right, including a reduction in permitted density. *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006). Though a Virginia case has not so held, land may theoretically be upzoned or downzoned by a zoning text amendment by significantly liberalizing or restricting, respectively, the by-right uses in the zoning district.

Eight Important Terms and Principles
• Zoning map amendments change the zoning district in which the land is situated; commonly referred to as a *rezoning*.
• Zoning text amendments change the zoning regulations.
• Zoning map and zoning text amendments are legislative acts of the governing body.
• Upzonings are rezonings that increase the permitted intensity of use or development by right, including an increase in density.
• Downzonings are rezonings that decrease the permitted intensity of use or development by right, including a reduction in permitted density.
• A denied upzoning is lawful if it is fairly debatable that the existing zoning is reasonable, even if the proposed zoning is also reasonable.
• Alleged piecemeal downzonings are subject to heightened review under the fairly debatable test.
• Zoning decisions should be based on sound zoning principles, seeking to achieve the purposes of zoning listed in Virginia Code § 15.2-2283 and based on the factors articulated in Virginia Code § 15.2-2284.

Upzonings are by far the more common type of rezoning and are typically initiated by the landowner. The analysis beginning in section 10-300 is presented in the context of cases in which, in most cases, applications for upzonings were denied. Section 10-400 re-examines the cases in section 10-300 in the context of the reasonableness of the zoning decision at issue under the fairly debatable test, which is the test by which the validity of a zoning decision (most often, a denied upzoning) would be considered by the courts. Section 10-400 also includes a review of the case law applying the fairly debatable test to alleged piecemeal dowzonings.

10-200 Initiation of the process

Zoning text and zoning map amendments can be initiated by the locality or by a landowner or their authorized representatives.

10-210 Zoning text amendments

Zoning text amendments must be initiated by a resolution of intent adopted by the governing body or a motion adopted by the planning commission. *Virginia Code § 15.2-2286(A)(7)*; *Ace Temporaries, Inc. v. City Council of the City of Alexandria*, 274 Va. 461, 649 S.E.2d 688 (2007) (multiple amendments of the same zoning text each require their own resolution or motion to initiate the process). The resolution or motion must state the public purposes for the proposed action. *Virginia Code § 15.2-2286(A)(7)*. It is sufficient for the resolution to merely recite the purposes stated in Virginia Code § 15.2-2286(A)(7) (public necessity, convenience, general welfare, or good zoning practices), rather than state specific, independent purposes. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991). However, it need not necessarily state the exact language of the statute provided that a statement of public purpose is given. *In re Zoning Ordinance Amendments by the Board of Supervisors of Loudoun County*, 67 Va. Cir. 462 (2004).

The text of the proposed zoning ordinance need not be available when the resolution of intent or the motion to initiate a zoning text amendment is adopted. *Virginia Code § 15.2-2286(A)(7)*; *see Ace Temporaries, supra*, (the "General Assembly did not include a requirement in Code § 15.2-2286(A)(7) that the text of an amendment be in written format at the time of initiation").

When adopting a zoning text amendment, the governing body need not have the full text of the proposed ordinance before it when it acts if the materials before the governing body are sufficiently clear as to what it is adopting. *Southern Iron Works, Inc.*, 242 Va. at 445-46, 410 S.E.2d 680-681 (holding the board of supervisors did not unlawfully delegate legislative power to staff in directing it to compile the text supplement setting forth the text amendment, where the staff made no substantive changes to what the board adopted).

10-220 Zoning map amendments

Zoning map amendments (*rezonings*) are initiated by petition of the owner of property, a contract purchaser with the owner's consent, or the owner's agent, of the property which is the subject of the proposed zoning map amendment. *Virginia Code § 15.2-2286(A)(7)*. Zoning map amendments also may be initiated by the governing body or the planning commission. *Virginia Code § 15.2-2286(A)(7)*.

When a rezoning application pertains to the rezoning of land already subject to proffered conditions, the consent of the owners of the other properties subject to those proffers is not required. *Town of Leesburg v. Long Lane Associates*, 284 Va. 127, 726 S.E.2d 27 (2012). However, those other owners are entitled to notice of the rezoning application. Virginia Code § 15.2-2302 allows a landowner subject to proffered conditions to apply to amend the proffers after providing written notice of the application to the owners of other parcels subject to the same existing proffers. The notice must be provided within 10 days after receipt of the application as provided in Virginia Code § 15.2-2204(H).

Within business 10 days after a rezoning application is submitted, the locality must submit the proposal to VDOT if the proposal will substantially affect transportation on state-controlled highways. *Virginia Code § 15.2-2222.1(B)*. The rezoning application must include a traffic impact statement if required by local ordinance or VDOT regulations. *Virginia Code § 15.2-2222.1(B)*. Within 45 days after its receipt of the traffic impact statement, VDOT must either provide written comment on the proposed rezoning to the locality or schedule a meeting with the locality's planning commission or other agent (to be held within 60 days after VDOT received the traffic impact statement) and the applicant to discuss potential modifications to the proposal to address concerns and deficiencies. *Virginia Code § 15.2-2222.1(B)*. VDOT must complete its initial review of the rezoning proposal within 45 days, and its final review within 120 days, after it receives the rezoning proposal from the locality. *Virginia Code § 15.2-2222.1(B)*.

While the VDOT review is ongoing, the planning commission must make a recommendation to the governing body on the application within 100 days after the matter was referred to the commission, or a shorter period prescribed by the governing body. *Virginia Code § 15.2-2285(B)*. If the commission fails to timely act, the application is deemed "approved," unless the proposed amendment or reenactment has been withdrawn by the applicant before time expires. *Virginia Code § 15.2-2285(B)*. A *county's* governing body must act upon and act on the application "within such reasonable time as may be necessary which shall not exceed 12 months unless the applicant requests or consents to action beyond such period or unless the applicant withdraws his motion, resolution or petition for amendment to the zoning ordinance or map, or both." *Virginia Code § 15.2-2286(A)(7)*. There is no similar requirement for the governing bodies of cities and towns.

10-300 The relevant factors to be considered in a rezoning

Virginia Code § 15.2-2284 states that zoning ordinances and districts must be drawn and applied by reasonably considering the following:

- The existing use and character of property.
- The comprehensive plan.
- The suitability of the property for various uses.
- The trends of growth or change.
- The current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies.
- The transportation requirements of the community.
- The requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services.
- The conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestal land and the conservation of properties and their values.
- The encouragement of the most appropriate use of land throughout the locality.

In addition, Virginia Code § 36-96.3(C) prohibits discrimination by a locality in its application of local land use ordinances and guidelines and in permitting housing developments: (1) on the basis of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, or disability; (2) because the housing development contains or is expected to contain affordable housing units as defined therein; or (3) by prohibiting or imposing conditions on the long-term rental or sale of dwelling units. It is not a violation if land use decisions or decisions relating to the permitting of housing developments are based on considerations of limiting high concentrations of affordable housing.

Every proposed rezoning should be accompanied by an analysis of how the amendment satisfies one or more of the factors listed above. Some of these factors are closely related to one another and are considered together below. A locality is not required to consider all of the factors in each zoning decision. Many of these factors may be addressed in the comprehensive plan and, in that case, the locality's analysis may focus on whether the proposed rezoning is consistent with the plan.

One of the central themes running through this section is that the reasonableness of the existing zoning is critical to the analysis and the application of the factors. No single factor is necessarily determinative. The cases cited in the sections beginning with section 10-310 appear repeatedly throughout the various factors discussed.

Summary of the Relevant Factors in a Rezoning and How Courts Have Looked at Those Factors	
Factor	**Courts' Perspectives**
Existing use and character of the property	Relevant to understanding whether existing use and zoning is reasonable; courts also will look at the abutting property
Consistency with the comprehensive plan	Critical factor, not only as to use and density, but other elements of the plan; decision consistent with the plan likely to be found reasonable; decision inconsistent with the plan not necessarily unreasonable because other factors in play
Suitability of the property for various uses; encouragement of most appropriate uses	Both the relative value of the property under the existing and proposed zoning, and the economic feasibility of developing under the existing zoning were key factors in several older cases; though still relevant, factor appears to play a lesser role in more recent cases
The trends of growth or change	The change in the character of an area since the existing zoning was established is a critical factor; courts have shown willingness to protect established neighborhoods even if change is occurring outside the neighborhood
Current and future requirements of the community for using land for various purposes as determined by population and economic studies and other studies	Reliance on this factor requires more than a decision-makers' belief that "we have too much (*e.g.*, commercial/industrial) zoning" or "we need more (*e.g.*, commercial/industrial) zoning"; studies are required to show what the needs of the community are; cannot be relied upon to squelch competition
The transportation requirements of the community; the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services	Adequate public facilities are key factors in a zoning decision and the importance of these factors will only continue to grow, particularly with the new requirements that transportation planning be incorporated into the locality's comprehensive plan and VDOT play a more direct role; if the existing zoning is reasonable, the courts are likely to affirm a denied upzoning on the ground that impacts to public facilities are not addressed
The conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land and the conservation of properties and their values	These factors have not been directly addressed in the case law; issues related to these factors have been discussed when considering the suitability of property for various uses and the trends of growth or change (see above)

10-310 The existing use and character of the property

The existing use and character of the property is an important factor that is key to understanding whether the existing use and zoning is reasonable. The courts have considered the use and character of not only the property subject to the upzoning, but also of the abutting and nearby property.

If abutting parcels are zoned or used similarly to the subject parcel, the existing zoning may be found to be reasonable. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999) (abutting parcels, as well as the subject parcel, were zoned agricultural and in agricultural use, where residential zoning was sought); *Patrick v. McHale*, 54 Va. Cir. 67 (2000) (where residential zoning was sought, existing agricultural zoning was reasonable even though abutting properties on two sides were zoned residential, where two other abutting properties were zoned agricultural).

10-320 Consistency with the comprehensive plan

Whether a proposed rezoning is consistent with the comprehensive plan is perhaps the most important consideration in modern zoning decision-making. It is important to remember that consistency pertains not only to the use, but also to many other policies in the comprehensive plan. Note also that although this section breaks out each of the factors identified in Virginia Code § 15.2-2284, the breadth and scope of a comprehensive plan such as the Albemarle County comprehensive plan incorporates several of the factors to be considered in a zoning decision. *See Chapter 9 for a discussion of the role of the comprehensive plan.*

If the existing density or use is consistent with the comprehensive plan, a decision to deny an upzoning should

be upheld. *Board of Supervisors of Roanoke County v. International Funeral Services*, 221 Va. 840, 275 S.E.2d 586 (1981) (adding that, where both the existing and the proposed uses are reasonable, the locality may retain the use permitted under the existing zoning even if the proposed use is more appropriate or even the most appropriate use of the land); *Atlantic Town Center Development Corp. v. Accomack County Board of Supervisors*, 94 Va. Cir. 35 (2016) (denial to rezone from agricultural to residential was upheld and not necessarily unreasonable, even though the application was consistent with the comprehensive plan; the "test for arbitrary and capricious is not wholly based upon compatibility with a comprehensive plan. The plan may create expectations in the mind of the landowner but it is the Board's acceptance or denial of the applicant's specific plan that is at issue"); *Williams v. Board of Supervisors of Fairfax County,* 1996 Va. Cir. LEXIS 528 (1996) (even though the property was more valuable if developed under the proposed zoning and the proposed zoning better met the county's demand for affordable housing, the existing zoning was consistent with the comprehensive plan and reasonable); *Turock Estate, Inc. v. Thomas*, 7 Va. Cir. 222 (1984) (upholding denial of rezoning from R-4 (multiple residence) to C-2 (limited commercial), even though land had previously been zoned C-2, because decision was reasonably based on the city's plan for the neighborhood that recommended that revitalization be achieved by devoting as much land as possible to housing and concentrating commercial uses only to limited areas).

If the existing zoning is inconsistent with the use identified in the comprehensive plan, the existing zoning is not necessarily unreasonable if other factors justify the denial of the rezoning. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999); *City Council of City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996); *Patrick v. McHale*, 54 Va. Cir. 67 (2000) (where residential zoning sought, agricultural zoning was reasonable even though the comprehensive plan provided for residential zoning in the area, where a significant portion of the area within the plan area was still zoned agricultural).

If the existing zoning is inconsistent with the comprehensive plan, and the proposed density or use is consistent with the comprehensive plan, a decision to deny an upzoning should nonetheless be upheld if other factors delineated in Virginia Code § 15.2-2284 are not satisfactorily addressed, such as:

- The applicant fails to adequately address explicitly identified impacts from the project by not proffering cash as articulated in the comprehensive plan to address the *pro rata* share of impacts caused by the proposed zoning on the future cost of public facilities. *Gregory v. Board of Supervisors of the County of Chesterfield*, 257 Va. 530, 514 S.E.2d 350 (1999) (applicant failed to make cash proffer as outlined in the comprehensive plan; cash proffer intended to address the per lot share of the county's cost to provide public facilities such as schools, roads, parks, libraries and fire stations, existing zoning shown to be reasonable) (decided under proffer law preceding Virginia Code § 15.2-2303.4).

- The existing zoning is shown to be reasonable, based on specific and well-articulated evidence. *Gregory, supra*; *City Council of City of Salem v. Wendy's of Western Virginia, Inc.,* 252 Va. 12, 471 S.E.2d 469 (1996).

- The proposed density or use would adversely affect the existing neighborhood. *Board of Supervisors of Fairfax County v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980).

- The proposed density or use fails to satisfy other comprehensive plan guidelines for the rezoning, such as the minimum size of the zone. *Hertz v. Fairfax County Board of Supervisors*, 37 Va. Cir. 508 (1992).

- The proposed density or use is premature, based upon specific, objective timing criteria stated in the comprehensive plan. *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980); *see Cussen v. Frederick County Board of Supervisors*, 39 Va. Cir. 561 (1990) (denial of upzoning upheld where the existing zoning was found to be reasonable and the comprehensive plan merely provided that new development in the urban area may be approved "when utilities and roads with sufficient capacity have been provided").

- The proposed use or density is premature because the subject parcel is in an area whose uses are still devoted to the existing zoning. *Patrick v. McHale*, 54 Va. Cir. 67 (2000).

If the existing zoning is inconsistent with the comprehensive plan, and the proposed density or use is

inconsistent with the comprehensive plan, a decision to rezone the property to a different use or density that is consistent with the comprehensive plan should be upheld. *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983) (upholding rezoning to residential classification consistent with the comprehensive plan, where applicant sought rezoning to commercial use; unaddressed traffic and access issues).

10-330 The suitability of the property for various uses; the encouragement of the most appropriate use of land throughout the county

There appear to be two classes of cases that fall under these combined, related categories – those pertaining to the relative value and the potential development of the land under its existing zoning and the proposed zoning, and those that pertain to the economic feasibility of developing under the existing zoning. These combined categories are also related to certain elements of the trends of growth or change discussed in section 10-340.

10-331 Relative value/potential development of the land under its existing zoning and the proposed zoning

The Virginia Supreme Court has said that in judging the reasonableness of an existing zoning classification, consideration should be given to economic factors. *Town of Vienna Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978). The relative value of the land under its existing zoning and the proposed zoning has been a factor considered by the courts to determine the reasonableness of the existing zoning, but it is a factor whose weight appears to have diminished over the past 40 to 45 years.

In *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975), one of several factors considered by the Virginia Supreme Court in concluding that the existing, lower-density residential zoning was unreasonable was evidence that the land would be worth $2,445,000 more if it was rezoned to the proposed zoning (the evidence also showed, however, that the owners could develop under the existing zoning and not lose money). In *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), the Court observed that the existing residential zoning was unreasonable, where a more intensive residential zoning classification was sought, because the land would be worth $2,467,000 more if it were rezoned ("It was clearly established that the property is suitable for a more valuable use than RE-1 . . ."). However, in the more recent *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999), the Court found that the potential development of the 30-acre tract at issue under existing zoning into two or three lots was a reasonable use of the land, where an 81-lot subdivision was sought under the proposed zoning.

In *Runion v. Board of Supervisors of Roanoke*, 65 Va. Cir. 41 (2004), a challenge to an *approved* upzoning, neighbors contended that the board of supervisors' upzoning of a 22.75-acre tract of land from agricultural rural ("AR") to residential single family ("R-1") was contrary to the community plan, bore no reasonable relation to the public health, safety, or general welfare, and failed to address community impacts. The trial court upheld the board's decision as reasonable, finding that under the AR zoning, the tract could be developed with 38 units with multiple driveway connections to an existing public street, and with no proffers. Under R-1 zoning, the tract could be developed with 44 units, but with more controlled access to the public street, and with proffers for fencing, easements, dedication of land, design review, and a limitation on logging. In addition, the court found that the R-1 zoning reasonably comported with the community plan and that it was in line with the scheme of development in the neighborhood.

10-332 Economic feasibility of developing land under existing zoning

In some older cases, the courts considered the economic feasibility of developing under existing zoning as evidence of the existing zoning's unreasonableness. In *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975), the cost of development under the existing lower-density zoning was one of several factors considered by the Virginia Supreme Court in concluding that the existing zoning was unreasonable. The comparatively higher per-unit cost of development under the existing zoning made higher-density development extremely feasible and reasonable. Note, however, that there was also evidence that the owners could develop under the existing zoning and not lose money.

In *Boggs v. Board of Supervisors of Fairfax County*, 211 Va. 488, 178 S.E.2d 508 (1971), the Virginia Supreme Court found that it was economically unfeasible to develop the land under its existing residential zoning (the county conceded that the existing residential zoning in an emerging commercial area was inappropriate), noting that the owners would have to spend $185,000 to make extensive on-and-off site improvements, particularly for drainage, before they could develop under the existing zoning. *See also City Council of the City of Fairfax v. Swart*, 216 Va. 170, 217 S.E.2d 803 (1975) (uncontradicted evidence that it was economically unfeasible to develop 3.285 acre parcel under existing single family residential zoning where nearby parcels were zoned for high density residential or commercial uses); *County Board of Arlington County v. God,* 216 Va. 163, 217 S.E.2d 801 (1975) (developing parcels for single family residential use, where surrounding area zoned and devoted to apartment uses, was economically unfeasible).

10-340 The trends of growth or change

The case law makes it readily apparent that the trends of growth or change in the vicinity of the land subject to a rezoning application are a common and important consideration in a zoning decision.

10-341 The change in the character of an area

The change in the character of an area since the existing zoning was established is an important factor that may show the unreasonableness of the existing zoning. *Boggs v. Board of Supervisors of Fairfax County*, 211 Va. 488, 178 S.E.2d 508 (1971) (existing single family residential zoning was unreasonable where "fantastic" change had occurred in the character of the area, with more than 33 rezonings from single family residential to apartments and commercial); *County Board of Arlington v. God*, 216 Va. 163, 217 S.E.2d 801 (1975) (existing single family residential zoning was unreasonable where the zoning was established in 1950 and since then the block on which the owner's parcels were located were almost entirely zoned and devoted to apartment uses).

10-342 Protecting an established stable neighborhood may buck a perceived trend

Evidence that a specific neighborhood is an established and stable neighborhood may successfully counter evidence of the trends of growth or change over a broader area.

Thus, where the existing zoning is residential and the proposed zoning is commercial or industrial, or even a more intensive residential use, protecting the viability of an existing residential neighborhood is an important factor that will show the reasonableness of the existing zoning. *City Council of the City of Salem v. Wendy's of Western Virginia, Inc.,* 252 Va. 12, 471 S.E.2d 469 (1996) (residential neighborhood was old, beautiful, tree-lined, with good housing stock, even though commercial and industrial development was occurring on its periphery); *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983) (expansion of commercial zoning would destabilize and disrupt stable residential communities); *Board of Supervisors of Fairfax County v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980) (existing residential zoning classification was reasonable in face of request for rezoning that would allow smaller residential parcel sizes, where the existing zoning reflected the land use in the area, there had been no major rezonings, subdivisions or resubdivisions of lands in the immediate area in over 20 years, and the rezoning would establish a precedent that would have an adverse impact on a stable, established residential subdivision).

10-343 How potentially conflicting evidence may be evaluated

Whether relied on to support or overturn the decision of the governing body, the character of the surrounding neighborhood is routinely identified by the courts to support their decision:

- Where the evidence describing the character of the existing neighborhood and current and future trends is such that the existing and the proposed zoning are both appropriate, the locality's governing body has the prerogative to choose the applicable classification. *City Council of City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996); *Board of Supervisors of Fairfax County v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980).

- Where the evidence describing the character of the existing neighborhood is such that the parcel is in a transition area between different zoning districts, the locality's governing body may draw a boundary line

somewhere provided it does so in a reasonable manner. *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983) (reasonably drawn); *Town of Vienna Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978) (unreasonably drawn).

- Where the character of the neighborhood has changed to such an extent that the existing zoning is unreasonable and development of the parcel under the existing zoning is economically unfeasible, the existing zoning may be found to be unreasonable, especially where there is insufficient evidence produced by the locality of the existing zoning's reasonableness to make the issue even fairly debatable. *City Council of the City of Fairfax v. Swart*, 216 Va. 170, 217 S.E.2d 803 (1975); *County Board of Arlington County v. God*, 216 Va. 163, 217 S.E.2d 801 (1975); *Boggs v. Board of Supervisors of Fairfax County*, 211 Va. 488, 178 S.E.2d 508 (1971).

- Where the proposed zoning is consistent with the comprehensive plan, but the character of the neighborhood is such that it was consistent with the existing zoning, the existing zoning will be found to be reasonable. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999); *Patrick v. McHale*, 54 Va. Cir. 67 (2000); *Custer v. City of Harrisonburg*, 44 Va. Cir. 342 (1998) (existing residential zoning on parcel in a residential neighborhood was reasonable, even though it was cut off from any residential area by being in the middle of the conjunction of an interstate highway and a four-lane heavily traveled thoroughfare).

10-350 The current and future requirements of the community for using land for various purposes as determined by population and economic studies and other studies

Under modern zoning practices, the current and future requirements of the community for land uses should be identified in the comprehensive plan, based on studies conducted for the comprehensive plan. This section considers the role the comprehensive plan and other studies may play in identifying the current and future requirements of the community and other relevant considerations. *See section 10-320 for a discussion of the comprehensive plan as a factor to be considered in zoning decisions generally,*

10-351 The role of the comprehensive plan as a tool to control the timing of growth

The board of supervisors may deny a rezoning application if it is inconsistent with the comprehensive plan. *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980). Therefore, if the comprehensive plan contains specific, objective standards for adequate public facilities and when land use may intensify within a plan area, a locality may time or phase development according to its plan. *See section 9-920 for additional discussion of this issue.*

In *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), the board of supervisors denied the applicant's request to rezone its property to a higher density that was consistent with the density recommended for the property in the comprehensive plan. The Virginia Supreme Court held that the denial of the rezoning was unreasonable. Although the comprehensive plan considered in *Allman* spoke to density, it was silent as to whether necessary public facilities should be provided in advance of higher density zoning. The unwritten policy of the county was to promote Reston for development first, followed by the properties on the periphery, such as the applicant's. The Court noted: "The obvious inference is that Allman and other property owners zoned RE-1 should await the full development of Reston before seeking a rezoning, even though the proposed zoning is in accordance with the County's Master Plan."

In *Lerner*, *supra*, the board denied the applicant's request to rezone its property from industrial park to shopping center. The board's decision was based upon the proposed rezoning's inconsistency with the comprehensive plan, which required that regional shopping centers have a minimum supporting population of 100,000 to 200,000 within a radius of 5 to 15 miles for a center containing 400,000 to 1,000,000 square feet. The Court concluded that the plan's standard was a valid basis to deny the rezoning application, thereby supporting the county's policy of timing or phasing development to a particular land use when the standards of the comprehensive plan were satisfied. *Lerner* provides three important principles: (1) the decision to phase or time development should be expressed in the comprehensive plan; (2) the criteria for phasing development should not be so vague to permit discriminatory application; and (3) the actual timing of development should be determined by the application of reasonably

objective criteria, rather than by general statements that public facilities should be adequate.

10-352 The need for certain housing stock or other uses

In overturning the board of supervisors' denial of a rezoning in *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 437, 211 S.E.2d 48, 50 (1975), the Virginia Supreme Court considered that the parties had "conceded that a critical housing need for low and moderate income families" existed in Fairfax County. The evidence showed that within the Upper Potomac Planning District (under Fairfax County's comprehensive plan), an overwhelming percentage of the land was zoned to require one or more acres of land per dwelling unit, and this resulted in the vast majority of housing built in the plan area being limited to those in a high-income bracket.

In *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975), one of several factors considered by the Virginia Supreme Court in overturning the board of supervisors' denial of a rezoning was evidence of a tremendous shortage of buildable lots in Fairfax County and that a developer would not attempt to develop at the existing zoning density, as opposed to the proposed, higher density, zoning.

10-353 Market need or market saturation

The decision to grant or deny a rezoning may be supported by studies showing that the current or future requirements of the community create a need for the class of uses proposed, or that show that the community's needs are already satisfied. For example, a study showing that the locality has, or will have, a significant need for multi-family residential dwellings over the next decade may justify the granting of a rezoning that would allow that use; a study showing that the locality has a multi-family dwelling housing stock that satisfies current and/or future demand may justify the denial of the rezoning application.

On the other hand, if the basis for the locality's decision to deny an upzoning is to restrict competition or to protect a previously approved commercial use, the decision will be overturned. *Board of County Supervisors of Fairfax County v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958) (board of supervisors improperly denied rezoning to allow regional shopping center where primary reason was the perceived adverse economic effect it would have on a previously approved smaller shopping center in the vicinity; no study performed); *compare, Northern Virginia Community Hospital v. Loudoun County Board of Supervisors*, 70 Va. Cir. 283 (2006) (in sustaining board of supervisors' demurrer on issue and distinguishing itself from *Davis*, court refused to examine motives of board in denying rezoning and permit applications to allow hospital in the face of claim by the hospital that the board was trying to restrict competition; because the board's acts were legislative in nature, the court said that it "may not generally explore whether the motive to act was inspired by a desire to restrict competition or by some other purpose"), citing *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948) and *Helmick v. Town of Warrenton*, 254 Va. 225, 492 S.E.2d 113 (1997). These are improper factors on which to base a zoning decision, and they bear no relation to the public health, safety, or welfare of the community. *Davis, supra; see also 1986-87 Va. Op. Atty. Gen. 124* (denial of pending application for rezoning to permit the construction of a shopping center based primarily on the desire to insulate existing retail businesses from competition is not a proper function of zoning; the opinion notes that the governing body's concerns were based on what some members "believed," rather than on studies showing the current or future requirements of the community).

10-360 The transportation requirements of the community; the requirements for airports, housing, schools, parks, playgrounds, recreation areas, and other public services

The transportation requirements of the community and the requirements for airports, housing, schools, parks, playgrounds, recreation areas, and other public services (collectively, "adequate public facilities") are two significant factors, particularly for large rezoning applications within urbanizing areas where traffic and other burdens on public facilities already exist or are emerging.

It does not appear that adequate public facilities issues must necessarily be set out in the comprehensive plan for a governing body to base a zoning decision on these factors because: (1) while it is desirable for a community to identify its public facilities requirements in the comprehensive plan, these requirements are delineated as separate

factors under Virginia Code § 15.2-2284, so they may be considered in a zoning decision even though they are not set out in the comprehensive plan; and (2) the impacts of a proposed project on the public facilities within a community may not be known until studies of the specific project's impacts are conducted.

In *2003 Va. Op. Atty. Gen. LEXIS 57, 2003 WL 23150084 (2003)*, the Attorney General was asked whether express enabling legislation was required for a local governing body to deny a rezoning request solely because of the lack of adequate public facilities and services to meet the needs generated by development of rezoned property. The Attorney General concluded that there is "no express statutory authorization that expressly grants to localities an ability to specifically require developers to provide adequate public facilities or to defer development until such services are provided." The Attorney General based its decision on Virginia Code § 15.2-2286, which delineates what a locality may include in its zoning ordinance. The Attorney General's opinion, however, did not consider Virginia Code § 15.2-2284, which delineates the factors that a governing body is to consider when adopting or amending its zoning ordinance or zoning map. The Attorney General's opinion also did not consider *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999), in which the Virginia Supreme Court upheld the denial of a rezoning to a use that was consistent with comprehensive plan because impacts to public facilities were not adequately addressed through proffers.

10-361 Existing zoning is reasonable; impacts to public facilities are identified, but not addressed or mitigated by the applicant

If the proposed rezoning will result in impacts to public facilities that are identified but are neither addressed nor mitigated, and the existing zoning is reasonable, the locality's decision should be upheld. *Gregory v. Board of Supervisors of the County of Chesterfield*, 257 Va. 530, 514 S.E.2d 350 (1999); *Hertz v. Fairfax County Board of Supervisors*, 37 Va. Cir. 508 (1992); *Cussen v. Frederick County Board of Supervisors*, 39 Va. Cir. 561 (1990); *Custer v. City of Harrisonburg*, 44 Va. Cir. 342 (1988); *Moulden v. Frederick County Board of Supervisors*, 10 Va. Cir. 307 (1987). In other words, the proposed zoning will be found to adversely impact public health, safety and welfare, and be found to be unreasonable. *Gregory, supra.*

Following are summaries of cases where the decision of the locality's governing body to deny an upzoning was upheld and the existing zoning was found to be reasonable, and impacts to public facilities (primarily transportation) under the proposed rezoning were unaddressed or unmitigated by the applicant:

- In *Gregory v. Board of Supervisors of the County of Chesterfield*, 257 Va. 530, 514 S.E.2d 350 (1999), a proposed development would have added 47 school-age children to schools and added 850 daily vehicle trips on off-site streets to a traffic volume already exceeding the acceptable level; because the staff-identified impacts were $5156 per unit, and the applicant proffered only $1500, the impacts were not adequately mitigated.

- In *Hertz v. Fairfax County Board of Supervisors*, 37 Va. Cir. 508 (1992), a proposed use on a 1.2 acre parcel would have had its sole access to a busy congested highway; the court said that the adverse traffic impact was a legitimate matter for the board to consider in denying the rezoning.

- In *Cussen v. Frederick County Board of Supervisors*, 39 Va. Cir. 561 (1990), the court said that the board of supervisors could properly consider the traffic impacts the rezoning would have on an area road that was already congested.

- In *Custer v. City of Harrisonburg*, 44 Va. Cir. 342 (1988), a proposed use on a 1.053 acre parcel was one of the most highly traffic-intensive uses to which the parcel could be put and would impose an unreasonable burden on highly congested intersections.

- In *Moulden v. Frederick County Board of Supervisors*, 10 Va. Cir. 307 (1987), the board of supervisors denied the upzoning of a 1.310 acre parcel from a residential to a commercial classification that would have allowed a proposed convenience store; although the applicant's expert testimony was that the proposed ingress and egress to the property would create no traffic dangers, the board was concerned of the danger of using a crossover to make left turns to enter and exit the site from Route 11, particularly because of existing congestion nearby.

The evidence in each case indicated that the requested change in use would make existing traffic congestion worse. *Hertz, Custer* and *Moulden* are noteworthy because those rezonings involved very small parcels, whose traffic impacts relative to the existing congestion would likely be minimal (though contributing), and whose size likely made mitigation of those impacts both practically and economically impossible.

The courts have never said that the failure or inability of an applicant to address or mitigate impacts on public facilities is evidence that the *existing* zoning is reasonable. It appears, however, that the courts may at least be more inclined to find that the existing zoning is reasonable if the proposed zoning would exacerbate existing undesirable conditions.

10-362 Existing zoning is unreasonable; impacts to public facilities are identified, but not addressed or mitigated by the applicant

The question of adequate public facilities is more easily considered when the existing zoning is reasonable. *See section 10-361*. As noted above, it appears that a proposed zoning's impacts on public facilities may influence a court's view of the reasonableness of the existing zoning in a proper case.

If the existing zoning is found to be unreasonable, the courts will then look to determine whether the proposed zoning is reasonable. A locality can anticipate having any decision denying a rezoning closely scrutinized for justification. In several important cases, the Virginia Supreme Court dealt with this issue, and the question of adequate public facilities was at the forefront of each case.

In *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975) and *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 21 S.E.2d 48 (1975), the impacts of the proposed rezonings on roads and schools were at issue. In both cases, the court rejected the board of supervisors' "inadequate public facilities" argument, noting that the necessary public facilities were either available *or would become available by the time the project had been developed*. The court also stated in *Allman*, 215 Va. at 439, 21 S.E.2d at 51 and reiterated the principle in *Williams*, that: "As a practical matter, and because of the ever-existing problem of finance, the construction and installation of necessary public facilities usually follow property development and the demand by people for services."

Allman and *Williams* should be addressed by: (1) identifying the impacts the project would have on public facilities; (2) determining that the public facilities are inadequate to handle those impacts and that they will not be satisfactorily addressed or mitigated by the applicant; and (3) confirming that the public facilities will not be available by the time the project is developed. Another lesson from these cases is that clearly articulated, relevant, and material evidence to support the locality's claim of inadequate public facilities is essential. *See also the discussion of 2003 Va. Op. Atty. Gen. LEXIS 57, 2003 WL 23150084 (2003) in section 10-360*.

10-370 The conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land and the conservation of properties and their values

Of the nine factors delineated in Virginia Code § 15.2-2284, the conservation of natural resources has garnered little attention in the published court decisions. The conservation of properties and their values have been considered in different contexts and are discussed in sections 10-330 and 10-340.

10-400 Evaluating the validity of a zoning decision under the fairly debatable test

The first inquiry in a challenge to a decision on a zoning decision is whether the decision was made in violation of or 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 zoning, 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) and discussed in section 10-410; *see Levine v. Town Council of Abingdon*, 94 Va.

Cir. 556 (2016) (failure of motion approving rezoning to identify any permitted public purposes for the rezoning did not invalidate the decision; the motion was made after full public hearings "that clearly considered the rezoning to be necessary to serve the 'general welfare' and 'public necessity'" and other significant benefits).

Once it is shown that the decision was made in compliance with the applicable zoning regulations, it is reviewed under the *fairly debatable* test. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999).

When an application for an upzoning is denied by the governing body, the fairly debatable test is applied as described in the following three paragraphs:

The decision of a locality to deny an application for an upzoning is a legislative act that is presumed to be reasonable. *Gregory, supra.* This presumption will stand until the applicant presents probative evidence that the legislative act was unreasonable. *Gregory, supra.* If the applicant's challenge is met by the locality with evidence of reasonableness that is sufficient to render the issue fairly debatable, then the legislative action must be sustained. *Gregory, supra.* An issue is fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. *Gregory, supra*; *City Council of City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996); *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975).

The burden is on the denied landowner to first prove the unreasonableness of the current zoning classification. *Gregory, supra; Board of Supervisors of Roanoke County v. International Funeral Services*, 221 Va. 840, 275 S.E.2d 586 (1981). If the landowner produces probative evidence that the existing zoning classification is unreasonable, the governing body is required to produce sufficient evidence of reasonableness to make the issue fairly debatable. *Gregory, supra.* As part of its inquiry, the court also considers evidence of the reasonableness of the proposed zoning classification. *Gregory, supra; Wendy's, supra; Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983); *International Funeral Services, supra.* The evidence to be sufficient for this purpose must meet not only a quantitative but also a qualitative test; it must be evidence that is not only substantial, but also relevant and material. *Williams, supra.*

If the issue is fairly debatable, the governing body's decision must be sustained. If both the existing zoning and the proposed zoning are appropriate, it is the governing body, not the landowner or the court, who determines the appropriate use. *Wendy's, supra.*

10-410 Void acts are never fairly debatable

When a governing body does not adhere to its own regulations, the action will be found to be arbitrary and capricious, not fairly debatable, and therefore void and of no effect.

Thus, a zoning action that ignores a regulatory prerequisite to the zoning action is void. In *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006), the board of supervisors rezoned a portion of the property at issue from the R-5 to the C-R (Commercial Redevelopment) zoning district. The zoning regulations provided that to be eligible for the C-R zoning district, the site had to be zoned C-3. Thus, the residents challenging the board's decision claimed that the board violated its own zoning ordinance. The county argued that the sentence referring to eligibility for the C-R zoning district was a general statement of intent or a preamble. The Virginia Supreme Court concluded that the language was not merely a preamble and that the provision providing only those sites zoned C-3 being eligible for C-R zoning was "an operative, essential, and binding part of the ordinance." *Renkey*, 272 Va. at 375, 634 S.E.2d at 356. The Court concluded that "the County acted in direct violation of ACZO § 27A. When the County re-zoned a portion of FBCC's property from "R-5" to "C-R" without complying with the eligibility requirement set out in its own ordinance, its action was arbitrary and capricious, and not fairly debatable, thereby rendering the re-zoning void and of no effect." *Renkey*, 272 Va. at 376, 634 S.E.2d at 356.

In *Levine v. Town Council of Abingdon*, 94 Va. Cir. 556 (2016), the town council's decision to approve a rezoning application was challenged on the ground that the motion approving the rezoning application failed to identify any permitted public purposes for the rezoning. The trial court held that the failure of the town council to identify a

public purpose in the motion did not invalidate the decision. The court said that the motion was made after full public hearings "that clearly considered the rezoning to be necessary to serve the 'general welfare' and 'public necessity'" and other significant benefits.

10-420 Factors relevant to the reasonableness or unreasonableness of the existing zoning

This section examines the most commonly considered factors delineated in Virginia Code § 15.2-2284 and discussed at length in section 10-300 but does so within the context of the fairly debatable test.

- The zoning of abutting or nearby parcels: Whether abutting parcels are zoned similarly to the subject parcel is a factor showing the reasonableness of the existing zoning. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999). *See section 10-310.*

- The actual land uses of abutting or nearby parcels: Whether abutting parcels are used similarly to the subject parcel under its existing zoning is a factor showing the reasonableness of the existing zoning. *Gregory, supra. See section 10-310.*

- Whether the existing use or the proposed use is consistent with the comprehensive plan: If the existing zoning is consistent with the use identified in the comprehensive plan, the existing zoning should be found to be reasonable. *Board of Supervisors of Roanoke County v. International Funeral Services*, 221 Va. 840, 275 S.E.2d 586 (1981); *Williams v. Board of Supervisors of Fairfax County*, 1996 Va. Cir. LEXIS 528 (1996); *Turock Estate, Inc. v. Thomas*, 7 Va. Cir. 222 (1984). However, if the existing zoning is inconsistent with the use identified in the comprehensive plan, this inconsistency does not establish that the existing zoning is unreasonable where other factors exist. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999); *City Council of City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996). *See section 10-320*. The other factors most relevant are the existing zoning and actual uses of abutting or nearby parcels, the character of the area, and the potential impacts to public facilities.

- Change in the character of the area since the existing zoning was established: The change in the character of an area since the existing zoning was established is an important factor that may show the unreasonableness of the existing zoning. *Boggs v. Board of Supervisors of Fairfax County*, 211 Va. 488, 178 S.E.2d 508 (1971); *County Board of Arlington County v. God*, 216 Va. 163, 217 S.E.2d 801 (1975). *See section 10-341.*

- The viability of an existing residential neighborhood: Where the existing zoning is residential and the proposed zoning is commercial or industrial, or even a more intensive residential density, the viability of the existing residential neighborhood is an important factor that will show the reasonableness of the existing zoning. *Wendy's, supra; Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629, 300 S.E.2d 79 (1983); *Board of Supervisors of Fairfax County v. Jackson*, 221 Va. 328, 269 S.E.2d 381 (1980). *See section 10-342.*

- Discriminatory zoning actions; other rezonings, close in time and space, of similarly situated parcels: Where some similarly situated lands are upzoned and others are not, the courts have found the existing zoning to be lacking a reasonable basis. *Town of Vienna Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978); *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975); however, the reader should also consider more recent cases in which the Virginia Supreme Court considered discriminatory zoning actions in the context of special use permits and conditional use permits discussed in section 12-730.

- Economic feasibility of developing land under existing zoning: In some older cases, the Virginia Supreme Court considered the economic feasibility of developing the land under existing zoning as a factor showing its unreasonableness. *Williams*, *supra; Boggs, supra; God, supra; City Council of the City of Fairfax v. Swart*, 216 Va. 170, 217 S.E.2d 803 (1975). However, in the more recent *Gregory* case, the Court found that the potential development of the 30-acre tract at issue under existing zoning into two or three lots (where an 81-lot subdivision was sought under the proposed zoning) was a reasonable use of the land. *See sections 10-331 and 10-332.*

- The need for certain housing stock or other uses: An identified shortage of a certain type of housing stock or uses (such as lots for residential uses) is a factor that may show the unreasonableness of the existing zoning. *Allman, supra; Williams, supra. See section 10-352.*

10-430 Factors relevant to the reasonableness or unreasonableness of the proposed zoning

Because the fairly debatable test requires that the reasonableness of the existing zoning be the threshold analysis, the courts have spent much more time engaged in that analysis, rather than considering the reasonableness of the proposed zoning. Nonetheless, the courts have occasionally ventured to expressly describe the proposed zoning in terms of its reasonableness.

- Adverse impacts not addressed as prescribed in the comprehensive plan: The proposed zoning may be found to be unreasonable if the applicant fails to adequately address explicitly identified impacts from the project by not proffering cash as articulated in the comprehensive plan to address the *pro rata* share of impacts on the future cost of public facilities. *Gregory v. Board of Supervisors of the County of Chesterfield*, 257 Va. 530, 514 S.E.2d 350 (1999). *See sections 10-361 and 10-362.*

- *Adverse impacts not otherwise addressed by project-specific solutions*: The proposed zoning may be found to be unreasonable if the adverse impacts arising from the proposed use are not addressed by project-specific solutions. *Custer v. City of Harrisonburg*, 44 Va. Cir. 342 (1998) (rezoning to commercial district to allow gas station/convenience store/car wash would be unreasonable given that the proposed use of the property was one of the most highly traffic intensive uses to which the property could be put and would place an unreasonable burden upon an already congested intersection, and the proposed use's hours of operation and signage would intrude on surrounding residential neighborhood on west side of freeway; existing zoning found to be reasonable). *See sections 10-361 and 10-362.*

- Proposed zoning is premature under the comprehensive plan: The proposed density or use is premature, based upon specific, objective timing criteria stated in the comprehensive plan, *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980). *See section 10-351.*

- Proposed zoning is consistent with the comprehensive plan: The decision to deny a rezoning that is consistent with the comprehensive plan is not necessarily unreasonable. *Atlantic Town Center Development Corp. v. Accomack County Board of Supervisors*, 2016 Va. Cir. LEXIS 112 (2016) (the trial court added "The test for arbitrary and capricious is not wholly based upon compatibility with a comprehensive plan. The plan may create expectations in the mind of the landowner but it is the Board's acceptance or denial of the applicant's specific plan that is at issue").

- Missing or incomplete information: An approved rezoning is not unreasonable merely because the decision-maker does not have information that addresses every unknown or uncertainty. In *Levine v. Town Council of Abingdon*, 94 Va. Cir. 556 (2016), the trial court held that the town council's approval of a rezoning was not unreasonable even though the traffic study was not completed at the time of the first of two public hearings and the site plan submitted in conjunction with the rezoning application was only "substantially" complete. The evidence showed that the town council had sufficient information to make a reasonable decision on the rezoning application.

Undoubtedly, the factors applied to determine the reasonableness of the existing zoning are also relevant when determining whether the proposed zoning is reasonable. The most important factors in making this determination include: (1) whether the proposed zoning is consistent with the comprehensive plan; (2) the zoning and actual land uses of the abutting or nearby properties; (3) the change in the character of the area since the existing zoning was established; (4) rezoning actions of similarly situated properties; and (5) the impacts of the proposed zoning on the existing neighborhood.

10-440 The application of the fairly debatable test when a rezoning is alleged to be a piecemeal downzoning

A *downzoning* is the rezoning of property that reduces the permitted intensity of use or development by right, including a reduction in permitted density. *See Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 285, 626 S.E.2d 357, 368 (2006); *Turner v. Board of County Supervisors of Prince William County*, 263 Va. 283, 559 S.E.2d 683 (2002) (finding a piecemeal downzoning partly based on reduction of residential density). In *Greengael*, the rezoning of land from R-4 (allowing high density multi-family residential use) to LI (light industrial) was not a downzoning because the LI designation allowed more intense coverage of land than the R-4 designation (50% versus 35%), and more expansive uses than R-4, including manufacturing and other industrial uses. The use of the land, rather than the profit expectation, is determinative of whether a rezoning is a downzoning. *Greengael, supra.*

Although the validity of a rezoning is reviewed under the fairly debatable test, the courts will conduct a more "expansive" review when a rezoning is a piecemeal downzoning. *Greengael LLC*, 271 Va. at 284, 626 S.E.2d at 367. A piecemeal downzoning has occurred when: (1) the zoning change is initiated by the locality on its own motion; (2) the downzoning is addressed to less than a substantial part of the community and as little as a single parcel; and (3) the downzoning reduces the permitted intensity of use or development by right, including reducing density, below that recommended and attainable in the comprehensive plan. *Greengael LLC*, *supra* (as for the second prong of the test, the Court said that a piecemeal downzoning "selectively addresses the landowner's single parcel"); *Turner, supra* (downzoning of 492 of county's 220,000 acres held to be piecemeal; although land was downzoned to a density consistent with the comprehensive plan, the downzoning was piecemeal because the density was not attainable under applicable zoning regulations); *Board of Supervisors of Fairfax County v. Snell Construction Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974) (downzoned a portion of the plaintiff's property from high density to medium density); *City of Virginia Beach v. Virginia Land Investment Association No. 1*, 239 Va. 412, 389 S.E.2d 312 (1990) (downzoning of 3,500 acres, which included one-fourth of the land zoned for development but only two percent of the city's area, held to be piecemeal); *but see Purcellville West LLC v. Board of Supervisors of Loudoun County*, 75 Va. Cir. 284 (2008) (sustaining the county's demurrer because the "pleadings, while they refer to decreasing densities on 'only a very small remaining portion of the Rural Policy Area,' do not support the necessary prerequisite of selective application necessary to support this claim").

10-441 The modified test

An aggrieved landowner can make a prima facie case that a rezoning was a piecemeal downzoning upon a showing that "since the enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare." *Greengael, LLC,* 271 Va. 266, 284, 626 S.E.2d 357, 367; *Board of Supervisors of Fairfax County v. Snell Construction Corp.*, 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974). At that point, the burden shifts to the governing body to offer evidence of mistake, fraud, or changed circumstances sufficient to make reasonableness fairly debatable. *Greengael, supra; Virginia Land Investment Association No. 1,* 239 Va. 412, 389 S.E.2d 312 (1990) (piecemeal downzoning is valid if there has been a change in circumstances substantially affecting the public health, safety, or welfare, or that the prior zoning was based on a mistake or fraud).

In *Greengael*, the plaintiff failed to make out a prima facie case of a piecemeal downzoning because it failed to establish that the rezoning reduced the density of development below that recommended by the county's comprehensive plan, where the property was rezoned from R-4 to LI and the comprehensive plan designation was "future industrial". *Greengael LLC*, 271 Va. at 285, 626 S.E.2d at 368. In *Hennage Creative Printers v. City of Alexandria*, 37 Va. Cir. 63 (1995), the downzoning of the plaintiff's property from an industrial to a mixed-use zoning district was held to not be a piecemeal downzoning. The trial court noted that: (1) the city had been broken down into 14 small areas for purposes of study as part of a city-wide master plan; (2) neither the plaintiffs' property nor the small area in which plaintiffs' property was located was singled out; (3) the zoning studies were conducted city-wide rather than aimed at specific parcels or small areas; and (4) the resulting density of the plaintiffs' property was not less than provided in the master plan adopted as a result of the city-wide study.

10-442 Mistake, fraud, or changed circumstances

Piecemeal downzonings will survive judicial review if there is evidence of mistake, fraud, or changed circumstances that justifies the action.

A *mistake* is demonstrated when there is probative evidence to show that material facts or assumptions relied upon by the governing body at the time of the previous rezoning were erroneous. *Board of Supervisors of Henrico County v. Fralin and Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981) (no evidence of mistake or changed circumstances). A mistake does not include judgmental errors. *Fralin and Waldron, supra.* Moreover, a difference of opinion or a change of heart is not a mistake. *Conner v. Board of Supervisors of Prince William County*, 7 Va. Cir. 62 (1981).

Fraud means a false representation of a material fact, made intentionally and knowingly, with the intent to mislead, upon which the defrauded person relies to his detriment. *Winn v. Aleda Construction Company, Inc.*, 227 Va. 304, 315 S.E.2d 193 (1984); *Peet v. Peet*, 16 Va. App. 323 (1993).

Changed circumstances mean a changed condition since the prior ordinance, as shown by objectively verifiable evidence that substantially affects the character of the neighborhood as far as the public health, safety or welfare is concerned. *Turner v. Board of County Supervisors of Prince William County*, 263 Va. 283, 559 S.E.2d 683 (2002) (holding that the "prior ordinance" is the last ordinance adopted by the locality before it enacted the ordinance that downzoned the land); *Fralin and Waldron, supra.* In *Seabrook Partners v. City of Chesapeake*, 240 Va. 102, 393 S.E.2d 191 (1990), the Virginia Supreme Court held that the city's downzoning of 9.88 acres of a neighborhood from multi-family to single family housing was valid where the city presented sufficient evidence of changed circumstances. The Court found that the neighborhood defined by the city had changed since 1969 when the multi-family zoning was established because the surrounding area had developed, or was planned to be developed, as single-family housing. If developed as multi-family housing as desired by the plaintiffs, the Court concluded that it was fairly debatable that the island of multi-family housing would substantially affect the public health, safety, or welfare.

10-450 Approval or disapproval of rezoning request where there are alleged unconstitutional proffers

Virginia Code § 15.2-2208.1(A) provides that any rezoning approved that includes an unconstitutional proffer, or any rezoning disapproved because the applicant refused to submit an unconstitutional proffer, is "entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to approve the rezoning without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs. Virginia Code § 15.2-2208.1 applies conditions attached to other types of land use applications as well, including special use permits. What may be an unconstitutional proffer is discussed in section 6-440.

Virginia Code § 15.2-2208.1(B) provides that if the aggrieved applicant proves that an unconstitutional proffer or condition has been proven to have been a factor in the grant or denial of the application, the trial court must presume, absent clear and convincing evidence to the contrary, that the applicant's acceptance of or refusal to accept the unconstitutional condition was the controlling basis for such impermissible grant or denial. An applicant must object to the condition in writing prior to the locality's action. *Virginia Code § 15.2-2208.1(B).*

In *Atlantic Town Center Development Corp. v. Accomack County Board of Supervisors*, 94 Va. Cir. 35 (2016), the applicant sought to rezone its land from agricultural to residential. The board of supervisors denied the rezoning and the applicant challenged the decision. One of the issues was whether the board denied the rezoning because the applicant failed to proffer an alleged unconstitutional proffer under Virginia Code § 15.2-2208.1(B). The circuit court held that the board did not deny the applicant's rezoning for that reason. The county's planning staff had discussed a phasing proffer with the applicant in an effort to ameliorate the county's concern that the density proposed by the applicant (432 units) was excessive. There was no evidence that phasing the project was demanded either by the board or county staff, or that the board even considered the need for a phasing proffer.

10-500 Zoning actions that may be susceptible to challenge

This section addresses several types of rezoning actions that may give rise to a challenge and may raise a variety

of constitutional issues.

10-510 Spot zonings

A *spot zoning* is the upzoning (allowing more intensive uses) of land to a classification that is different than that of the surrounding land. The common element found in a spot zoning is the rezoning of a parcel from an original zoning classification that was identical to parcels similar in size and use and situated in close proximity to the parcel rezoned. *Guest v. King George County Board of Supervisors*, 42 Va. Cir. 348 (1997). However, the fact that adjacent land is not similarly zoned does not necessarily make a rezoning a spot zoning. *Clark v. Town of Middleburg*, 26 Va. Cir. 472 (1990).

Illegal spot zoning occurs when the purpose of a zoning text or zoning map amendment is solely to serve the private interests of one or more landowners, rather than to further the locality's welfare as part of an overall zoning plan that may include a concurrent benefit to private interests. *Riverview Farm Associates v. Board of Supervisors of Charles City County*, 259 Va. 419, 528 S.E.2d 99 (2000); *Board of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981); *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967); *Runion v. Board of Supervisors of Roanoke*, 65 Va. Cir. 41 (2004) (rezoning land from AR to R-1 was not illegal spot zoning because the rezoning was part of a continuing plan of development for the county, the community plan recognized that development in the area was inevitable, granting the rezoning with proffers allowed the county to better protect the interests of the county than merely allowing the property to develop under its AR classification, particularly in this case where the increase in density went from 38 to 44, and the rezoning was compatible with the surrounding area).

A spot zoning that is consistent with the comprehensive plan should be found to be lawful since, by being consistent with the plan, it is furthering the locality's welfare.

10-520 Zoning to depress land values

One of the purposes of zoning is to "encourage economic development activities that provide desirable employment and enlarge the tax base." *Virginia Code § 15.2-2283*. One of the factors to be considered in any zoning decision is the "conservation of properties and their values." *Virginia Code § 15.2-2284*. These two provisions indicate a legislative intent that a legitimate purpose of zoning is to protect and enhance land values.

The opposite is not a legitimate purpose of zoning. A governing body may not use its zoning power to depress the value of land in order to lower the costs of a public taking. *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 222 S.E.2d 570 (1976).

10-530 Contract zoning

A locality has no authority to enter into a private agreement with a property owner to amend a zoning ordinance, thereby contracting away its police power. *Pima Gro Systems, Inc. v. Board of Supervisors of King George County*, 52 Va. Cir. 241 (2000). "An agreement made to zone or rezone for the benefit of an individual landowner is generally illegal. It is an *ultra vires* act bargaining away the police power. Zoning must be governed by the public interest and not by benefit to a particular landowner." *Pima Gro, supra,* citing *83 Am.Jur.2d, Zoning and Planning, § 46*.

Localities are enabled to enter into a voluntary agreement with a landowner that would result in a downzoning of undeveloped or underdeveloped lands in exchange for a tax credit equaling the amount of excess real estate taxes paid due to the higher zoning classification. *Virginia Code § 15.2-2286(A)(11)*. This, of course, is not illegal contract zoning.

10-540 Socio-economic zoning

For purposes here, socio-economic zoning attempts to achieve sociological or economic objectives not related to the regulation of land on issues that are not otherwise expressly enabled. Socio-economic zoning is invalid if its effect is to favor one sociological or economic interest over another. In *Board of Supervisors of Fairfax County v. DeGroff*

Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973), the Virginia Supreme Court invalidated a regulation that required certain developments having 50 or more dwelling units to build at least 15 percent of the dwelling units for low and moderate income housing. The Court stated:

> The amendment, in establishing maximum rental and sale prices for 15% of the units in the development, exceeds the authority granted by the enabling act to the local governing body because it is *socio-economic zoning* and attempts to control the compensation for the use of land and the improvements thereon.
>
> Of greater importance, however, is that the amendment requires the developer or owner to rent or sell 15% of the dwelling units in the development to persons of low or moderate income at rental or sale prices *not fixed by a free market*. Such a scheme violates the guarantee set forth in Section 11 of Article 1 of the Constitution of Virginia, 1971, that no property will be taken or damaged for public purposes without just compensation.

DeGroff Enterprises, Inc., 214 Va. at 235, 198 S.E.2d at 601.

The Court concluded "that the legislative intent [in the state enabling legislation] was to permit localities to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group." *DeGroff Enterprises, Inc.*, 214 Va. at 238, 198 S.E.2d at 602. The General Assembly has since responded by enabling localities to establish *voluntary* affordable housing programs in their zoning ordinances. *Virginia Code §§ 15.2-2304 and 15.2-2305*. Affordable housing programs that comply with Virginia Code §§ 15.2-2304 or 15.2-2305 are not unlawful socio-economic zoning.

In *Board of Zoning Appeals of Fairfax County v. Columbia Pike Ltd.*, 213 Va. 437, 192 S.E.2d 778 (1972), the Virginia Supreme Court held that a zoning regulation requiring that persons constructing office space in a commercial high rise office building zone construct four parking spaces for each 1000 square feet of office space: (1) did not require that the parking spaces be leased only with and as part of the lease or rental of office space; and (2) did not prohibit the landlord from charging employees and tenants in the building for using or reserving the parking spaces. Thus, the Court held that the BZA could not prohibit the landlord from leasing parking spaces separate from the lease of office space. The Court stated that the BZA had "*confused the use of property with compensation for use of property*. These are two entirely separate and distinct things." The Court added that:

> Under Article 8 of Chapter 11 of Title 15.1 of the Code the General Assembly has authorized local governing bodies by ordinance to control the use and development of lands within their respective jurisdictions. *There is no legislation, however, which enables these governing bodies to control the compensation of land or the improvements thereon.*

(italics added) *Columbia Pike, Ltd.*, 213 Va. at 438, 192 S.E.2d at 779.

10-550 Illegitimate or personal reasons not based on zoning principles

A zoning action may be improper when a landowner has been singled out for adverse treatment based on illegitimate or personal reasons. *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989). In *Marks*, a palmist sought a conditional use permit and the city initially supported granting the permit. However, after certain residents displayed overt religious hostility to the presence of the palmist, the city council denied the permit. The Fourth Circuit Court of Appeals held that the city council's decision was arbitrary and capricious because the public's negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible grounds for a land use decision. *Marks, supra.*