

Chapter 14

Decisions by Zoning Officials

14-100 Introduction

This chapter examines the typical decisions referred to in various provisions of the Virginia Code as decisions, determinations, orders, and requirements, including notices of violation (collectively, *decisions*), and except where otherwise noted, this refers to written decisions) made by the zoning administrator and other administrative officers (collectively, the *zoning administrator*), and what makes a decision one that may have binding effect. *See James v. City of Falls Church*, 280 Va. 31, 43, 694 S.E.2d 568, 575 (2010) (a planning commission is not an administrative officer for purposes of making decisions under Virginia Code § 15.2-2311).

Chapter 15 explores the BZA's consideration of appeals from decisions made by the zoning administrator. Chapter 16 (Interpreting a Statute or Ordinance), Chapter 17 (Classifying Primary Uses Determining Whether a Use is an Accessory Use), Chapter 18 (Nonconforming Uses and Structures), and Chapter 19 (Vested Rights) provide guidance on a selected range of issues frequently considered by a zoning administrator and a BZA.

14-200 Decisions made by the zoning administrator

A locality is enabled to provide for administering and enforcing its the zoning ordinance. *Virginia Code § 15.2-2286(A)(4)*. The decisions made by the zoning administrator and other administrative officers under this authority invariably affect the interests of various persons, including the landowner and its neighbors. The zoning administrator in particular has all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, and this authority includes: (1) ordering in writing the remedying of any condition found in violation of the ordinance; (2) insuring compliance with the ordinance, bringing legal action, including injunction, abatement, or other appropriate action or proceeding subject to appeal; and (3) in specific cases, making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of vested rights under Virginia Code §§ 15.2-2307 and 15.2-2311(C). *Virginia Code § 15.2-2286(A)(4)*.

When a request for a decision is made, the zoning administrator must respond within 90 days unless the requester has agreed to a longer period. *Virginia Code § 15.2-2286(A)(4)*. The range of issues that the zoning administrator may be asked to resolve in a decision include:

- The meaning of a particular regulation in the zoning ordinance.
- How a land use should be classified and whether the use is permitted within a particular zoning district.
- Whether a proposed structure complies with setback, height, bulk and other requirements.
- Whether a use or structure is nonconforming.
- Whether an owner has vested rights.
- Whether a lot meets minimum lot size requirements.
- Whether a use or structure complies with the zoning ordinance.

Even though zoning administrators must necessarily interpret the zoning ordinance to execute their responsibilities, they may not rule upon the validity of a zoning regulation, nor waive any requirement they are not expressly authorized to waive. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 487 S.E.2d 207 (1997) (declaring a

zoning ordinance invalid is within the sole province of the courts); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992) (waiver).

14-210 What makes a decision by the zoning administrator one that may have binding effect

A decision, and in particular, a determination, must be based upon a set of existing facts, rather than upon a recitation of non-existent facts, hypotheticals, proposals, ideas, concepts, or “what-if” suppositions. *See Lynch v. Spotsylvania County Board of Zoning Appeals*, 42 Va. Cir. 164 (1997).

If a zoning violation is not the issue, there must be some application pending for specific relief that triggers the zoning administrator’s need to make a decision. *Lilly v. Caroline County*, 259 Va. 291, 298, 526 S.E.2d 743, 746 (2000). The application for specific relief need not pertain directly to a decision on the question answered. *Lilly, supra* (a determination of whether a radio tower was a use permitted by right arose in the context of a proposed zoning amendment and an application for a special use permit).

If a zoning violation is the issue, a decision need not be triggered by an application for specific relief. The zoning administrator may decide that a zoning violation exists upon any information that comes to their attention, by any means. *Gwinn v. Alward*, 235 Va. 616, 622, 369 S.E.2d 410, 412 (1988). Any other approach would hamstring the zoning administrator in enforcing the locality’s zoning laws. *Gwinn, supra*.

When a Decision May Have Binding Effect	
Decision Pertains to a Zoning Violation	Decision Pertains to Another Issue
<ul style="list-style-type: none"> • Need not be based on a pending application before the locality, but may be based on information that comes to the zoning administrator’s attention • Must be based upon a set of existing facts • Must be in writing 	<ul style="list-style-type: none"> • Must be a pending application before the locality • Must be based upon a set of existing facts • Should be in writing, but may be made orally

If there is no pending application or no zoning violation in issue, any decision by the zoning administrator will likely be found to be an advisory opinion that does not trigger the right to appeal under Virginia Code § 15.2-2311. *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 445 S.E.2d 97 (1994). This rule has been highlighted in two decisions of the Virginia Supreme Court.

In *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), Crucible operated a security training facility in Stafford County and wanted to expand its facility. It sought and obtained from the zoning administrator an “interpretation” that the proposed facility would be classified as a “school,” a by-right use in the applicable zoning district at the time. The zoning administrator’s interpretation was contained in a letter entitled “Zoning Verification,” and the interpretation was conditioned on it being valid as of the date of the letter and was subject to change. Relying on that letter, Crucible bought the property. When the county changed its zoning regulations to allow schools only by special use permit, Crucible sought to claim vested rights based on the zoning administrator’s “Zoning Verification.” The Virginia Supreme Court held that the “Zoning Verification” was not a determination within the meaning of Virginia Code § 15.2-2311(C) so as to allow rights to vest, stating:

The zoning verification letter merely stated that Crucible’s facility fell within the definition of “school” according to the then-current zoning laws and that those laws were subject to change. The zoning verification letter did not permit Crucible to use its property in a way that was otherwise not allowed under then-current zoning laws, and Crucible cannot establish a right to proceed based upon Code § 15.2-2311(C).

Crucible, 278 Va. at 161, 677 S.E.2d at 288.

In *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010), the city’s zoning administrator was asked to interpret the zoning ordinance to decide whether church parcels within a historic district could be consolidated and concluded that they could. Based on the zoning administrator’s interpretation, the church filed a plat to consolidate

the parcels. When the plat reached the city’s planning commission, the commission disagreed with the zoning administrator’s interpretation and disapproved the plat. In concluding that the zoning administrator’s interpretation did not rise to the level of a decision to which vested rights might accrue under Virginia Code § 15.2-2311(C), the Virginia Supreme Court said:

[T]he zoning administrator merely provided an interpretation of City Code § 48-800(a). In its letter to the zoning administrator, Columbia Baptist requested a “zoning interpretation.” And in his reply letter, the zoning administrator made clear that he was responding to a “request for an interpretation.” He further stated: “while the actual consolidation process is a Planning Commission function [,] it is my *interpretation*” [emphasis in original] that the ordinances permit the consolidation . . . That “interpretation” lacked the finality of an “order, requirement, decision or determination” under Code § 15.2-2311(C).

James, 280 Va. at 44, 694 S.E.2d at 575. The Court went on to hold that the planning commission had the authority to interpret the zoning ordinance in consideration of the plat, and it was not obliged to adopt the zoning administrator’s interpretation. *See also Greene v. Board of Zoning Appeals of Fairfax County*, 34 Va. Cir. 227 (1994) (erroneous written determination as to whether property was to be used only for open space was advisory to the county only, it was not one triggering rights and obligations under what is now Virginia Code § 15.2-2311).

A decision has legal significance because, if a person aggrieved by the decision fails to timely appeal it to the BZA, it becomes a final, binding decision – a *thing decided*. At first impression, a different procedure applies when one seeks to challenge a zoning decision made in conjunction with the issuance of a building permit and received no actual notice of the issuance of the permit. *Virginia Code § 15.2-2313*. In such a situation, Virginia Code § 15.2-2313 appears to allow the aggrieved party to pursue relief in court even though no appeal was taken from the decision of the administrative officer to the BZA, provided that the lawsuit is filed within 15 days after the start of construction. However, relying on the Virginia Supreme Court’s description in *Lilly, supra*, of an appeal to the BZA as a *mandatory appeal*, two trial courts have concluded that an appeal to the BZA under Virginia Code § 15.2-2311 is a prerequisite to an action under Virginia Code § 15.2-2313. *Campbell v. Davidson*, 96 Va. Cir. 55 (2017); *Mirror Ridge Homeowners Association v. Loudoun County Board of Supervisors*, 51 Va. Cir. 406 (2000). *See section 14-230 for required notice of right to appeal written notices of violation or orders.*

14-220 The thing decided rule

Important legal rights and responsibilities attach to a decision. A person aggrieved by a decision of the zoning administrator has the right to appeal it to the BZA. *Virginia Code § 15.2-2311; see Chapter 15*. If this mandatory appeal is not timely filed, the zoning administrator’s decision becomes a *thing decided* and, thus, it is not subject to court challenge. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988) (zoning administrator’s determination that a landowner operated a junkyard on his property in violation of the zoning ordinance became a thing decided and not subject to attack because the landowner did not appeal the decision); *Board of Supervisors of Fairfax County v. Martin*, 23 Va. Cir. 37 (1990) (landowners who failed to appeal decisions to the BZA would not later be allowed to put on evidence of their claim that their use was nonconforming).

When an application for specific relief is pending, a decision or determination that triggers the right to appeal may be made orally. *Lilly, supra* (zoning administrator orally determined at a public hearing whether a use was by-right, the persons aggrieved were present at the hearing, and the zoning administrator advised the public that they could appeal the determination to the BZA).

14-221 The rationale for the rule

The thing decided rule is based on a fundamental principle of administrative law – when an administrative remedy is provided, that remedy must be exhausted before an administrative determination may be challenged in court. In the zoning context, “a landowner may be precluded from making a direct judicial attack on a zoning decision if the landowner has failed to exhaust ‘adequate and available administrative remedies before proceeding

with a court challenge.” *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 23, 445 S.E.2d 97, 100 (1994), quoting *Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989); *Henrico County v. Market Inns, Inc.*, 228 Va. 82, 319 S.E.2d 737 (1984). Thus, a person aggrieved by a decision of the zoning administrator must exhaust the administrative remedy provided – a timely appeal to the BZA under Virginia Code § 15.2-2311 – before an issue may be raised in court.

The exhaustion doctrine serves several purposes: (1) it permits the BZA to apply its experience with the zoning ordinance and to perform functions within its area of expertise; (2) it provides an opportunity for the locality and the other parties to more fully develop the facts upon which the decision is based; (3) it avoids unnecessary judicial review by giving the BZA an opportunity to correct any mistakes of the zoning administrator; and (4) it preserves the autonomy of the administrative system established by a locality for reviewing official determinations.

Thus, an aggrieved person who fails to timely appeal a zoning administrator’s decision to the BZA is thereafter precluded from challenging the following in a civil court proceeding:

- **Interpretation:** The interpretation of a zoning regulation. *See Phillips v. Telum, Inc.*, 223 Va. 585, 292 S.E.2d 311 (1982); *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 222 S.E.2d 570 (1976); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Noel v. Chesterfield County*, 37 Va. Cir. 219 (1995).
- **Use classification:** The classification of a use on the property. *Lilly v. Caroline County*, 259 Va. 291 (2000) (tower was a use allowed by right); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988) (activities and use constituted a junkyard).
- **Nonconforming status:** Whether a use has nonconforming status. *Board of Supervisors of Fairfax County v. Martin*, 23 Va. Cir. 37 (1990).
- **Vested rights:** Whether a landowner has vested rights to develop its property. *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 831, S.E.2d 483 (2019).
- **Violations:** Whether a violation of the zoning ordinance exists in a civil enforcement proceeding. *County of Chesterfield v. Lane*, 104 Va. Cir. 1 (2019); *City of Chesapeake v. Kinser*, 97 Va. Cir. 453 (2015) (in civil action seeking declaratory and injunctive relief, the city was entitled to summary judgment supported by the thing decided rule where the defendants had withdrawn their appeal to the BZA); *see City of Virginia Beach v. Witchduck Lake Enterprises*, 99 Va. Cir. 151 (2018) (declining to apply the thing decided rule in a criminal enforcement proceeding).

This short list is not exhaustive. Essentially, the determination of any issue germane to a zoning administrator’s decision may become a thing decided if it is not timely appealed.

The preclusive effect of the rule applies in civil zoning enforcement actions, thereby preventing a defendant from raising issues not appealed as defenses. *Dick Kelly Enterprises, supra*. The rule also may facilitate the resolution of civil zoning enforcement actions. In *McLane v. Clark*, 2010 Va. Cir. LEXIS 66, 2010 WL 2693526 (2010), a Fairfax County zoning inspector issued a notice of violation in 2008 to the owners of a bed and breakfast. The notice of violation was never appealed, but the county did not enforce the alleged violation at that time. Almost two years later, the zoning administrator filed a civil enforcement action in which the county sought both mandatory and prohibitory injunctive relief. The circuit court concluded that the thing decided rule entitled the county to obtain a prohibitory injunction without a trial. The court noted that one of the purposes of a prohibitory injunction was to prevent the future commission of an anticipated wrong. Citing the statutory authority for injunctive relief under Virginia Code §§ 15.2-2208 and 15.2-2286(A)(4), the court concluded:

Given that these statutes expressly provide for injunctive relief for the violation of a zoning ordinance, all that is required by the County in this case is proof of a violation. A Notice of Violation was issued to the Clarks on March 18, 2008, and it was not appealed. Therefore, the fact

that the Clarks were in violation of a zoning ordinance is a thing decided. [citation omitted]
Accordingly, the County has shown all that is required for entry of a prohibitory injunction.

McLane, 2010 Va. Cir. LEXIS at 9, 2010 WL 2693526.

As for the county's request for a mandatory injunction, the court observed that its purpose is to "undo an existing wrongful condition" whose "use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue." *McLane*, 2010 Va. Cir. LEXIS at 4, 2010 WL 2693526 (2010). Although the thing decided rule conclusively determined that the owners were in violation in 2008, the owners contended that the 2008 violation had been abated. The court concluded that the 2008 notice of violation was insufficient to establish that the violation still existed so as to justify the issuance of a mandatory injunction without a trial on the issue.

There are circumstances when the administrative remedy – appeal to the BZA – need not be exhausted. Because neither the zoning administrator nor the BZA may rule on the validity of a zoning ordinance, there is no requirement to exhaust administrative remedies before challenging the validity of an ordinance. *Dail v. York County*, 259 Va. 577, 582, 528 S.E.2d 447, 450 (2000) (challenge to county ordinance); *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997) (no requirement to appeal the county building inspector's determination or to apply for a new zoning permit because there was no administrative remedy equal to the relief sought).

In addition, a landowner need not exhaust administrative remedies by seeking a vested rights determination from the zoning administrator before asking the court to make such a determination. *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 157-158, 677 S.E.2d 283, 286 (2009). This is so because, historically, the courts were empowered to make vested rights determinations. The 1993 amendment to Virginia Code § 15.2-2286 that authorized zoning administrators to make vested rights determinations did not divest the courts of their authority. Thus, the authority exists concurrently in the zoning administrator and the courts. However, once a landowner pursues a vested rights determination through the zoning administrator and the BZA, it must exhaust that remedy and, if it fails to do so, the matter is a thing decided. *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 583, 831 S.E.2d 483 (2019). The Virginia Supreme Court explained: "To allow Bragg Hill to independently seek a vested rights determination in circuit court, beyond the 30-day appeal period following the BZA's determination would render Code § 15.2-2314 meaningless" and would defeat the purpose of the administrative remedy, which "would be eternally subject to collateral attack in a future circuit court proceeding." *Bragg Hill*, 297 Va. at 583-584, 831 S.E.2d 492.

14-222 The rule will apply if the zoning administrator made the basis of the decision clear

The thing decided rule will apply if the zoning administrator has made the basis of the decision clear. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988). It does not appear that this requirement is overly demanding or requires an unusual amount of detail.

In *Lilly*, the Virginia Supreme Court concluded that the oral statement by the zoning administrator at a public hearing that a "radio tower was a by-right use in the Rural Preservation zoning district" was a sufficient explanation of the basis for his determination. *Lilly*, 259 Va. at 297, 526 S.E.2d at 746.

In *Dick Kelly Enterprises*, the zoning administrator had notified the landowner of certain "zoning and building code violations at the subject property," noted that the property was located in a "Bay Front Residential District," and that "we have learned that for a period in excess of two years you have used it as a forty-two (42) unit apartment complex" rather than as a 42-unit motel. The zoning administrator further stated that the subject property's use was "inconsistent with the use approved in the Certificate of Occupancy, violates Section 904 of the zoning ordinance and Sections 112 and 115 of the building code" and "violates the area, parking, and other BFR district regulations." The Virginia Supreme Court concluded that the zoning administrator had adequately made clear the basis for the decision. *Dick Kelly Enterprises*, 243 Va. at 379, 416 S.E.2d at 684.

In *Abward*, zoning officials sent the landowner a series of letters stating that the use of his property was “considered by the Fairfax County Zoning Ordinance to be a junk yard . . . Consequently, the use of this commercial property as a repository for junk vehicles, trash service equipment, and miscellaneous junk and debris is in violation of the Ordinance.” The letter also advised the landowner that the property was located in a C-8, highway commercial, zoning district and, as such, could not be used for “trash hauling and related storage of vehicles,” and that the use of the property “as the location for a refuse collection service and the related storage of vehicles observed on September 13, 1984, is in violation of the Fairfax County Zoning Ordinance.” The Virginia Supreme Court concluded that the zoning officials had adequately made clear the basis for their determination. *Abward*, 235 Va. at 622, 369 S.E.2d at 413.

14-230 Required notice to the owner when a request for a decision is made by a person other than the owner

Virginia Code § 15.2-2204(H) provides that when a person other than the landowner or the landowner’s agent requests a decision, determination, order, or requirement from either the zoning administrator, or another administrative officer that is subject to appeal under Virginia Code §§ 15.2-2311 and 15.2-2314, written notice of the request must be given to the landowner of the property within 10 days after receipt of the request.

The written notice to the landowner must either be given by the zoning administrator or other administrative officer or, at the direction of the zoning administrator or other officer, the requesting applicant. If the applicant is required to provide the notice to the landowner, the applicant also must provide satisfactory evidence to the zoning administrator or other administrative officer that the notice has been given. Written notice mailed to the owner at the last known address of the owner as shown on the current real estate tax assessment books or current real estate tax assessment records satisfies the notice requirements.

14-240 Required notice to the owner of a notice of violation or order

A notice of violation or an order of the zoning administrator will be binding against a landowner only if the zoning administrator provided notice of violation or the order to the landowner. *Virginia Code § 15.2-2311(A)*. Otherwise, any decision of the BZA on the matter is nonbinding against the landowner. *Virginia Code § 15.2-2311(A)*. If the landowner had actual notice of the notice of violation or the order, or participated in the BZA appeal hearing, the lack of notice is waived. *Virginia Code § 15.2-2311(A)*.

14-250 Required notice of right to appeal written notices of violation or orders

Any written notice of a zoning violation or a written order of the zoning administrator must include a statement informing the recipient that they may have a right to appeal the notice of zoning violation or written order within 30 days, and that the decision will be final and unappealable if not appealed within 30 days. The 30-day appeal period for the recipient of the notice or order does not begin until they are advised of the right to appeal. *Virginia Code § 15.2-2311(A)*. A written notice that is sent by registered or certified mail to, or posted at, the last known address of the landowner as shown on the current real estate tax assessment books or current real estate tax assessment records, is deemed sufficient notice to the landowner and satisfies the notice requirements. *Virginia Code § 15.2-2311(A)*. Finally, the notice of appeal must inform the recipient of the applicable appeal fee and provide a reference to where additional information may be obtained regarding filing an appeal. *Virginia Code § 15.2-2311(A)*.

Under Virginia Code § 15.2-2311(A), the required notice of appeal applies only to written notices of violation and written orders of the zoning administrator. It does not apply to other decisions and determinations that may be made and, thus, the 30-day appeal period may run against someone who may not have received, or may not have been entitled to receive, notice of the decision or determination. In other words, third parties do not have an unlimited period of time to appeal a decision, even if they assert that they are aggrieved. Otherwise, there would be no finality to a decision or determination. *But see Ripol v. Westmoreland County Industrial Development Authority*, 82 Va. Cir. 69 (2010), where third-parties were allowed to challenge a decision as to whether a proposed use was a “school” long after the 30-day appeal period had passed because the decision was not directed to them and there was no evidence that the petitioners knew about the decision when it was made.

14-300 The doctrine of estoppel and its application to erroneous decisions

A zoning official may make an incorrect decision, and that incorrect decision may place a burden on the person affected by it; other times an incorrect decision may give landowners greater rights than they might otherwise be entitled to and, once discovered, the locality may seek to correct that error.

14-310 The doctrine of estoppel

In the land use context, the doctrine of estoppel is typically raised by a landowner who has been erroneously granted a permit or some other kind of approval. For example, a building official may issue a building permit for a building that will be unlawfully located within the setback area on the lot. When the mistake is discovered, but construction on the building has begun, the landowner will claim that the locality is estopped (prevented) from applying the setback regulations to the lot because it relied on the building permit issued by the locality.

Except in the circumstances discussed in section 14-320, the doctrine of estoppel does not apply to Virginia localities. *Wolfe v. Board of Zoning Appeals of Fairfax County*, 260 Va. 7, 532 S.E.2d 621 (2000); *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138 (1981); *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978); *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968). The doctrine of estoppel does not apply to localities because:

An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute.

WANV, 219 Va. at 63, 244 S.E.2d at 763-764.

No subordinate municipal official can bind the municipality to an incorrect . . . interpretation of the [locality's] ordinances.

Wolfe, 260 Va. at 19, 532 S.E.2d at 627; *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992).

If a building permit is issued in violation of law, it confers no greater rights upon a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance or authorize a structure at a location prohibited by the ordinance. Its issuance by such a municipal officer is unauthorized and void. [citations omitted] Administrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them.

Segaloff, 209 Va. at 382, 163 S.E.2d at 685 (building canopy constructed in setback as shown on approved building permit plans, but in violation of setback regulations).

Thus, estoppel does not apply because the laws of the state and a locality are supreme to any decision of an official in the administration of those laws. The effect is to prevent a law from being overridden or circumscribed by erroneous decisions at the administrative level. It is irrelevant whether the official is acting in good faith. *Hurt*, 222 Va. at 97, 279 S.E.2d at 142 (estoppel would not apply even though the building official acted in good faith and under the honest belief that he had a legal right to issue the building permit, because he was without authority to issue a building permit for the construction of a multi-family apartment building unless and until the county regulation had been met).

14-320 Virginia Code § 15.2-2311(C) and statutory estoppel

Virginia Code § 15.2-2311(C) provides “for the potential vesting of a right to use property in a manner that otherwise would not have been allowed.” *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008). When a zoning administrator makes an erroneous written decision that works to the benefit of a landowner (e.g., by allowing the landowner to do something not otherwise allowed by the zoning ordinance) and that error is discovered, the zoning administrator presumably will seek to correct it. Virginia Code

§ 15.2-2311(C) creates a limited circumstance when estoppel principles apply to localities, and vests rights in the landowner if the zoning administrator does not correct an erroneous written determination within 60 days after the date of the decision.

Specifically, Virginia Code § 15.2-2311(C) provides:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical errors.

See section 19-400 for a discussion of the vested rights that may attach to an erroneous determination.

14-400 The doctrine of laches as applied to decisions related to zoning enforcement

In most Virginia localities, zoning enforcement is triggered by a complaint, which is usually lodged by a neighbor of the alleged violator or other concerned citizens. Some localities are engaged in proactive zoning enforcement where zoning inspectors go out seeking zoning violations on their own. Under this prevailing state of zoning enforcement, it is possible for zoning violations to go unnoticed by the locality for years, sometimes decades. The passage of time, however, in no way legitimizes the illegal use or prevents the locality from enforcing its zoning regulations.

Laches is an equitable defense that may be raised by a party who claims that the failure of another party to assert a known right for an unexplained length of time is prejudicial to the party raising the defense. *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 47, 353 S.E.2d 727, 735 (1987). Assuming for the sake of argument that the defense of laches applies against localities, the defense would be raised by a zoning violator facing a zoning enforcement action. However, laches does not apply to a locality in the discharge of its governmental functions, and this includes the enforcement of its zoning regulations. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 381, 416 S.E.2d 680, 685 (1992); *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 164, 349 S.E.2d 351, 354 (1986).

In *Dick Kelly Enterprises*, the landowner unsuccessfully argued that the doctrine should apply because it had been illegally operating an apartment building in a building zoned for a motel use for six years before the zoning regulations were enforced. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the circuit court rejected the landowner's claim that laches should prevent the county from enjoining him from operating his illegal vehicle light service business because the county had not enforced against his property for over 40 years, the business was now his sole source of income, and because he was no longer able to work away from his home due to his and his wife's medical conditions.

To put it simply, an illegal use does not become a legal use solely because it has escaped detection from zoning inspectors for a certain period of time.