Chapter 20

Development Rights in the Rural Areas Zoning District in Albemarle County

20-100 Introduction

This chapter reviews the regulations and many of the key issues pertaining to development rights in the rural areas zoning district in Albemarle County and, in particular, how they may be used and how their use may be limited.

20-200 What is a development right?

Up to five development rights were allocated to each *parcel of record* in the rural areas zoning district existing at 5:15 p.m. on December 10, 1980[1], when the current zoning ordinance was adopted by the Albemarle County board of supervisors. *Albemarle County Code § 18-10.3*. A *parcel of record* is synonymous with *lot of record*, which is defined to be a "lot shown on a subdivision plat or other lawful plat or legal description which is lawfully recorded in the Clerk's Office of the Circuit Court of Albemarle County, Virginia." Notwithstanding that definition, those lots approved by the County before December 10, 1980, including those approved on a preliminary subdivision plat, but not put to record until after December 10, 1980, are deemed to be parcels of record for the purpose of determining development rights. *Albemarle County Code § 18-6.5.3 (former)*. As will be examined more closely in the following sections, development rights permit the creation of lots less than 21 acres in size in the rural areas zoning district.

In a series of official determinations, the zoning administrator has determined that a parcel of record must be one that was originally established as a lot that could be developed for, most typically, residential purposes. Special lots, such as well lots, cemeteries, and narrow strips of land created for the purpose of providing access, are not parcels of record with development rights.

The board of supervisors may grant a special use permit to allot additional development rights to parcels of record outside of the reservoir watersheds, provided that the additional development rights are compatible with the neighborhood and specified goals and objectives are satisfied. *Albemarle County Code § 18-10.5.2.1*. Special use permits to attain additional development rights are rarely sought.

In this chapter, the term *parcel of record* refers to the original lot that was allocated development rights; the term *lot* refers to each lot created from a parcel of record.

20-300 What a development right allows

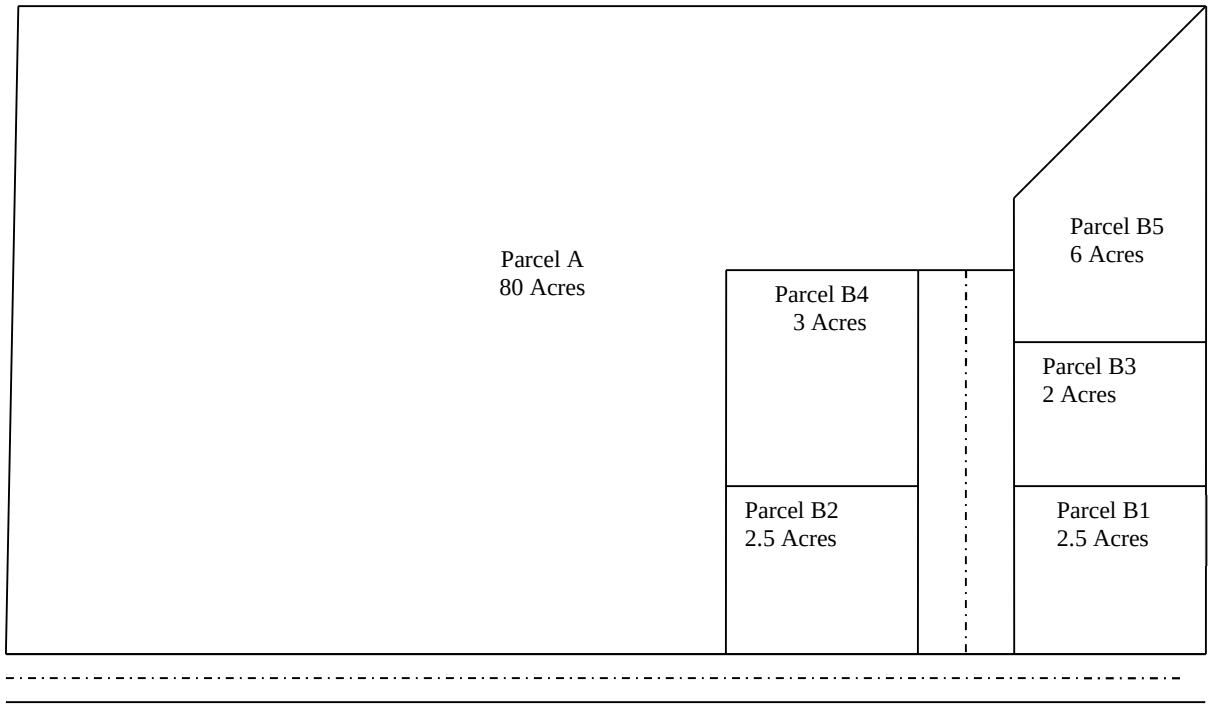
Development rights have a dual nature – they identify not only the number of lots that may be theoretically created by the subdivision of a parcel of record, but also the number of single-family dwellings that may be established. A parcel of record may be divided into up to five lots that are at least two acres in size, but less than 21 acres, in addition to as many 21-plus acre lots that can be created. *Albemarle County Code §§ 18-10.3.1 and 18-10.3.2*. The table below explains how development rights would be allocated:

Parcel Size	Number of Theoretical Development Rights
≥ 10 acres	5
≥ 8 acres, but < 10 acres	4
≥ 6 acres, but < 8 acres	3

[1] Six development rights were conferred by the ordinance adopted December 10, 1980. The number of development rights was reduced from 6 to 5 by a zoning text amendment adopted March 18, 1981.

Parcel Size	Number of Theoretical Development Rights
≥ 4 acres, but < 6 acres	2
< 4 acres	1

The following illustration shows how a 96-acre parcel of record could be subdivided using its 5 allocated development rights:



The 80-acre residue in this illustration could then be subdivided into a total of three lots, because that is the maximum number of 21-acre lots that could be created from it. If the development right lots were reduced in size so that the residue was 84 acres or more, then the residue could be divided into four lots.

Development rights also identify the number of single-family dwellings that may be established on a single lot less than 21 acres in size in the rural areas. Up to five single-family dwellings may be established on a single lot. *Albemarle County Code § 18-10.5.1.* Multiple dwellings on a single lot must be located so that if the lot were subdivided, each dwelling could be located on a separate lot that satisfied all the requirements of the zoning and subdivision ordinances. The location of three or more dwellings on a single lot is permitted only with an approved site plan. *Albemarle County Code § 18-32.2(a).*

20-400 Theoretical and usable development rights

The development rights allocated by Albemarle County Code § 18-10.3 are *theoretical.* They may be usable only if the lot being created contains a building site meeting the requirements of the zoning ordinance. The requirements for a building site are in Albemarle County Code § 18-4.2.1.

The use of development rights also may be limited by other zoning and subdivision regulations, conditions of approval, private covenants, or easements. *See sections 20-700 through 20-1000 for more discussion of the limitations on the use of development rights.*

20-500 How the number of development rights is determined

The number of theoretical development rights is determined in a variety of ways. Typically, the number of

development rights is determined by staff in the department of community development in the course of their review of subdivision plats and is based on the information supplied by the landowners, surveyors, or engineers. Landowners, or more often, their engineers or surveyors, show the usable development rights on the subdivision plat.

On occasion, the number of theoretical development rights is determined by the zoning administrator in an *official determination*. Official determinations issued by the zoning administrator are made with the assistance of the county attorney. These determinations require research through the land records to identify the parcel of record existing immediately prior to December 10, 1980, and then analyzing the history of the lot since December 10, 1980 to determine whether any development rights have been off-conveyed from the original parcel of record. Official determinations are often requested by landowners who believe that their land may be comprised of multiple parcels of record, or by prospective buyers, appraisers, or auditors seeking to fully understand the value of the land. It is fairly common for a single *tax parcel* identified on the county's tax maps to consist of multiple parcels of record under Albemarle County Code § 18-10.3. The administrative practice of the county's assessor's office through the 1970s was to consolidate adjoining parcels under the same ownership into a single tax parcel so that the county could mail fewer tax bills and track fewer tax parcels. The determination of the number of parcels of record requires a thorough examination of the deeds and plats in the chain of title, sometimes back to the late 1800s.

Official determinations also are made by the zoning administrator for applications under the county's acquisition of conservation easements ("ACE") program. The number of theoretical and usable development rights is used to rank the property under the criteria in the ACE ordinance and for appraising the value of the open-space easement (for those development rights that will be extinguished by the easement).

Official determinations of development rights become binding on the land if they are not timely appealed to and reversed or modified by the board of zoning appeals ("BZA").

20-510 Parcels separated by roads: 1980 to 1990

From the adoption of the current Zoning Ordinance in 1980 until the Albemarle County Circuit Court's 1990 decision in *Sanford v. Board of Zoning Appeals of Albemarle County, Virginia*, the zoning administrator and the BZA consistently determined that a public road did not divide a parcel into multiple parcels of record.

20-520 Parcels separated by roads; physical separation sufficient: 1990 to 2002

In *Sanford*, the trial court overturned the BZA's decision that the Inglecress property was a single parcel. The court held that a 10-acre piece of the property (identified as "Parcel X") was not only physically separated from its parent parcel when Garth Road was realigned in 1958, but it also was *legally* separated before December 10, 1980 and, therefore, was a parcel of record by a probated will. With respect to the physical separation resulting from the realignment of Garth Road, the *Sanford* court cited *City of Winston-Salem v. Tickle*, 53 N.C.App. 516 (1981), a North Carolina eminent domain case, for this rule: "It is generally held that parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law." *Tickle, supra.*

After *Sanford*, the practice of the zoning administrator was to determine that parcels physically separated by a public road were separate parcels of record under Albemarle County Code § 18-10.3.

20-530 Parcels separated by roads; legal separation required: 2002 to present

In late 2001, the Virginia Supreme Court decided *County of Chesterfield v. Stigall*, 262 Va. 697, 554 S.E.2d 49 (2001), in which the Court considered whether a taking by eminent domain triggered the property tax roll-back provisions under Virginia Code § 58.1-3241, applicable to separated or split-off parcels under land use valuation. The Court concluded that the roll-back provisions were not triggered by the mere *physical separation* of the taxpayer's land caused by the taking of right-of-way for construction of the Powhite Parkway. Rather, the Court concluded that the statutory language required that the roll-back provisions be triggered by a *legal separation* initiated by the owner – and this required, at a minimum, "a change in the legal description of the property, either by metes and bounds or

by plat, which is duly recorded in the appropriate land records." *Stigall*, 262 Va. at 705, 554 S.E.2d at 54.

Stigall instructs that there is a significant distinction between parcels that are physically separated and those that are legally separated, and that the applicable law determines the applicable standard in a particular situation. As a result, county staff re-examined its application of *Sanford* and the *Tickle* rule.

In light of *Stigall*, and in the context of a parcel physically separated by a public road, the county concluded that Albemarle County Code § 18-10.3's requirement that a parcel be a "parcel of record" required *legal separation* of the land, established by a recorded plat or other legal description delineating, describing, and establishing each piece separated by the road as a separate parcel. Thus, a proper parcel determination in such a case had to be based on whether the parcel was *legally* separated based upon plats or other legal descriptions of record, rather than merely be *physically* separated by a public road, at 5:15 p.m. on December 10, 1980.

The Albemarle County Circuit Court upheld this new interpretation in 2004 in *Scruby v. Board of Zoning Appeals of Albemarle County*, 65 Va. Cir. 89 (2004). The Virginia Supreme Court's decision in *W & W Partnership v. Prince William County Board of Zoning Appeals*, 279 Va. 483, 689 S.E.2d 739 (2010) re-affirms the application of the principles considered in *Stigall* to zoning matters.

20-600 Development rights and 21-acre lots

As noted in section 20-300, development rights identify the number of lots less than 21 acres in size that may be theoretically created by the subdivision of a parcel of record. The rural areas zoning district regulations also allow as many 21-acre or greater sized lots to be created as possible. *Albemarle County Code § 18-10.3.2*. The table below shows the number of lots that could be created from parcels of various sizes:

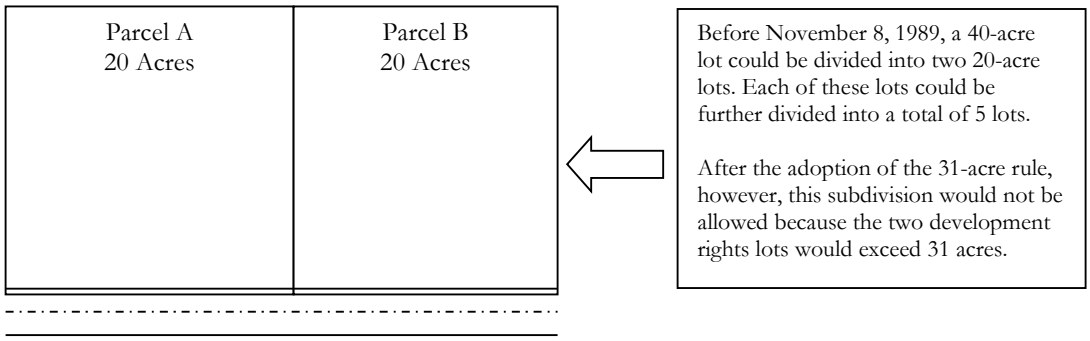
Potential Development of Various Sized Parcels of Record			
Size of the Parcel of Record	**Theoretical Development Right Lots**	**21-Acre Lots**	**Total Number of Lots That May Be Created**
38 acres	5	1	6
84 acres	5	3	8
167 acres	5	7	12
220 acres	5	10	15

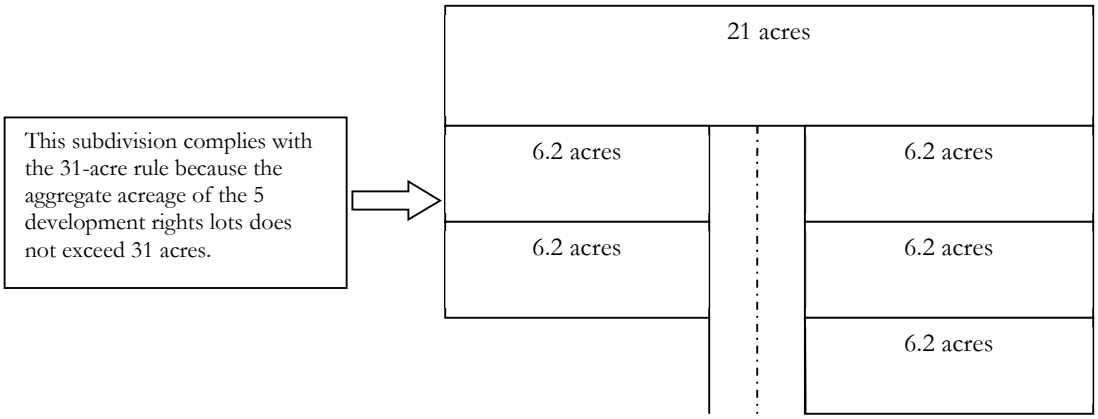
As noted in section 20-400, the actual number of lots may be less if building sites and other zoning and subdivision requirements cannot be satisfied.

20-700 The 31-acre rule

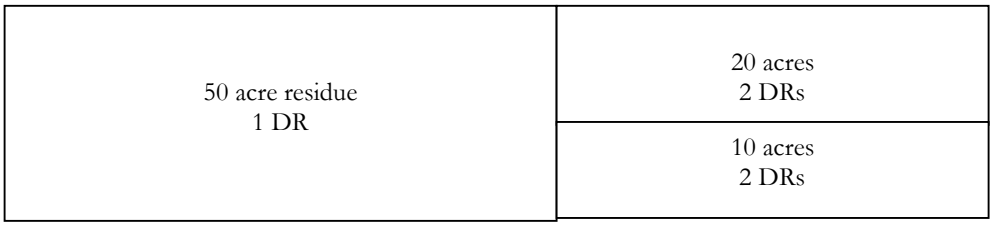
Subdivisions occurring after November 8, 1989 are subject to what is commonly known as the *31-acre rule*. The rule provides that the "aggregate acreage devoted to such lots or development shall not exceed thirty-one (31) acres, except in such case where this aggregate acreage limitation is precluded by other provisions of this ordinance." *Albemarle County Code § 18-10.3.1*. In other words, the rule limits the aggregate acreage consumed by development right lots to 31-acres.

Although development right lots may be as small as 2 acres, the regulations allow a development right lot to be as large as just less than 21 acres. The 31-acre rule minimizes the acreage consumed by development right lots and requires the balance of the property to be lots of at least 21 acres in order to better preserve Albemarle County's rural character. The illustrations below show how the 31-acre rule would apply in two situations shown on the following page.





The following illustration shows how development rights can be encumbered by the operation of the 31-acre rule on an 80-acre parcel.



In this illustration, two lots, containing 20 acres and 10 acres respectively, are divided from the original parcel. The off-conveyances are assigned a total of 4 development rights and contain a total of 30 acres. The 50-acre residue retains 1 development right. However, the development right cannot be used because a 2-acre lot, divided from the residue, would result in an aggregate of 32 acres being devoted to development lots.

The 31-acre rule comes with several quirks that arise in its application, depending on the site of the parcel of record. Following are some of those quirks:

- 31-acre parcel: The area available for DR lots is the entire 31-acre parcel; the average lot size for the 5 DR lots is 6.2 acres.

- 31.01-acre parcel: The area available for DR lots is 10.01 acres, because a residue of at least 21 acres must be maintained; the average lot size for the 5 DR lots is 2.002 acres.

- 41-acre parcel: The area available for DR lots is 20 acres, because a residue of at least 21 acres must be

maintained; the average lot size for the 5 DR lots is 4 acres.

- 52-acre parcel: The area available for DR lots is 31 acres and a residue of at least 21 acres must be maintained; the average lot size for the 5 DR lots is 6.2 acres.

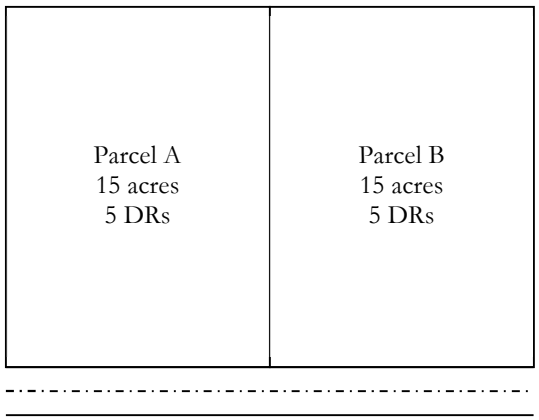
20-800 Development rights must be used within the boundaries of the parcel of record; the "kernel rule"

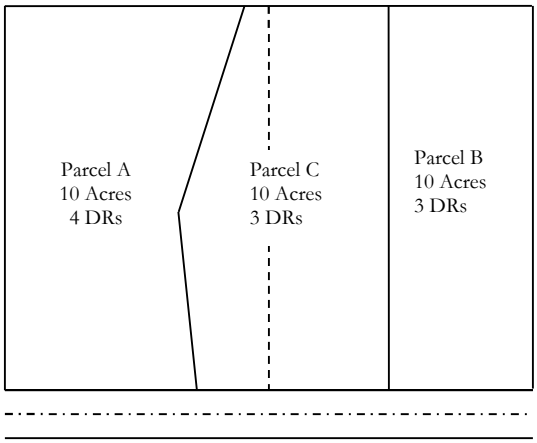
The general rule is quite simple – development rights must be used within the boundaries of the parcel of record. *Albemarle County Code § 18-10.3.1.*

Over time, lots may be created from a parcel of record or their boundary lines may be adjusted. The requirement that development rights be used within the boundaries of the parcel of record – sometimes referred as the *kernel rule* – requires that each development right lot created contain a *kernel* from the original parcel of record. The rule prevents the transfer of development rights from one parcel of record to another. By doing so, the rule prevents landowners from assembling development rights from other parcels of record, a practice that could result in large suburban-scale subdivisions and development at a much greater density than otherwise allowed in the rural areas zoning district.

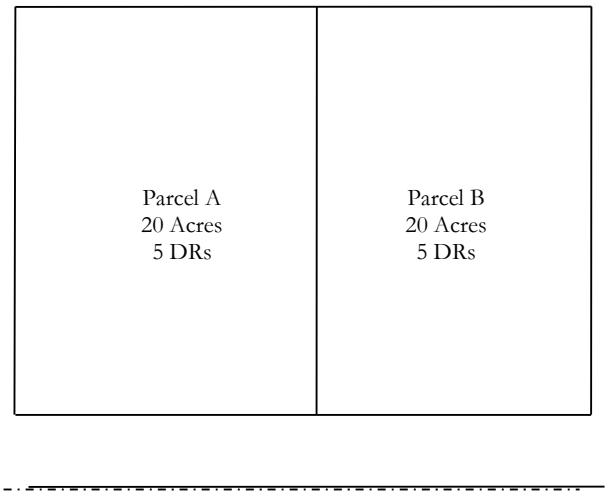
A kernel must consist of: (1) a minimum two-acre piece of land; (2) a building site; and (3) a development right. Although a kernel must have a building site and a development right, a dwelling itself need not be established within the kernel. A 3 ½ acre lot could not add one-half acre and divide because the one-half acre added could not be a kernel meeting all three of these requirements.

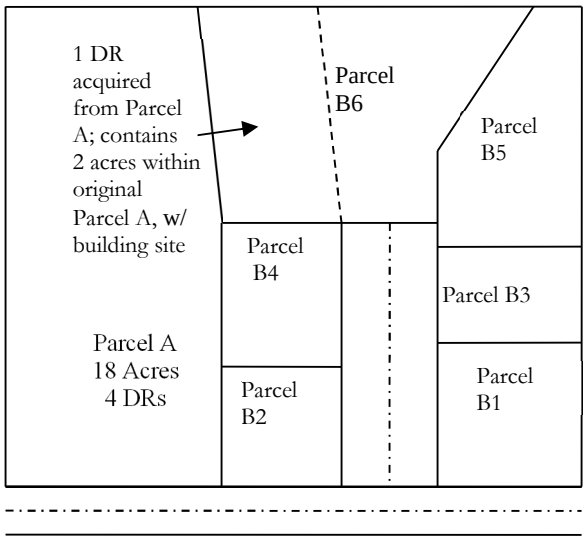
The illustrations below show how the kernel rule would be applied in two situations:





Parcel C contains 1 DR acquired from Parcel A, which contains 2+ acres within the portion that came from Parcel A, including a >30,000 square foot building site and contains 2 DRs acquired from Parcel B, each with at least 2 acres and a >30,000 square foot building site within the portion that came from Parcel B. Note that a dwelling using the 1 DR from Parcel A need not necessarily be established within the portion of Parcel C that came from Parcel A.





The kernel rule does not prevent development rights from being transferred among lots created from a single parcel of record. The kernel rule also does not apply to the creation of 21-acre lots. Finally, the kernel rule does not apply to rural preservation developments established under Albemarle County Code § 18-10.3.3.

20-900 Allotment of development rights upon subdivision

Both the zoning ordinance and the subdivision ordinance require that development rights be allocated to the several lots created (including the residue) when a parcel of record or a lot is subdivided. *Albemarle County Code § 18-10.3.2; Albemarle County Code § 14-302(A)(10)*. The subdivision ordinance also requires that the subdivision plat identify the number of acres consumed by development right lots to allow the county and the public to monitor compliance with the 31-acre rule. *Albemarle County Code § 14-302(A)(10).*

Occasionally, a subdivision plat, particularly those approved in the early 1980s when the concept of development rights was still new, fails to allot all the development rights. This omission does not extinguish the development rights. There have been several occasions where the landowners of lots created from a parcel of record sought to "claim" a development right that had not been allocated.

In one case, the landowners of all the lots created from the original parcel of record who might otherwise have been eligible to use the additional development right (*e.g.*, their lots had been allocated only one development right though the lots were larger than 4 acres) agreed to allow one of the eligible landowners to have it.

In another case, the landowner of one of the eligible lots asked the county about available development rights, was informed that there was an unallocated available development right and used it before the landowner of the other eligible lot was aware of the situation. In the end, the landowner who missed the unallocated development right did not appeal the decision that allowed the other landowner to claim the development right. A development rights determination of the landowner's lot revealed that it had more development rights than the landowner thought.

The department of community development now has procedures in place to ensure that unallocated development rights are not used without the knowledge of the landowners of the other eligible lots.

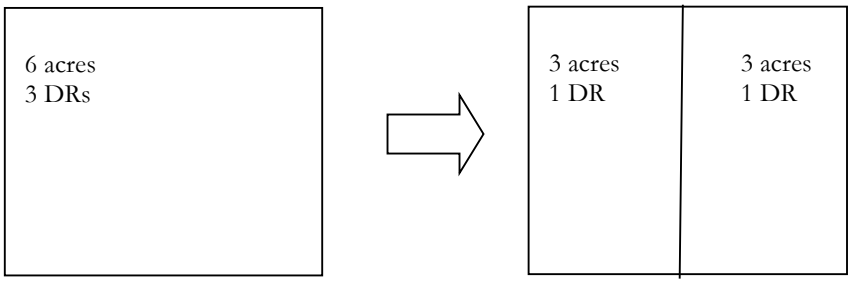
20-1000 Other limitations on the use of development rights

Development rights are part of the zoning of a rural areas lot and, because those rights were created by a legislative action, they may be extinguished only by a legislative action, *i.e.*, a rezoning to another zoning district or a comprehensive downzoning of the rural areas by, for example, reducing the number of development rights. Thus,

the failure of a landowner to allot all development rights as discussed in section 20-900, or to use all development rights in a project, does not extinguish those development rights that are not allotted or used. For example, a landowner who subdivides a 63-acre parcel into a 21-acre lot and a 42-acre lot does not extinguish the right to further subdivide the 42-acre lot into two 21-acre lots, or to use the 5 development rights allocated to the original parcel of record. As another example from a different zoning district, there is no doubt that a landowner who subdivides a 1-acre lot zoned R-4 (4 dwellings per acre) into 3 lots does not waive the right to further create the fourth lot and dwelling to achieve the zoning density allowed under the R-4 zoning district regulations, assuming that all applicable zoning and subdivision regulations can be satisfied.

Nonetheless, there are ways by which the use of development rights may be limited:

- Subdivision – lot acreage precludes full use of development rights: In this situation, the development right lots are sized in a way that prevents all the development rights from being used. For example, a six-acre lot has three development rights and it is divided into two three-acre lots. Because each three-acre lot may use only one development right, the third development right is unusable while the lots are in this configuration.



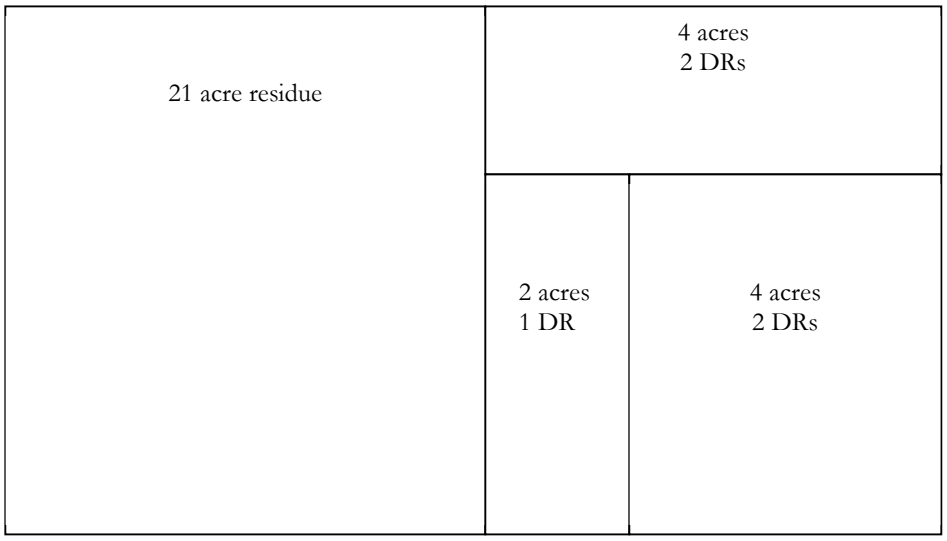
- Subdivision – acreage consumes 31-acres before all development rights used: In this case, the area consumed by the development right lots reaches the 31-acre limit before all the development rights are used. For example, a 70-acre parcel of record has five development rights and, in the first subdivision, a 20-acre lot and a 10-acre lot are created. Because the aggregate area of these two lots is 30 acres, and the minimum size of a development right lot is two acres, no further development right lots may be created from the parcel of record. However, the lots could be resubdivided and resized and, of course, the 20-acre lot and the 10-acre lot could be further subdivided if they were allocated additional development rights.

- Condition of approval restricts further subdivision or additional dwellings without a new permit: The most likely scenario in this situation is a private street approval that is conditioned on the lots not being further subdivided without further approval. The justification for the condition is to ensure that the approved private street is adequate for a particular number of dwellings, and that additional dwellings would require further review to assure that the private street is adequate for the additional traffic. This kind of condition does not extinguish the development rights. The condition would apply only so long as the lots are served by a private street (*i.e.*, the condition could be avoided by constructing a public street). The condition also could be amended or eliminated by a future county action. Even assuming that there was authority and justification to impose a condition that prohibited a private street from being converted to a public street, the development rights would not be extinguished because, as noted before, the condition could be amended or eliminated.

- Proffers: In one of the less likely scenarios, proffers could encumber the use of development rights. For example, their use could be encumbered in an owner-initiated rezoning from rural areas to rural areas with a proffer prohibiting subdivision or more dwellings.

- Restrictive covenants: Restrictive covenants – privately imposed and privately enforced restrictions on land use – may limit the full use of development rights. For example, a subdivision consisting of two four-acre lots and one two-acre lot, with a recorded restrictive covenant expressly prohibiting further subdivision of any of the lots, would prevent the additional development rights allocated to the two four-acre lots from being used. The county does not enforce restrictive covenants.

The following illustration shows how development rights can be encumbered by private covenant.



In this illustration, the original parcel contained 31 acres. Three lots containing two acres, four acres, and four acres respectively have been divided from the original parcel. These lots were assigned the five development rights associated with the original parcel. The zoning ordinance would permit the use of the two development right assigned to the four-acre lots resulting in their further division. However, the subdivider may restrict the further division of these lots by the recordation of a restrictive covenant. This covenant would be enforced as a private civil matter.

- Open-space and similar easements: Open-space easements that restrict the number of lots that may be created or the number of dwellings that may be established limit the use of development rights. In essence, the landowner has either sold the development rights (such as under the ACE program as part of the county's purchase of the easement) or has agreed to not use them. In either case, the easement holder, such as the county, the Virginia Outdoors Foundation, and the county's acquisition of conservation easements authority, may enforce the terms of the easement to ensure that the development rights surrendered are not used.

- *Development rights allocated to a lot with a limited number of building sites*: In this situation, development rights are allocated to a lot where the conditions of the lot will prevent the full number of development rights from being used. For example, by allotting four development rights to an eight-acre lot, all but one acre of which lies in the flood plain, three of the four development rights may not be used because no more than one 30,000 square foot building site will exist on the lot.

None of the examples above extinguish development rights. Development rights for lots under open-space easements exist, but they cannot be used either because the landowner no longer owns them or has agreed not to use them; conditions of approval can be amended or eliminated; lots can be resubdivided, restrictive covenants can expire, and standards of development can be changed.