Chapter 27

Enforcing the Zoning Ordinance

27-100 Introduction

This chapter provides guidance to zoning officials for determining whether a zoning violation exists, conducting inspections and collecting evidence, and preparing for court. In enforcing its zoning ordinance, a locality may seek criminal fines *(Virginia Code § 15.2-2286(A)(5)),* a court order requiring the violator to abate the violation through an injunction *(Virginia Code § 15.2-2208),* or civil penalties *(Virginia Code § 15.2-2209)*. In conjunction with an enforcement action, the locality may also record a *lis pendens* meeting the requirements of Virginia Code § 8.01-268 in the clerk's office of the circuit court. *See Virginia Code § 15.2-2208(B)*.

27-200 Determining whether a zoning violation exists, and having the evidence to prove it

In most cases, zoning officials must establish the condition of the property on a particular date or series of dates as being in violation of one or more zoning regulations. There are three key elements to establish a violation: (1) the ownership and occupancy of the property; (2) the applicable zoning of the property; and (3) the unlawful condition or use of the property. A methodical approach should be taken to determine whether a zoning violation exists.

The principles discussed in this section apply primarily to civil zoning enforcement actions and discuss the sources for various pieces of *evidence* and how to get them before the court. Many of these principles may also apply when the zoning ordinance is enforced in a criminal proceeding.

27-210 Establishing ownership and occupancy of the property; other violators

The first element to be established is the ownership and occupancy of the property. Although ownership and occupancy are typically not in issue by the time a zoning enforcement case gets to court, the issue can be raised in any case.

Ownership of the property may be established by:

- Deed: An authenticated copy of the last recorded deed showing that the zoning violator is the owner of the property.
- Official records: An authenticated copy of the locality's public real estate records pertaining to the property.
- Admissions of the party-opponent: Testimony that the zoning violator, a party to the zoning enforcement action, admitted that they are the owner of the property.

Establishing ownership by deed alone may be insufficient if the deed was recorded many years prior to the enforcement action and there is no evidence presented of a recent title search. In *Harlow v. City of Richmond*, 1995 Va. App. LEXIS 954, 1995 WL 264311 (1995) (unpublished), the Virginia Court of Appeals held that ownership was not established by deeds recorded 8 and 19 years before the date of the alleged offense. The court said that the deeds were "too remote in time to prove ownership." The court rejected the city's additional evidence that the appellant had applied or offered to apply for a variance on one parcel, and that he obtained a building permit. The problem faced by the city in *Harlow* should be addressed by presenting additional evidence showing current ownership status, *e.g.*, evidence that a search of the land records up to the present did not show that the ownership had since changed, presenting official real estate records, or testifying about admissions by the owner.

Occupancy of the property may be established by:

- Leases and similar documents: A lease, rental agreement, or similar document obtained from the owner or the occupant.

- Admissions of the party-opponent: Testimony that the zoning violator admitted that he is the occupant of the property.

- Testimony based on observations: A witness may testify as to who was present on the property each time a zoning inspection was conducted.

Even when establishing occupancy, the zoning official should keep in mind the *Harlow* decision and develop evidence showing the current occupancy status.

When the owner or occupant is a natural person, identifying the correct violator is simple. When the owner or occupant is an artificial entity such as a corporation or a limited liability company ("LLC"), the zoning official must be certain to determine the correct name of the entity and proceed against that entity, rather than the corporate officers or the LLC's members or manager, even if the corporation is a one-person operation or the LLC has only one or two members. *Jordan v. Commonwealth*, 36 Va. App. 270 (2001).

Situations will arise when the owner and the occupant are not the same, and it is typical for zoning ordinances to hold both owner and occupant responsible for zoning violations. If the locality desires to enforce its regulations against the owner where an occupant is the direct violator, the zoning administrator must send a written notice of violation (*see section 27-400*) to both the owner and the occupant of the property. *See Virginia Code § 15.2-2204(H)* (requiring that when any "applicant" requesting a written order, requirement, decision, or determination is not the owner of the real property in issue, written notice must be provided to the owner within 10 days) and *Virginia Code § 15.2-2311(A)* (a BZA decision is binding on the owner of the real property that is the subject of an appeal only if the owner has been provided notice of the zoning violation or written order in accordance with that section; actual notice or participation in the appeal waives the owner's right challenge the validity of the BZA's decision due to lack of notice).

There is little Virginia case law on the issue of whether the owner, the occupant, or some third party is responsible for the condition of the property. In *City of Charlottesville v. Rice*, 22 Va. Cir. 327 (1990), the landowner contracted to have aluminum siding and windows installed on his house, which was in a historic preservation district. The contract provided that the contractor would obtain all required building permits. When cited for a zoning violation because the contractor failed to obtain all the required permits, the landowner claimed that he was not liable because the contract provided that the contractor would obtain the permits. The court ruled in favor of the city, holding that the historic preservation district regulations applied to landowners, and the duty to comply could not be delegated or assigned to another person.

There also is little case law nationally on this issue. The cases that have considered the issue generally hold that if landowners had actual or constructive knowledge of the violating conditions and the power to stop the violation, they can be liable for the violation. *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 818 N.E.2d 425 (2004); *Town of Boothbay v. Jenness*, 2003 ME 50, 822 A.2d 1169 (2003); *Commonwealth v. DeLoach*, 714 A.2d 483 (Pa. 1998); *City of Webster Groves v. Erickson*, 789 S.W.2d 824 (Mo. App. E.D., 1990).

Steps to Ensure the Landlord is Responsible
• Authorize separate penalties against the owner by ensuring that the zoning ordinance provides that any person who violates, or permits another to violate, is responsible. • Ensure that the owner has notice of the violation by always sending a written notice of violation to the owner and the occupant. • Provide the owner a reasonable opportunity to obtain the occupant's compliance or eviction by not proceeding with further enforcement until the 30-day period in which to appeal the notice of violation to the BZA has expired.

Lastly, occasionally the charged violator may be neither an owner nor an occupant of the property. Whether an enforcement action may be successfully brought against that person depends on the language in the zoning ordinance. If the ordinance provides that "any person" may violate the zoning ordinance, or otherwise does not limit the class of violators to owners and occupants, then an enforcement action may be brought against anyone who fits within that broader class of violators. *Turner v. City of Harrisonburg*, 2013 Va. App. LEXIS 275, 2013 WL 5537129 (2013) (unpublished) (defendant was lawfully convicted of violating the zoning ordinance even though he neither owned nor occupied the property where the violation occurred because the zoning ordinance provided that "any person" found in violation of the zoning ordinance was guilty of a violation).

27-220 Establishing the applicable zoning regulations

The second element to be established is the applicable zoning regulations that prohibit the condition or use. This information is contained in the text of the zoning ordinance – in the definitions, the district regulations, and in other regulations. There are two facts that must be established:

- The zoning of the property: The zoning of the property may be established by introducing an authenticated copy of the relevant portion of the official zoning map, or by having the court take judicial notice of the map, which is part of the zoning ordinance.

- The applicable zoning regulations: The applicable zoning regulations that are being violated may be established by having the court take judicial notice of the zoning regulations relevant to the action.

The applicable zoning regulations should be reduced to their fundamental elements. This exercise allows the zoning official to know precisely what will have to be proven in court, and to be certain that no element of a violation is overlooked. Once each element of the violation is confirmed, the zoning official should then identify what facts will establish each element of the violation. Some of these facts will be obvious, others will not.

27-230 Establishing the condition or use of the property

At this stage of the investigation, the zoning official must collect the evidence pertaining to the unlawful use or condition of the property, and then connect that evidence to the applicable zoning regulations.

- Identify what evidence needs to be collected: The zoning official should first identify what facts will establish each element of the violation that must be proven. Some of these facts will be obvious, others will not. It may be useful to discuss this with other zoning officials to learn from their experience.

- Collect the evidence: The zoning official must collect the evidence in a form that will be admissible in court. The following evidence should be gathered from an inspection of the property and research: (1) observations by the zoning official; (2) photographs; (3) detailed field notes; (4) observations by others; and (5) public records, such as recorded deeds. See section 27-240 for a discussion of evidence and its sources and admissibility.

- Connect the evidence to the applicable zoning regulations: The last step in the process is to connect the evidence to the applicable zoning regulations to confirm that a violation exists. The zoning official should have evidence supporting a determination that each element of the violation exists.

These three steps require an understanding of the evidence needed to prove a violation, and its admissibility in court, and that is the subject of the following section.

27-240 Evidence used to prove the violation

The term *evidence* generally refers to the testimony, documents, and other information presented to the court at a trial to persuade the court that a proposition should be taken as established or proven. Evidence must be *relevant* for it to be admissible in court. *Relevant evidence* is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence, *i.e.*, it tends to prove or disprove a material issue in the case. Following are types of evidence that may be admissible in court.

- Testimony of the zoning official based on personal observations: A witness, including a zoning official, may testify about their observations while on the property, on adjacent property, or while on public property such as a road. The relevant observations should be reflected in notes or a report. Although out-of-court conversations with third persons may not be admissible in court generally, they will be if those conversations amount to an admission offered against the violator if it is the violator's own statement or that of an authorized representative of the violator. As a practice suggestion, the zoning official should pay attention to and document every out-of-court statement made by a zoning violator and their representatives.

- Testimony of others based on personal observations: Neighbors of the violating property may be able to testify about their observations of the property, and their testimony may be particularly useful for those violations that are transitory in nature (*e.g.*, the storage of commercial vehicles on residential property at night), or when the owner is claiming nonconforming status. Testimony from neighbors may also be invaluable in those cases where the zoning violation appears minor or trivial because their participation will show the court that, while the violation may not seem serious to a disinterested third party, it is disrupting the neighborhood.

- Deeds and other records of documents affecting an interest in property and statements in those records: The record of a document purporting to establish or affect an interest in property (*e.g.*, a deed), and statements in those documents, are admissible. Recitals of fact in a deed or deed of trust are *prima facie* evidence of those facts. As a practice suggestion, the zoning official should conduct a search of the owner of the property in the circuit court's records and obtain an authenticated copy of the deed from the clerk of the court.

- Official zoning map, written notices of violation, and other official records and reports: Records, reports, statements, or data compilations, in any form, of public offices or agencies stating the activities of the office or agency, or matters observed within the scope of the office or agency's duties, are admissible. Official records, and the statements contained in those records, are *prima facie* evidence of the facts stated. The official zoning map and written notices of violation are official records.

- Photographs: Photographs can be powerful evidence of the condition of a property. Photographs should be taken by persons who have knowledge of the basics of photography to ensure proper focus, lighting, and composition. Photographs are admissible either to illustrate the testimony of a witness, or as independent evidence of matters revealed by the photograph. To ensure that photographs will be admissible in court, witnesses should be able to testify that the photographs are a fair and accurate representation of their observations. The witness need not have taken the photograph, and neither the witness nor the photographer is required to testify about the technical details (*e.g.*, shutter speed, film speed and type, lens focal length) of the photograph for it to be admissible.

- Ordinances: A court must take judicial notice of a locality's ordinances, including its zoning ordinance. *Virginia Code § 8.01-386(A) (civil cases); Virginia Code § 19.2-265.2(A) (criminal cases).* To assist the court, staff should prepare authenticated copies of the relevant sections of the zoning ordinance and highlight the relevant provisions or be certain that the court has an always-updated copy of the code.

The reality is that most zoning enforcement cases are simple, and the zoning inspector can testify about all three elements of a case (ownership/occupancy, applicable zoning and regulations, and the condition of the property), without introducing all the documentary evidence discussed above.

27-300 Authority to enter private property

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. Article I, Section 10 of the Virginia Constitution contains a similar prohibition. These constitutional protections apply to

zoning inspections even when zoning violations are enforced civilly, instead of criminally.

The Fourth Amendment protects citizens from warrantless searches of private property where the owner has a reasonable expectation of privacy in the place searched. In other words, the "Fourth Amendment protects the curtilage of a house and . . . the extent of the curtilage is determined by factors that bear upon whether an individual may reasonably expect that the area in question should be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 1139 (1987), quoted in *Robinson v. Commonwealth*, 273 Va. 26, 639 S.E.2d 217 (2007). Searches of property conducted without a search warrant are *per se* unreasonable under the Fourth Amendment. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006). However, not every observation by a government official is a search within the meaning of the Fourth Amendment. Rather, a search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *Illinois v. Andreas*, 463 U.S. 765, 103 S. Ct. 3319 (1983); *United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996).

Before entering private property, particularly occupied private property, the zoning official should request permission from the owner or the occupant to enter the property to conduct the inspection. When requesting consent, the zoning official should explain to the owner or occupant that a complaint has been received about a use or activity on the property and that an investigation is being conducted to determine compliance with the zoning ordinance. In most cases, the owner or occupant will grant consent. Express consent for locality officials to enter and inspect property provided on a land use application is valid, provided that the entry and inspection is related to compliance with the laws for which the land use approval was sought. *McNeice v. Town of Waterford*, 607 Fed. Appx. 103 (2d Cir. 2015) (building permit application) (unpublished). When consent is refused, and entry into portions of the property for which a reasonable expectation of privacy may exist is necessary for the zoning official to complete the investigation, a search warrant may be required, and the zoning official should consult with the locality's attorney.

Four Reasons Why Nonconsensual Warrantless Inspections of Occupied Property Should be Avoided
• Whether zoning violations are enforced in civil or criminal proceedings, zoning officials must respect the Fourth Amendment's prohibition against warrantless searches and the landowner's right to a reasonable expectation of privacy. • Nonconsensual warrantless inspections of occupied property put the safety of the zoning officials at risk. • Nonconsensual warrantless inspections of occupied property may be perceived as overzealousness by the public, potentially damaging the reputation and effectiveness of the locality's zoning enforcement program. • Nonconsensual warrantless inspections of occupied property may only heighten the suspicions of the landowner and reduce cooperation towards compliance.

This section provides three different procedures for obtaining warrants to conduct inspections: (1) administrative search warrants issued by a judge of the circuit court; (2) criminal search warrants issued by a judge or magistrate; and (3) inspection warrants issued by a magistrate or court of competent jurisdiction. This section ends with a review of the law pertaining to warrantless inspections.

27-310 Administrative search warrants

A zoning violation that will be enforced in a civil proceeding may require that the zoning official obtain an administrative search warrant. The locality's attorney should work with the zoning official to secure the warrant and will prepare all the paperwork.

Under Virginia Code §§ 19.2-393 through 19.2-397, the following rules and procedures apply:

- Authority to issue warrant: An administrative search warrant is issued by the judge of the circuit court. *Virginia Code § 19.2-393*.

- Affidavit required, showing probable cause: An administrative search warrant may be issued only upon a showing of probable cause, supported by an affidavit particularly describing the place, things, or persons to be inspected and the purpose for which the inspection for testing is to be made. *Virginia Code § 19.2-394*. The

affidavit must contain either a statement that consent to inspect has been sought and refused or explain that the facts or circumstances reasonably justify the failure to seek consent to effectively enforce the zoning ordinance. *Virginia Code § 19.2-394*.

- Probable cause explained: *Probable cause* in the criminal sense is not required. *Probable cause* exists if either reasonable legislative or administrative standards for conducting the inspection are satisfied with respect to the place, things, or persons, or there exists probable cause to believe that there is a condition, object, activity, or circumstance which legally justifies the inspection. *Virginia Code § 19.2-394*; *Mosher Steel v. Teig*, 229 Va. 95, 103, 327 S.E.2d 87, 94 (1985) (the "warrant application must provide the judicial officer with factual allegations sufficient to justify an independent determination that the inspection program is based on reasonable standards and that the standards are being applied . . . in a neutral and nondiscriminatory manner"); *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967).

- Examination of affiant by the issuing judge: The issuing judge may examine the affiant under oath or affirmation to verify the accuracy of any matter indicated by the statement in the affidavit. *Virginia Code § 19.2-394*.

Seeking an Administrative Search Warrant: One Approach
• Call the judge's secretary to inform that the zoning administrator will be applying for an administrative search warrant to allow the county's zoning official to enter the property. Also inform the court that the purpose of the inspection is to determine whether a violation of the zoning ordinance exists on the property.
• Inform the secretary when the papers (affidavits, supporting exhibits, and a proposed administrative search warrant) will be delivered.
• Ask the secretary for available times for the judge to meet with the zoning officials and the locality's attorney, if desired, to answer questions about the application.
• Ask the secretary to inform the locality's attorney's office as soon as the administrative search warrant is issued because it has a short life.

- Issuance of administrative search warrant; contents: An administrative search warrant is a written order, made in the name of the Commonwealth, signed by a judge of the circuit court. The order must: (1) describe, either directly or by reference to any accompanying or attached supporting affidavit, the property or premises where the inspection is to occur, *Virginia Code § 19.2-393*; and (2) specify the duration of the warrant, which may not exceed 10 days unless extended by the judge. *Virginia Code § 19.3-395*. The description of the property or premises to be searched must be sufficiently accurate so that the zoning official executing the warrant and the owner or custodian of the property or premises can reasonably determine from the warrant the activity, condition, circumstance, object, or property of which inspection is authorized. *Virginia Code § 19.2-393*.

Suggested Items to Seek in an Administrative Search Warrant
• Authority to take photographs and video.
• Authority to obtain soil and water samples, especially if the nature of the violation, such as a junkyard, may have conditions in which hazardous substances may be stored on the property, where it is likely that spills may be observed, or where materials may be buried.
• Authority to bring a police officer or sheriff's deputy for the sole purpose of providing security for the zoning inspectors, particularly if the zoning inspectors have received threats from the violator or the relationship between the zoning inspectors and the violator has been contentious.
• Ask that the 10-day life of the administrative search warrant be extended beyond 10 days, particularly in the winter when weather may prevent or delay access to the property, or when law enforcement officers will be accompanying the zoning inspectors.
• Ask that the warrant authorize the inspection to be conducted without the owner or the occupant being present, provided that prior notice of the date and time of the inspection is given.

- Conducting the inspection: An inspection pursuant to a warrant may not be made in the absence of the owner, custodian, or possessor of the place, things or persons unless specifically authorized by the issuing judge upon a showing that the authority is reasonably necessary to effectuate the purpose of the regulation being enforced.

Virginia Code § 19.2-396. An entry pursuant to the warrant must not be made forcibly, except that the issuing judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of an immediate threat to public health or safety, or where the facts establish that reasonable attempts to serve a previous warrant have been unsuccessful. *Virginia Code § 19.2-396*. In the case of entry into a dwelling, prior consent must be sought and refused and notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the issuing judge finds that failure to seek consent is justified and that there is a reasonable suspicion of an immediate threat to public health or safety. *Virginia Code § 19.2-396*.

- Return of warrant: After the administrative search warrant has been executed and the inspection conducted, the warrant must be returned to the clerk of the circuit court within the time specified in the warrant. *Virginia Code § 19.2-395*.

27-320 Criminal search warrants

A zoning violation that will be enforced criminally may require that the zoning official obtain a criminal search warrant. The locality's attorney should work with the zoning official and the locality's law enforcement agency in securing the warrant and will prepare all paperwork.

Under Virginia Code §§ 19.2-52 through 19.2-60, the following rules and procedures apply:

- Authority to issue warrant: A criminal search warrant is issued by any judge, magistrate, or "other person having authority to issue criminal warrants." *Virginia Code § 19.2-52*.

- Affidavit required, showing probable cause: A criminal search warrant may be issued only upon a complaint on oath supported by an affidavit. *Virginia Code § 19.2-52*. The affidavit may be made by any person and must reasonably describe the place or thing to be searched, the things to be searched for, and briefly allege the material facts constituting probable cause for issuing the warrant. *Virginia Code § 19.2-54*. The affidavit must also allege substantially the offense requiring the search. *Virginia Code § 19.2-54*.

- Probable cause explained: *Probable cause* in the criminal sense is a probability of criminal activity. More specifically, probable cause is defined "as knowledge of such facts and circumstances to raise the belief in a reasonable mind, acting on those facts and circumstances, that the [alleged violator] is guilty of the crime of which he is suspected." *Eubank v. Thomas*, 399 Va. 201, 208, 861 S.E.2d 397, 402 (2021) (plaintiff's, who were defendants in dismissed and abandoned zoning enforcement actions, sufficiently alleged tort of malicious prosecution in case against county employees who alleged obtained criminal search warrant without probable cause). "The task of the issuing magistrate is simply to make a 'practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and the basis of knowledge of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place." *Lebedun v. Commonwealth*, 27 Va. App. 697, 706, 501 S.E.2d 427, 431 (1998).

- Issuance of criminal search warrant; contents: A criminal search warrant must: (1) be directed to a police officer, *not to the zoning administrator*; (2) identify the affiant; (3) recite the offense in relation to which the search is to be made; (4) name or describe the place to be searched (the property by tax map and parcel number and/or address); (5) describe the property to be searched; (6) recite that the magistrate has found probable cause to believe that the property constitutes evidence of a crime identified in the warrant, or tends to show that a person named or described in the warrant has committed or is committing a crime; (7) command that the place be forthwith searched, either in day or night, and that the objects described in the warrant, if found, be seized; provided that if the search will be of a place of abode, the initial entry must be between 8:00 a.m. and 5:00 p.m., unless another time is authorized upon good cause shown; (8) state the date and time the search warrant was issued; and (9) have the affidavit attached to the search warrant. *Virginia Code § 19.2-56*. Additional rules apply to search warrants for records or other information pertaining to a subscriber to, or customer of, an electronic communication service or remote computing service, whether a domestic corporation or a foreign corporation, which is transacting or has transacted any business in Virginia. *Virginia Code § 19.2-56*.

- What may be searched and seized: A criminal search warrant may be issued for the search of or for specified places, things or persons, and any object or thing, including documents, books, papers, or records constituting evidence of a zoning violation may be seized. *Virginia Code § 19.2-53*.

- Conducting the inspection: An inspection pursuant to a criminal search warrant must be conducted within 15 days by the police officer or other law enforcement officer to whom it is delivered. No other person may be permitted to be present during or participate in the execution of the warrant except: (1) the owners and occupants of the place to be searched when permitted to be present by the officer in charge of the search; and (2) persons designated by the officer in charge of the search to assist or provide expertise in the conduct of the search. *Virginia Code § 19.2-56*.

- Return of warrant: The officer executing the warrant must endorse the date of execution on the warrant and file it, with an inventory of any property seized, and the accompanying affidavit, within three days after the execution of the search. *Virginia Code § 19.2-57*. The return must be filed in the circuit court clerk's office. *Virginia Code § 19.2-57*.

Unlike administrative search warrants, criminal search warrants must be executed by law enforcement officers, and the zoning officials play secondary roles, assisting and lending their expertise to the officers in charge.

27-330 Inspection warrants to inspect dwellings

A zoning ordinance may provide for the issuance of inspection warrants by a magistrate or court of competent jurisdiction. *Virginia Code § 15.2-2286(A)(16)*. The authority to inspect under an inspection warrant issued under Virginia Code § 15.2-2286(A)(15) is limited to dwellings.

Under this procedure, the zoning administrator must present sworn testimony to a magistrate or court of competent jurisdiction, and if the sworn testimony establishes probable cause that a zoning violation has occurred, the magistrate or court may grant an inspection warrant "to enable the zoning administrator or his agent to enter the subject dwelling for the purpose of determining whether violations of the zoning ordinance exist." *Virginia Code § 15.2-2286(A)(16)*. The zoning administrator must make a reasonable effort to obtain consent from the owner or tenant of the dwelling before requesting an inspection warrant. *Virginia Code § 15.2-2286(A)(16)*.

27-340 Warrantless searches

In the context of a typical zoning inspection, the areas of a property subject to Fourth Amendment protections (*i.e.*, in which an owner is deemed to have a reasonable expectation of privacy) are the home and the curtilage of the home. *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984); *Robinson v. Commonwealth*, 273 Va. 26, 639 S.E.2d 217 (2007); *Jefferson v. Commonwealth*, 27 Va. App. 1, 497 S.E.2d 474 (1998). "This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.' [citations omitted]." *Covey v. Assessor of Ohio County,* 777 F.3d 186, 192 (4th Cir. 2015) (plaintiffs' complaint successfully alleged a plausible Fourth Amendment violation where deputy assessor ignored "no trespassing" sign, searched the house's curtilage, including the walk-out basement patio). Achieving certain governmental interests, such as enforcing a locality's zoning regulations, will not justify an inspector's actions and the search may be found to be "unduly intrusive." *Covey*, 777 F.3d at 195 ("What began as a mere regulatory violation turned into an affront to the Coveys' constitutional rights when Crews entered the curtilage and the Coveys' home").

As a general proposition, the curtilage of the home is the area immediately surrounding the home "to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver,* 466 U.S. at 180, 104 S. Ct. at 1742. Four factors are considered to determine whether an area is within the curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134 (1987). The curtilage can be conceived as an area inside a line that divides the private confines of the home from the surrounding open fields.

27-341 Various areas within the curtilage in which a reasonable expectation of privacy may or may not exist

Absent any affirmative attempts to discourage trespassers, owners or possessors of private property impliedly consent to members of the public intruding on certain limited areas of their property. *Robinson v. Commonwealth*, 273 Va. 26, 34-35, 639 S.E.2d 217, 222 (2007) ("Implied consent can be negated by obvious indicia of restricted access, such as posting 'no trespassing' signs, gates, or other means that deny access to uninvited persons"). This consent extends to those areas of the property used when approaching a house in an ordinary attempt to speak with the occupant, such as the driveway, front sidewalk, front porch, and any other path. Thus, zoning officials searching for evidence of a zoning violation who stray from the "path" that is impliedly open to the public exceed the scope of the implied consent and any search conducted without a warrant is unreasonable.

Following are several very general guidelines as to how the Fourth Amendment may be applied to a warrantless search of various areas of residential property during a zoning inspection:

- Driveway and walkway to front door: Absent express orders from the person in possession of the property that to enter the property is a trespass, there is no reasonable expectation of privacy in the driveway and the walkway to the front door. *Robinson v. Commonwealth*, 273 Va. 26, 639 S.E.2d 217 (2007); *United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996).

- Fenced backyard: There is a reasonable expectation of privacy within a fenced backyard. *Kearney v. Commonwealth*, 4 Va. App. 202, 355 S.E.2d 897 (1987) (reasonable expectation of privacy existed in inoperable truck located behind fence, twenty feet from home).

- Unfenced backyard: Whether a reasonable expectation of privacy exists in an unfenced backyard depends on whether the area is within the curtilage of the home, but at the very least the area of a residential backyard immediately adjacent to the home's backyard is within the curtilage. *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984). However, the warrantless entry into areas other than a residence's front entrance does not always violate the Fourth Amendment. *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998).

- Items in plain view: There is no reasonable expectation of privacy in items that are in plain view to the public. *Taylor, supra.* This includes items within a house that are observed from the street or even through a front window when the government official is at the front door. *Taylor, supra.*

- Looking into windows of dwellings: Beyond what can be seen through open windows either from public vantage points or from the walkway to the front door as discussed above, an owner or occupant likely has a reasonable expectation of privacy with respect to any other windows. The zoning official should be aware of Virginia Code § 18.2-130, which makes it a crime to "enter upon the property of another and secretly or furtively peep, spy or attempt to peep or spy into or through a window, door or other aperture of any building, structure, or other enclosure of any nature occupied or intended for occupancy as a dwelling."

It is impossible to consider all possible factual scenarios in which a Fourth Amendment issue may arise. A zoning official should consult the locality's attorney for guidance. In any case, the zoning official should first seek the express consent of the person in possession of the property before entering private property. For the public areas of non-residential property, an owner's or occupant's reasonable expectation of privacy is significantly less or nonexistent.

27-342 Undeveloped and unoccupied areas where no reasonable expectation of privacy exists

There is no reasonable expectation of privacy in open fields (undeveloped and unoccupied lands), even if the actions would be a trespass under the common law. *Oliver v. United States*, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741 (1984) ("an individual may not demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home"); *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445 (1924).

This rule applies even if the property has been posted with "No Trespassing" signs. *Oliver, supra*. The fact that a zoning official ignores a "no trespassing" sign, even in light of a state or local rule to adhere to such signs, "does not per se amount to a violation of the Fourth Amendment." *Covey v. Assessor of Ohio County,* 777 F.3d 186, 194 (4th Cir. 2015) (plaintiffs' complaint successfully alleged a plausible Fourth Amendment violation where deputy assessor ignored "no trespassing" sign, searched the house's curtilage, including the walk-out basement patio).

27-343 Extraordinary measures to observe a zoning violation

Although zoning officials who enter the areas of the curtilage that are impliedly open to the public are "free to keep their eyes open," an official who uses overly intrusive means of investigation, such as binoculars, ladders, or other sensory-enhancing devices, may exceed the scope of the landowner's implied consent discussed in section 27-341.

Following are several guidelines as to the extent to which a zoning official should go in observing the portion of a property within the curtilage without a warrant and without the consent of the owner. The criminal cases cited below are from other jurisdictions and are not zoning cases. They are provided for illustrative purposes only.

- Binoculars: Binoculars are usually characterized as low-powered visual aids. Whether using binoculars is an unreasonable search generally appears to turn on whether the binoculars allow law enforcement officers to see more clearly what they can otherwise see unaided (no reasonable expectation of privacy and not a search), or whether it allows them to see what otherwise could not be seen (a search). *Compare United States v. Whaley*, 779 F.2d 585 (11th Cir. 1986) (using binoculars to view criminal activities in basement from 40 yards was permissible to aid observations that could be made with the naked eye) with *People v. Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979) (use of binoculars by police officer who stationed himself on a hilltop 200 to 300 yards from the defendants' building at an altitude approximately that of the sixth or seventh floor of the building was a search because his observations were not observable to anyone not using an optical aid).

- Telescopes: Telescopes are usually characterized as high-powered visual aids and, in most situations, allow law enforcement officers to see what otherwise could not be seen and, therefore, their use without a warrant is an unreasonable search. *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980) (use of telescope constituted a search); *United States v. Kim*, 415 F. Supp. 1252 (D. Haw. 1976) (use of high-powered telescope constituted a search).

- Artificial vantage points over a fence: Physical barriers such as fences indicate a desire by the landowner to keep certain areas of property private. *See State v. Christensen*, 131 Idaho 143, 953 P.2d 583 (1998) (no implied invitation to enter where the entrance to the driveway was obstructed by a closed gate posted with a "no trespassing" sign). Creating an artificial vantage point over a fence may be an unreasonable search. Whether the measures to look over a fence or other barriers are reasonable will depend, in large part, on the height of the fence. *People v. Smola*, 174 Mich. App. 220, 435 N.W.2d 8 (1989) (standing on car bumper to look over 6-foot fence is not a search because no reasonable expectation that fence would shield backyard from observation); *State v. Corra*, 88 Ore. App. 339, 745 P.2d 786 (1987) (standing on rock to peer over 6-foot fence not a search; many people tall enough to see over fence); *Sarantopoulos v. State*, 629 So.2d 121 (1993) (standing on tip toes to look over 6-foot fence not a search); *United States v. McMillon*, 350 F. Supp. 593 (D.D.C. 1972) (viewing backyard from neighbor's porch not a search); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) (mounting a video camera on a power pole to observe a backyard over a 10-foot fence was a search, even though portions of the backyard were surrounded by a 5-foot fence).

- Aerial surveillance: Aerial surveillance of either an open field or the curtilage is not a search. *Florida v. Riley*, 488 U.S. 445, 109 S. Ct. 693 (1989) (helicopter at height of 400 feet); *United States v. Breza*, 308 F.3d 430 (4th Cir. 2002) (helicopter at height of 35 feet).

- Breaching a locked or posted gate: When the curtilage is fenced and the gate is locked or is posted with a "no trespassing" or "keep out" sign, breaching the gate is a search because, in effect, the fence and the locked or posted gate extend the walls of the house (to which a greater expectation of privacy exists) to the area enclosed by the fence. *See Robinson v. Commonwealth*, 273 Va. 26, 34-35, 639 S.E.2d 217, 222 (2007) ("Implied consent can

be negated by obvious indicia of restricted access, such as posting 'no trespassing' signs, gates, or other means that deny access to uninvited persons").

Although questions regarding extraordinary measures often arise during training sessions, the reality is that these measures should rarely be needed in a zoning investigation because, as noted in section 27-341, most landowners allow the zoning official to enter the property to observe.

27-400 The notice of violation

The zoning administrator's authority includes the authority to order "in writing the remedying of any condition found in violation of the ordinance." *Virginia Code § 15.2-2286(A)(4)*. The zoning administrator exercises this authority in an individual case by issuing a notice of official determination of violation, also known as a *notice of violation* or *NOV*.

The notice of violation can play a crucial role in the enforcement process by: (1) advising the owner or occupant of the property that a condition or use of the property is in violation of the zoning ordinance, and ordering the owner or occupant to bring it into compliance by a specific date; (2) putting the owner or occupant on notice that if they desire to challenge the zoning administrator's determination that a zoning violation exists, they must appeal the determination to the BZA within 30 days; and (3) informing the owner or occupant that if they fail to file a timely appeal, the determinations made in the notice of violation are *things decided* (*see Chapter 15*), and are no longer subject to challenge or a defense in a judicial enforcement proceeding.

For these reasons, the notice of violation should be carefully prepared and contain the following:

- Important identifying information: The notice of violation should the following information: (1) the name and address of the owner of the property; (2) the name and address of the occupant of the property, if different; (3) the tax parcel number or tax identification number of the property; (4) the street address of the property; and (5) the zoning designation of the property.

- Date of the inspection of the property/date of the violation: The notice of violation should identify the date the property was inspected that resulted in the determination that a violation exists on the property.

- Determination of nonconforming status: The notice of violation should make an affirmative determination of the nonconforming status of the property. By doing so, if the notice of violation is not appealed to the BZA, the issue of nonconforming status is a thing decided that cannot be raised as a defense in a civil proceeding in court.

- Description of the violation and the supporting facts: The notice of violation should identify each violation, identify the regulation of the zoning ordinance violated, and summarize the relevant facts supporting the conclusion that the use or activity violates the cited regulation.

- Description of corrective action required: The notice of violation should explain to the owner or occupant what steps must be taken for the property to comply with the zoning ordinance.

- Description of timeline for corrective action: The notice of violation should explain that the property must be brought into immediate compliance, and that a re-inspection will be conducted on a certain date. This statement should also clearly state that compliance by the date of the re-inspection does not absolve the owner or occupant of the original violation. The goal of requiring immediate compliance is to ensure that there is no perception by the owner or occupant that the violation will be allowed to continue without consequence until an unspecified future date. On the other hand, conducting the re-inspection on a certain date in the future recognizes the reality that not all violations can be corrected immediately.

- Notice of right to appeal: Virginia Code § 15.2-2311 requires that the notice of violation include a "statement informing the recipient that he may have a right to appeal the notice of a zoning violation . . . within 30 days . . .

and that the decision shall be final and unappealable if not appealed within 30 days. The appeal period shall not commence until the statement is given."

- Notice of the applicable fee and other information: Virginia Code § 15.2-2311 requires that a notice of violation inform the recipient of the applicable appeal fee and provide a reference to where additional information may be obtained regarding filing an appeal.

The notice of violation may either be hand delivered or mailed by registered or certified mail. Written notice of a zoning violation or a written order of the zoning administrator sent by registered or certified mail to, or posted at, the last known address of the property owner as shown on the current real estate tax assessment books or real estate tax assessment records, is deemed sufficient notice to the property owner and satisfies the notice requirements under general law. *Virginia Code § 15.2-2311(A).*

27-500 The zoning official goes to court

When zoning violations are not corrected by the owner or occupant after the zoning administrator issues a notice of violation, the locality may enforce its zoning regulations by filing an action in court. The locality's attorney should work closely with the zoning official in preparing the case for court.

Following are three basic guidelines to assist zoning officials for those cases that will go to court.

27-510 Understand the case

There are three fundamental steps that the zoning official must take when preparing for court:

- Assemble the documentary and demonstrative evidence: After consulting with the zoning administrator about what zoning regulations, maps, deeds, records, and photographs will be used in court, the documents should be assembled in a form that is appropriate to submit as evidence. The zoning official should have previously obtained the zoning map, deeds, and other records and had them authenticated.

- Understand each zoning regulation the defendant has violated: The zoning official must completely understand each zoning regulation the defendant has violated, and this understanding must be comprehensive to enable the zoning official to recall and explain every clause, every exception, and prior administrative interpretations.

- Know the facts: The zoning official must have first-hand knowledge of the facts surrounding the violation to be able to recite every material fact accurately without resorting to notes. The material facts the zoning official must know include: (1) the name of the owner of the property and, if different, the name of the occupant of the property; (2) the tax map and parcel number of the property; (3) the street address of the property; (4) that the property is located within the locality; (5) the zoning of the property, including overlay districts; (6) the relevant zoning history of the property including proffers, special use permits, variances and other zoning approvals; (7) the date a violation was determined to exist on the property; (8) the nature of the violation; (9) the facts supporting the determination that a violation existed; and (10) the condition of the property just before the trial date (which is not relevant to whether a violation existed, but may be information the court will want to know).

Neither the law nor the facts need to be particularly complicated in most cases and documentary and demonstrative evidence other than photographs may not be necessary. The zoning official can simplify the case by understanding which zoning regulations and facts are relevant to prove the case. For example, if the warrant in debt alleges that the defendant's property was used in violation of the zoning ordinance on March 31 of that year, the zoning official should focus on the facts surrounding the violation on that date alone, even if the property was inspected on other dates.

27-520 Collaborate with the locality's attorney

In all but routine zoning enforcement cases, the zoning official who will be a witness in a case should prepare an outline of the facts establishing the alleged violation, and then share it with the locality's attorney. The zoning official must ensure that the outline includes facts sufficient to establish each element of the violation. However, the outline should be edited to omit those facts that are irrelevant because they neither establish, nor tend to establish, an element of the violation.

Based on the outline prepared by the zoning official, the locality's attorney should then prepare questions for the zoning official who will be testifying in court. In addition, the attorney should meet with the zoning official prior to court to prepare for court. Working together during the final stages of preparation ensures that: (1) there is admissible evidence to establish every element of the violation; (2) the legal issues and the evidence are reduced only to those necessary to establish a violation; and (3) the zoning official is prepared to respond to questions on both direct examination (questions by the attorney) and cross-examination (questions by the defendant); and (4) weaknesses in the case are acknowledged and addressed.

For routine and simple zoning enforcement cases, the zoning official and the locality's attorney should develop a simpler procedure to prepare.

27-530 General rules for testifying

The testimony of a zoning official is critical in a zoning enforcement case. The most effective witness is sincere, direct, well-prepared, and unemotional. The zoning official's testimony, brought out through the locality's attorney's questions, will educate the court about the facts in the case. The zoning official should paint the picture as clearly as possible, and without exaggeration. The truth will best be served by a deliberate and succinct recitation of facts the zoning official knows to be true.

The typical zoning enforcement case is tried before a judge (not a jury), so when the zoning official is testifying, close attention must be given to what the judge is and is not saying. Likewise, in most cases the judge's knowledge of the case is based on the information contained in the pleadings, which may contain very few details about the case. Thus, the zoning official should not assume that the judge fully understands the nature of the case or the violation until the legal issues have been presented and the facts laid out.

Following is a list of fundamental rules for the zoning official to follow when testifying in court:

- Tell the truth.
- Give responsive answers.
- Listen to the question asked and think before answering; answer only the question that is asked; do not anticipate questions and the answer you will give; let the examiner finish each question.
- Do not give rambling or evasive answers; a simple "yes" or "no" answer may be all that is required; if the locality's attorney wants elaboration, they will ask for it.
- Do not guess an answer if you do not know or remember the answer; however, you may testify that you think something is probably true, or probably untrue.
- If you need to explain an answer, do so.
- Do not ask the court if you can answer a question "off the record."
- If you do not understand the question, or have any doubt about it, ask to have the question restated.

- Do not answer over an objection made by a party; stop talking until the judge rules and you are asked a new question or instructed to answer the original question.

- Speak loudly, slowly, and clearly, and strive for clarity, crispness, and conviction.

- Look at the judge when answering questions.

- Do not memorize your testimony.

- Speak in your own words.

- Lean forward, keep your head up, make eye contact, and use hands for illustration.

- Do not kid or joke.

- Be courteous to the judge, the other party, and the other party's attorney.

- Admit mistakes.

- Do not show anger or hostility at any time, particularly during cross-examination.

- Do not argue or attempt to advocate a particular position; be factual, direct, and straightforward; leave advocacy to the locality's attorney.

- If asked, do not be reluctant to admit on the stand that you have reviewed your testimony with your locality's attorney or that you have otherwise prepared for court.

A zoning official may be cross-examined by the defendants or their attorney. The primary purpose of cross-examination is to shake the witness' belief in what they have said. Stating the truth defeats this tactic. The cross-examination may stray from the search for the facts, and wander to show bias or favoritism. When the cross-examination heads in this direction, the zoning official should not feel badgered by these questions. The other side may be searching for a way to discredit the direct testimony. The best way for the zoning official to handle cross-examination like this is to always state the truth and answer each question concisely, politely, and honestly.

27-540 Courtroom decorum

The zoning administrator and the zoning officials who will be attending a court hearing in a zoning enforcement action should comply with the following rules of courtroom decorum:

- The zoning administrator or other representative of the locality sits at the plaintiff's table with the locality's attorney; all other zoning officials should be seated in the spectator section of the courtroom; any witnesses may be asked by the court to wait outside the courtroom while other witnesses are testifying.

- Dress conservatively and neatly.

- Do not read, chew gum, sleep, or talk while in the courtroom when court is in session.

- Do not talk to defendants represented by an attorney unless the attorney is present or gives express consent.

- Do not talk to the defendant's attorney in the courthouse unless the locality's attorney is present.

- When seated in court, do not react to favorable or unfavorable testimony.

- When called to testify during direct examination, do not take any notes or papers to the stand unless the locality's attorney has first reviewed them.

- Be courteous and polite at all times, especially if the defendant's attorney is obviously hostile.
  If the zoning official is unable to recall the details of the foregoing rules, courtroom decorum can be attained by maintaining professionalism and giving the court the respect it deserves.

27-600 Defenses commonly raised in zoning enforcement proceedings

There are several defenses that may be raised in a zoning enforcement proceeding. Most of them have little or no merit.

27-610 The use is nonconforming

As noted in section 27-400, the notice of violation should determine the nonconforming status of the use at issue. If this determination is made and it is not appealed to the BZA, it becomes a *thing decided* and may not be raised as a defense in a civil enforcement proceeding. *See Chapter 18 for a detailed discussion of nonconformities; see Chapter 14 for a discussion of the thing decided rule.*

27-620 The locality has delayed bringing the enforcement for so long that it should not be allowed to enforce its regulations against the violating landowner

In most Virginia localities, zoning enforcement is triggered by a citizen's complaint unless the violation is apparent to a zoning inspector from a public location, such as a road. As a result, it is possible for zoning violations to go unnoticed by the locality for years, sometimes decades. The passage of time, however, in no way makes an illegal use legal or prevents the locality from enforcing its zoning regulations. In fact, under Virginia Code § 15.2-2209 (civil penalties), each day during which a violation is found to exist is a separate offense. Thus, for as long as the violation continues, there is no running of a statute of limitations if a locality delays bringing an enforcement action.

The idea that an illegal use should be allowed to continue simply because of the length of time it has existed appears to be loosely based on the doctrine of *laches*. *Laches* is an equitable defense that may be raised by a party who claims that the failure to assert a known right for an unexplained length of time under circumstances that are prejudicial to the party raising the defense. *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987). Assuming for the sake of argument that the defense of laches applies against a locality, the landowner would contend that since the illegal use has continued for so long without the locality bringing an enforcement action, the illegal use should be immune from enforcement. However, laches does not apply against localities in the discharge of their 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, 416 S.E.2d 680 (1992); *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987); *City of Portsmouth v. City of Chesapeake,* 232 Va. 158, 349 S.E.2d 351 (1986).

In *Dick Kelly Enterprises*, the landowner argued that the doctrine should apply because it had been illegally operating an apartment building on land zoned for a motel use for six years before the city enforced its zoning regulations. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the landowner argued that laches should apply to allow an illegal vehicle light service business to continue operating because the county had not enforced its regulations 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.

In *Staples v. Prince William County*, 81 Va. Cir. 308 (2010), the landowners sought to enjoin the county from enforcing a regulation limiting campground stays to not more than 14 consecutive days, claiming the county had known about long-term campers for over 40 years and that its failure to enforce the regulation barred the county from now doing so under principles of waiver, laches, and estoppel.

Even if laches applied, it would not apply in most cases because the locality does not unreasonably delay enforcing the zoning regulations; rather, it simply does not know that a violation exists. It is also hard to imagine that a landowner could suffer prejudice in such a case. To put it simply, an illegal use does not become a legal use solely because it has escaped detection from zoning inspectors for a lengthy period.

27-630 Selective enforcement

Perhaps because they are unaware that most localities' zoning officials enforce hundreds of cases each year, some zoning violators believe the locality is selectively enforcing its regulations against them.

In *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992), the landowner contended that it was denied equal protection because the city *selectively enforced* its motel ordinance and singled it out for punishment, while others also unlawfully operated motels as apartments. The Virginia Supreme Court held that this contention had no merit, stating:

> Of course, the mere enforcement of the law against one individual and not against others does not amount to a denial of equal protection of the laws. [citation] And, while protection of the laws will be extended equally to all individuals in the pursuit of their lawful activities, no individual has the right to demand protection of the laws in the commission of an unlawful act. [omitted]. Because the use of the subject property is unlawful, the so-called "retaliatory prosecution" defense is not applicable to this enforcement action against such unlawful conduct.

Dick Kelly Enterprises, 243 Va. at 382-383, 416 S.E.2d at 686.

In selective enforcement claims where First Amendment issues are involved, such as when a violation of the locality's sign regulations are in issue, the party claiming selective enforcement must demonstrate that the locality's enforcement process had a discriminatory effect and that it was motivated by a discriminatory purpose. *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524 (1985). Thus, the party claiming selective enforcement must show not only that similarly situated individuals were treated differently, but that there was "clear and intentional discrimination." *Sylvia Development Corporation v. Calvert County*, 48 F.3d 810, 825 (4th Cir. 1995). Following are several factors that will be considered: "(1) evidence of a 'consistent pattern' of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings." *Central Radio Company, Inc. v. City of Norfolk,* 811 F.3d 625, 635 (4th Cir. 2016).

A variation on this theme is the claim by the zoning violator that it knows of other zoning violations in the locality that have not been abated. Obviously, there is no requirement that all other violations in the locality be abated before the locality may proceed against any other zoning violator, and the zoning violator making the claim is certainly not entitled to some form of immunity from enforcement until those violations are abated.

27-640 The zoning ordinance is unconstitutionally vague

The claim that a zoning ordinance is unconstitutionally vague, and therefore void, should be taken seriously. The void-for-vagueness doctrine requires that a statute or ordinance "be sufficiently precise and definite to give fair warning to an actor that contemplated conduct is criminal." *Norton v. Board of Supervisors of Fairfax County*, 299 Va. 749, 858 S.E.2d 170, 175 (2021) (definition of "dwelling" was not unconstitutionally vague), citing *Tanner v. City of Virginia Beach*, 277 Va. 432, 439, 674 S.E.2d 848 (2009). Language is unconstitutionally vague if persons of common intelligence must necessarily guess at the meaning of the language and differ as to its application. *Norton, supra*, citing *Tanner , supra*; *Vaughn v. City of Newport News*, 20 Va. App. 530 (1995) (regulation prohibiting "outside storage of goods, materials and equipment" not void for vagueness). Although absolute precision is not required, a law must afford a reasonable degree of certainty so that a person is not left to guess at what conduct is prohibited. *Turner v. Jackson*, 14 Va. App. 423 (1992). Even if a locality enforces its zoning regulations only in civil proceedings, it should take a claim that its zoning regulations are vague seriously and amend them if necessary.