

## LAND USE AND ZONING LAW

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### I. INTRODUCTION

Since the early days of nuisance law, but especially since the early twentieth century and the validation of zoning ordinances, land use planning and management have been fundamental roles of local government. As evinced by its state code, the Commonwealth of Virginia recognizes the essential role that localities play in land use planning. The Virginia Code requires that localities create planning commissions,<sup>1</sup> adopt comprehensive plans,<sup>2</sup> and, if the localities have adopted zoning ordinances,<sup>3</sup> establish boards of zoning appeals.<sup>4</sup> As most of the implementation of these mandates is left to individual localities, the form of implementation is not uniform but naturally varies from county to county and city to city.

Despite the idiosyncrasies from county to county, local ordinances and institutions must not contradict state-level legislation and judgments. In Virginia, which follows Dillon's Rule, the state government has the ultimate control over land use matters.<sup>5</sup> Lo-

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1. VA. CODE ANN. § 15.2-2210 (Repl. Vol. 2008 & Cum. Supp. 2011).

2. *Id.* § 15.2-2223 (Repl. Vol. 2008 & Cum. Supp. 2011).

3. *See id.* § 15.2-2280 (Repl. Vol. 2008 & Cum. Supp. 2011).

4. *Id.* § 15.2-2308 (Cum. Supp. 2011).

5. *See, e.g.,* City of Richmond v. Confrere Club of Richmond, Va, Inc., 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) ("In determining the legislative powers of local governing bodies, Virginia follows the Dillon Rule of strict construction. The Dillon Rule provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.") (citations omitted).

calities, essentially, may not exercise power other than that granted by the Virginia General Assembly.<sup>6</sup> This restriction is of special importance in the field of land use and zoning law as the restriction prevents localities from limiting development more strictly than permissible under the Virginia Code.<sup>7</sup> The application of Dillon's Rule in Virginia is the source of much litigation in the field of land use and zoning law as property owners challenge localities that the owners believe have passed ordinances inconsistent with the Virginia Code. The Virginia court system, therefore, also plays a paramount role in influencing and interpreting land use and zoning law in the Commonwealth. This article highlights selected developments in various areas of land use law that have emerged from the General Assembly and the Supreme Court of Virginia over the past three years.

## II. SUBDIVISION OF LAND

Originally, subdivision controls were instituted to allow localities to provide for features such as accessible neighborhoods, navigable street patterns, and adequate infrastructure.<sup>8</sup> In Virginia, localities enjoy some latitude in enacting subdivision ordinances;<sup>9</sup> however, any such ordinances must not go beyond the scope of state-level enabling legislation.<sup>10</sup>

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6. *Id.* (citations omitted).

7. *See, e.g., id.* (citations omitted).

8. JAMES A. KUSHNER, 1 SUBDIVISION LAW AND GROWTH MANAGEMENT § 1:5 (2d ed. 2011).

9. *See, e.g., Bd. of Supervisors v. Georgetown Land Co.*, 204 Va. 380, 383, 131 S.E.2d 290, 292 (1963) (noting that the General Assembly "in enacting the Virginia Land Subdivision Act, delegated to each locality a portion of the police power of the state, to be exercised by it in determining what subdivisions would be controlled, and how they should be regulated," and that "[t]he legislature left much to the discretion of the locality in making such determination.").

10. *See Bd. of Supervisors v. Countryside Inv. Co.*, 258 Va. 497, 504, 522 S.E.2d 610, 613 (1999) (noting that "pursuant to the strict construction required by the Dillon Rule, the Board [of Supervisors of a locality] does not have unfettered discretion when deciding what matters it may include in its subdivision ordinance. Rather, the Board must include those requisites which are mandated in Code § 15.2-2241.").

## A. *Court Decisions*

### 1. *County of Chesterfield v. Tetra Associates, LLC*

In *County of Chesterfield v. Tetra Associates, LLC*, the Supreme Court of Virginia ruled that localities cannot “use a subdivision ordinance to prohibit a use of . . . property that is permitted by the property’s zoning classification.”<sup>11</sup> In this case, Tetra Associates attempted to subdivide a 7.071-acre agriculturally zoned parcel of land into five residential lots with a minimum size each of 43,560 square feet (one acre).<sup>12</sup> Chesterfield County denied this request, stating that sections 17-2 and 17-36(a) of the county subdivision ordinance prohibited residential subdivisions in agricultural zones.<sup>13</sup> Section 17.2 defined “subdivision lot” as the division of any parcel into two or more residential lots less than five acres large.<sup>14</sup> Section 17-36(a) prohibited subdivision lots in agricultural districts.<sup>15</sup> Tetra sued the county, claiming that these ordinances were void because they attempted to regulate property subdivision in a manner not allowed by the Virginia Code.<sup>16</sup>

The Supreme Court of Virginia agreed with Tetra and held that sections 17-2 and 17-36(a) of the county code went beyond the scope of authority granted to Chesterfield County by the General Assembly.<sup>17</sup> The court first noted that county code sections 19-123(a) and 19-28(f) together permitted one-acre residential lots in agricultural districts.<sup>18</sup> The court then found that the county subdivision ordinances contradicted these sections by not allowing one-acre residential lots in agricultural districts.<sup>19</sup> The court concluded that the subdivision ordinances were impermissible attempts to prohibit uses already allowed by the agricultur-

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11. 279 Va. 500, 507, 689 S.E.2d 647, 650 (2010).

12. *Id.* at 503, 689 S.E.2d at 648.

13. *Id.* at 502–03, 689 S.E.2d at 647–48.

14. *Id.* at 502, 689 S.E.2d at 647.

15. *See id.* at 502–03, 689 S.E.2d at 647.

16. *Id.* at 505, 689 S.E.2d at 649.

17. *Id.* at 507, 689 S.E.2d at 650 (citation omitted).

18. *Id.*

19. *Id.*

al zoning classification.<sup>20</sup> The county subdivision ordinances, therefore, were “violative of the Code of Virginia and void.”<sup>21</sup>

## 2. *W&W Partnership v. Prince William County Board of Zoning Appeals*

In *W&W Partnership v. Prince William County Board of Zoning Appeals*, the Supreme Court of Virginia held that the conveyance of land to the Commonwealth for a road did not create a legal subdivision of the remaining private property.<sup>22</sup> In 1940, Bryon and Georgette Woodside conveyed part of their single tract of land to the Commonwealth for the extension of Route 234; the road subsequently bisected the remainder of the Woodsides' land.<sup>23</sup> The deed conveying the land did not contain a description of the Woodsides' remaining property, nor was a plat showing the remaining property recorded.<sup>24</sup> In 2005, W&W Partnership (“W&W”) obtained the Woodsides' remaining property, and after subdividing and conveying a portion of it, retained 5.17 acres north of Route 234 and 10.13 acres south of Route 234.<sup>25</sup> W&W petitioned Prince William County to issue a separate address and parcel number for the 5.17 acres north of Route 234; however, the county denied the request because a 1982 zoning ordinance only allowed lots of at least ten acres in the A-1 district in which W&W's land was located.<sup>26</sup> W&W argued that the land was already legally subdivided in 1940 when the Woodsides conveyed the 1.44-acre portion for the extension of Route 234.<sup>27</sup> The zoning administrator, board of zoning appeals, and circuit court all disagreed with W&W, each finding instead that the extension of the road did not legally subdivide the property but rather merely created a single parcel with two noncontiguous portions.<sup>28</sup>

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20. *Id.*

21. *Id.*

22. 279 Va. 483, 488–89, 689 S.E.2d 739, 742 (2010).

23. *Id.* at 485, 689 S.E.2d at 740.

24. *Id.*

25. *Id.*

26. *Id.* at 485–86, 689 S.E.2d at 740.

27. *Id.* at 485, 689 S.E.2d at 740.

28. *Id.* at 485–86, 689 S.E.2d at 740–41.

After reviewing controlling case law, the Supreme Court of Virginia affirmed the judgments of the lower bodies.<sup>29</sup> The court first reiterated that

the creation of a new lot “is a legal separation of property because it results from action by the owner and involves, 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.”<sup>30</sup>

*Chesterfield County v. Stigall*, a 2001 Supreme Court of Virginia decision, involved similar facts to *W&W Partnership* in that the landowner’s parcel was divided when the Commonwealth, through eminent domain, obtained some of the land and constructed a freeway over it.<sup>31</sup> In that case, the noncontiguous parcel continued to be viewed legally as a single parcel of land, and the supreme court concluded that a physical separation is not tantamount to a legal subdivision.<sup>32</sup>

W&W conceded that *Stigall* was controlling but attempted to distinguish it because it did not involve a separation of property due to the owner’s voluntary actions.<sup>33</sup> W&W argued that the voluntary conveyance by the Woodsides was “an ‘action by the owner’ sufficient to legally separate the 5.17 acres from the parent tract.”<sup>34</sup> While the court agreed with the apparent distinction, the court noted that the essential element of a legal separation is not the action of the landowner but rather the “duly recorded . . . change in the legal description of the property either by metes and bounds or by plat.”<sup>35</sup> As nothing in the public records indicated that the Woodsides’ land was subdivided following the conveyance, the parcel, though physically divided, never was legally subdivided.<sup>36</sup>

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29. *Id.* at 488–89, 689 S.E.2d at 742.

30. *Id.* at 487, 689 S.E.2d at 741 (quoting *Chesterfield Cnty. v. Stigall*, 262 Va. 697, 705, 554 S.E.2d 49, 54 (2001)).

31. *Id.* (citing *Stigall*, 262 Va. at 700, 554 S.E.2d at 51).

32. *Id.* (citing *Stigall* 262 Va. at 705–06, 554 S.E.2d at 54).

33. *Id.*, 689 S.E.2d at 741–42.

34. *Id.*

35. *Id.* at 488, 689 S.E.2d at 742 (citing *Stigall*, 262 Va. at 705, 554 S.E.2d at 54).

36. *Id.* at 488–89, 689 S.E.2d at 742.

### B. *Legislation*

In Senate Bill 873, the 2011 General Assembly added a new section to Virginia Code section 15.2-2244 that permits localities to adopt subdivision ordinances that allow for a single division of a parcel “for the purpose of sale or gift to a member of the immediate family . . . of beneficiaries of a trust, [or] of land held in trust.”<sup>37</sup> All trust beneficiaries must (i) be immediate family members, (ii) agree to subdivide the property, and (iii) agree, through a restrictive covenant placed on the property, to prohibit the transfer of the property to anyone who is not an immediate family member for fifteen years.<sup>38</sup>

## III. HISTORIC PRESERVATION

In the Historic Preservation Act of 1966, Congress declared that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”<sup>39</sup> That same year, the Commonwealth of Virginia established the Virginia Historic Landmarks Commission, the predecessor to the Virginia Department of Historic Resources.<sup>40</sup> Twelve years later, the Supreme Court of the United States upheld the validity of state and local historic preservation ordinances in *Penn Central Transportation Co. v. City of New York*.<sup>41</sup> To this day, historic preservation continues to be of interest in the field of land use law, often finding landowners’ desire to use their property as they wish in opposition to localities’ attempt to preserve the historic character of their communities.

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37. S.B. 873, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 15, 2011, ch. 141, 2011 Va. Acts 223).

38. VA. CODE ANN. § 15.2-2244.1 (Repl. Vol. 2012). The fifteen-year nontransfer period may be reduced by a locality “when changed circumstances so require.” *Id.*

39. 16 U.S.C. § 470(b)(2) (2006).

40. See VA. DEP’T OF HISTORIC RES., VIRGINIA’S HISTORICAL REGISTERS: A GUIDE FOR PROPERTY OWNERS (2007), [http://www.dhr.virginia.gov/pdf\\_files/Virginia\\_Property\\_Owners\\_Guide\\_Updated\\_2007.pdf](http://www.dhr.virginia.gov/pdf_files/Virginia_Property_Owners_Guide_Updated_2007.pdf).

41. 438 U.S. 104, 129 (1978) (internal citations omitted).

### A. *Court Decision: Covell v. Town of Vienna*

In *Covell v. Town of Vienna*, the Supreme Court of Virginia ruled on the constitutionality of Vienna's general historic districts ordinance ("HDO") and its specific Windover Heights Historic District ("WHHD") ordinance.<sup>42</sup> This case arose when Vienna denied Michael Covell a certificate of appropriateness ("COA") to erect a fence on his property within WHHD.<sup>43</sup> Covell had applied for the COA but declined to properly fill out the application or provide additional information when requested.<sup>44</sup> In addition to denying the COA, Vienna had denied Covell and other landowners their requests to have their parcels removed from the WHHD.<sup>45</sup> The circuit court consolidated these various cases and an appeal was brought to the Supreme Court of Virginia.<sup>46</sup> In the consolidated case, the landowners argued that (i) Vienna arbitrarily denied Covell's COA,<sup>47</sup> (ii) the WHHD ordinance was unconstitutionally vague,<sup>48</sup> (iii) the HDO was violative of the Virginia Code,<sup>49</sup> and (iv) the WHHD ordinance was violative of the Vienna Town Code.<sup>50</sup>

Applying a fairly debatable standard, the Supreme Court of Virginia first ruled that Covell's COA was appropriately denied.<sup>51</sup> The court noted that Covell had not presented any evidence to rebut the presumption of validity of Vienna's denial, but rather he had only argued that both ordinances were invalid.<sup>52</sup> Regarding the COA, the court reiterated its holding in *Norton v. City of Danville* and stated that the court did not have the authority to consider the validity of an ordinance on an appeal from a COA denial.<sup>53</sup>

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42. 280 Va. 151, 154, 694 S.E.2d 609, 611 (2010).

43. *Id.* at 155, 694 S.E.2d at 612.

44. *Id.*

45. *Id.* at 156, 694 S.E.2d at 612.

46. *Id.*

47. *Id.* at 157, 694 S.E.2d at 613.

48. *Id.* at 162–63, 694 S.E.2d at 616.

49. *Id.* at 158, 694 S.E.2d at 613–14.

50. *Id.* at 160, 694 S.E.2d at 615.

51. *Id.* at 157–58, 694 S.E.2d at 613.

52. *Id.* at 157, 694 S.E.2d at 613.

53. *Id.* (citing *Norton v. City of Danville*, 268 Va. 402, 407–08, 602 S.E.2d 126, 129 (2004)).

Turning to the validity of the HDO, the court held that the ordinance was not ultra vires and therefore was valid.<sup>54</sup> The landowners argued that the HDO was invalid because it defined an “area’ rather than buildings or structures.”<sup>55</sup> Examining former Virginia Code sections 15.1-503.2(a) and 15.1-430(b) (in effect when Vienna adopted the HDO), the court found that the General Assembly clearly had intended to allow localities to create historic areas, even those that do not include buildings or structures.<sup>56</sup> Specifically, the court noted that former code section 15.1-503.2(a) allowed localities “to delineat[e] one or more historic districts adjacent to such landmarks, buildings and structures, *or* encompassing such historic areas.”<sup>57</sup>

Regarding the validity of the WHHD ordinance, the court found that, in light of section 15.2-1427(C) of the Virginia Code, the ordinance had been validly adopted.<sup>58</sup> The landowners argued that the WHHD ordinance was adopted improperly because it did not follow the strict adoption requirements of the Vienna Town Code.<sup>59</sup> Citing section 15.2-1427(C), the court held that any ordinances adopted by a governing body have been adopted validly unless the adoption violates either the United States Constitution or the Virginia Constitution.<sup>60</sup>

Finally, addressing the constitutional challenge to the WHHD Ordinance, the court held that the ordinance was not unconstitutionally vague.<sup>61</sup> The court promptly disposed of the landowners’ challenge by noting that the WHHD ordinance and COA application included very specific instructions for submitting a COA.<sup>62</sup> As

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54. *See id.* at 158, 694 S.E.2d at 613–14.

55. *Id.*, 694 S.E.2d at 613.

56. *Id.* at 159–60, 694 S.E.2d at 614 (citing VA. CODE ANN. § 15.1-503.2(a) (Cum. Supp. 1978) (authorizing governing bodies of counties to establish historic district zones); VA. CODE ANN. § 15.1-430(b) (Cum. Supp. 1978) (defining “historic area”)).

57. *Id.* at 160, 694 S.E.2d at 614–15 (alteration in original) (quoting VA. CODE ANN. § 15.1-503.2(a) (Cum. Supp. 1978)) (internal quotation marks omitted).

58. *Id.* at 160–61, 694 S.E.2d at 615 (citing VA. CODE ANN. § 15.2-1427(c) (Repl. Vol. 2008) (providing that all ordinances adopted by a governing body shall be deemed validly adopted in the absence of state or federal constitutional violations)).

59. *Id.* at 160, 694 S.E.2d at 615.

60. *Id.* at 161, 694 S.E.2d at 615.

61. *Id.* at 165, 694 S.E.2d at 617.

62. *Id.* at 164, 694 S.E.2d at 617.

Covel disregarded these instructions in his application, the court found that this was not a case in which Vienna had considered the “application and applied vague criteria subjectively to arrive at an arbitrary or discriminatory result.”<sup>63</sup> As the town previously had denied the application for incompleteness, the fault was Covel’s, not an alleged unconstitutional vagueness in the ordinance.<sup>64</sup>

### B. *Legislation: Historic Districts*

In House Bill 1137, the General Assembly amended section 15.2-2306 of the Virginia Code to include stricter requirements for establishing local historic districts.<sup>65</sup> Prior to establishing or expanding historic districts, localities must now (i) inventory all landmarks, buildings, or structures in the district, (ii) allow for public input from the owners of affected properties, (iii) provide written criteria being used to determine which properties are to be included in the district, and (iv) compare the inventory and the criteria to determine which properties meet the criteria for inclusion in a historic district.<sup>66</sup> Furthermore, localities only may create historic districts in areas where a majority of properties meet the criteria.<sup>67</sup> If, however, a given property is located along an arterial street or highway that is “a significant route[] of tourist access,” a locality may include it in a historic district notwithstanding the above requirements.<sup>68</sup>

## IV. CONDEMNATION

While the exercise of eminent domain is often a contentious issue, the power of a sovereign to practice it is not in question.<sup>69</sup> The Supreme Court of Virginia has said that eminent domain is “a high prerogative right, and there is no doubt about the power of the State to exercise it, or to delegate it to subordinate agencies

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63. *Id.* at 165, 694 S.E.2d at 617.

64. *Id.*

65. *See* H.B. 1137, Va. Gen. Assembly (Ex. Sess. 2012) (enacted as Act of Apr. 18, 2012, ch. 790, 2012 Va. Acts \_\_\_).

66. VA. CODE ANN. § 15.2-2306(C) (Repl. Vol. 2012).

67. *Id.*

68. *Id.*

69. *See, e.g.,* Light v. City of Danville, 168 Va. 181, 196, 190 S.E. 276, 281 (1937).

to be exercised in proper proceedings for the public welfare.”<sup>70</sup> The state, however, must exercise such power carefully, and the courts must strictly construe the statutes granting that power to the state.<sup>71</sup> Especially in light of its contentious nature, both the condemning authority and the property owner must follow the specific statutory procedures when eminent domain is exercised.<sup>72</sup>

#### A. *Court Decisions*

##### 1. *Dean v. Board of County Supervisors of Prince William County*

In *Dean v. Board of County Supervisors of Prince William County*, the Supreme Court of Virginia held that the circuit court did not err in prohibiting the admission of evidence of an involuntary sale in an eminent domain proceeding.<sup>73</sup> In this case, Prince William County had begun condemnation proceedings against Dean’s property because he and the county were unable to agree on compensation for his property, which the county needed for the local transportation commission.<sup>74</sup> Dean proffered evidence of a “purported comparable sale of property” between Sultan Aman and the county, which the county sought to exclude.<sup>75</sup> In the Aman sale, the county had negotiated with Aman and eventually settled on a price higher than their original offer in order “to avoid any risk or time and expense of going to court.”<sup>76</sup> According to Virginia law, similar sales are only admissible as evidence in condemnation proceedings if such sales were “voluntary and free from compulsion and not by way of compromise.”<sup>77</sup>

The Supreme Court of Virginia held that evidence of the Aman sale was not admissible because it was not fully voluntary.<sup>78</sup> The court recognized that the sale may have been voluntary from

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70. *Id.*

71. *See id.*

72. *See id.*

73. 281 Va. 536, 540, 708 S.E.2d 830, 832 (2011).

74. *Id.* at 538, 708 S.E.2d at 831.

75. *Id.*

76. *Id.* at 538–39, 708 S.E.2d at 832.

77. *Id.* at 540, 708 S.E.2d at 832–33.

78. *Id.* at 541, 708 S.E.2d at 833.

Aman's perspective, seeing as he had negotiated with the county; however, it determined that Dean had not shown that the sale was voluntary from the perspective of the county.<sup>79</sup> The court first found that the county was under compulsion to buy Aman's property because the county needed the property for a road project.<sup>80</sup> Furthermore, the county had compromised extensively with Aman because it wanted to avoid the time and expenses of court proceedings.<sup>81</sup> As the county was under compulsion to acquire Aman's property and did so only after extensive compromise, the sale was not fully voluntary.<sup>82</sup> Accordingly, the court held that evidence of the sale could be excluded in the present trial proceedings.<sup>83</sup>

2. *Taco Bell of America, Inc. v. Commonwealth Transportation Commissioner of Virginia*

In *Taco Bell of America, Inc. v. Commonwealth Transportation Commissioner of Virginia*, the Supreme Court of Virginia held that even if elements of a condemned property are moveable, whether such elements are fixtures or personalty is a jury question.<sup>84</sup> In this case, a parcel of land in Fairfax County containing a Taco Bell restaurant was condemned by the Commonwealth in order to allow for the reconstruction of Route 29.<sup>85</sup> To determine the just compensation owed to Taco Bell, the Commonwealth transportation commissioner filed a motion in limine prior to the trial to exclude evidence of the value of several pieces of equipment "used in the restaurant as part of Taco Bell's business."<sup>86</sup> Ultimately, the trial judge determined that this equipment was "purely personal property," and that the jury was not authorized to determine its value in connection with the just compensation owed to Taco Bell.<sup>87</sup> Taco Bell appealed, arguing that the jury

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79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.*

83. *See id.* at 541–42, 708 S.E.2d at 833.

84. 282 Va. 127, 133, 710 S.E.2d 478, 482 (2011).

85. *Id.* at 129, 710 S.E.2d at 479.

86. *Id.*, 710 S.E.2d at 480.

87. *Id.* at 131, 710 S.E.2d at 481.

should have been permitted to consider the equipment's value in determining just compensation.<sup>88</sup>

The Supreme Court of Virginia agreed with Taco Bell and reversed the trial court's ruling.<sup>89</sup> The court first noted that when determining whether property is personal or a fixture, courts should weigh: (i) the actual or constructive annexation of the property to the real estate, (ii) the essential nature of the property to the use of the real estate, and (iii) the property owner's intention to make the property a permanent addition to the real estate.<sup>90</sup> The court stated that the trial court improperly based its decision to exclude the evidence solely on the fact that the property was moveable.<sup>91</sup> Applying the three-part fixture test, the Supreme Court of Virginia noted that, while the equipment was moveable, it was also essential for the operation of the restaurant.<sup>92</sup> The equipment included chairs, ovens, freezers, and a neon sign—all of which were needed for the structure to operate as a restaurant.<sup>93</sup> Furthermore, the court noted that Taco Bell intended for the equipment to remain with the real estate for the life of the restaurant; in other words, the property was a permanent addition.<sup>94</sup> As Taco Bell satisfied two of the three fixture factors, the court ultimately held that the fixtures' values should have been decided upon by the jury in determining the just compensation due to Taco Bell.<sup>95</sup>

### B. *Amendments to the Virginia Constitution*

In early 2012, the General Assembly approved a bill that placed an amendment to article I, section 11 of the Virginia Constitution on the November 2012 ballot.<sup>96</sup> This amendment, if ap-

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88. *Id.*

89. *Id.* at 133, 710 S.E.2d at 492.

90. *Id.* at 131–32, 710 S.E.2d at 481 (citing *Danville Holding Corp. v. Clement*, 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941)).

91. *Id.* (citing *Danville Holding Corp.*, 178 Va. at 232, 16 S.E.2d at 349).

92. *Id.* at 133, 710 S.E.2d at 482.

93. *Id.* at 132–33, 710 S.E.2d at 481–82.

94. *Id.* at 133, 710 S.E.2d at 482.

95. *Id.*

96. H.J. Res. 3, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Feb. 27, 2012, ch. 736, 2012 Va. Acts \_\_\_).

proved by the citizens of the Commonwealth, would change section 11 to provide further protections against the taking of private property.<sup>97</sup>

The amendment first adds the language “or damaging” to section 11, thus extending protections to the damage of private property in addition to an actual taking.<sup>98</sup> The amendment next strikes the existing “takings” language and adds a new paragraph to section 11 which states, “[T]he General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. . . . without just compensation to the owner thereof.”<sup>99</sup> The amendment further provides that “[j]ust compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking.”<sup>100</sup>

Seemingly in response to the Supreme Court of the United States’ decision in *Kelo v. City of New London*,<sup>101</sup> the amendment also clarifies what uses are public.<sup>102</sup> The amendment specifically states that a taking or damaging “is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.”<sup>103</sup> So as not to interfere with the development of public utilities and common carrier services, the amendment also states that when a public company or corporation, or a railroad exercises eminent domain, the use is public if it “is for the authorized provision of utility, common carrier, or railroad services.”<sup>104</sup> Overall, the comprehensive language of the amendment effectively precludes Virginia jurisdictions from taking or damaging property in a way authorized by *Kelo*.

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97. See *id.*; see also, Julian Walker, *Va. Referendum May Curtail Eminent Domain Power*, VIRGINIAN-PILOT (July 17, 2012), <http://hamptonroads.com/2012/07/va-referendum-may-curtail-eminent-domain-power>.

98. H.J. Res. 3.

99. *Id.*

100. *Id.* “[L]ost profits’ and ‘lost access’ are to be defined by the General Assembly.” *Id.*

101. 545 U.S. 469, 489–90 (2005) (affirming New London’s ability to transfer land between two private owners and ruling that the contemplated redevelopment project was a public use).

102. See Walker, *supra* note 97 (noting that since 2007 the General Assembly has been moving to narrow eminent domain powers in the wake of the 2005 *Kelo* decision).

103. H.J. Res. 3. Furthermore, the burden of proving that a use is public is on the condemnor. *Id.*

104. *Id.*

## V. UNIFORMITY REQUIREMENTS

Almost all state zoning enabling acts have provisions for uniformity,<sup>105</sup> and Virginia is no exception.<sup>106</sup> Uniformity requirements typically are enacted to ensure that zoning is not used for discriminatory purposes—favoring or disfavoring certain similarly situated parcels and landowners over others.<sup>107</sup> Uniformity requirements often are challenged as unreasonable or arbitrary when applied to certain parcels within a district that cannot readily meet the uniformity standard.<sup>108</sup>

### A. *Court Decisions: Schefer v. City Council*

In *Schefer v. City Council*, the Supreme Court of Virginia held that a city ordinance establishing different height restrictions on standard and sub-standard lots within the same residential zoning district was constitutionally and statutorily valid.<sup>109</sup> Anton Schefer owned several lots, each less than 7500 square feet in area, in an R1-B zoning district in the City of Falls Church.<sup>110</sup> The Falls Church City Code required that all lots in the R1-B district be at least 7500 square feet in area; however, Schefer created his lots prior to the adoption of that requirement.<sup>111</sup> Falls Church dubbed lots of 7500 square feet or more “standard lots” and lots less than 7500 square feet “substandard lots.”<sup>112</sup> In 2006, Falls Church adopted a set of height regulations applying only to substandard lots.<sup>113</sup> The ultimate result of these regulations was that the maximum allowable building height in standard lots would be thirty-five feet while the maximum allowable height in substandard lots would be a ratio of the ground area to thirty-five feet.<sup>114</sup> Following enactment of the regulations, Schefer surveyed the height and lot area of one of his substandard lots and found that

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105. See PATRICIA E. SALKIN, 1 AMERICAN LAW OF ZONING § 6:25 (5th ed. 2012).

106. VA. CODE ANN. § 15.2-2282 (Repl. Vol. 2012).

107. See SALKIN, *supra* note 105.

108. See *id.*

109. 279 Va. 588, 594–96, 691 S.E.2d 778, 782 (2010).

110. *Id.* at 591, 691 S.E.2d at 779.

111. *Id.* (citation omitted).

112. See *id.*, 691 S.E.2d at 779–80 (citation omitted).

113. *Id.* (citing FALLS CHURCH CITY, VA., CODE § 38-28(b)(2) (as amended Dec. 11, 2006)).

114. *Id.*, 691 S.E.2d at 780.

the building was taller than the new ratio allowed.<sup>115</sup> He subsequently filed suit against Falls Church, arguing that the regulations violated section 15.2-2282 of the Virginia Code and deprived him of equal protection under the law.<sup>116</sup>

Section 15.2-2282 of the Virginia Code requires that “[a]ll zoning regulations . . . be uniform for each class or kind of building[] and use[] throughout each district.”<sup>117</sup> Schefer argued that section 15.2-2282 required identical height restrictions for all lots in the R1-B district.<sup>118</sup> Specifically, Schefer argued that all one-family dwellings in the R1-B district are uses of the same class or kind, and therefore that they all must be under identical height restrictions.<sup>119</sup> The Supreme Court of Virginia disagreed, concluding instead that dwellings on standard lots and dwellings on substandard lots are two different types of uses, despite both being residential and within the R1-B district.<sup>120</sup> Classifying standard residential lots as different uses from substandard residential lots, the court held that the height regulations did “not violate the uniformity requirement of Code § 15.2-2282.”<sup>121</sup>

The court also quickly disposed of Schefer’s equal protection claim by reiterating that when an individual challenges a zoning ordinance, “[t]he burden of proof is on him . . . to prove that it is clearly unreasonable, arbitrary or capricious.”<sup>122</sup> Instead of providing evidence to this effect, Schefer merely alleged that the regulations were facially discriminatory.<sup>123</sup> The court found that nothing in the regulations was inherently suspect or an infringement on a fundamental right; therefore, the equal protection claim had to fail because Schefer had not presented sufficient evidence to counter the presumption of validity.<sup>124</sup>

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115. *Id.* at 592, 691 S.E.2d at 780.

116. *Id.*

117. VA. CODE ANN. § 15.2-2282 (Repl. Vol. 2008 & Cum. Supp. 2010).

118. 279 Va. at 592, 691 S.E.2d at 780.

119. *Id.* at 594, 691 S.E.2d at 781–82.

120. *Id.* at 594–95, 691 S.E.2d at 782.

121. *Id.* at 595, 691 S.E.2d at 782.

122. *Id.* (quoting *Bd. of City Supervisors v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959)).

123. *See id.* at 596, 691 S.E.2d at 782.

124. *Id.*

## VI. ZONING PROCEDURE

A. *Court Decisions*

## 1. Waivers, Special Exceptions, and the Role of Planning Commissions

In *Sinclair v. New Cingular Wireless PCS*, the Supreme Court of Virginia held that a provision allowing for waivers from a zoning ordinance is not ultra vires but that a procedure allowing a planning commission to review waiver applications is.<sup>125</sup> In this case, Kent Sinclair's neighbor contracted with Cingular Wireless to install a cellular phone tower on her property, which sat on a critical slope.<sup>126</sup> The Albemarle County Code normally restricts construction on critical slopes;<sup>127</sup> however, the code also provides for individuals to obtain a waiver allowing construction from the local planning commission.<sup>128</sup> The planning commission's ruling on the waiver may only be appealed to the board of supervisors by the applicant if the waiver is denied or subject to conditions objectionable to the applicant.<sup>129</sup> Over Sinclair's objections to the planning commission, New Cingular successfully obtained a waiver in February 2010.<sup>130</sup> Sinclair subsequently filed suit, claiming that the waiver provision exceeded the scope of powers delegated by the General Assembly.<sup>131</sup>

The Supreme Court of Virginia first found that the waiver provision was permitted lawfully by the General Assembly because Virginia Code section 15.2-2286(A)(3) allows localities to grant "special exceptions under suitable regulations and safeguards in a zoning ordinance."<sup>132</sup> Sinclair argued that the waiver was not a special exception but rather a variance, and thus subject to the

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125. 283 Va. 198, 208–09, 720 S.E.2d 543, 549 (2012).

126. *Id.* at 201, 720 S.E.2d at 544–45 (explaining that a critical slope is land with slopes of twenty-five percent or more).

127. *See* ALBEMARLE COUNTY, VA., CODE § 18.4.2 (2012).

128. *See id.* § 18.4.2.5(a).

129. *See id.* § 18.4.2.5(a)(5).

130. 283 Va. at 202, 720 S.E.2d at 545.

131. *Id.*

132. *Id.* at 205, 720 S.E.2d at 547 (quoting VA. CODE ANN. § 15.2-2286(A)(3) (Repl. Vol. 2012)).

provisions of Virginia Code sections 15.2-2309(2) and 15.2-2286(A)(4).<sup>133</sup> The court distinguished the waiver provision from a variance, stating that “where ‘the property may be developed in a way consistent with the ordinance, but only with approval of the [locality] after specified conditions are met,’ a variance is not necessary.”<sup>134</sup> As the waiver was more analogous to a special exception, which was specifically permitted by the Virginia Code, the allowance of a waiver was not beyond the scope of the county’s power.

The actual procedure for obtaining the waiver, however, violated Dillon’s Rule.<sup>135</sup> The court held that the General Assembly did not intend for localities to allow planning commissions to authorize departures from zoning ordinances; rather, only zoning administrators and boards of zoning appeals may authorize departures.<sup>136</sup> Planning commissions have broad advisory powers but lack executive, legislative, or judicial power.<sup>137</sup> The court noted that the Virginia Code expressly authorizes only zoning administrators, boards of zoning appeals, and local governing bodies to approve modifications or departures from zoning ordinances.<sup>138</sup> As the Virginia Code does not permit planning commissions to rule on departures from zoning ordinances, the procedure for obtaining the waiver was void and violative of the Virginia Code.<sup>139</sup>

## 2. Amendment of Rezoning Proffers

In *Arogas, Inc. v. Frederick County Board of Zoning Appeals*, the Supreme Court of Virginia held that a county is not required to hold an additional public hearing on amending a rezoning prof-

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133. *Id.* at 202–03, 720 S.E.2d at 545.

134. *Id.* at 204, 720 S.E.2d at 546 (alteration in original) (quoting *Bell v. City Council*, 224 Va. 490, 496, 297 S.E.2d 810, 814 (1982)).

135. *Id.* at 205, 720 S.E.2d at 547.

136. *Id.* at 206, 720 S.E.2d at 547.

137. *Id.* (citing VA. CODE ANN. § 15.2-2210 (Repl. Vol. 2012)).

138. *Id.* at 208, 720 S.E.2d at 548–49 (citations omitted); *see also* VA. CODE ANN. § 15.2-2286(A)(4) (Cum. Supp. 2011) (“Where provided by ordinance, the zoning administrator may be authorized to grant a modification from any provision contained in the zoning ordinance . . . .”); *id.* § 15.2-2310 (Repl. Vol. 2008) (“Applications for special exceptions . . . shall be transmitted promptly to the secretary of the board [of zoning appeals] who shall place the matter on the docket to be acted upon by the board [of zoning appeals].”); *id.* § 15.2-2286(A)(3) (Cum. Supp. 2011) (“[T]he governing body of any locality may reserve unto itself the right to issue such special exceptions.”).

139. *Sinclair*, 283 Va. at 208–09, 720 S.E.2d at 548–49 (citations omitted).

fer after the initial public hearing, and that a circuit court is correct to reject a plaintiff's request that the circuit court usurp the role of a local zoning administrator.<sup>140</sup> In this case, Arogas sought to construct a diesel and gasoline fuel station on a piece of property that Arogas purchased from the Sempeles in March 2007.<sup>141</sup> The zoning administrator refused to process Arogas' site plan application, however, because that parcel of land was bound by a proffer prohibiting the sale of diesel fuel to "over the road truck carrier[s]" submitted by the Sempeles when they owned the land.<sup>142</sup> The Sempeles had submitted this proffer prior to a rezoning hearing in 2004.<sup>143</sup> The proffer was discussed at a public hearing but subsequently was amended by the board of supervisors following the close of the hearings.<sup>144</sup> As the amended proffer was adopted without a subsequent public hearing on the amendments, Arogas argued that the proffer was invalid for violating Frederick County Code section 165-13(A).<sup>145</sup> Following the denial to process its application, Arogas petitioned the circuit court to review the application itself.<sup>146</sup>

The Supreme Court of Virginia first held that the proffer was valid despite the lack of an additional public hearing.<sup>147</sup> The court found that subsequent public hearings are not required for amendments to proffers based on the language of Frederick County Code sections 165-11 and 165-13.<sup>148</sup> Section 165-13 of the county code merely required public hearings for initial proffers, not amendments to proffers.<sup>149</sup> Furthermore, section 165-11 of the county code allowed for the board to "make appropriate changes or corrections" to proffers without requiring the board to hold an additional public hearing.<sup>150</sup> Accordingly, the court also noted that Virginia Code section 15.2-2285(C) only required that localities

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140. 280 Va. 221, 228–30, 698 S.E.2d 908, 912–13 (2010) (citation omitted).

141. *Id.* at 225, 698 S.E.2d at 910.

142. *Id.* at 225–26, 698 S.E.2d at 910–11 (internal quotation marks omitted).

143. *Id.* at 224–25, 698 S.E.2d at 910.

144. *Id.* at 225, 698 S.E.2d at 910.

145. *Id.*, 698 S.E.2d at 911.

146. *See id.* at 230, 698 S.E.2d at 913.

147. *See id.* at 228, 698 S.E.2d at 912.

148. *See id.* at 227, 698 S.E.2d at 912.

149. *See id.* at 226, 698 S.E.2d at 911 (citation omitted).

150. *See id.* (citation omitted).

hold “at least one public hearing” before adopting a zoning ordinance or proffer.<sup>151</sup>

Addressing Arogas’ argument that the circuit court should have reviewed the site plan application itself, the court held that the judiciary did not have the power to do so.<sup>152</sup> The court ruled that the zoning administrator should have reviewed Arogas’ properly submitted site plan; however, the court stated that the judiciary itself is not empowered to review site plans.<sup>153</sup>

### B. *Legislation: Notice of Zoning Determinations*

In House Bill 1844, the General Assembly amended sections 15.2-2204, 15.2-2301, and 15.2-2311 of the Virginia Code, and altered the notice provisions for local zoning determinations.<sup>154</sup> The bill first amended section 15.2-2204 by adding subsection (H), which provides for notification procedures when third parties apply for a zoning determination.<sup>155</sup> Subsection (H) states that when a third party requests a zoning determination from an administrative officer or the board of zoning appeals, the owner of the property in question must be given written notice within ten days of the receipt of the request.<sup>156</sup> Notice must be given by either an administrative officer or, at the direction of an administrator, the third party making the request.<sup>157</sup> Mailing written notice to the owner at his last known address as shown in real estate assessment records satisfies this notice requirement.<sup>158</sup>

The bill next amended section 15.2-2301 to provide that decisions made by local governing bodies following appeals to the zoning administrator are binding only on property owners if the owners receive actual written notification of the body’s decision.<sup>159</sup>

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151. *Id.* at 228, 698 S.E.2d at 912 (citing VA. CODE ANN. § 15.2-2285(C) (Cum. Supp. 2010)).

152. *Id.* at 230, 698 S.E.2d at 913.

153. *See id.* (internal citation omitted).

154. H.B. 1844, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 24, 2011, ch. 457, 2011 Va. Acts 716).

155. *Id.*

156. VA. CODE ANN. § 15.2-2204(H) (Cum. Supp. 2011). However, subsection (H) does exempt “inquiries from the governing body, planning commission, or employees of the locality made in the normal course of business.” *Id.*

157. *Id.*

158. *Id.*

159. H.B. 1844, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 24, 2011,

Finally, the bill amended section 15.2-2311(A) to provide that appellate decisions made by the board of zoning appeals are binding only upon property owners if the owners have actual knowledge of the zoning violation or written order of the zoning administrator.<sup>160</sup> If, however, the property owner has actual knowledge of either the violation or written order, that knowledge will act as a waiver to his right to challenge the board's decision over failure to receive notice.<sup>161</sup>

## VII. ROADS AND TRANSPORTATION

As Virginia's population continues to grow, the importance of not simply roads, but integrated transportation networks, will increase in the coming years.<sup>162</sup> With that growing importance, it is essential that individuals know which thoroughfares are public and which are private, and that localities know what their role is in a larger statewide transportation network.

### A. *Court Decisions: Dykes v. Friends of the C.C.C. Road*

In *Dykes v. Friends of the C.C.C. Road*, the Supreme Court of Virginia ruled that long and continued public use of a private road cannot convert that private property into public property.<sup>163</sup> The facts of this case concern a road that the Civilian Conservation Corps ("C.C.C.") constructed on private property in the late 1930s.<sup>164</sup> Both parties stipulated that "[s]ince its construction, the road has been used by the general public as a thoroughfare" and that local county officers "consider[ed] it as a public road and . . . used the road for at least 25 years for official purposes."<sup>165</sup> Although the road was in general use by both the public and county

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ch. 457, 2011 Va. Acts 716).

160. *Id.*

161. VA. CODE ANN. § 15.2-2311(A) (Cum. Supp. 2011).

162. See KAREN J. RAE, VA. DEP'T OF RAIL & PUB. TRANSP., THE VIRGINIA STATE RAIL PLAN: A MULTIMODAL STRATEGY TO MEET THE COMMONWEALTH'S PASSENGER AND FREIGHT TRANSPORTATION NEEDS THROUGH 2025, SR-1 (2004), <http://www/drpt.virginia.gov/activities/files/FR5-DRPT-VSRP-Summary-report.pdf>.

163. 283 Va. 306, 313, 720 S.E.2d 537, 541 (2012).

164. *Id.* at 309, 720 S.E.2d at 539.

165. *Id.* at 309-10, 720 S.E.2d at 539.

officials, no records indicated that either the county or the Virginia Department of Public Transportation (“VDOT”) ever officially adopted the road into either the county or the state road system.<sup>166</sup> Believing the road to be private, Dykes and the other owners of the property (the “Property Owners”) restricted public access to the road by erecting pole gates.<sup>167</sup> Thereafter, the Friends of the C.C.C. Road sought an injunction requiring the Property Owners to remove the pole gates.<sup>168</sup> The circuit court issued an opinion letter ruling that the road was private, but that the public was entitled to its unrestricted use; therefore, it ultimately issued an order requiring the Property Owners to remove the pole gates.<sup>169</sup> Both parties appealed.<sup>170</sup>

The Supreme Court of Virginia began its analysis by holding that the C.C.C. Road was indeed on private property and that there had been neither a dedication nor an acceptance to establish the road as a public road.<sup>171</sup> The court noted that there must be an unmistakable showing of intent on part “of the landowner to permanently give up his property” to the public.<sup>172</sup> The court found that there was no such showing of intent by the present landowners, and so the road remained private.<sup>173</sup> Furthermore, the court explicitly held that “[t]he law of this Commonwealth simply does not allow for a conversion of private property to public property solely by public use.”<sup>174</sup> Continuous public use does not equate to the formal dedication and acceptance of a private road as a public one.<sup>175</sup>

The court also rejected the claim that the road was made public through a prescriptive easement.<sup>176</sup> Again, the court focused on the elements of dedication and acceptance. The court noted that a

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166. *Id.* at 310, 720 S.E.2d at 539.

167. *Id.* at 309, 720 S.E.2d at 539.

168. *Id.*

169. *Id.* at 310–11, 720 S.E.2d at 540.

170. *Id.* at 311, 720 S.E.2d at 540.

171. *Id.* at 312, 720 S.E.2d at 540–41.

172. *Id.* (quoting *Mulford v. Walnut Hill Farm Grp., LLC*, 282 Va. 98, 106, 712 S.E.2d 468, 473 (2011)).

173. *Id.*

174. *Id.* at 313, 720 S.E.2d at 541.

175. *Id.*

176. *See id.* at 314–15, 720 S.E.2d at 542–43.

conversion of private property into public property by prescription only occurs when a dedication can be implied by long and continuous public use and when a competent local authority has accepted that dedication.<sup>177</sup> If there has been no dedication and acceptance, public use of a private road merely shows “a license by the owner permitting the use.”<sup>178</sup> Ultimately, the court found for the Property Owners and held that they may continue to bar public access to the road with pole gates.<sup>179</sup>

### B. *Legislation: Transportation Planning*

In House Bill 1248, the General Assembly amended section 15.2-2223 of the Virginia Code to provide for better integration between regional planning, comprehensive planning, and transportation planning.<sup>180</sup> The bill added the requirement that local transportation plans be consistent with VDOT’s Six-Year Improvement Program.<sup>181</sup> Prior to adopting a transportation plan, a locality must submit the proposed plan to VDOT, which then has ninety days to comment on the plan’s consistency with the Six-Year Improvement Program.<sup>182</sup>

## VIII. CEMETERIES

The final internment of human remains is an important feature of any civilization, and one that perhaps often is overlooked and not thought of as a division of land use law. In a state such as Virginia, however, where ancient sites, battlefields, and historic homes abound, the creation and classification of cemeteries is especially poignant.

In *Shilling v. Baker*, the Supreme Court of Virginia held that the scattering of cremated human remains (“cremains”) and the erection of memorial plaques on a piece of land do not operate to

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177. *Id.* at 315, 720 S.E.2d at 542 (quoting *Bd. of Supervisors v. Norfolk & W. Ry. Co.*, 119 Va. 763, 773, 91 S.E. 124, 128 (1916)).

178. *Id.*

179. *Id.*, 720 S.E.2d at 543.

180. H.B. 1248, Va. Gen. Assembly (Ex. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 729, 2012 Va. Acts \_\_\_).

181. *Id.*

182. VA. CODE ANN. § 15.2-2223(5)(3) (Repl. Vol. 2012).

establish that land as a cemetery.<sup>183</sup> The facts of this case involve a tract of land on top of a hill owned by the Baker family.<sup>184</sup> Beginning in 1949, and covering two generations, this hilltop was used as a scattering ground for the ashes of deceased Baker family members.<sup>185</sup> Memorial plaques, a small rope fence, and a larger forty-square-foot wrought iron fence all were placed on the tract by family members.<sup>186</sup> The land actually was owned by Brian Baker; however, he allowed his sister, Kathryn Shilling, to bury an urn containing her mother's ashes on the site next to their grandparents' ashes.<sup>187</sup> In 2007, Baker contracted to sell his entire parcel of land, which included the hilltop site.<sup>188</sup> The sale was contingent upon Baker relocating the "cemetery" to the base of the hill.<sup>189</sup> Shilling opposed the relocation of the "cemetery" and filed suit, asking the court to declare the hilltop site to be a legally official cemetery.<sup>190</sup> Following a decision by the local board of zoning appeals and the circuit court, the Supreme Court of Virginia was asked to decide "whether the actions of Shilling and her family established a legal cemetery."<sup>191</sup>

The court ultimately held that the spreading and internment of cremains on the site did not operate to create a legal cemetery.<sup>192</sup> Shilling first argued that the common law elements to establish a cemetery should be dispositive because the first cremains were spread in 1949, thirty-five years before the adoption of the relevant county ordinance governing cemeteries.<sup>193</sup> Shilling argued that at common law, a family cemetery could be established by (i) the appropriation of land for use as a cemetery, (ii) internment of family members on the property, (iii) setting off of that land, and (iv) the erection of markers on the site.<sup>194</sup> Shilling argued that an actual "burial" of remains was not inherent in the concept of a

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183. 279 Va. 720, 728, 691 S.E.2d 806, 810 (2010).

184. *Id.* at 722–23, 691 S.E.2d at 807.

185. *Id.*

186. *Id.*

187. *Id.* at 722, 691 S.E.2d at 807.

188. *Id.* at 723, 691 S.E.2d at 807.

189. *Id.*

190. *Id.*

191. *Id.* at 725, 691 S.E.2d at 809.

192. *Id.* at 728, 691 S.E.2d at 810.

193. *Id.* at 726, 691 S.E.2d at 809.

194. *Id.* (citing *Heiligman v. Chambers*, 338 P.2d 144, 146–48 (Okla. 1959)).

cemetery under the common law.”<sup>195</sup> The court disagreed, however, and noted that the site at question in *Heiligman v. Chambers*, a 1959 case from Oklahoma, contained the buried remains of three bodies.<sup>196</sup>

The court next rejected Shilling’s argument that under the Virginia Code cemeteries do not require burials.<sup>197</sup> Shilling argued that section 54.1-2310 defined a cemetery as any land used for the internment of human remains.<sup>198</sup> Shilling contended that the spreading of cremains qualified as a “final disposal of human remains,”<sup>199</sup> and thus as a legal internment.<sup>200</sup> The court disagreed, however, and noted that the final sentence of the definition of internment stated that “[t]he sprinkling of ashes on church grounds shall not constitute internment.”<sup>201</sup> The court ultimately held that internment is essential to the creation of a cemetery; as no internment had occurred on the hilltop site, no legal cemetery had been created.<sup>202</sup>

## IX. CLUSTER DEVELOPMENTS

Cluster developments are essentially subdivisions that allow for higher density development in a certain district so long as the development is clustered together, leaving the rest of the district as open space.<sup>203</sup> Cluster developments are seen as having many potential benefits and a solution to problems faced by ever-increasing development and decreasing open space.<sup>204</sup> Through recent legislation, the General Assembly has attempted to make it

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195. *Id.*

196. *Id.* (citing *Heiligman*, 338 P.2d at 147).

197. *Id.* at 727, 691 S.E.2d at 810.

198. *Id.* at 726, 691 S.E.2d at 809; *see also* VA. CODE ANN. § 54.1-2310 (Repl. Vol. 2009) (defining “internment” as “all forms of final disposal of human remains”).

199. *See* VA. CODE ANN. § 54.1-2310.

200. *Shilling*, 279 Va. at 726, 691 S.E.2d at 809–10.

201. *Id.* at 727, 691 S.E.2d at 810 (alteration in original) (quoting VA. CODE ANN. § 54.1-2310 (Repl. Vol. 2009)) (internal quotation marks omitted).

202. *Id.* at 727–28, 691 S.E.2d at 810.

203. *See* Patricia E. Salkin, *Zoning and Land Use Planning*, 36 REAL ESTATE L. J. 628, 639–40 (2007).

204. *See, e.g.*, Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 WM. & MARY ENVTL. L. & POLY REV. 121, 148 (2009); *Cluster/Conservation Development*, U. ILL. EXTENSION, <http://urbanext.illinois.edu/lcr/cluster.cfm>.

easier for developers to obtain local approval to construct cluster developments.

In House Bill 1931, the General Assembly amended section 15.2-2286.1 of the Virginia Code to prohibit localities from placing certain requirements on cluster developments.<sup>205</sup> Subsection (B) now specifically allows localities to subject cluster developments to applicable land use ordinances; however, subsection (B) prohibits localities from imposing “more stringent land use requirements” on cluster developments.<sup>206</sup> Furthermore, localities now are prohibited from denying the extension of water or sewer lines from adjacent properties to cluster developments, so long as the development is “located within an area designated for water and sewer service” by the locality.<sup>207</sup> Finally, for any “open space” or “conservation areas”<sup>208</sup> within a cluster development, localities are prohibited from (i) requiring the identification of “slopes, species of woodlands or vegetation and whether any of such species are diseased, the locations of species listed as endangered, threatened, or of special concern, or riparian zones” in those areas; (ii) requiring that those areas be excluded from density calculations; (iii) prohibiting the construction of roads used for access to the cluster development in those areas; (iv) prohibiting the location of storm water management areas in those areas; and (v) requiring that cluster development lots directly abut those areas.<sup>209</sup>

## X. FARM WINERIES

The Virginia secretary of agriculture and forestry has noted that “[t]he Virginia wine industry is one of the fastest growing segments of Virginia’s diverse agricultural industry.”<sup>210</sup> Indeed,

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205. H.B. 1931, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 25, 2011, ch. 549, 2011 Va. Acts 869).

206. VA. CODE ANN. § 15.2-2286.1(B) (Cum. Supp. 2011).

207. *Id.*

208. “Open space” and “conservation areas” have the same meaning as “open-space land” in Virginia Code section 10.1-1700. *See id.* § 15.2-2286.1(B) (Cum. Supp. 2011) (referring to *id.* § 10.1-1700 (Repl. Vol. 2012)).

209. *Id.* § 15.2-2286.1(B).

210. Press Release, Office of the Governor, Virginia Wine Industry Jobs Grow by 50%; Economic Impact Doubles, New Study Finds (Feb. 2, 2012), *available at* [http://www.virginiawine.org/system/datas/344/original/Virginia\\_Wine\\_Industry\\_Jobs\\_Grow\\_by\\_50\\_Economic\\_Impact\\_Doubles\\_New\\_Study\\_Finds.pdf](http://www.virginiawine.org/system/datas/344/original/Virginia_Wine_Industry_Jobs_Grow_by_50_Economic_Impact_Doubles_New_Study_Finds.pdf).

the industry has seen significant increases in grape production and winery construction since 2000.<sup>211</sup> It contributes \$747 million annually to the economy of the Commonwealth, an increase of 106 percent over figures from a 2005 economic impact study.<sup>212</sup> In 2006, the General Assembly added a new section to the Virginia Code specifically protecting farm wineries from local regulations.<sup>213</sup> The adoption of this statute and the increasing development and expansion of the Virginia wine industry has caused friction between localities and winery owners that has played out in various venues.

A. *Court Decisions: Marterella v. Bellevue Landowners Council, Inc.*

In *Marterella v. Bellevue Landowners Council, Inc.*, the Supreme Court of Virginia held that a trial court could not set aside a jury verdict in favor of the plaintiff vineyard owner.<sup>214</sup> In this case, the Marterellas began to develop a farm winery on a lot in the Bellevue Farms Subdivision.<sup>215</sup> The Marterellas intended to operate their farm winery for both the production of wine and the on-site sale of wine to members of the public.<sup>216</sup> They believed that both of these activities would be allowed on the lot they were developing based on a provision in the subdivision handbook which provided that “[a]griculture is the only commercial activity expressly permitted under the covenants. Any other work that . . . leads to regular visits by customers, suppliers, business associates or others, is not acceptable.”<sup>217</sup> In 2005, the Marterellas requested the Bellevue Landowners Council, Inc. (“BLOC”) to allow them to begin the on-site sale of wine.<sup>218</sup> BLOC denied their request, but the Marterellas began selling wine despite BLOC’s de-

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211. See, e.g., Philip Carter Strother & Robert Jackson Allen, *Wine Tasting Activities in Virginia: Is America’s First Wine Producing State Destined to Wither on the Vine Due to Overregulation?*, 23 T.M. COOLEY L. REV. 221, 230–31 (2006).

212. Press Release, Office of the Governor, *supra* note 210.

213. Act of Apr. 6, 2006, ch. 794, 2006 Va. Acts 1220 (codified as amended at VA. CODE ANN. § 15.2-2288.3 (Cum. Supp. 2006)).

214. *Marterella v. Bellevue Landowners Council, Inc.*, No. 111625, slip op. at 5 (Va. May 11, 2012).

215. *Id.* at 1.

216. *See id.*

217. *Id.* at 2 (first alteration in original).

218. *See id.* at 1.

nial.<sup>219</sup> BLOC subsequently petitioned the circuit court for injunctive relief to prohibit the Marterellas from selling wine on their property.<sup>220</sup> BLOC argued that the Marterellas were selling wine in violation of the subdivision's declarations and covenants; the Marterellas argued that BLOC's claim was "barred by estoppel, waiver and selective enforcement."<sup>221</sup>

At trial, the Marterellas presented evidence that the subdivision's declarations and covenants were misleading and inconsistent and that other commercial activities were allowed elsewhere in the subdivision.<sup>222</sup> The Marterellas further testified that they had "made a significant financial investment in their vineyard and winery."<sup>223</sup> Over BLOC's objection, the trial court submitted the Marterellas' estoppel plea to the jury, instructing it that it could return a verdict for the Marterellas if (i) BLOC suggested that the Marterellas' intended use was permitted; (ii) the Marterellas relied on those suggestions; and (iii) the Marterellas made financial investments in reliance on those suggestions.<sup>224</sup> The court further instructed the jury that it could return a verdict for the Marterellas if BLOC had not been enforcing the covenants uniformly in Bellevue Farms.<sup>225</sup> Following deliberation, the jury returned a verdict for the Marterellas; however, the court set aside the verdict and entered final judgment for BLOC, holding that "the term agriculture as 'commonly understood' [does] not include the on-site retail sale of wine" and that the Marterellas unreasonably interpreted the language.<sup>226</sup>

The Supreme Court of Virginia reversed the trial court's judgment, holding that "[a] trial court may set aside a jury verdict only if that verdict is plainly wrong or without credible evidence to support it."<sup>227</sup> As no definition of agriculture was given in the jury

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219. *Id.*

220. *Id.*

221. *Id.* at 1–2.

222. *Id.* at 2–3.

223. *Id.* at 3.

224. *Id.* at 2–3.

225. *Id.* at 3.

226. *Id.* at 3–4.

227. *Id.* (citing VA. CODE ANN. § 8.01-430 (Repl. Vol. 2007)).

instructions, the jury was free to determine if its definition in the declarations and covenants included the on-site sale of wine.<sup>228</sup> The supreme court held that nothing in the instructions required a finding of reasonableness, and thus that the trial court deviated from the law by injecting a reasonableness standard following the jury verdict.<sup>229</sup> As there was no reasonableness requirement, the jury's verdict was not plainly wrong, and the trial court therefore erred by setting it aside.<sup>230</sup>

### B. *Attorney General Opinions*

In an opinion dated August 2010, the attorney general clarified his understanding of farm buildings and their relationship to the Uniform Statewide Building Code ("Building Code").<sup>231</sup> Under the Virginia Code, farm buildings are defined as buildings used *primarily* for farming operations.<sup>232</sup> If a structure qualifies as a farm building, it is exempt from the requirements of the Building Code.<sup>233</sup> If, however, it does not qualify, it must conform to the Building Code's requirements.<sup>234</sup>

The question presented to the attorney general was whether the use of farm buildings to occasionally host events, such as concerts and weddings, would disqualify the structure from the "farm building" definition and thus require it to conform with the Building Code, requiring the owner to obtain a new occupancy permit.<sup>235</sup> The attorney general determined that the crucial factor regarding the classification of a farm building is its primary use.<sup>236</sup> The attorney general stated that, in his opinion, the inclusion of the word *primarily* in Virginia Code section 36-97 indicated that "the General Assembly contemplated that some non-specified uses would be made of these buildings."<sup>237</sup> Ultimately, therefore, the

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228. *Id.* at 4–5.

229. *Id.* at 5 (citation omitted).

230. *Id.*

231. Op. to Mr. Kevin J. Burke, Esq. (Aug. 23, 2010).

232. VA. CODE ANN. § 36-97 (Repl. Vol. 2011). Specific operations defined include (i) storage and production of agricultural products, (ii) sheltering of livestock, (iii) offices relating to the farm operations, and (iv) the storage of farm equipment. *Id.*

233. VA. CODE ANN. § 36-99(B) (Repl. Vol. 2011).

234. Op. to Mr. Kevin J. Burke, Esq. (Aug. 23, 2010).

235. *Id.*

236. *Id.*

237. *Id.*

attorney general determined that the occasional use of farm buildings for events would not constitute a change in their primary use and thus would not require the owner to obtain a new occupancy permit or comply with the Building Code.<sup>238</sup>

C. *Alcoholic Beverage Control Board Hearings: In Re Paradise Springs Winery, LLC*

This hearing involved the Virginia Alcoholic Beverage Control Board (“ABC Board”) granting a Class A Farm Winery License to Paradise Springs Winery, LLC (“Paradise Springs”) despite two objections from the Fairfax County Board of Directors, the Fairfax County Board of Supervisors, the Fairfax County Zoning Administration, and the local Noble Estates Homeowners Association (the “County”).<sup>239</sup> Under the Virginia Code, the ABC Board is granted the authority to license farm wineries for operation in the Commonwealth of Virginia.<sup>240</sup> The ABC Board has broad discretion for granting a license, but may consider the factors outlined in code section 4.1-222 when deciding whether or not to do so.<sup>241</sup> The County objected to Paradise Springs’ license application on two counts under code section 4.1-222.<sup>242</sup>

The County first objected on the grounds that the location of the winery would “adversely affect real property values or substantially interfere with the usual quietude and tranquility of [the] residential area.”<sup>243</sup> This objection was based largely on the contention that the winery would generate unsafe road conditions, especially due to the narrow and winding nature of nearby roads.<sup>244</sup> Furthermore, the County argued that the winery would attract large numbers of visitors, disrupting the peaceful nature of the neighborhood.<sup>245</sup> Addressing these arguments, Paradise Springs presented evidence showing that many members of the

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238. *Id.*

239. *In re Paradise Springs Winery, LLC*, Alcoholic Beverage Control Bd., Appl. #056973, 1 (Sept. 3, 2009).

240. VA. CODE ANN. §§ 4.1-207, 4.1-222 (Repl. Vol. 2010).

241. *See id.* § 4.1-222 (Repl. Vol. 2010).

242. *In re Paradise Springs Winery*, at 3.

243. *Id.*

244. *Id.* at 11–15.

245. *Id.*

local community desired the winery's opening because it would preserve the rural nature of the community.<sup>246</sup> Additionally, it presented evidence showing that other entities which attract large numbers of people, such as parks and soccer fields, were allowed to operate in the area.<sup>247</sup> Finally, Paradise Springs showed that other farm wineries around the state are similarly situated in rural areas with winding, narrow country roads.<sup>248</sup>

The County next contended that the ABC Board should deny the license because the site that Paradise Springs had chosen did "not conform to the requirements of the governing body of the County."<sup>249</sup> The land on which Paradise Springs wanted to open its winery was a 36-acre parcel zoned R-C (Residential Conservation), and most of the land was forested; however, a portion had been cleared.<sup>250</sup> Paradise Springs' intent was to use five acres of the open land for the production of wine, two-and-one-half of which would be used exclusively for growing grapes.<sup>251</sup> In Fairfax County, agricultural uses are an acceptable accessory use permitted in R-C districts; however, the local zoning administration determined that Paradise Springs' winery would not qualify as an agricultural use because the local zoning ordinance's definition of "agricultural" did not include the production of wine from grapes not grown immediately on the subject property.<sup>252</sup> As the owners of Paradise Springs were not intending to grow one hundred percent of the grapes used in their wine production on the site in Fairfax County, the zoning officials analogized their intended use to an establishment for production and processing, a use not permitted in the R-C district.<sup>253</sup> Considering that less than one hundred percent of the grapes used would be grown on-site and that the use was analogized to production and processing rather than

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246. *Id.* at 16–22.

247. *Id.* at 20.

248. *Id.* at 21.

249. *Id.*; *see also*, VA. CODE ANN. § 4.1-222(A)(2)(a) (Repl. Vol. 2010).

250. *In re Paradise Springs Winery*, at 8, 16.

251. *Id.* at 6.

252. *Id.* at 8. The Virginia Code requires that for a winery to obtain a Class-A Farm Winery license, at least fifty-one percent of the grapes used in producing the wine must be grown on land owned or leased by the winery. *See* VA. CODE ANN. § 4.1-219 (Repl. Vol. 2010).

253. *In re Paradise Springs Winery*, at 9.

agricultural, the zoning administration denied Paradise Springs' application for a special use permit.<sup>254</sup>

Following a hearing, the ABC Board found that both of the County's objections were unsubstantiated.<sup>255</sup> Addressing the first objection, the ABC Board held that the winery's operation would not "*substantially interfere* with the *usual quietude and tranquility* of the residential area."<sup>256</sup> The ABC Board found that "[t]he most persuasive evidence" with regard to this argument was that other Farm Wineries across the state, situated on similarly narrow and winding roads, had been granted farm winery licenses.<sup>257</sup> Furthermore, the ABC Board noted that similar crowd drawing attractions are located around Paradise Springs' site.<sup>258</sup>

Addressing the second objection, the ABC Board held that the Virginia Code does not require farm wineries to grow one hundred percent of their wine-producing grapes on site.<sup>259</sup> The ABC Board first noted that the Virginia Code only requires a Class A Farm Winery to use at least fifty-one percent of grapes grown on land *owned or leased* by the farm winery and that Paradise Springs had successfully shown that it would meet this fifty-one percent mark.<sup>260</sup> The ABC Board held that by essentially requiring one hundred percent of Paradise Springs' grapes to be grown on site, Fairfax County's zoning ordinance was inconsistent with the Virginia ABC Act, and thus could not be used "to deny the issuance of a Class A Farm Winery license" to Paradise Springs.<sup>261</sup> Furthermore, the ABC Board noted that the County's actions in denying the special use permit violated Virginia Code section 4.1-128(A), which states that no locality shall "adopt an ordinance or resolution that prohibits or regulates the storage, warehousing, and wholesaling of wine in accordance with Title 4.1, regulations

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254. *Id.* at 8–9. The owners of Paradise Springs had, however, laid out three scenarios for obtaining at least fifty-one percent of the grapes they needed for production from land owned or leased by Paradise Springs. *Id.* at 6–7.

255. *Id.* at 23, 26.

256. *Id.* at 27.

257. *Id.*

258. *Id.*

259. *Id.* at 24.

260. *Id.* at 24–25.

261. *Id.* at 25–26.

of the Alcoholic Beverage Control Board, and federal law at a licensed farm winery.”<sup>262</sup>

In *Marterella*, the Supreme Court of Virginia decided that a jury could find that the general definition of “agriculture” could include the on-site retail sale of wine.<sup>263</sup> Through the *Paradise Springs* decision, the ABC Board determined that local ordinances were inconsistent with state regulations and issued a farm winery license over the objections of the locality.<sup>264</sup> These decisions, taken together with the ABC Board’s grant of authority over alcoholic beverage matters within the Commonwealth and the fairly recent Virginia Farm Winery Zoning Act,<sup>265</sup> suggest that the state government is expressing a desire to preempt localities in farm winery regulation, except in the cases of very large scale events and unreasonable outdoor amplified music.<sup>266</sup>

## VI. CONCLUSION

From Tidewater in the East to Shenandoah to the Cumberland Plateau in the West, the Commonwealth of Virginia covers 42,774.2 square miles of land and water.<sup>267</sup> Since the turn of the millennium, the Commonwealth’s population has increased by nearly one million individuals, and its population density has increased from 179.2 persons per square mile to 202.6 persons per

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262. *Id.* (quoting VA. CODE ANN. § 4.1-128(A) (Repl. Vol. 2010)).

263. *See supra*, text accompanying notes 214–30.

264. *See supra*, text accompanying notes 239–62.

265. Act of Apr. 6, 2006, ch. 794, 2006 Va. Acts 1220 (codified as amended at VA. CODE ANN. § 15.2-2288.3 (Cum. Supp. 2006)).

266. These recent developments favoring a more comprehensive state-wide approach to the farm winery industry in Virginia suggest a trend away from earlier decisions that allowed for local regulations affecting alcoholic beverages to stand in light of title 4.1 of the Virginia Code and ABC regulations. Two of the most seminal cases dealing with local regulation of alcoholic beverage sales are *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 424, 281 S.E.2d 836, 842 (1981) (holding that localities could use *valid zoning ordinances* to regulate the *location* of establishments selling alcoholic beverages); and *Cnty. of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 204, 559 S.E.2d 627–30 (2002) (holding that a locality could condition a use permit on the applicant not selling alcoholic beverages at his establishment) (citing *Tiny House, Inc.*, 422 Va. at 422–23, 281 S.E.2d at 841). The passage of the Farm Winery Act, exemptions from the building code for farm structures, and the recent decisions in *Marterella* and *Paradise Springs* all suggest that if the Supreme Court of Virginia was confronted with a local ordinance that attempted to regulate the sale of alcohol on a farm winery, it may reach a different result than it did in *Tiny House* and *Windy Hill*.

267. United States Summary: 2000, Population and Housing Unit Courts, tbl. 17, available at <http://www.census.gov/prod/cen2000/phc3-us-pt1.pdf>.

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square mile.<sup>268</sup> As Virginia's population continues to see a steady increase and population densities rise, it is important for both individuals and the state to continue practicing responsible stewardship of the Old Dominion's land in a manner that honors the property rights of its citizens while promoting sustainable practices in land use.

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268. Resident Population Data, Population Density, *available at* <http://2010.census.gov/2010census/data/apportionment-dens-text.php>.