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# CONDITIONAL ZONING IN VIRGINIA

*Frank O. Brown, Jr.\**  
*Susanne L. Shilling\*\**

## I. INTRODUCTION

Zoning ordinances in the United States are of relatively recent origin.<sup>1</sup> Local government planners were quick to recognize their usefulness as a means of land use control,<sup>2</sup> and over the years zoning ordinances have been developed into many varied and complex forms. This article will focus on conditional zoning, one of the newest forms of zoning, as it exists today in Virginia. Some background on zoning in general, however, will be useful to achieve a proper understanding of conditional zoning.

The greatest impetus to the development of zoning in general came as the result of a 1926 United States Supreme Court decision, *Village of Euclid v. Ambler Realty Co.*<sup>3</sup> *Euclid* stands for the proposition that zoning is a valid exercise of the state's police power.<sup>4</sup> Since *Euclid*, all fifty states have enacted enabling legisla-

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1. The first zoning ordinance in the U.S. was adopted by New York City in July 1916. A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 1-6 (4th ed. 1981).

2. Various other types of land use controls, however, such as building set back lines, had been evolving prior to the development of zoning ordinances. See, e.g., *Eubank v. City of Richmond*, 226 U.S. 137 (1912), in which the United States Supreme Court held that although the statutory establishment of building lines was not invalid per se, the manner in which the setback lines were established in the City of Richmond was invalid in that it permitted one set of property owners to control the property rights of other property owners, without the benefit of a fixed standard for the exercise of such discretionary power. The Court stated: "[T]he property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality." *Id.* at 143-44.

3. 272 U.S. 365 (1926).

4. *Accord*, *Gorieb v. Fox*, 145 Va. 554, 134 S.E. 914 (1926), *aff'd*, 274 U.S. 603 (1927). The

tion delegating this police power to their localities,<sup>5</sup> although the legislation may take either a permissive or a mandatory form.<sup>6</sup> As a result of the great influx of state legislation, almost every major city in the United States has enacted zoning ordinances.<sup>7</sup>

In *Euclid*, the form of zoning at issue was that of a locality divided into zoning districts, with the land within each district subject to uniform regulation. This type of zoning became known as "Euclidean" zoning and was used as the primary model for zoning ordinances throughout the United States.<sup>8</sup> Yet the requirement of uniform regulation for each district can be onerous to some landowners who wish to use their land in a manner different from that prescribed by the zoning ordinance, and especially onerous when that use would otherwise be beneficial to the community. In order

Virginia Supreme Court of Appeals held:

It is within the police power of the legislature to pass an act authorizing the councils of cities and towns to divide their municipalities into "districts" or "zones," and to establish building lines on the streets to which all property owners must conform; and such an act, if passed in the interest of the health, safety, comfort, or convenience of the public, or for the promotion of the public welfare, when not unreasonable, is constitutional and valid.

145 Va. at 561-62, 134 S.E. at 916.

5. N. WILLIAMS, *AMERICAN PLANNING LAW, LAND USE, AND THE POLICE POWER* 8 (1974).

6. In Virginia, much of the land use planning legislation is permissive and not mandatory, so that localities are not required to adopt zoning ordinances. For example, VA. CODE ANN. § 15.1-446.1 (Repl. Vol. 1981) requires that every governing body adopt a comprehensive plan by July 1, 1980, but the statute is permissive regarding the components of the comprehensive plan, stating that "[i]t may include . . . a zoning ordinance and zoning district maps" (emphasis added). VA. CODE ANN. § 15.1-486 (Repl. Vol. 1981) states that "[t]he governing body of any county or municipality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into [zoning] districts . . ." (emphasis added).

7. Houston, Texas is an anomaly in that it has adopted no zoning ordinance. The results of Houston's laissez-faire attitude toward land development and control are recited in a brief article entitled *A City's Growing Pains*, NEWSWEEK, Jan. 14, 1980, at 45.

8. See, e.g., VA. CODE ANN. § 15.1-488 (Repl. Vol. 1981), which provides that: "All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts."

Yet cities may have special powers, conferred by their charters, to make exceptions to this uniformity requirement through the issuance of use permits. For example, the Council of the City of Richmond (which consists of nine elected members) is empowered to authorize, by an extraordinary majority of at least six votes, the use of land, buildings and structures in a district even though the use does not conform to the regulations and restrictions for the district. In addition, the Council has the power to *impose* conditions on the use of the land when it becomes necessary to protect the community from any detrimental effects of the special use. RICHMOND, VA., CHARTER § 17.11 (1975); RICHMOND, VA., CODE § 32.1-1050 (1975).

to alleviate these burdens, states have enacted enabling legislation to provide for flexibility devices,<sup>9</sup> including variances<sup>10</sup> and special exceptions.<sup>11</sup>

A variance, which is granted by a board of zoning appeals<sup>12</sup> or an

9. "Ever since basic zoning and land use regulation were upheld by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*, local legislatures, administrative bodies, and courts have been groping in the drak [sic] for ways to make the rather rigid 'Euclidean' formula more flexible and adaptable . . . ." Comment, *Toward a Strategy for Utilization of Contract and Conditional Zoning*, 51 J. URB. L. 94, 94 (1973).

10. *E.g.*, VA. CODE ANN. § 15.1-430(p) (Repl. Vol. 1981), which states:

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done.

11. Special exceptions are also referred to as conditional uses and as conditional uses by special exception. VA. CODE ANN. § 15.1-430(i) (Repl. Vol. 1981) states: "'Special exception' means a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith."

12. *E.g.*, VA. CODE ANN. § 15.1-495 (Repl. Vol. 1981), which provides in part:  
Boards of zoning appeals shall have the following powers and duties:

(b) To authorize upon appeal or original application in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of such piece of property, or of the use or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the use of the property or where the board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

- (1) That the strict application of the ordinance would produce undue hardship.
- (2) That such hardship is not shared generally by other properties in the same zoning district and the same vicinity.
- (3) That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

equivalent quasi-judicial body, is considered to be a constitutional "safety valve" to the zoning ordinances as applied to specific parcels of land.<sup>13</sup> Examples of typical variances are those granted for lot width or depth, road frontage, setbacks, lot size, and building height. The burden of proof is on the applicant to demonstrate by a preponderance of the evidence<sup>14</sup> that the literal application of the ordinance to his or her property will result in unnecessary hardship. The variance is, by its very nature, of limited application in that the relief awarded to the landowner is personal in nature; the zoning itself has not been changed.<sup>15</sup>

Special exceptions<sup>16</sup> also provide a degree of flexibility to Eucli-

No such variance shall be authorized except after notice and hearing as required by § 15.1-431.

No variance shall be authorized unless the board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

In authorizing a variance the board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary to the public interest, and may require a guarantee or bond to insure that the conditions imposed are being and will continue to be complied with.

13. The New York Court of Appeals noted that:

The object of a variance granted by the Board of Appeals in favor of property owners suffering unnecessary hardship in the operation of a zoning law, is to afford relief to an individual property owner laboring under restrictions to which no valid general objection may be made. Where the property owner is unable reasonably to use his land because of zoning restrictions, the fault may lie in the fact that the particular zoning restriction is unreasonable in its application to a certain locality, or the oppressive result may be caused by conditions peculiar to a particular piece of land. In the former situation, the relief is by way of direct attack upon the terms of the ordinance. In order to prevent the oppressive operation of the zoning law in particular instances, when the zoning restrictions are otherwise generally reasonable, the zoning laws usually create a safety valve under the control of a Board of Appeals, which may relieve against "unnecessary hardship" in particular instances.

*Otto v. Steinhilber*, 282 N.Y. 71, —, 24 N.E.2d 851, 852 (1939) (citations omitted). See also *Alleghany Enterprises, Inc. v. City of Covington*, 217 Va. 64, 225 S.E.2d 383 (1976).

14. *Trotter v. Board of Zoning Appeals*, No. F-251 (EEE) (Henrico Cir. Ct. Jan. 12, 1967). See also C. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* 175 (1977).

15. "No provision of § 15.1-495 shall be construed as granting any board [of zoning appeals] the power to rezone property." VA. CODE ANN. § 15.1-495(e) (Repl. Vol. 1981).

16. Rathkopf has indicated that:

The term "special exception" is a carryover from the early days of zoning; the term "special permit" goes even farther back, being found in regulatory ordinances prior to zoning. Because the early zoning ordinances adopted these terms, the courts ruling upon such provisions necessarily used the language of the ordinances before them which perpetuated the use of these terms. "Special exception" is clearly a misnomer.

dean zoning by allowing a local governing body to establish in each zoning district certain categories of uses other than those expressly permitted by the zoning ordinance. These special exceptions are not permitted as a matter of right because such uses may affect the community adversely, unless subjected to special conditions, in which case the special exception use may be beneficial.<sup>17</sup> Classic examples of special exception uses are hospitals and private recreation associations in areas zoned residential.<sup>18</sup>

Although variances and special exceptions provide some relief to the strictures of Euclidean zoning, local governing bodies, faced with complex land use issues and ever-increasing development pressures, have found the limited flexibility of variances and special exceptions to be inadequate to meet their needs. As a result, local planning bodies have been creative in developing numerous other flexibility devices to cope with these problems. The major devices are planned unit developments, floating zones, overlay zones, transferable development rights, and conditional zoning.

## II. CONDITIONAL ZONING

### A. Introduction

Conditional zoning is one of the most important flexibility devices to emerge in Virginia in recent years. The Virginia Code defines conditional zoning as "the allowing of reasonable conditions governing the use of . . . property, such conditions being in addi-

Since the use is specifically provided for in the ordinance as one to be permitted where the conditions legislatively prescribed are found, no exception to the ordinance is being made.

3 RATHKOPF, *supra* note 1, at 41-7.

17. See VA. CODE ANN. § 15.1-495 (Repl. Vol. 1981).

Boards of zoning appeals shall have the following powers and duties:

. . .

(f) To hear and decide applications for such special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest and may require a guarantee or bond to insure that the conditions imposed are being and will continue to be complied with.

18. Rathkopf lists the following examples of special exceptions: "motels, churches, gasoline service stations, restaurants, quarries, senior citizen housing, fraternity houses, trucking terminals, billiard parlors, institutional uses, schools and colleges, social service centers, clubs, driving ranges and miniature golf courses, drive-in restaurants, day care centers, and television transmitting towers." RATHKOPF, *supra* note 1, at 41-4, -5.

tion to the regulations provided for a particular zoning district or zone by the overall zoning ordinance."<sup>19</sup> Because the validity of conditional zoning has not been addressed by the Virginia Supreme Court, a look at the statutory and case law of other jurisdictions is helpful in anticipating the issues which may be raised with respect to conditional zoning in Virginia.

### B. *The Validity of Conditional Zoning*

Zoning with conditions<sup>20</sup> has been criticized by some commentators on the basis of its similarity to contract zoning, which is illegal.<sup>21</sup> Furthermore, many courts have ruled that zoning with conditions is *ultra vires*, illegal, void, and contrary to public policy.<sup>22</sup>

19. VA. CODE ANN. § 15.1-430(q) (Repl. Vol. 1981). One authority has broadly defined conditional zoning as "a zoning reclassification subject to conditions not generally applicable to land similarly zoned. In other words, when an area of land is rezoned from one classification to another, and such change is not outright but subject to some type of condition, then we are confronted with a conditional zoning problem." Miller, *The Current Status of Conditional Zoning*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 121, 122 (1974).

20. Most courts in other states have not used consistent labels in analyzing cases in which zoning amendments have been granted accompanied by conditions or restrictions. The authors have chosen the generic term "zoning with conditions" to refer to such zoning which was at issue in the cases discussed in this section.

21. Compare RATHKOPF, *supra* note 1, with ROHAN, ZONING AND LAND USE CONTROLS (1978). Rohan notes the following distinction between "contract zoning" and "conditional zoning." Contract zoning involves a reciprocal agreement between the landowner and the municipality by which the owner promises to restrict the use of property in return for the municipality's promise to allow the rezoning. Many courts hold such agreements illegal as an *ultra vires* bargaining away of the local government's police power. Conditional zoning, on the other hand, involves a situation in which the property owner covenants to perform certain conditions, such as restricting use, dedicating land, or making physical improvements, even though the municipality makes no commitment to rezone. ROHAN, *supra*, at 1-43 n.21. See also Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972).

In *Midtown Properties, Inc. v. Township of Madison*, 68 N.J. Super. 197, \_\_\_, 172 A.2d 40, 45 (Super. Ct. Law Div. 1961), *aff'd per curiam*, 78 N.J. Super. 471, 189 A.2d 226 (Super. Ct. App. Div. 1963), a New Jersey court succinctly stated its objection to contract zoning:

The viciousness of this contract may be briefly summarized thusly:

(a) The township having adopted a master plan it could only be amended or changed in accordance with law and not by a contract which destroys such master plan and results in haphazard or piecemeal zoning.

(b) The defendants surrendered their inherent power, right, and duty, to keep their zoning and planning ordinances mutable by making necessary amendments or changes for the benefit of the public.

22. See, e.g., *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956); *Baylis v. City of Baltimore*, 219 Md. 164, 148 A.2d 429 (1959); *Rose v. Paape*, 221 Md. 369, 157 A.2d 618 (1960); *Carole*

These courts have invalidated zoning with conditions regardless of which method has been used to impose the condition, whether they are contained in a separate document, such as a collateral agreement or declaration of covenants,<sup>23</sup> whether imposed as a condition in the minutes of the proceedings or in the resolution or rezoning ordinance,<sup>24</sup> or whether offered by the landowner orally or in writing as an inducement in favor of the rezoning.<sup>25</sup> Furthermore, these cases fail to distinguish among the various forms of conditions which may be imposed, such as a restriction upon the use of property<sup>26</sup> or upon a feature of a use,<sup>27</sup> or a requirement that the land-

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Highlands Citizen Ass'n, Inc. v. Board of County Comm'rs, 222 Md. 44, 158 A.2d 663 (1960); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966); Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (Super. Ct. Law Div. 1961), *aff'd per curiam*, 78 N.J. Super. 471, 189 A.2d 226 (Super. Ct. App. Div. 1963); Houston Petroleum Co. v. Automotive Prods. Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952); Haymon v. City of Chattanooga, 513 S.W.2d 185 (Tenn. App. 1973); City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953); *cf.* City of Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967); Pressman v. Mayor of Baltimore, 222 Md. 330, 160 A.2d 379 (1960); Yates v. Mayor of Jackson, 244 So. 2d 724 (Miss. 1971).

23. Houston Petroleum Co. v. Automotive Prods. Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952); Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (Super. Ct. Law Div. 1961), *aff'd per curiam*, 78 N.J. Super. 471, 189 A.2d 226 (Super. Ct. App. Div. 1963). *But see* Haymon v. City of Chattanooga, 513 S.W.2d 185 (Tenn. App. 1973).

24. Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959).

25. In Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971), the landowner's attorney orally promised the legislative body that buildings on the parcel would conform to design plans. The court invalidated the rezoning legislation, stating:

Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature described are not otherwise required or contemplated. Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land.

*Id.* at 545, 178 S.E.2d at 441. *See also* City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953).

26. In Allred v. City of Raleigh, the court applied the *ultra vires* rationale to invalidate a zoning amendment which would have allowed the construction of a high-rise apartment complex in a residential area. Although the amendment would have allowed a variety of uses, the ordinance was adopted in consideration of the one specific use and plan proposed. The court construed the state enabling act to require that all uses permitted by a particular zoning classification be made available to all property within the district. 277 N.C. at \_\_\_, 178 S.E.2d at 440. *See also* Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959) (use was restricted to that of a funeral home).

27. Harnett v. Austin, 93 So. 2d 86 (Fla. 1956) (buffer); Baylis v. City of Baltimore, 219

owner perform some act in connection with the rezoning, such as dedicating a portion of the property, or a separate property, for public purposes.<sup>28</sup>

The indiscriminate judicial condemnation of the practice of zoning with conditions in these cases appears, however, to be grounded upon non-compliance with a basic principle which underlies all zoning practices—that in order to be a valid exercise of the police power, the authorization to zone must be exercised in a reasonable manner so as to secure the health, safety, and welfare of the public and not arbitrarily, discriminatorily, or capriciously. In none of the cases in which the court expressed blanket disapproval of the challenged zoning was there a valid basis for the rezoning itself, independent of any conditions. No condition associated with illegal zoning would be upheld. Zoning with conditions, therefore, has inadvertently been associated with invalid zoning practices as a result of these early cases.

*Church v. Town of Islip*<sup>29</sup> was the first case to abandon this rigid analysis and hold in favor of zoning with conditions because of its utility as a flexible response to the pressures of urbanized growth. In *Church*, neighboring property owners challenged the change of zoning of a lot in the Town of Islip from a residential to a business use. They charged that the amendment was not in conformity with a comprehensive plan, that it arbitrarily singled out one tract for business zoning, and that it was illegal "contract zoning." Referring to the lower court's decision, the New York Court of Appeals noted that "community growth pressure forcing zoning changes negated the idea that the Town Board's action was arbitrary or without reason, and that there was nothing illegal about the Town Board's subjecting the new district to uses more restricted than customarily permitted in a business district."<sup>30</sup> In upholding the legality of the condition challenged, the court declared:

Surely these conditions were intended to be and are for the benefit

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Md. 164, 148 A.2d 429 (1959) (off-street parking); *Houston Petroleum Co. v. Automotive Prods. Credit Ass'n*, 9 N.J. 122, 87 A.2d 319 (1952) (set back).

28. *Harnett v. Austin*, 93 So. 2d 86 (Fla. 1956) (construction of a wall); *City of Knoxville v. Ambrister*, 196 Tenn. 1, 263 S.W.2d 528 (1953) (dedication of property for a park).

29. 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

30. *Id.* at 257, 168 N.E.2d at 682, 203 N.Y.S.2d at 868.

of the neighbors. Since the Town Board could have, presumably, zoned this Bay Shore Road corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation. Since the owners have accepted them, there is no one in a position to contest them. Exactly what "contract zoning" means is unclear and there is really no New York law on the subject. All legislation "by contract" is invalid in the sense that a Legislature cannot bargain away or sell its powers. But we deal here with actualities, not phrases. To meet increasing needs of Suffolk County's own population explosion, and at the same time to make as gradual and as little of an annoyance as possible the change from residence to business on the main highways, the Town Board imposes conditions. There is nothing unconstitutional about it. Incidentally, the record does not show any agreement in the sense that the owners made an offer accepted by the board.<sup>31</sup>

Although the court's analysis does not clearly distinguish zoning with conditions from illegal contract zoning, the holding is clear that where the rezoning is reasonable, there exists no constitutional prohibition against the imposition of reasonable conditions.

*Church* was the springboard for a long line of cases which upheld the practice of zoning with conditions.<sup>32</sup> Significantly, in terms of the methods by which the conditions may be legally imposed, the cases which upheld zoning with conditions are in direct opposition to those cases which held squarely against the legality of the practice. For example, courts have held that conditions may be imposed by a separate writing including a declaration of restric-

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31. *Id.* at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

32. *See, e.g.*, *Haas v. City of Mobile*, 289 Ala. 16, 265 So. 2d 564 (1972); *Transamerica Title Ins. Co. v. Tucson*, 23 Ariz. App. 385, 533 P.2d 693 (1975) (conditional zoning upheld, albeit specific conditions held to be invalid); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); *Ervin Co. v. Brown*, 228 Ga. 14, 183 S.E.2d 743 (1971); *Goffinett v. County of Christian*, 65 Ill. 2d 40, 357, N.E.2d 442 (1976); *Arkenberg v. City of Topeka*, 197 Kan. 731, 421 P.2d 213 (1966); *Sylvania Elec. Prods., Inc. v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *In re City of New York (Rosedale Avenue)*, 40 Misc. 2d 1076, 243 N.Y.S.2d 814 (1963); *Longdowd Corp. v. Straight Improvement Co.*, 39 Misc. 2d 1005, 242 N.Y.S.2d 260 (1963); *Point Lookout Civic Ass'n v. Town of Hempstead*, 12 A.D.2d 505, 207 N.Y.S.2d 121 (1960); *Gladwyne Colony, Inc. v. Township of Lower Merion*, 409 Pa. 441, 187 A.2d 549 (1963); *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970); *State ex rel. Myhre v. City of Spokane*, 70 Wash. 2d 207, 422 P.2d 790 (1967).

tive covenants,<sup>33</sup> that they may be stated in resolutions, in the minutes of the rezoning proceedings, or in the zoning ordinance itself,<sup>34</sup> or that they may be volunteered orally or in writing by the landowner.<sup>35</sup>

One jurisdiction has gone so far as to approve a collateral agreement between the landowner and the municipality. In the landmark case of *State ex rel. Myhre v. City of Spokane*,<sup>36</sup> a challenge was brought to the validity of an ordinance which amended the zoning ordinance of the City of Spokane by reclassification of certain property from a residence zone to a business zone. At the time the amendatory ordinance was adopted, the city entered into a collateral or concomitant zoning agreement with the owners of the property in the reclassified area. Subsequently, other city residential property owners brought an action to attack the validity of the amendatory ordinance as *ultra vires*.<sup>37</sup> In upholding the agreement, the court rejected as unsound the line of cases holding invalid all zoning ordinances which are amended with concomitant agreements, stating:

We hold the better rule to be that, before deciding to amend a zoning ordinance, the city must weigh the benefits which will flow to the public generally against the detriment, if any, to the adjacent property owners or to the public which may result therefrom. An amendment to a zoning ordinance and a concomitant agreement should be declared invalid only if it can be shown that there was no valid reason for a change and that they are clearly arbitrary and unreasonable, and have no substantial relationship to the public health, safety, morals, and general welfare, or if the city is using the concomitant agreement for bargaining and sale to the highest bidder or solely for

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33. See, e.g., 8 N.Y.S.2d at 254, 168 N.E.2d at 680, 203 N.Y.S.2d at 866. *Bucholz v. City of Omaha*, 174 Neb. 852, 120 N.W.2d 270 (1963) and *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) held that a city may enforce such restrictive covenants as a third party beneficiary.

34. *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); *Sylvania Elec. Prods., Inc. v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962).

35. *Ervin Co. v. Brown*, 228 Ga. 14, 183 S.E.2d 743 (1971).

36. 70 Wash. 2d 207, 422 P.2d 790 (1967). The Washington court reaffirmed the *Myhre* rationale and principles of law in *City of Redmond v. Kezner*, 10 Wash. App. 332, 517 P.2d 625 (1973). See also *Goffinett v. County of Christian*, 30 Ill. App. 3d 1089, 333 N.E.2d 731 (1975), *aff'd*, 65 Ill. 2d 40, 357 N.E.2d 442 (1976).

37. 70 Wash. 2d at \_\_\_, 422 P.2d at 792.

the benefit of private speculators.<sup>38</sup>

The rules established by cases which uphold zoning with conditions are as broad as are the rules which invalidate the practice. Thus, zoning with conditions has survived a variety of attacks upon its legality,<sup>39</sup> particularly that it (1) violates the uniformity requirement imposed by statute,<sup>40</sup> and (2) constitutes "spot zon-

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38. *Id.* at —, 422 P.2d at 796. Compare *Myhre and Redmond with Chrobuck v. Shohomish County*, 78 Wash. 2d 858, 480 P.2d 489 (1971). In *Chrobuck*, a collateral agreement was invalidated where conduct between the landowner, Atlantic-Richfield, and members of the zoning body suggested that the rezoning was solely for the benefit of Atlantic-Richfield; the requested commercial zoning was totally inappropriate for an area primarily used for residential and recreational purposes. The court found that the proceeding was so lacking in the appearance of fairness as to violate the requirements of due process of law. This case is particularly interesting when compared to cases in jurisdictions which invalidate conditional zoning. See, e.g., *Midtown Properties, Inc. v. Township of Madison*, 68 N.J. Super. at 197, 172 A.2d at 40; *Haymon v. City of Chattanooga*, 513 S.W.2d 185 (Tenn. App. 1973). Such comparison suggests that the potential for abuse of the rezoning process can be curtailed without invalidating the process itself.

39. Zoning with conditions has been unsuccessfully challenged upon the ground that it violates the principles of notice and hearing required by due process of law. *Sylvania Elec. Prods., Inc. v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962). This objection has also been directed specifically at reverter clauses which provide that if the petitioner fails to comply with conditions imposed on the development of the property, it will be rezoned to its original classification. In *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969), the court adopted this negative view toward reverter clauses and yet upheld the imposition of other forms of conditions. Other courts, however, have upheld reverter clauses which implicitly require conformance to procedural requirements imposed upon rezoning. See, e.g., *Goffinett v. County of Christian*, 65 Ill. 2d 40, 357 N.E.2d 442 (1976). See also *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963).

Another line of attack on zoning with conditions involves the claim that an ordinance which references a concomitant agreement is vague, indefinite, and uncertain in its terms. *Haas v. City of Mobile*, 289 Ala. 16, 265 So. 2d 564 (1972); *Guhl v. Manning*, 223 Ga. 796, 158 S.E.2d 230 (1967).

40. The objection that zoning with conditions violates the statutory Euclidean concept is unsuccessful in courts which are inclined to uphold zoning with conditions, for such courts have adopted a flexible approach to the uniformity requirements of Euclidean zoning. For example, in *Sylvania Electric Products*, the Massachusetts court stated:

It is inconsequential that other areas elsewhere in the city, in, or to be put in, such a zoning district, would not have those restrictions. Requirements of uniformity and conformity to a plan do not mean that there must be identity of every relevant aspect in areas given the same zoning classification.

344 Mass. at 434, 183 N.E.2d at 122. See also *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) (uniformity requirement relates only to uses and is not violated by other forms of restrictions). Cf. *Pecora v. Zoning Comm'n*, 145 Conn. 435, 144 A.2d 48 (1958) (uniformity requirement imposed by statute relates only to buildings and structures, not land). See generally *Hunsaker, Conditional Zoning in Texas*, 57 Tex. L.

ing."<sup>41</sup> Neither of these objections has dissuaded the courts from upholding the validity of zoning with conditions,<sup>42</sup> primarily because at the base of each of these decisions is a resounding determination that the rezoning itself, independent of the conditions, is proper.<sup>43</sup> Thus, in *Arkenberg v. City of Topeka*,<sup>44</sup> in responding to a claim that the proposed apartment complex was "in the wrong place," the court carefully examined the area and determined that the neighborhood's former character—residential with only single family dwellings—had changed. And, in *Goffinett v. County of Christian*,<sup>45</sup> a synthetic gas production plant was located in an agricultural area after a finding that the comprehensive plan of the locality encouraged more emphasis on industry.

Regrettably, few of the cases upholding the validity of zoning with conditions expressly distinguish between "contract zoning" and "conditional zoning," and the terms are often used interchangeably.<sup>46</sup> For example, in the case of *Scrutton v. County of*

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REV. 829 (1979), which suggests that the requirement of uniformity should pose no problem since by definition "interface zones" between conflicting uses are not "uniformly situated."

41. See *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969). Rohan defines "spot zoning" as an attempt to rezone a particular property or small group of properties, for the benefit of an individual property owner, for use in a special way which is different from the general pattern of zoning in the surrounding geographic area. ROHAN, *supra* note 21, at 1.02 n.35. Rohan also notes that conditional zoning is not per se a form of spot zoning since spot zoning usually involves only a small geographic area, whereas size is not normally an issue in relation to the validity of conditional zoning. *Id.* at 5.01[2]. The court in *King's Mill Homeowner's Ass'n v. City of Westminster*, 192 Colo. 219, 557 P.2d 1186 (1976), identified the following as the appropriate standard for determining whether a particular action constitutes "spot zoning": "[T]he test is whether the change in question was made for the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations." *Id.* at —, 557 P.2d at 1191.

42. Although the court in *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969), designated the zoning change as spot zoning, it held that the amendment was nonetheless valid, because changes in the neighborhood had created conditions compatible with the proposed new use.

43. *Church v. Town of Islip*, 8 N.Y. 2d at —, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

44. 197 Kan. 731, 421 P.2d 213 (1966). *Accord*, *King's Mill Homeowner's Ass'n v. City of Westminster*, 192 Colo. 219, 557 P.2d 1186 (1976).

45. 65 Ill. 2d 40, 357 N.E.2d 442 (1976).

46. In *Haas v. City of Mobile*, 289 Ala. 16, 265 So. 2d 564 (1972), the court succinctly postulated the difference when it distinguished between "reasonable measures in light of anticipated traffic considerations and mandatory contractual prerequisites which might control or embarrass the legislative prerogatives of the city." *Id.* at —, 265 So. 2d at 567. In *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970), the court ex-

*Sacramento*,<sup>47</sup> the court used the term "conditional zoning" to apply to an agreement between the landowner and the municipality and proceeded to declare that the term "contract zoning" has no legal significance.<sup>48</sup>

Zoning with conditions has not, however, been approved without limitations.<sup>49</sup> These judicial limitations relate most directly to the form of the condition imposed upon the rezoning. It has been held, therefore, that restrictions upon use<sup>50</sup> or upon the feature of a use<sup>51</sup> must be reasonable and non-discriminatory and must be designed to ameliorate the possible deleterious effects of the change upon development in the surrounding area.<sup>52</sup>

A constitutional question arises with respect to conditions which require that the landowner perform an act, such as the dedication and improvement of a portion of the property, or of separate property, for public purposes: is such a requirement a valid exercise of the police power? Where these landowner exactions are involved, zoning with conditions has been held valid only where the conditions are responsive to an increased demand for public services created by the proposed development.<sup>53</sup> This requirement was ex-

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pressly found that no contract with the city existed in connection with the voluntary restrictions. It should be noted, however, that the *Zupancic* court also defined conditional zoning narrowly and declared by way of dictum that such assurances were neither contract zoning nor conditional zoning. *Id.* at \_\_\_, 174 N.W.2d at 537-38.

47. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

48. *Id.* at \_\_\_, 79 Cal. Rptr. at 878.

49. An alternative statement of this general rule is that where the zoning is reasonable, conditions may be imposed which are reasonable and non-discriminatory. *Haas v. City of Mobile*, 289 Ala. 16, 265 So. 2d 564 (1972); *Arkenberg v. City of Topeka*, 197 Kan. 731, 421 P.2d 213 (1966); *Church v. Town of Islip*, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

50. *King's Mill Homeowner's Ass'n v. City of Westminster*, 192 Colo. 219, 557 P.2d 1186 (1976) (zoning contingent upon representation that property would be developed for use exclusively as a regional shopping center); *Sylvania Elec. Prods., Inc. v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962) (use restricted to the proposed development); *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (use restricted to bowling alley and certain commercial uses).

51. *Sylvania Elec. Prods., Inc. v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962) (floor area, setback, height, buffer, signage and lighting restrictions).

52. 275 Cal. App. 2d at 412, 79 Cal. Rptr. at 872.

53. Landowner exactions have been held valid in the following cases: *Haas v. Mobile*, 289 Ala. 16, 265 So. 2d 564 (1972) (requirement that right-of-ways be dedicated as a condition to zoning justified to reduce traffic problems resulting from new use); *Transamerica Title Ins. Co. v. City of Tucson*, 23 Ariz. App. 385, 533 P.2d 693 (1975) (public needs created by new

pressly addressed in *Scrutton v. County of Sacramento*.

[T]he police power permits the imposition of reasonable conditions upon the landowner's proposal. Not all conditions are valid. A grant of public privilege may not be conditioned upon the deprivation of constitutional protections. The police power "cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property." An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain or as a mask for discriminatory taxation.<sup>54</sup>

In summary, cases which invalidate zoning with conditions do so upon the basis of unconstitutionality (with regard to police power) and violation of public policy. In response to these prohibitions, cases which support the validity of zoning with conditions do so upon the imposition of certain limitations designed to reduce the possibility of abuse by public officials. These limitations would be achieved by applying the following guidelines:

(1) The rezoning amendment, considered independently of the conditions, should represent a reasonable exercise of the zoning power;

(2) the conditions should be imposed by a method that avoids the abrogation by the governing body of its police powers, and the municipality should avoid a promise, or appearance of a promise, that the rezoning will be granted or obtained in consideration of the landowner's promise; and

(3) the promise exacted should have a reasonable relation to the rezoning and not be solely for the purpose of effecting a collateral benefit on behalf of the municipality.

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use justified right-of-way exaction for streets); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) (dedication of property for street purposes); *State ex rel. Myhre v. City of Spokane*, 70 Wash. 2d 207, 422 P.2d 790 (1967) (dedication of land for widening of adjacent streets).

54. 275 Cal. App. 2d at —, 79 Cal. Rptr. at 879 (citations omitted). *Accord*, *Transamerica Title Ins. Co. v. City of Tucson*, 23 Ariz. App. 385, 533 P.2d 693 (1975). Note that the standard imposed in relation to landowner exactions is significantly narrower than the rule of reasonableness applied to restrictions on a use or on a feature of a use.

### III. CONDITIONAL ZONING IN VIRGINIA

#### A. *Legislative Authority for Conditional Zoning*

The Constitution of Virginia empowers the General Assembly to delegate, by general or special act, the exercise of any of its powers to any county, city, town or other unit of government within the State.<sup>55</sup> The Virginia Supreme Court has viewed the delegation of power in this manner:

[T]he legislature may confer the police power of the State upon cities and towns located therein. The extent of this power is difficult to define, but it is elastic and expands automatically to protect the public against the improper use of private property to the injury of the public interest. It must never be exercised except in a reasonable manner and for the welfare of the public.<sup>56</sup>

Virginia adheres to Dillon's Rule, which states that "municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable."<sup>57</sup> Dillon's Rule has been logically extended to a corollary rule that the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication. As a delegated power, the power to zone is therefore strictly construed in Virginia.<sup>58</sup>

Special legislation was initially enacted in Virginia to permit conditional zoning only in counties with the urban county executive form of government—that is, only in Fairfax County.<sup>59</sup> Subsequent amendments to the Virginia Code permitted conditional zoning in a city completely surrounded by Fairfax County, in a county contiguous to Fairfax County, in a city completely sur-

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55. VA. CONST. art. VII, § 3.

56. *Gorieb v. Fox*, 145 Va. 554, 561, 134 S.E. 914, 916 (1926).

57. *Board of Supervisors v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455-56 (1975).

58. VA. CODE ANN. § 15.1-486 (Repl. Vol. 1981).

59. VA. CODE ANN. § 15.1-491(a) (Repl. Vol. 1981). Testimony by James Scott, Member, Board of Supervisors of Fairfax County, indicated that between June 1975 and April 1977, Fairfax County had processed 241 applicant-sponsored rezoning applications, of which 180, or 75%, were adopted with conditions. Transcript of Proceedings, at a Public Hearing of the Subcommittee of the Counties, Cities and Towns Committee of the House of Delegates, State of Virginia 101 (July 19, 1977).

rounded by a contiguous county, and finally, in those counties on the Eastern Shore of Virginia.<sup>60</sup>

Interest in conditional zoning for other localities prompted the Counties, Cities and Towns Committee of the House of Delegates to hold a series of public hearings around the state in 1977. The draft legislation which was the subject of those public hearings would have permitted local governing bodies to *impose* additional conditions on applicants for rezoning.<sup>61</sup>

Relying on the sentiments expressed in those hearings, the General Assembly in its 1978 session passed general enabling legislation to permit conditional zoning statewide. This legislation provided for the voluntary proffering of additional conditions by the landowner, rather than the imposition of additional conditions by the local governing body, as was suggested by the draft legislation.<sup>62</sup> Those jurisdictions which already had conditional zoning under the previously enacted special legislation were not to be affected by the new legislation unless they adopted it in whole or in part by amendment of their zoning ordinances.<sup>63</sup> Furthermore, in an unusual move, the General Assembly provided a declaration of legislative policy and findings in the Code,<sup>64</sup> apparently out of concern for providing a more stable constitutional base for the conditional zoning legislation.

A review of the Virginia statute, in comparison with the experi-

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60. VA. CODE ANN. § 15.1-491(a) (Repl. Vol. 1981).

61. Transcript of Proceedings at a Public Hearing of the Subcommittee of the Counties, Cities and Towns Committee of the House of Delegates, State of Virginia 90 (July 21, 1977).

62. VA. CODE ANN. § 15.1-491.1 to -491.6 (Repl. Vol. 1981).

63. 1978 VA. ACTS, ch. 320.

64. VA. CODE ANN. § 15.1-491.1 (Repl. Vol. 1981) provides as follows:

It is the general policy of the Commonwealth in accordance with the provisions of § 15.1-489 to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and [at]the same time to recognize effects of change. It is the purpose of §§ 15.1-491.1 through 15.1-491.4 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. The provisions of this section and the following five sections shall not be used for the purpose of discrimination in housing.

ence of conditional zoning in other states, reveals that the General Assembly has incorporated provisions into the Virginia statute which obviate many of the problems encountered in other states. The provisions of the general enabling legislation may generally be divided into procedural and substantive aspects. Procedurally the zoning ordinance may provide for:

- (1) The voluntary proffering<sup>65</sup>
- (2) in writing
- (3) by the owner
- (4) of reasonable conditions<sup>66</sup>
- (5) in addition to the regulations provided for the zoning district
- (6) as a part of a rezoning or amendment to the zoning map.

The Virginia Code specifies the following substantive prerequisites for conditional zoning:<sup>67</sup>

(1) the rezoning itself must give rise to the need for the conditions;<sup>68</sup> (2) conditions must have a reasonable relation to the rezoning; (3) conditions must not include a cash contribution to the county or municipality; (4) conditions shall not include mandatory dedication of real or personal property unless specifically provided for in Section 15.1-466(f) regarding subdivision of land;<sup>69</sup> (5) conditions shall not include payment for or construction of off-site improvements, except pro-rata, off-site drainage and sewerage facilities payments assessed in accordance with a general sewer and drainage improvement program;<sup>70</sup> (6) no condition shall be prof-

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65. A voluntary proffer precludes any objection that the condition would render the zoning illegal as contract zoning. *See* note 21 *supra* and accompanying text.

66. Reasonable conditions are required by the *Church* line of cases in order to validate conditional zoning. *See* notes 29-38, 52 *supra* and accompanying text.

67. VA. CODE ANN. § 15.1-491.2 (Repl. Vol. 1981).

68. The rezoning itself must also have a valid basis. *See* note 43 *supra* and accompanying text.

69. The problem concerning unconstitutional taking by means of the police power would consequently be avoided. *See* notes 53, 54 *supra* and accompanying text.

70. In the context of land subdivision, the supreme court, relying on the corollary to Dillon's Rule, held that Prince William County did not have the power to exact construction costs for off-site highway improvements from a subdivider in *Hylton Enterprises, Inc. v. Board of Supervisors*, 220 Va. 435, 258 S.E.2d 577 (1979). The court specifically referred to the local governing bodies' pro-rata share assessment power under § 15.1-466(j) in support

ferred which is not related to the physical operation of the property; and (7) all such conditions shall be in conformity with the comprehensive plan.<sup>71</sup>

There has been considerable discussion among practitioners, professional planners, planning commission members, and elected officials regarding the meaning of the requirement that all conditions be in conformity with the comprehensive plan. For example, one wonders whether a condition that the property be developed only for professional office uses would conform to a comprehensive plan which called for the property to be used for medium density residential purposes, if it were argued that the inclusion of professional office uses in the neighborhood would contribute to a more viable medium density residential community.<sup>72</sup>

### B. *Application and Enforcement*

Before the enactment of conditional zoning legislation in Virginia, local governing bodies or planning commissions often deferred acting on controversial requests for rezoning to permit citizens' groups composed of those neighboring property owners who were in opposition to the proposed change to confer with the appli-

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of the proposition that "[t]his express authorization significantly evidences the legislative intent that only provisions explicitly approved by the General Assembly may be included in local subdivision ordinances." 220 Va. at 440, 258 S.E.2d at 581.

71. A "spot zoning" problem could thereby be avoided. See notes 41, 45 *supra* and note 72 *infra* and accompanying text.

VA. CODE ANN. § 15.1-446.1 (Repl. Vol. 1981) is permissive in that it states that the comprehensive plan *may*, but is not required to, include the following: (a) a land use plan; (b) a transportation plan; (c) a community facilities plan; (d) designation of historic and urban renewal areas; (e) an official map; (f) a capital improvements program; (g) a subdivision ordinance; (h) a zoning ordinance and zoning district maps.

72. An instructive Rhode Island case is *Sweetman v. Town of Cumberland*, 117 R.I. 134, 364 A.2d 1277 (1976), in which Rhode Island's conditional zoning statute, which permits the *imposition* of conditions on zoning by the local government body, was upheld. The court stated: "The rule is that the amendment is required to conform to the comprehensive plan of zoning in effect in the community. . . . [T]he meaning of a comprehensive plan for purposes of [the statute] is only that the ordinance bear a reasonable relationship to the public health, safety and welfare." *Id.* at \_\_\_\_, 364 A.2d at 1287 (citations omitted). In finding that imposing differing conditions on property in the same land use classification was not an arbitrary differentiation *per se*, the court noted that "where it has not been shown that a 'fundamental right' has been affected or that legislation sets up a 'suspect classification,' a statute will be invalidated on equal protection grounds only if the classification bears no reasonable relationship to the public health, safety or welfare." *Id.* at \_\_\_\_, 364 A.2d at 1288.

cant. The usual result of such meetings would be restrictive covenants, which would be recorded in the land records after the rezoning was granted. If violations of the covenants occurred, enforcement rested with the parties to the covenants, while the local governing body was legally justified in keeping out of the dispute. The citizen parties often found the costs of enforcement to be prohibitive, even though customarily such covenants provide that the losing party pay the prevailing party's attorney's fees and costs.

The 1978 general enabling legislation for conditional zoning now permits the zoning administrator for the local governing body to administer and enforce the conditions attached to the zoning through such legal actions as injunction, abatement or other appropriate action or proceeding, and also to require a guarantee in sufficient amount for the construction of any physical improvements required by the conditions.<sup>73</sup> Thus, the costs of enforcement are effectively shifted to a "deeper pocket" which may have the resources and technical expertise lacked by citizen groups. In terms of the relative permanence of the conditions, however, the possibility exists that the local governing body will change the conditions by amending the zoning ordinance,<sup>74</sup> whereas restrictive covenants usually remain in effect for a specified period as negotiated by the parties.

The zoning administrator is also required to maintain a Conditional Zoning Index, as well as appropriate annotations on the zoning maps to show the existence of conditions on specific rezonings.<sup>75</sup> Lack of knowledge about conditional zoning and the Conditional Zoning Index obviously presents a dangerous trap for the unwary title attorney who may discover, much to his chagrin, that property zoned commercial, for example, is substantially restricted regarding the commercial purposes for which it may be used.

In the event that a zoning applicant is aggrieved by the decision of the zoning administrator under Section 15.1-491.3, he or she

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73. VA. CODE ANN. § 15.1-491.3 (Repl. Vol. 1981).

74. VA. CODE ANN. § 15.1-491.6 (Repl. Vol. 1981).

75. VA. CODE ANN. § 15.1-491.4 (Repl. Vol. 1981).

may petition the local governing body for review of the decision.<sup>76</sup>

### C. *Future Use of Conditional Zoning in Virginia*

The Virginia Supreme Court has only peripherally addressed the issue of conditional zoning. In the case of *Town of Vienna Council v. Kohler*,<sup>77</sup> the Court held that there was no legal impediment to the Vienna Council considering the written proffer of a zoning applicant under the special legislation referred to above. Yet, because Dillon's Rule and its corollary are still strong in Virginia, one can reasonably anticipate that the Virginia Supreme Court will narrowly view this holding and any future conditional zoning litigation with an eye to the legislation enacted; a local governing board must act within its statutory power to fix zoning ordinances.

Any of the avenues of attack on conditional zoning mentioned in the preceding review of cases could be raised in Virginia when appropriate. The general enabling legislation, however, appears to have addressed those issues effectively. In addition, a 1981 Virginia Supreme Court case, *Board of Supervisors v. International Funeral Services, Inc.*,<sup>78</sup> although not specifically dealing with conditional zoning, shored up the presumption of validity of a legislative act by a local governing body. Further, the court interprets an aggrieved zoning applicant's burden of proof to be so weighty that, in the future, overturning the decision of a local governing body in a Virginia zoning case will be possible only in the most extreme situations.<sup>79</sup>

## IV. CONCLUSION

Conditional zoning provides localities with one of the most effective flexibility devices provided to date for resolving the conflicts inherent in a land use system, whose effectiveness must, by its very nature, depend upon the balancing of conflicting individual property rights and public interests. Through its general enabling legislation the General Assembly has provided the means; it is now up

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76. VA. CODE ANN. § 15.1-491.5 (Repl. Vol. 1981).

77. 218 Va. 966, 244 S.E.2d 542 (1978).

78. 221 Va. 840, 275 S.E.2d 586 (1981). See generally Comment, *Challenging Rezoning in Virginia*, 15 U. RICH L. REV. 423 (1981).

79. 221 Va. at 843, 275 S.E.2d at 588.

to the local governing bodies of Virginia to use it to achieve the ends desired.



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