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## Challenging Rezoning in Virginia

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# CHALLENGING REZONING IN VIRGINIA

## I. INTRODUCTION

Zoning is an intrusion into our everyday lives, regulating a right basic to most Americans—the free use of their land. As municipalities increase their use of the zoning mechanism, more landowners will find the use of their lands restricted and in turn will seek legal counsel in order to challenge the restrictions. Presently, when faced with a rezoning question, a practitioner has to filter through the many treatises, articles and cases in an attempt to pull together Virginia law.<sup>1</sup> It is the purpose of this comment to compile Virginia rezoning law in order to serve as a reference for the practitioner who is unfamiliar with this ever-developing body of law.

## II. HISTORY AND DEVELOPMENT

The concept of zoning originated in early Roman times.<sup>2</sup> Zoning in the United States appears to have developed since 1692 when Massachusetts began regulating gunpowder mills and slaughterhouses.<sup>3</sup> One of the first comprehensive zoning ordinances in the United States was enacted in New York in 1916, and almost immediately similar regulations were adopted by hundreds of municipalities.<sup>4</sup>

The United States Supreme Court first upheld the right of a municipality to enact a comprehensive zoning ordinance in 1926.<sup>5</sup> In *Village of Euclid v. Ambler Realty Co.*,<sup>6</sup> the Supreme Court found that the power to zone is derived from the inherent police power of the state.<sup>7</sup> The power to zone, therefore, is a legislative power vested in the state which must be delegated by the state to the local governments.<sup>8</sup> Since a municipality has no inherent police power, its power to zone must be derived from statute. In Virginia, this zoning enabling statute is title 15.1, section 86 of the

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1. See generally Comment, *Zoning, Planning and the Scope of Judicial Review in Virginia*, 25 AM. U.L. REV. 497 (1976); Note, *Challenging Exclusionary Zoning Practices*, 10 U. RICH. L. REV. 646 (1976); Note, *Land Use Law in Virginia*, 90 U. RICH. L. REV. 513 (1975).

2. 1 YOKLEY, *ZONING LAW AND PRACTICE* § 1-3 (3d ed. 1965).

3. Solberg, "Rural Zoning in the United States" (Agric. Info. Bull. 59, USDA 1952).

4. 1 ANDERSON, *AMERICAN LAW OF ZONING* § 1.13 (2d ed. 1976).

5. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

6. *Id.*

7. *Id.* at 390.

8. *E.g.*, *National Maritime Union v. City of Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961).

Virginia Code.<sup>9</sup>

Zoning is defined by the code as the division of the territory under the jurisdiction of a governing body into districts in order to regulate (a) uses, (b) structural dimensions, (c) the amount of land, water and air space to be occupied, and (d) the use of the natural resources.<sup>10</sup> When members of a municipal council or county board of supervisors adopt a zoning ordinance they are acting in a legislative capacity.<sup>11</sup> As such, they enjoy absolute immunity from personal suit when making zoning decisions.<sup>12</sup> Their motives in enacting the ordinance are also beyond the scope of judicial review.<sup>13</sup>

The purpose of zoning is to promote the health, safety, morals, and general welfare of the community; to protect and conserve the value of buildings; and to encourage the most appropriate use of the land.<sup>14</sup> Promotion of this purpose involves a two-fold approach. First, zoning should be designed to protect the present character of an area by excluding "prejudicial uses."<sup>15</sup> Second, zoning should provide for development of an area in a manner consistent with the uses for which it is suited.<sup>16</sup> Zoning ordinances are either exclusive, designating certain prohibited uses in a particular district; or inclusive, specifying certain permissible uses and excluding all others.<sup>17</sup> Both types of zoning ordinances have been recognized in Virginia.<sup>18</sup>

Rezoning is an amendment to present zoning which either increases the number of allowable uses of the subject property (upzoning), or which decreases the property's permissible uses (downzoning). Land is zoned by ordinances passed by the legislative bodies of municipalities and counties. The necessary and proper procedure for rezoning land is likewise by legis-

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9. VA. CODE ANN. § 15.1-486 (Cum. Supp. 1980).

10. *Id.*

11. *Shannon Fredericksburg Motor Inn, Inc. v. Hicks*, 434 F. Supp. 803 (E.D. Va. 1977).

12. *Id.* at 805. *Accord*, *Ligon v. State*, 448 F. Supp. 935 (D. Md. 1977).

13. *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 32 (1948).

14. *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958). *See also* VA. CODE ANN. § 15.1-489 (Cum. Supp. 1980).

15. *Board of Supervisors v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959) (court failed to define "prejudicial use"; however such a use might be inferred from the present Code to include one which overcrowds the land, causes undue density of population in relation to existing community facilities, or obstructs light or air). *See* VA. CODE ANN. 15.1-489 (Cum. Supp. 1980).

16. *Board of Supervisors v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959).

17. *Wiley v. County of Hanover*, 209 Va. 153, 155, 163 S.E.2d 160, 162 (1968).

18. *E.g.*, *Fairfax County v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947).

lative ordinance.<sup>19</sup>

### III. REZONING METHODS

The Virginia Code provides that “[w]henever the public necessity, convenience, general welfare, or good zoning practices require, the governing body may by ordinance, amend . . . the regulations, district boundaries, or classifications of property.”<sup>20</sup> Amendment may be initiated by resolution of the governing body, by motion of the local planning commission, or by petition of any property owner.<sup>21</sup> The governing body must refer all amendments to the planning commission for its recommendations.<sup>22</sup> Public hearings must be held by both the governing body and the planning commission prior to the enactment of zoning amendments.<sup>23</sup>

There are at least three methods the governing body may utilize in enacting a zoning amendment.<sup>24</sup> One method, usually associated with residential areas, is referred to as “lot zoning.”<sup>25</sup> Residential or lot zones generally specify the minimum lot size for each dwelling unit or the maximum number of units that may be accommodated within a certain area. As the minimum lot size increases or decreases, the intensity of development varies accordingly.

Amendment of the text of a zoning ordinance, a second method, changes the allowable uses within a particular zone while leaving the use classification unchanged.<sup>26</sup> This method is exemplified by an amendment reducing a maximum building height from 75 to 50 feet while leaving the district zoned “commercial.” This is a subtle, almost covert method of rezoning.

The third and perhaps most common method of rezoning is to change the allowable uses of a piece of property by changing its classification.<sup>27</sup> A

19. *See* Board of Supervisors v. Davis, 200 Va. 316, 106 S.E.2d 152 (1959); VA. CODE ANN. § 15.1-491(g) (Cum. Supp. 1980).

20. VA. CODE ANN. § 15.1-491(g) (Cum. Supp. 1980).

21. *Id.*

22. VA. CODE ANN. § 15.1-493 (Cum. Supp. 1980).

23. VA. CODE ANN. §§ 15.1-431, -493 (Cum. Supp. 1980). Note that if land is to be zoned to uses greater than were declared in the public notice required by § 15.1-431, § 15.1-493 requires that another public hearing must be held before the governing body may enact the amendment. Note also that § 15.1-431 allows the planning commission and governing body to hold one joint public hearing.

24. Linowes & Delaney, *Downzoning—And How the Landowner May Fight It*, 5 REAL EST. L. J. 311, 312-14 (1977).

25. *Id.* at 312-13.

26. *Id.* at 313-14.

27. *Id.* at 314.

downzoning amendment changing a subclassification from R-2 to R-1 is an example of a classification change. Typically R-2, or Residential-2, zones allow not only for single family residences but also for multi-family dwellings such as townhouses and apartments. Changing the zoning to R-1 would eliminate multi-family uses of the property and greatly reduce its value to developers.

#### IV. CHALLENGING REZONING

There is no statutory right of appeal from the zoning decisions of a municipal legislative body.<sup>28</sup> There are, however, at least four ways rezoning controversies may reach a Virginia court.<sup>29</sup> First, an "aggrieved person"<sup>30</sup> may seek an injunction to prevent enforcement of a zoning ordinance affecting his property.<sup>31</sup> Second, a declaratory judgment may be sought to have the ordinance declared unconstitutional.<sup>32</sup> The third and most frequently used method of obtaining judicial review of rezoning decisions is to sue in equity for a declaratory judgment and injunctive relief from the zoning ordinance.<sup>33</sup> Finally, one may petition the circuit court of the county or city for certiorari to review the administrative decision of the board of zoning appeals,<sup>34</sup> though one may be required to exhaust one's administrative remedies prior to seeking any judicial relief.<sup>35</sup>

Those who have standing to challenge a zoning amendment may be divided into two categories: the aggrieved landowner and any other "aggrieved third party."<sup>36</sup> Generally, in order to have standing in a zoning

28. Note, *Land Use Law in Virginia*, *supra* note 1, at 539.

29. *Id.* There are actually eight ways zoning challenges reach Virginia's courts. The remaining four (which are not applicable to rezoning contests) include: a writ of mandamus ordering an official to issue a requested permit; an injunction to prevent the governing body from granting a permit or variance; civil or criminal actions by the local governing bodies to enforce zoning matters. *Id.*

30. See note 36 *infra* and accompanying text.

31. See, e.g., *Standard Oil v. City of Charlottesville*, 42 F.2d 88 (4th Cir. 1930); *McNair v. Clatterbuck*, 212 Va. 532, 186 S.E.2d 45 (1972); *City of Alexandria v. Texaco Co.*, 172 Va. 209, 1 S.E.2d 296 (1939). See VA. CODE ANN. § 15.1-499 (Repl. Vol. 1973).

32. Note, *Land Use Law in Virginia*, *supra* note 1, at 539.

33. See, e.g., *Board of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48, *cert. denied*, 423 U.S. 940 (1975). See VA. CODE ANN. §§ 8.01-184 to -191 (Repl. Vol. 1977).

34. VA. CODE ANN. § 15.1-497 (Cum. Supp. 1980).

35. See *Gayton Triangle Land Co. v. Board of Supervisors*, 216 Va. 764, 222 S.E.2d 570 (1976) (landowner's rezoning challenge held improper for failure to first seek variance from board of zoning appeals). Cf. *Board of Supervisors v. Rowe*, 216 Va. 128, 133 n.4, 216 S.E.2d 199, 205 n.4 (1975) (landowner challenging rezoning need not apply for variance before bringing his declaratory judgment action if the challenged restrictions or obligations could not be remedied by variance).

36. See Note, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV.

matter, one must be specially, personally and adversely affected by the governing body's actions, as distinguished from a party who is affected in a general way.<sup>37</sup> A landowner has a definite legal interest in the use of his land and is always accorded the status of an "aggrieved person."<sup>38</sup> However, in order for a third party to qualify as an "aggrieved person," he must be able to prove some special damages not shared with other landowners in the same general vicinity.<sup>39</sup> For example, it has been held that a landowner whose property adjoins land directly affected by a zoning change has an interest sufficient to give him standing.<sup>40</sup> Logically, the less distance between a third party's land and the land which is the subject of the ordinance, the more likely the third party will be deemed to have standing to challenge the ordinance.<sup>41</sup>

Regardless of the method chosen to attack a zoning amendment, the challenge will usually be based upon two legal arguments. First, it may be claimed that the zoning amendment is invalid because it is an improper exercise of police power. Second, the challenger may argue that the zoning ordinance is unconstitutional.<sup>42</sup>

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294 (1967).

37. See generally *Knowlton v. Browning-Ferris Industries*, 220 Va. 571, 260 S.E.2d 232 (1979); *County of Fairfax v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947); *Goreib v. Fox*, 145 Va. 554, 134 S.E. 914, *aff'd*, 274 U.S. 603 (1926).

38. Note, *The "Aggrieved Person" Requirement in Zoning*, *supra* note 36, at 296-97.

39. *Id.* at 306. See, e.g., *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967) (standing of third parties challenging rezoning not made an issue).

40. Note, *The "Aggrieved Person" Requirement in Zoning*, *supra* note 36, at 303. See, e.g., *Snyder v. City Council*, 35 Colo. App. 32, 531 P.2d 643 (1974); *Tazza v. Planning & Zoning Comm'n*, 164 Conn. 187, 319 A.2d 393 (1972); *Hubert v. Zoning Board*, 158 Conn. 187, 257 A.2d 810 (1969); *Whittingham v. Village of Woodbridge*, 111 Ill. App. 2d 147, 249 N.E.2d 332 (1969); *Allen v. Covvel*, 488 S.W.2d 671 (Mo. App. 1972). *But cf.* *Unitarian Church v. Shorten*, 64 Misc. 2d 1027, 316 N.Y.S.2d 837 (1970) (abutting property owners not entitled to standing absent showing of economic loss).

41. Note, *The "Aggrieved Person" Requirement in Zoning*, *supra* note 36, at 304. See, e.g., *Habliston v. City of Salisbury*, 258 Md. 350, 265 A.2d 885 (1970) (person with property boundary within 200-500 feet held to have standing); *White v. Major Realty, Inc.*, 251 Md. 63, 246 A.2d 249 (1968) (owners with property one-half mile away held to lack standing); *Leroux v. Baltimore*, 248 Md. 106, 234 A.2d 747 (1967) (owners and property within same block held to have standing); *Wilkinson v. Atkinson*, 242 Md. 231, 218 A.2d 503 (1966) (owners of property across boulevard held to have no standing); *Duddles v. City Council*, 21 Or. App. 310, 535 P.2d 583 (1975) (property owners within sight or sound may have standing). *But see* *Mueller v. Anderson*, 60 Misc. 2d 568, 303 N.Y.S.2d 143 (1969) (distance of property owner from subject property irrelevant if within "immediate vicinity" of subject).

42. *Linowes & Delaney*, *supra* note 24, at 316.

### A. *Police Power Theories*

The multi-faceted police power test has its origins in the United States Supreme Court's holding in *Village of Euclid v. Ambler Realty Co.*<sup>43</sup> The Court found that a zoning ordinance is invalid when it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."<sup>44</sup> Such a test is by its very definition elastic and thus allows for restrictions on uses of property to be amended as necessary. However, the purpose of the amending ordinance must always bear a reasonable relationship to the public good as vested in the police power — the underlying rationale of zoning.

The concept of rezoning so as to benefit the public welfare is a nebulous one which can best be demonstrated by case examples. In Virginia it has been held that the denial of a rezoning request in order to forestall business competition bore no substantial relation to the public health, safety, morals or general welfare and was, therefore, improper.<sup>45</sup> Likewise, an attempt to control the manner in which a landowner is compensated for the use of his land has been held to be beyond the underlying purposes of zoning and, therefore, arbitrary and capricious.<sup>46</sup> It is similarly improper for a zoning ordinance to be used to encourage low income housing.<sup>47</sup> While aesthetic considerations may be a factor in the adoption of a zoning ordinance, they alone will not justify restricting the use of the property.<sup>48</sup> Promotion of some private interest over that of the entire community will be struck down as illegal "spot zoning."<sup>49</sup>

Another means of demonstrating that a zoning action is not in the public interest and hence beyond the police power is to show that it operates primarily for the purposes of exclusion. While a balanced community may

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43. 272 U.S. 365 (1926).

44. *Id.* at 395.

45. *Board of Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958).

46. *Board of Zoning Appeals v. Columbia Pike Ltd.*, 213 Va. 437, 192 S.E.2d 778 (1972).

47. *Board of Supervisors v. DeGross Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973).

48. *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881, *appeal dismissed*, 302 U.S. 658, *rehearing denied*, 302 U.S. 781 (1937). See Note, *Virginia Defines Scope of Local Power to Impose Dedication and Land Use Requirements Upon Individual Landowners — Board of Supervisors v. Rowe*, 10 U. RICH. L. REV. 440 (1976).

49. See, e.g., *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967). Spot zoning/rezoning was defined as an act of a zoning commission or legislative body which permits uses in any given area of a locality which are diametrically opposed on a permanent basis to the uses zoned or planned around it to the detriment of harmonious development, thus not within the police powers test. *Id.* at 402 n.2, 157 S.E.2d at 923 n.2.

be a valid zoning goal, the governing body's action to achieve balance cannot be for the purpose of excluding *future* burdens, economic or otherwise, on administration of public services.<sup>50</sup> In *Board of Supervisors v. Allman*,<sup>51</sup> the board's denial of a rezoning request primarily because of its timing was held to be inconsistent and discriminatory and, therefore, arbitrary and capricious. The court found the evidence indicated that the denial was intended to discourage higher density uses in one end of the county until after the development of a more favored segment of the county.<sup>52</sup> Similarly, in an earlier case, an action by the same Board of Supervisors was held to be exclusionary when the Board enacted a zoning amendment which channeled all of the development into one end of the county by requiring a minimum of two acres per lot on the other side of the county.<sup>53</sup> The court found the practical effect of the amendment was "to prevent people in the low income bracket from living in the . . . area . . . ." <sup>54</sup> Such an intentional and exclusionary purpose was found to bear no relation to the health, safety, morals or prosperity and general welfare of the area.<sup>55</sup>

Since a locality's police power is derived from statute, rezoning which is in conflict with a statute is necessarily beyond the locality's police powers. Thus in a jurisdiction in which zoning is required by statute to conform with the master or comprehensive land use plan of the locality, rezoning in conflict with the plan would be invalid.<sup>56</sup> While such a requirement has been recommended,<sup>57</sup> Virginia has no such rule. In Virginia "a comprehensive or master plan does not have the status of a zoning ordinance. It is advisory only and serves as a guide to a zoning body."<sup>58</sup>

An equitable argument exists which operates as an exception to the municipality's police powers. A landowner may resist a zoning amend-

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50. Linowes & Delaney, *supra* note 24, at 322. See *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). See generally Note, *Challenging Exclusionary Zoning Practices*, 10 U. RICH. L. REV. 646 (1976).

51. 215 Va. 434, 211 S.E.2d 48, *cert. denied*, 423 U.S. 940 (1975).

52. *Id.* at 440-41, 211 S.E.2d at 52.

53. *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

54. *Id.* at 661, 107 S.E.2d at 396.

55. *Id.*

56. Linowes & Delaney, *supra* note 24, at 322. See, e.g., *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968). See generally, Haar, "In Accordance With a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955).

57. See Comment, *Zoning, Planning and the Scope of Judicial Review in Virginia*, *supra* note 1, at 530 (1976).

58. *Board of Supervisors v. Allman*, 215 Va. 434, 441, 211 S.E.2d 48, 52, *cert. denied*, 423 U.S. 490 (1975). See VA. CODE ANN. § 15.1-446.1 (Cum. Supp. 1980) ("The comprehensive plan shall be made with the purpose of *guiding*. . .") (emphasis added).

ment by asserting that he has vested rights to the present zoning of his land. In order to acquire vested rights in a certain zoning classification a property owner must in good faith incur substantial obligations in reliance on the present zoning.<sup>59</sup> Good faith actions in reliance mean obligations incurred with relation to the property *before* the property owner learns of a pending zoning change.<sup>60</sup> What is substantial reliance will vary with the jurisdiction. In Virginia it has been held that

where . . . a special use permit has been granted under a zoning classification, a bona fide site plan has thereafter been filed and diligently pursued, and substantial expense has been incurred in good faith before a change in zoning, the permittee then has a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation.<sup>61</sup>

Only the property owner may benefit from the vested rights theory. It is not applicable to third parties. The court has stated "while the views of persons owning neighboring property should be considered, property owners have no *vested right* to continuity of zoning of the general area in which they reside, and the mere purchase of land does not create a right to rely on existing zoning."<sup>62</sup>

## B. *Constitutional Theories*

Violation of the right to due process of law will render a zoning ordinance invalid. In fact, it has been suggested that the best place to begin any zoning challenge is at the procedural due process level.<sup>63</sup> As an example, recall that the local governing body is required by statute to refer all zoning ordinances to the planning commission for their recommendations.<sup>64</sup> Failure to follow this procedural step will void any ordinance or

59. Linowes & Delaney, *supra* note 24, at 322-23, 323. See VA. CODE ANN. § 15.1-492 (Cum. Supp. 1980) ("Nothing in this article shall be construed to authorize the impairment of any vested right. . . .").

60. Linowes & Delaney, *supra* note 24, at 323. See Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972).

61. Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972) (\$59,600 in engineering fees held substantial expense in reliance). *Accord*, Board of Supervisors v. Cities Service Oil Co., 213 Va. 359, 193 S.E.2d 1 (1972). Note, however, that under Code § 15.1-492 a vested right to a use not in conformance with zoning may be continued only so long as that use, or a more restricted one continues, and that use is not discontinued for more than two years. VA. CODE ANN. § 15.1-492 (Cum. Supp. 1980).

62. Vienna Council v. Kohler, 218 Va. 966, 976, 244 S.E.2d 542, 547-48 (1978).

63. Prichard, *The Fundamentals of Zoning Law*, 46 VA. L. REV. 362, 367 (1960).

64. See note 21 *supra* and accompanying text.

amendment.<sup>65</sup> Failure to hold a public hearing on the adoption of an ordinance, or providing for a greater use than was advertised in the public notice are other examples of procedural flaw . . . which will void a zoning amendment.<sup>66</sup>

A landowner may set aside a zoning amendment which deprives him of substantive due process, that is one which operates as a confiscation of his property without just compensation.<sup>67</sup> Although zoning by its very nature deprives a landowner of some of the uses of his land, some degree of restriction is constitutionally tolerable because it is for the greater public good and, therefore, within the police power test.<sup>68</sup> However, when the discretion of the landowner as to the use of his land is so restricted that he is deprived of all beneficial use of his property because the zoning precludes all its practical uses, the zoning ordinance "is invalid as to that property."<sup>69</sup> Thus, it has been held that zoning land for single-family residences is confiscatory and, therefore, illegal where it is practically impossible to use the land in question for such residences.<sup>70</sup>

Rezoning may also be challenged as a violation of the equal protection clause of the fourteenth amendment. This constitutional argument has been most successfully employed to invalidate zoning ordinances when it was coupled with the exclusionary purposes argument noted previously.<sup>71</sup> In *Board of Supervisors v. Rowe*,<sup>72</sup> the court held that an ordinance which excluded a large number of otherwise legitimate retail businesses from a retail business district denied equal protection and constituted a taking of property without due process.<sup>73</sup> Evidence was introduced which demonstrated that the ordinance prohibited construction on about twenty-nine percent of the land in the business zone. Land values in the business zone dropped from \$2.69 per square foot to \$1.50 per square foot

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65. See *Standard Oil Co. v. City of Charlottesville*, 42 F.2d 88 (4th Cir.-1930); *National Realty Corp. v. City of Virginia Beach*, 209 Va. 172, 163 S.E.2d 154 (1968).

66. See note 23 *supra* and accompanying text. Cf. *Ciaffone v. Community Shopping Corp.*, 195 Va. 41, 77 S.E.2d 817 (1953) (public hearing need not forecast the precise action of the board).

67. *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971); *County of Fairfax v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947). See VA. CONST. art. 1 § 11.

68. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

69. *Boggs v. Board of Supervisors*, 211 Va. 488, 491, 178 S.E.2d 508, 510 (1971).

70. *Id.*

71. *Linowes & Delaney*, *supra* note 24, at 327. See generally *Challenging Exclusionary Zoning Practices*, *supra* note 50. See also note 49 *supra* and accompanying text.

72. 216 Va. 128, 216 S.E.2d 199 (1975).

73. *Id.* at 144, 216 S.E.2d at 212.

while the value of neighboring properties remained constant.<sup>74</sup> The court held that where a land use permitted to one landowner is restricted to another similarly situated, the restriction is *prima facie* discriminatory. Since the ordinance could not be justified as a legitimate exercise of police power, it constituted a denial of equal protection of the laws.<sup>75</sup>

A potential constitutional challenge to a zoning amendment is that it violates the right to travel within and among the states.<sup>76</sup> Although this privilege is not expressly provided for in the United States Constitution, there is authority to support the proposition that the right to travel is constitutionally protected.<sup>77</sup> Therefore, when a zoning action precludes the entrance of many people who would otherwise migrate, the zoning measure may impinge upon the right to travel. Although Virginia has never explicitly recognized this argument, it is necessarily interwoven with the police power objections previously discussed. Similarly, since the restriction of the right to travel would have exclusionary effects, this argument may be incorporated with those of violation of equal protection and discrimination.<sup>78</sup>

## V. SCOPE OF JUDICIAL REVIEW

When the validity of a zoning amendment is challenged, each case will

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74. *Id.* at 141, 216 S.E.2d at 210.

75. *Id.* at 144, 216 S.E.2d at 212. See also *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975).

76. *Linowes & Delaney*, *supra* note 24, at 329. See also *Challenging Exclusionary Zoning Practices*, *supra* note 50, at 653.

77. *Challenging Exclusionary Zoning Practices*, *supra* note 50, at 654. One interpretation is that the right to travel is so fundamental it needed no express articulation and is implicitly recognized under the ninth amendment. *Linowes & Delaney*, *supra* note 24, at 330. Another interpretation of this right was espoused in a brief for appellant by Samuel Slaff in *Edwards v. California*, 314 U.S. 160 (1941), a case in which the state alleged that its police power provided authority to restrict the travel of indigents into the state.

Freedom of movement and of residence must be a fundamental right in a democratic State. Whether within the privileges and immunities clause of the Fourteenth Amendment or within the term liberty in the due process clause, it is a basic constitutional right, the more valuable to those who migrate because of economic compulsions.

*Id.* at 163. While the scope of *Edwards* seems to encompass *interstate* travel only, it is the opinion of many commentators that the right to *intrastate* travel is an implicit fundamental right as well. *Challenging Exclusionary Zoning Practices*, *supra* note 50, at 654-57.

78. See generally *Board of Supervisors v. Carper*, 200 Va. 653, 661, 107 S.E.2d 390, 396 (1959). While the right-to-travel argument was not expressed, its recognition appears implicit in the holding that the rezoning was designed to prevent low income people from living in the area. The rezoning was held exclusionary and, therefore, unreasonable. See also *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975).

be determined on its particular facts.<sup>79</sup> Since zoning is an exercise of delegated police power, ordinances are entitled to the rebuttable presumption of validity traditionally granted all legislative enactments.<sup>80</sup> There is, however, a split of authority among the states as to whether the act of rezoning should be characterized as legislative or quasi-judicial.<sup>81</sup> Virginia appears to have adopted the legislative characterization.<sup>82</sup> This legislative designation is evidenced by the Virginia Supreme Court's statement as to the traditional allocation of the burden of proof in *Board of Supervisors v. Snell*.<sup>83</sup> The court noted that when a comprehensive zoning amendment is enacted

[t]he burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals or general welfare. The court will not substitute its judgments for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.<sup>84</sup>

The court indicated that the burden of proof may vary, however, depending upon the comprehensiveness of the rezoning ordinance challenged. The court articulated the opinion that while a landowner is always faced with the possibility of comprehensive rezoning and the heavy burden of proof related to it, the landowner's burden with respect to challenging a piecemeal downzoning<sup>85</sup> ordinance should be lessened.<sup>86</sup> Thus the court

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79. See *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 290, 192 S.E. 881, 889, appeal dismissed, 302 U.S. 658 (1937), rehearing denied, 302 U.S. 781 (1938). Accord, *Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973); *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

80. Comment, *Zoning, Planning and the Scope of Judicial Review in Virginia*, supra note 1, at 523. See *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881 (1937).

81. See Comment, *Zoning, Planning and the Scope of Judicial Review in Virginia*, supra note 1, at 527. See, e.g., *Neuberger v. City of Portland*, 37 Or. App. 13, 586 P.2d 351 (1978) (zoning amendments affecting few property owners are quasi-judicial); *Westbrook v. Albany Planning Commission*, 148 Ga. App. 338, 251 S.E.2d 110 (1978) (legislative); *Eastside Properties Inc. v. Dade County*, 358 So. 2d 873 (Fla. App. 1978) (legislative); *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971) (quasi-judicial).

82. *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974); *Board of Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958). But cf. Comment, *Zoning, Planning and the Scope of Judicial Review in Virginia*, supra note 1, at 510-11 (suggests court's failure to define carefully the scope of review has led to a situation in which the courts continue to espouse the applicability of the legislative presumption while denying it in fact).

83. 214 Va. 655, 202 S.E.2d 889 (1974).

84. *Id.* at 658, 202 S.E.2d at 892 (quoting *Board of Supervisors v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959)).

85. Piecemeal downzoning was defined by the court as an ordinance "initiated by the

held that in a challenge to piecemeal downzoning the aggrieved landowner need only make a *prima facie* showing that there has been no change in circumstances substantially affecting the public health, safety or welfare since enactment of the prior zoning ordinance. The burden of going forward with evidence of mistake or fraud regarding the prior ordinance or with evidence of changed circumstances then shifts to the governing body.<sup>87</sup> In order to carry its burden, the governing body need only supply enough evidence to reach the point where the reasonableness of the ordinance becomes fairly debatable.<sup>88</sup>

The *Snell* court noted that the rule it had adopted was similar to the Maryland "change or mistake" rule.<sup>89</sup> The court also pointed out, however, that the Virginia rule differs from the Maryland rule in two important respects. First, the Virginia rule is limited in application to piecemeal downzoning "*such as that here involved.*"<sup>90</sup> Second, the "Virginia rule does not require the governing body to produce *strong* evidence, but evidence sufficient to render the issue of reasonableness 'fairly debatable'."<sup>91</sup>

Just as the enactment of a zoning amendment is a legislative function, so is the denial of a request for rezoning.<sup>92</sup> The burden is on the one who seeks rezoning to show the need for it.<sup>93</sup> Refusal to rezone will be upheld by a reviewing court where no compelling need for rezoning is shown, and where no clear demonstration has been made that the existing zoning classification is no longer reasonable or appropriate.<sup>94</sup> The "fairly debat-

zoning authority on its own motion; one selectively addressed to landowners' single parcel and an adjacent parcel; and one that reduces the permissible residential density *below* that recommended by a duly-adopted Master Plan." *Id.* at 658, 202 S.E.2d at 893.

86. *Id.* at 659, 202 S.E.2d at 893.

87. *Id.*

88. *Id.* Note, however, that the governing body in *Snell* was unable to meet this burden. One commentator has suggested that the court has increased its level of scrutiny within the traditional legislative presumption test. See note 80 *supra*. See, e.g., *Town Council v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978); *Board of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48, *cert. denied*, 423 U.S. 940 (1975). In both cases the governing body was unable to meet the "fairly debatable" test.

89. *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 659 n.1, 202 S.E.2d 889, 893 n.1 (1974). See, e.g., *Burke, The Change-Mistake Rule and Zoning in Maryland*, 25 AM. U.L. REV. 631 (1976).

90. *Id.* (emphasis added). The court's language leaves open the question whether piecemeal downzoning is strictly defined as in note 85 *supra*, or whether piecemeal downzoning simply means anything less than comprehensive downzoning.

91. *Id.*

92. *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975).

93. *Town Council v. Kohler*, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978).

94. *Id.*

able" test will apply.<sup>95</sup>

The issue may be said to be "fairly debatable" when the evidence offered for support of opposing views would lead objective and reasonable persons to reach differing conclusions.<sup>96</sup> Such evidence must be both quantitative and qualitative, that is to say it must be evidence which is not only substantial, but relevant and material as well.<sup>97</sup> One authority suggests that this evidential test is best dealt with through the introduction of expert testimony designed to counter that which is expected from the government agents involved in the rezoning process.<sup>98</sup> Experts should definitely be available to provide testimony that the use planned by the landowner is more appropriate than that provided for in the zoning change.<sup>99</sup>

Virginia courts will refrain from substituting their judgments for those of the local legislative body.<sup>100</sup> The court will remand the case to the proper officials for a final determination rather than rewrite the zoning ordinance.<sup>101</sup>

## VI. INVERSE CONDEMNATION

One who loses a judicial rezoning challenge is left with land either substantially increased in value (upzoned), or significantly decreased in value (downzoned). At least with respect to downzoning the landowner has one other alternative as yet unrecognized in Virginia's courts.<sup>102</sup> A downzoning ordinance may so restrict the free use of a piece of property as to

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95. *Id.*

96. Board of Supervisors v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975).

97. *Id.*

98. Linowes & Delaney, *supra* note 24, at 329. See, e.g., Board of Supervisors v. Allman, 215 Va. 434, 211 S.E.2d 48, *cert. denied*, 423 U.S. 940 (1975); Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975) (evidence introduced through expert testimony).

99. Linowes & Delaney, *supra* note 24, at 332.

100. County Board of Fairfax v. God, 216 Va. 163, 217 S.E.2d 801, *cert. denied*, 423 U.S. 1088 (1975); City Council v. Swart, 216 Va. 170, 217 S.E.2d 803 (1975); Boggs v. Board of Supervisors, 211 Va. 488, 178 S.E.2d 508 (1971).

101. *Id.*

102. Although inverse condemnation per se has yet to be recognized in Virginia, especially in relation to downzoning, the case of *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477, 84 S.E.2d 511 (1954) appears to be a useful precedent. It was held in *Heldt* that article 1 § 11 of the Virginia Constitution is self-executing and that a landowner whose property is damaged by the state may enforce his constitutional right to compensation in a common-law action. *Id.* at 482, 84 S.E.2d at 515. See VA. CONST. art. 1 § 11 ("the General Assembly shall not pass any law . . . whereby private property shall be *taken or damaged* for public uses, without just compensation. . . .") (emphasis added).

constitute a de facto condemnation,<sup>103</sup> otherwise known as inverse condemnation. Inverse condemnation is a "taking" of private property for public use without the invocation of the power of eminent domain.<sup>104</sup>

Inverse condemnation and a motion for declaratory judgment seeking to have a rezoning ordinance set aside as confiscatory are corollary actions distinguished only by the remedies sought. The remedy in an action for inverse condemnation is compensation for the decreased value of one's land whereas the remedy in an action for declaratory judgment is having the zoning amendment set aside.

The concept of inverse condemnation with respect to zoning seems first to have been applied in airport cases.<sup>105</sup> In these cases the courts have treated the zoning ordinances as a mere substitute for the purchase of a flight or clearance easement.<sup>106</sup> One court has noted that an important distinction between airport zoning and more traditional height zoning is that the airport zoning contemplates actual physical use of the airspace by aircraft while building cases do not involve such physical use.<sup>107</sup>

California has led the nation in expanding inverse condemnation as a cause of action in cases involving downzoning.<sup>108</sup> Other jurisdictions appear to be following the trend, including, possibly, Maryland.<sup>109</sup> As one source has noted, inverse condemnation appears to be an up and coming remedy for the downzoned landowner.<sup>110</sup>

## VII. CONCLUSION

Although the decision whether to enact initial zoning legislation is a discretionary one to be made by the governing body of a municipality or

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103. Linowes & Delaney, *supra* note 24, at 335.

104. *Id.* at 334.

105. See E. YOKLEY, *ZONING LAW AND PRACTICE* § 32-6 (4th ed. 1980).

106. J. BEUSCHER, R. WRIGHT & M. GITELMAN, *CASES AND MATERIALS ON LAND USE* 825 (2d ed. 1976).

107. *Sneed v. Riverside County*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

108. See, e.g., *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975); *Furey v. City of Sacramento*, 24 Cal. 3d 862, 598 P.2d 844, 157 Cal. Rptr. 684 (1979); *HFH, Ltd. v. Superior Court*, 41 Cal. App. 3d 794, 116 Cal. Rptr. 436 (1974). *But cf. Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (inverse condemnation after downzoning denied).

109. *Ligon v. State*, 448 F. Supp. 935 (D. Md. 1977). See also *Holloway v. City of Pipestone*, 269 N.W.2d 28 (Minn. 1978) (inverse condemnation recognized as potential cause of action after downzoning); *Dempsey v. Boys Club, Inc.*, 558 S.W.2d 262 (Mo. Ct. App. 1977); *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); *Eck v. City of Bismark*, 283 N.W.2d 193 (N.D. 1979).

110. Linowes & Delaney, *supra* note 24, at 337.

county,<sup>111</sup> it seems obvious that the trend in Virginia is towards increasing local governmental regulation in the guise of zoning ordinances. It, therefore, becomes apparent that local practitioners previously unfamiliar with zoning concepts will have to come to grips with these concepts in order to deal with encroaching zoning ordinances. Hopefully this compilation of Virginia rezoning law will serve as a useful tool in such an endeavor.

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111. VA. CODE ANN. § 15.1-486 (Cum. Supp. 1980).

