Chapter 10

Legislative, Discretionary, Quasi-judicial, and Ministerial Acts

10-1 Introduction

The nature of the various land use actions taken by County boards and commissions varies greatly. This chapter identifies the characteristics and qualities of legislative, discretionary, quasi-judicial, and ministerial acts and how each is different from one another. The distinctions are important because, among other things, certain acts are presumptively valid or correct, and certain acts are cloaked in various state and federal immunities from the consequences that may follow.

10-2 Legislative acts

"The power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people." *County of Fairfax v. Fleet Industrial Park Ltd. Partnership*, 242 Va. 426 (1991); *see, Mumpower v. Housing Authority*, 176 Va. 426 (1940); *Laird v. City of Danville*, 225 Va. 256 (1983). A legislative function can be exercised only by the Board of Supervisors. *Fleet Industrial Park, supra*.

The exercise of legislative power involves the "balancing of the consequences of private conduct against the interests of public welfare, health, and safety." *Helmick v. Town of Warrenton*, 254 Va. 225 (1997). While legislative acts create new laws, ministerial acts generally implement existing laws. *Helmick, supra*. The Virginia Supreme Court has recognized that it is not always easy to determine when a legislative body is acting in a legislative or some other capacity. *Blankenship v. City of Richmond*, 188 Va. 97 (1948). In general, a legislative body exercises a legislative power when it prescribes a course of conduct. *Blankenship, supra* (distinguishing legislative acts from quasi-judicial acts).

10-2.1 Acts that are legislative

Within the context of land use, amendments to the comprehensive plan are legislative acts. *See, Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70 (1997). Ordinances that regulate or restrict conduct with respect to property is purely legislative (*Helmick, supra*) and, therefore, zoning text and zoning map amendments are legislative acts. *See, City Council of Virginia Beach v. Harrell*, 236 Va. 99 (1988); *Board of Supervisors of Fairfax County v. Southland Corp*., 224 Va. 514 (1982). Thus, when two reasonable zoning classifications apply to a property (the existing and proposed zoning classifications), the Board of Supervisors has the legislative prerogative to choose between those reasonable zoning classifications. *Board of Supervisors of Fairfax County v. Miller & Smith, Inc*., 242 Va. 382 (1991). Moreover, when the Board considers the many factors when taking zoning actions, the weighing of those factors is a legislative function. *Miller & Smith, supra*.

Acting on a request for a special use permit is also a legislative act. *Richardson v. Suffolk*, 252 Va. 336 (1996); *Bollinger v. Board of Supervisors*, 217 Va. 185 (1976). Finally, acting on a request to vacate a subdivision plat is a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225 (1997). The determination of whether to vacate a subdivision plat, like the decision regarding the grant or denial of a special use permit, is a decision which regulates or restricts the use of property. *Helmick, supra*.

The Planning Commission does not act in a lawmaking capacity when it considers matters for recommendation to the Board that are legislative in nature. However, in making its recommendation, the Commission considers the same factors and matters of public policy as the Board. Neither the BZA nor the ARB exercise legislative powers except when the BZA considers special use permits for signs. The BZA is able to exercise this power because the state has expressly authorized a local governing body to

delegate the power to do so.

10-2.2 Effect of act being classified as legislative

A legislative act is presumed to be reasonable. *Ames v. Town of Painter*, 239 Va. 343 (1990); *Board of Supervisors of Fairfax County v. Southland Corp*., 224 Va. 514 (1982); *Helmick v. Town of Warrenton*, 254 Va. 225 (1997). A legislative act is also presumed to be valid. *Richardson v. Suffolk*, 252 Va. 336 (1996). If challenged in court by probative evidence that the decision was unreasonable, the Board of Supervisors need only produce sufficient evidence of reasonableness to make the issue fairly debatable. *Richardson, supra*. If the issue is fairly debatable, the Board's legislative decision must be sustained. *Richardson, supra.* In considering whether the decision is reasonable, the motives of the Board are generally immaterial. *Helmick, supra*.

Because a legislative act requires the exercise of discretion, members of the Board of Supervisors are immune from liability under Virginia law from any suit arising out of the exercise or failure to exercise their discretionary or governmental authority. *Virginia Code § 15.2-1405 (official immunity).* See section 4-3.1. Members of the Board are also immune from suit and liability in actions brought under 42 U.S.C. § 1983 arising from their legislative decisions. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (in the land use context, absolute immunity exists when local legislative officials acting in their legislative, as opposed to administrative or executive, capacities). See section 4-4.3.

Finally, legislative actions are not subject to procedural due process claims arising from alleged deficiencies in the notice or hearings. The County is only required to satisfy statutory notice and hearing requirements. *County of Fairfax v. Southern Iron Works, Inc*., 242 Va. 435 (1991) (procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings, not legislative proceedings).

10-3 Discretionary acts that are not legislative acts

A discretionary act that is not legislative in nature is occasionally required to be taken as a condition precedent to a primary legislative, quasi-judicial or ministerial act.

For example, a modification or waiver requiring the exercise of some discretion may be required before a site plan or subdivision plat may be approved. Assuming that the consideration of the modification or waiver requires the exercise of some discretion, approval of the application is discretionary, rather than ministerial and mandatory, until the modification or waiver is approved (assuming all other applicable requirements are satisfied). *See, Planning Commission of City of Falls Church v. Berman*, 211 Va. 774 (1971) (once the applicant has complied with all applicable regulations, approval of the site plan is no longer discretionary but ministerial and mandatory; planning commission could not deny a site plan for a reason other than failure to comply with applicable regulations), cited in *Mountain Venture v. Planning Commission of Lovettsville*, 26 Va.Cir. 50 (1991).

10-3.1 Discretion to make factual determinations

Discretionary acts, non-legislative in nature, may be delegated by the locality's governing body to subordinate bodies or officials. "Under the changing circumstances and conditions of life, it is frequently necessary that power be delegated to an agent to determine some fact or state of things upon which the legislative body may make laws operative." *Gavis v. Board of Zoning Appeals of City of Winchester*, 1985 WL 306753 (Va. Cir. Ct. 1985). The ability to grant discretion is limited. The Board of Supervisors may delegate to the Planning Commission, the ARB, or the agent the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by the general terms of a law exist. *Ours Properties, Inc. v. Ley*, 198 Va. 848 (1957); *Gavis, supra.* This grant of discretion does not make the act legislative in nature.

When discretion is delegated, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637 (1959); *Gavis, supra*. "There must be provided uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards." *Andrews, supra* (standard of "whether [a] proposed use would be desirable or advantageous to the neighborhood or the community or the county at large. . . [required to comply] to the minimum requirement for the promotion of the public health, safety, covenience and general welfare" found "too general and wholly vague"). In *Ours Properties*, the Virginia Supreme Court upheld an ordinance vesting discretion in zoning officials to grant an application for an industrial establishment if "satisfactory evidence is presented that such establishment will not adversely affect any contiguous district through the dissemination of smoke, fumes, dust, odor, or noise or by reason of vibration and that such establishment will not result in any unusual danger of fire or explosion." A delegation of the power to exercise discretion based upon a finding of facts is not of itself an arbitrary or capricious delegation. *Ours Properties, supra*.

When a discretionary approval includes the authority to impose conditions, the purpose of a particular regulation may imbue the decision making body with the discretion to impose particular conditions that address the purposes of the regulation. *Schalk v. Planning Commission of City of Winchester*, 1987 WL 488696 (Va. Cir. Ct. 1987).

10-3.2 Discretion may not be exercised in an arbitrary or capricious manner

When the decision making body exercises its discretion, it may not exercise that discretion in an arbitrary or capricious manner. *Glass v. Board of Supervisors of Frederick County*, 30 Va.Cir. 504 (1981). Actions are defined as arbitrary and capricious when they are "willful and unreasonable" and taken "without consideration or in disregard of facts or law or without determining principle." *School Board of City of Norfolk v. Wescott*, 254 Va. 218 (1997).

If the decision making body has not abused its discretion by acting arbitrarily or capriciously, and it has acted within the ambit of its legislatively conferred powers, then its actions should be sustained. *Schalk v. Planning Commission of City of Winchester*, 1987 WL 488696 (Va. Cir. Ct. 1987) (noting that when a planning commission exercises discretion, its act is akin to a quasi-judicial act by the BZA).

10-4 Quasi-judicial acts

In general, it may be said that a public body acts in a quasi-judicial capacity when it grants or denies a privilege or benefit, and in a legislative capacity when it prescribes a course of conduct. *Blankenship v. City of Richmond*, 188 Va. 97 (1948).

10-4.1 Acts that are quasi-judicial

The BZA acts in a quasi-judicial capacity when it considers a variance. *Ames v. Town of Painter*, 239 Va. 343 (1990). The Zoning Administrator acts in a quasi-judicial capacity when making official determinations. *Lynch v. Spotsylvania County Board of Supervisors*, 1997 WL 1070572 (Va. Cir. Ct. 1997).

10-4.2 Effect of act being classified as quasi-judicial

The review of a decision of a BZA is limited to the scope of the BZA proceeding. *Foster v. Geller*, 248 Va. 563 (1994). This review is further limited to determining whether the BZA applied erroneous principles of law or, where the BZA's discretion is involved, whether the decision is plainly wrong and in violation of the purpose and intent of the Zoning Ordinance. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502 (1993); *Masterson v. Board of Zoning Appeals of City of Virginia*

Beach, 233 Va. 37 (1987). The BZA is required to make findings that reasonably articulate the basis for its decision. *Packer v. Hornsby*, 221 Va. 117 (1980).

The decision of the BZA is presumed to be correct. *Foster, supra; Masterson, supra.* This presumption of correctness applies even when the issue is one that is of a purely legal nature. *Foster, supra*.

10-5 Ministerial acts

A ministerial act is one performed under a given set of facts and in a prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, one's own judgment upon the propriety of the act being done. *Richlands Medical Association v. Commonwealth ex rel. State Health Commissioner*, 230 Va. 384 (1985). A duty is ministerial even though an officer has to determine the existence of the facts that make it necessary for him to act. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582 (1976).

In contrast to a legislative act that establishes a policy or law, a ministerial act implements that policy or law by applying the facts in the particular circumstances to the law or policy. When all of the requirements of a statute or ordinance are satisfied, an action that was once discretionary becomes ministerial and mandatory. *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70 (1997) (once zoning requirements were satisfied, and building permit application otherwise satisfied USBC requirements, issuance of building permit was ministerial and mandatory).

10-5.1 Acts that are ministerial

The approval of site plans and subdivision plats are ministerial acts. At an early point in the subdivision plat or site plan process, a locality may have the discretion to deny the plat or plan. Once the applicant has complied with all existing ordinances, however, the function of approval becomes ministerial, and the plat or plan must be approved. *Hylton, supra; Planning Commission of City of Falls Church v. Berman*, 211 Va. 774 (1971). The exercise of discretion so as to deny an application that satisfies the applicable criteria would be arbitrary and capricious. An arbitrary and capricious act is one taken by an administrative agency that is "willful and unreasonable . . . without consideration or in disregard of facts or without determining principle."

The ministerial nature of site plans and subdivision plats is best reflected in the requirement that if a plan or plat is denied, a locality is required to identify for the applicant the particular requirement that is unsatisfied, and explain what the applicant must do to satisfy that requirement. *Virginia Code § 15.2-2259(A)*. The ultimate question is not whether a plan or plat *should* be approved or denied as a policy matter, but whether the plan or plat will be approved or denied upon a determination as to whether it satisfies the applicable ordinances. For what it's worth, one trial court has stated that, as a general proposition, the approval of a site plan is more ministerial than the approval of a subdivision plat. *Mountain Venture Partnership Lovettsville II et al. vs. Planning Commission of Town of Lovettsville*, 1991 WL 835305 (Va. Cir. Ct. 1991).

10-5.2 Effect of act being classified as ministerial

Unlike legislative actions, a presumption of reasonableness and judicial deference do not attach to the performance of ministerial duties. If a ministerial duty is not performed as required by law, the court will issue a writ of mandamus compelling the ministerial duty to be performed. *Phillips v. Telum, Inc*., 223 Va. 585 (1982).

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The official immunity afforded County officers and employees under Virginia law does not exist for the performance of a ministerial duty. *Heider v. Clemons*, 241 Va. 143 (1991). In actions under 42 U.S.C. § 1983, the absolute immunity that attaches to legislative acts does not attach to ministerial acts. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). Likewise, the qualified immunity that may be readily available for legislative acts will not exist for the improper performance of a ministerial duty if the law governing the rights that have been violated is so clear, at the time of their conduct, that a reasonably competent person, in their position, would not have believed the conduct to be lawful. *See, Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). See section 4.4.

10-6 Guidance on the review of ministerial acts: site plans and subdivision plats

This section provides guidance on the review of site plans and subdivision plats. See also chapters 15 (subdivisions) and 16 (site plans).

10-6.1 The fundamental differences between the review of a preliminary site plan or subdivision plat and an application for a zoning map amendment or a special use permit

There are numerous differences between the review of a preliminary site plan or plat and an application for a zoning map amendment or a special use permit. The most fundamental differences are apparent upon a brief overview of the County's regulations pertaining to land development, which operate in two steps. The first step is a policy determination made by the Board of Supervisors pertaining to the appropriate use of the land. The Board makes this determination through the adoption of the Comprehensive Plan and the zoning regulations that will apply to a particular area. The second step is a ministerial determination made by either the agent or the Planning Commission as to whether or not land proposed for development or subdivision complies with the requirements of the applicable County ordinances. The agent or the Commission makes this determination when it considers site plans and subdivision plats.

10-6.2 The relevant issues when a site plan or a subdivision plat is considered

The most relevant issue when a site plan or subdivision plat is considered is whether the site plan satisfies the requirements of the Zoning Ordinance or whether the plat satisfies the requirements of the Subdivision Ordinance. Whether the particular use is consistent with the Comprehensive Plan, or is otherwise appropriate for the land, are not relevant. The determination of the appropriate use of the land is a discretionary legislative determination reserved to, and already made by, the Board of Supervisors.

Thus, when considering a preliminary site plan or preliminary subdivision plat, the agent and the Planning Commission are not concerned with policy issues such as whether the proposed development is a desirable use of the land. Rather, the agent and the Commission should be concerned only with determining that the development or subdivision satisfies the requirements of the applicable ordinances.

10-6.3 Whether the Planning Commission may exercise discretion in considering site plans and subdivision plats

There are many situations where the Planning Commission may exercise discretion on issues related to a site plan or subdivision plat. Both the Subdivision Ordinance and the Zoning Ordinance

allow an applicant to request a waiver or modification of some requirement of the applicable regulations. The approval of this request may be a prerequisite to the Commission's approval of the plan or plat. In either case, however, the consideration of these discretionary matters are separate and distinct from the ministerial nature of the Commission's review of a site plan or subdivision plats.

10-6.4 Whether a site plan or subdivision plat may be denied on health, safety or nuisance grounds

General statements in land use regulations setting forth their general purposes of protecting the public health, safety, and welfare or preventing nuisances, do not themselves provide a basis to deny a site plan or a subdivision plat. *See, Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497 (1999) (Virginia Code § 15.2-2200 is merely a statement of purpose and intent, and is not a source of power). Presumably, the Subdivision and Zoning Ordinances address these purposes through specific and comprehensive regulations that encompass the full scope of the enabling legislation.

At the preliminary site plan or preliminary plat stage, the applicant has the opportunity to address health, safety, welfare or nuisance concerns (through the application of the requirements of the Subdivision or Zoning Ordinance) prior to submittal of the final plan or plat. In addition, it should be noted that health, safety or nuisance concerns must be based upon reasonable, credible evidence, rather than fears or opinion.