Nothing in My Back Yard? The Case Against Expanding Third-Party Rights to Challenge Local Land Use Decisions in Virginia

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In April of 2008, the Virginia Supreme Court handed down its ruling in *Logan v. City Council of the City of Roanoke*.[1] In its unanimous decision, the court resolved an issue that was frequently contested in cases involving citizen challenges to local land use actions such as subdivision approvals.[2] The question addressed in *Logan* was whether third-party neighboring landowners possessed a right-of-action to bring a so-called NIMBY[3] lawsuit seeking to overturn the approval of a subdivision decision they opposed. Before *Logan*, members of the land use bar representing local governments and developers sought to quash lawsuits by neighbors contesting subdivision approvals by arguing for a strict construction of the applicable statute that did not specify a right of appeal for third parties. Plaintiff attorneys representing the neighbors contended that the Virginia Declaratory Judgment Act authorized the neighbors' right-of-action.

This Article summarizes the law relating to third-party challenges to local land use decisions in Virginia and provides commentary responding to the suggestion that third-party rights of action should be expanded. Part I reviews the primary statutory provisions for appealing planning, subdivision, and zoning decisions in Virginia. Part II discusses the evolution of declaratory judgment actions as vehicles for third-party challenges to planning and subdivision decisions from 1990 to April 18, 2008, when the *Logan* decision was handed down. Discussion and legal analysis of whether the current state of the law should be changed by legislation is contained in Part III, and Part IV contains conclusions and final thoughts.

1. 275 Va. 483, 659 S.E.2d 296 (Va. 2008).
2. This Article's focus is third-party challenges to non-zoning actions. As discussed in Part I(C), *infra*, third-party citizens and taxpayers who are aggrieved and meet the legal requirements for standing have a statutory right of action under Virginia Code §15.2-2314 and §15.2-2285(F) to challenge zoning actions.
3. NIMBY is an acronym originally standing for "Not in my Back Yard." "NIMBY" represents the attitude of landowners who may not necessarily be anti-growth but who vigorously oppose virtually any development close to their homes.

I. An Overview of Planning, Subdivision, and Zoning in Virginia

When discussing land use challenges in Virginia, it is fundamental to first identify the type of land use decision at issue. Land use in Virginia falls into three general categories: (1) planning; (2) subdivision; and (3) zoning. Each land use process is governed by distinct procedures set forth in separate articles of Title 15.2 of the Code of Virginia. Chapter 22 contains the land use procedures for planning, subdivision of land and zoning. Planning commissions are governed by Article 2, and comprehensive plan requirements and procedures are contained in Article 3.[4] Land subdivision and development provisions are set forth in Article 6.[5] Zoning is found in Article 7.[6] Chapter 22 of Title 15.2 contains the universe of Virginia land use statutes; however, this Article is limited to its statutory provisions for appeals.

After determining whether a decision is a planning, subdivision, or zoning action and identifying the plaintiffs and their relationship to the challenged land use decision, a careful review of the applicable statute is necessary to determine whether the right-of-action asserted exists.[7] Each land use

4. Article 2 is codified as Va. Code Ann. §§15.2-2210 to 15.2-2222.1 and Article 3 is codified as §§15.2-2223 to 15.2-2232.
5. Va. Code Ann. §§15.2-2240 to 15.2-2279 (2008).
6. *Id.* §§15.2-2280 to 15.2-2316.
7. It is worth reiterating the distinction between a right-of-action and a cause of action. In Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp., 234 Va. 54, 57, 360 S.E.2d 342, 343-44 (Va. 1987), the Virginia Supreme Court explained the difference:

   > A right of action is a remedial right to presently enforce a cause of action; operative facts giving rise to a right of action comprise a cause of action." Shiflet v. Eller, 228 Va. 115, 120, 319 S.E.2d 750, 754 (Va. 1984). "While a cause of action and a right of action may accrue simultaneously, they do not necessarily do so." First Virginia Bank-Colonial v. Baker, 225 Va. 72, 81, 301 S.E.2d 8, 13 (Va. 1983).

   This Article analyzes the issue of third-party *rights*-of-action. It does not address the factual question of whether a cause of action has

process, planning, subdivision, and zoning has distinct procedures for appeals and this Article will review the respective appeal statutes.

A. Planning: Appealing a Planning Commission's "Substantial Accord" Determination

Every Virginia locality must adopt a comprehensive plan.[8] After the comprehensive plan is adopted, the planning commission is charged with, inter alia, determining whether proposed streets, public areas, buildings, utilities, and other features are in substantial accord with the comprehensive plan.[9] Virginia Code §15.2-2232(B) sets forth the procedures for appealing such a planning commission action:

> The owner or owners or their agents may appeal the decision of the commission to the governing body within ten days after the decision of the commission. The appeal shall be by written petition to the governing body setting forth the reasons for the appeal.[10]

By its plain language, the statute restricts appeals to the governing body of a planning commission's substantial accord determination to the "owner or owners or their agents." Neighbors and other third parties are not authorized by the statute to appeal to the governing body. The Virginia Supreme Court ruled in *Miller v. Highland County*[11] that without statutory authorization, neighbors also lacked the right to appeal a planning commission's substantial accord determination by bringing an action in circuit court.

B. Subdivision and Development: Appealing a Subdivision Plat or Site Plan Disapproval

The planning commission, or another designated agent, is also responsible for administration of the subdivision ordinance. Virginia Code §15.2-2259 governs the process whereby the planning commission or its agent receives subdivision plats, reviews them for compliance with the subdivision ordinance, and issues either approval or disapproval.[12] In more populous localities, the approval of plats, site plans, and plans of development for solely commercial and industrial uses are governed by the provisions of §15.2-2259.[13] Virginia Code §15.2-2259(D) provides the available appeal procedure for the denial of a proposed subdivision plat or applicable site plan or plan of development:

> If a commission or other agent disapproves a plat and the subdivider contends that the disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious, he may appeal to the circuit court having jurisdiction of such land . . . .[14]

The only party having any appeal right under §15.2-2259(D) is the subdivider. Likewise, in localities that have adopted procedures for the tentative approval of preliminary plats, only the subdivider has a right to appeal from the disapproval of his submitted plat.[15]

C. Zoning: Appealing a Zoning Action

Zoning is the classification of land into districts based on use, and a person seeking a change from existing classifications must file an application with the zoning administrator.[16] Such an application could be in the form of a request for a zoning amendment, special or temporary zoning permit, special exception, or variance.[17] The zoning administrator is charged with enforcement of the zoning ordinance and making formal determinations interpreting the ordinance requirements.[18] The zoning administrator is responsible for receiving applications for rezoning, zoning permits, special exceptions, etc., and appeals for variances and, in many jurisdictions, the zoning administrator is authorized by the local governing body to issue special permits or temporary permits.[19]

The General Assembly has authorized the creation of local boards of zoning appeals (BZA) to hear, among other things, appeals of certain actions taken under the zoning ordinance, appeals for variances, and applications for special exceptions where it is authorized to do so by ordinance.[20] Specifically, appeals to the BZA are authorized for "any person aggrieved" by an order, requirement, decision, or determination of the zoning administrator or other officer in the administration and enforcement of the local zoning ordinance, any zoning ordinance adopted or any modification of zoning requirements.[21]

The local governing body, whether a town council or board of supervisors, hears applications for zoning amendments and proposals to change land use classifications. The Code of Virginia mandates that proposed zoning amendments are referred to the planning commission for its recommendation

been stated. Likewise, this article does not address the separate issue of legal standing which must always be considered every legal challenge. *See* Riverview Farm Assoc. v. Board of Supervisors of Charles City County, 259 Va. 419, 528 S.E.2d 99 (Va. 2000); Virginia Beach Beautification Comm'n v. Board of Zoning Appeals, 344 S.E.2d 899, 902, 231 Va. 415, 419 (Va. 1986); Cupp v. Board of Supervisors of Fairfax County, 318 S.E.2d 407, 411, 277 Va. 580, 589 (Va. 1984).

8. Va. Code Ann. §15.2-2223.
9. *Id.* §15.2-2232(A).
10. *Id.* §15.2-2232(B) (appeal must be heard and determined within 60 days from its filing).
11. Miller v. Highland County, 274 Va. 355, 361, 650 S.E.2d 532, 533 (Va. 2007).
12. Va. Code Ann. §15.2-2259.
13. *Id.* §15.2-2259(A)(2).
14. *Id.* §15.2-2259(D) (an appeal must be filed within 60 days of the disapproval). *See also id.* §15.2-2259(C) (appeal for subdivider when planning commission or agent fails to act on subdivision plat within specified time period).
15. *Id.* §15.2-2260.
16. Procedures are governed by the local ordinance as authorized by the Virginia Code, and may vary from locality to locality. *See id.* §15.2-2286 (permitted provisions in zoning ordinances).
17. *Id.* §15.2-2286(A)(7) (zoning amendments); *id.* §15.2-2310 (applications for special exceptions and variances).
18. *Id.* §15.2-2311 (determinations).
19. *See, e.g.,* Fauquier County, Va., Zoning Ordinance §13-501 (Mar. 13, 2008). The Fauquier Zoning Administrator is also authorized by the local ordinance to issue special exceptions.
20. Va. Code Ann. §15.2-2309.
21. *Id.* §15.2-2311(A).

before the governing body acts on the proposal.[22] The Code also prescribes for advertisement of the proposal and notice of public hearings held by the planning commission and governing body.[23] After the public is provided notice and an opportunity to be heard, the members of the governing body may act on the proposed zoning amendment.

With respect to zoning actions made by the BZA, Virginia Code §15.2-2314 authorizes a right of appeal for the following persons:

> Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board.[24]

Unlike the previously discussed statutes that limit the right of appeal to the "owner or owners or their agents" or the "subdivider," §15.2-2314 authorizes appeals for any aggrieved person or taxpayer.

For zoning ordinances and amendments made by the local governing body, Virginia Code §15.2-2285(F) provides the appeal procedure:

> Every action contesting a decision of the local governing body adopting or failing to adopt a proposed zoning ordinance or amendment thereto or granting or failing to grant a special exception shall be filed within thirty days of the decision with the circuit court having jurisdiction of the land affected by the decision. *However, nothing in this subsection shall be construed to create any new right to contest the action of a local governing body.*[25]

The statute does not limit the class of potential applicants but specifies that it does not create any new right of action. Therefore, under either §15.2-2314 or §15.2-2285(F), the right to appeal a zoning action is available to a larger set of potential petitioners and is less restrictive than the planning or subdivision appeal statutes.

The plain language of these statutes would appear to resolve the question of whether a right of action exists with respect to a particular land use action. The controversy before *Logan* was how to harmonize the Title 15.2 appeal statutes with the Virginia Declaratory Judgment Act found in Title 8.01.

II. A Recent History of Declaratory Judgment in Virginia Land Use Actions

In the recent past, the Virginia Declaratory Judgment Act[26] was often the authority upon which certain third parties relied to challenge non-zoning land use actions. In some cases, the plaintiffs were successful in obtaining judicial review of local land use decisions under the declaratory judgment statutes.

22. *Id.* §15.2-2285(B).
23. *Id.* §15.2-2204 (planning commission hearings); *id.* §15.2-2385(C) (governing body hearings).
24. *Id.* §15.2-2314.
25. *Id.* §15.2-2285(F) (emphasis added).
26. *Id.* §§8.01-184 to 8.01-191 (2008).

A. Parker *and* Barton*: Successful Third-Party Declaratory Judgment Challenges to Non-Zoning Land Use Actions*

In 1990, in a case styled *Parker v. County of Madison*,[27] a neighboring landowner was successful in overturning a subdivision approval without specific statutory authority for the lawsuit. The neighbor brought a declaratory judgment action against a developer and the County of Madison alleging that the developer's subdivision plat did not comply with a recently enacted subdivision ordinance and therefore was improperly approved. The neighbor received a favorable decision from the Virginia Supreme Court that the local governing body was obligated to act in accordance with the new subdivision law.[28] The court's ruling invalidated the subdivision approval that the plaintiff neighbor challenged.

At the time, having no instruction from the Virginia Supreme Court to the contrary, judges in the state permitted declaratory judgment actions in land use cases to be prosecuted by third parties, such as neighbors. Three days before the *Parker* decision was handed down, the Loudoun County Circuit Court issued a ruling in *Barton v. Town of Middleburg*,[29] a third-party suit to challenge an approved site plan. The trial judge analyzed the issue of whether the action was authorized as follows:

> Complainants have not cited, and I feel that is true because they cannot cite, any specific statute or ordinance giving them a cause of action for challenging the site plan approval. The Complainants have no specific statutorily-created cause of action for such a challenge.
>
> . . .
>
> Having no specific statutory cause of action, the only possible basis upon which the Complainants could bring this suit would be pursuant to the Declaratory Judgment Act, §8.01-184 et seq. Under §8.01-184, the interpretation of municipal ordinances is a specifically enumerated instance of an actual antagonistic assertion and denial of right. Here the Complainants clearly allege that the approval of the site plan violates ordinances of the Town of Middleburg. Hence, this case is a proper one for review in a declaratory judgment proceeding. The Complainants have stated a cause of action.[30]

Following the Virginia Supreme Court's recent instruction, the circuit court would not issue the same ruling today, but the decision helps illustrate the once difficult question of how to reconcile the appeal provisions of Title 15.2 and the declaratory judgment statutes and demonstrates the evolution of the law in this area.[31]

27. 244 Va. 39, 40-41, 418 S.E.2d 855-56 (Va. 1992).
28. *Id.* at 40-41. At the trial court level, the parties in *Parker* litigated the issue of whether a third-party right of action existed, but it does not appear from the record that the subdividers pursued the issue on appeal.
29. 27 Va. Cir. 20 (Va. Cir. Ct. 1992).
30. *Id.* at 22.
31. In 2006, the author was involved in litigation in Loudoun County in which Judge Chamblin ruled that the plaintiffs lacked a right-of-action to challenge a subdivision approval. Rosemont at Trevor Hill Homeowners Ass'n et al. v. Lou-

B. Do NIMBY Lawsuits Fit Within the Intent of the Declaratory Judgment Statutes?

The General Assembly has codified the authority circuit courts have to grant declaratory judgments. Virginia Code §8.01-184 provides:

> In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.[32]

The declaratory judgment statutes do not create any independent right-of-action and the Virginia Supreme Court has explained that the statutes were not designed to encourage additional litigation:

> The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature. In other words, the intent of the act is to have courts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests. *This is with a view rather to avoid litigation than in aid of it.*[33]

Neighbors who have brought declaratory judgment actions challenging subdivision approvals purport to seek an interpretation of a municipal ordinance, but often they seek much more.[34] Instead, many NIMBY lawsuits are brought by neighbors who disagree with their local government's administration of the subdivision ordinance and they seek a reversal of a local decision made under the ordinance. Arguably, these neighbors are seeking full-fledged judicial review of a local decision as opposed to a pure legal interpretation of a statute, which is contemplated by Virginia Code §8.01-184. In contrast, a permissible declaratory judgment action could be brought by a person directly affected by the enforcement of a municipal ordinance when the purpose of the suit is a declaration that the ordinance is unconstitutional.[35] Such action would be consistent with the purposes enunciated by the General Assembly in the statutes. However, the declaratory judgment statutes are not available for use by strangers to aid in additional litigation where the right of action does not otherwise exist. It is clear that a locality may be sued in matters relating to its duties,[36] but the Virginia Supreme Court has clarified in recent opinions that third parties seeking to challenge local land use actions must find authority elsewhere in the Virginia Code as a basis for their right of action.

C. The Virginia Supreme Court Settles the Dispute: Shilling, Miller, *and* Logan

Neighbors have a statutory right-of-action to challenge zoning decisions as long as they can establish that they are "aggrieved" by the zoning decision they appeal.[37] Virginia's high court recently addressed the question of whether neighbors have a right-of-action in the areas of land planning and subdivision.

1. A *Shilling* Effect on Third-Party Subdivision Appeals

In *Shilling v. Jimenez*,[38] adjacent landowners challenged a family subdivision in Loudoun County by filing a bill of complaint in the circuit court against the subdividers and their lenders. The plaintiff neighbors alleged that the subdivision approval was improper because the subdividers applied with false affidavits in order to qualify as a family subdivision under the county ordinance.[39] As a basis for their suit, the neighbors relied on Virginia Code §§15.2-2241 and 15.2-2255 and a county subdivision ordinance that provided:

> Any person aggrieved by the interpretation, administration, or enforcement of these regulations as they apply to a subdivision or site plan application may petition the Circuit Court of Loudoun County as provided by law.[40]

The trial court sustained the demurrers of the subdividers who successfully argued that the adjacent landowners had not stated facts constituting a right of action.[41] The adjacent landowners were granted an appeal by the Virginia Supreme Court.

The issue on appeal was "whether a landowner, aggrieved by the local governing body's approval of a subdivision of neighboring lands, may attack that approval indirectly by suit against the subdividers and their successors in title."[42] The court's 2004 ruling affirmed the trial court and held that the adjacent landowners possessed no right-of-action:

doun County et al., No. CL00041102-00, *cert. denied*, No. 062467 (Va. Super. Ct. Feb. 26, 2007). Judge Chamblin was proved to be correct by the *Logan* decision that followed his ruling months earlier.

32. Va. Code Ann. §8.01-184. Declaratory Judgment actions are common in lawsuits involving contracts, *see, e.g.,* Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth., 266 Va. 564, 587 S.E.2d 711 (Va. 2003); insurance coverage issues, *see e.g.,* Montgomery Mut. Ins. Co. v. Riddle, 266 Va. 539, 587 S.E.2d 513 (Va. 2003); and will contests, *see, e.g.,* Huaman v. Aquino, 272 Va. 170; 630 S.E.2d 293 (Va. 2006).
33. Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 421,177 S.E.2d 519, 524 (Va. 1970) (emphasis added).
34. The *Parker* case was one in which it can be said that the neighbors did seek an interpretation of a subdivision ordinance, namely which ordinance applied to the application.
35. *See, e.g.,* Estes Funeral Home v. Adkins, 266 Va. 297, 586 S.E.2d 162 (Va. 2003) (action seeking declaratory judgment that solid waste fees assessed against the plaintiff violated equal protection clause and were unconstitutional).
36. Va. Code Ann. §15.2-1404.
37. *Id.* §15.2-2314. *See, e.g.,* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (Va. 2004).
38. 268 Va. 202, 205, 597 S.E.2d 206, 208 (Va. 2004).
39. *Id.* at 206.
40. Loudoun County, Va., Land Subdiv. & Dev. Ordinance §1242.04(1)(a) (2004). *Shilling*, 268 Va. at 206.
41. *Shilling*, 268 Va. at 206.
42. *Id.* at 204.

> Nowhere in these enabling acts has the General Assembly either conferred upon a third party, a stranger to the subdivision approval process, a right to bring a suit to enforce the local ordinance or expressly empowered the local governing body to grant such a right.[43]

As clarified later in *Miller* and *Logan*, the ruling was intended to bar any party other than the subdivider from appealing subdivision actions unless the subdivision statutes were amended to create such a right of action for neighbors. However, the *Shilling* plaintiff did not name the locality as a defendant. As a result, the case did not present the court with an opportunity to rule that a neighbor could not appeal a subdivision action by bringing a complaint against the local governing body. Consequently, disputes continued about whether a third-party right of action existed in Virginia land use apart from the zoning appeal statutes.[44]

2. *Miller* Time: Applying the *Shilling* Ruling to Planning Commission Actions

In 2006 in Highland County, adjacent landowners filed actions for declaratory judgment styled as *Miller v. Highland County*,[45] to contest the planning commission's determination that a conditional use permit allowing construction of wind turbines was in substantial accord with the comprehensive plan. One of the issues in the consolidated appeal to the Virginia Supreme Court was whether a third-party declaratory judgment action existed under Virginia Code §15.2-2232 in light of the court's ruling in *Shilling*.[46] The court acknowledged its prior decisions that the "declaratory judgment statutes do not create or alter any substantive rights"[47] and held:

> Under the plain language of these statutory provisions [§15.2-2232], only the owner of the property at issue, or the owner's agent, may appeal to the governing body from a "substantial accord" determination of the planning commission. Notably, the statute does not provide third parties with a right of appeal from such a determination.[48]

The court's decision issued in 2007 significantly extended the *Shilling* holding by clarifying that "the declaratory judgment statutes may not be used to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute."[49]

On the same day as the *Miller* decision, the court also handed down its ruling in *Umstattd v. Centex Homes*,[50] and confirmed the continued availability of declaratory judgment actions for subdivision challenges by the applicant, as opposed to a neighbor. In the case, Centex Homes sought to develop a tract of land in the town of Leesburg but the town repeatedly rejected its application and preliminary subdivision plat.[51] In response, Centex Homes filed a complaint that included a petition for writ of mandamus as count one and a motion for declaratory judgment as count two.[52] The issue on appeal was "whether mandamus was an appropriate remedy to compel a local land development official to accept an application for a subdivision and a preliminary subdivision plat."[53]

The Virginia Supreme Court answered the question presented in the negative and instructed the trial court to instead decide the case under the declaratory judgment statutes. With regard to the petition for writ of mandamus, the court ruled that the review of a subdivision application involves the exercise of discretion and judgment by the local officials and therefore mandamus is not an appropriate remedy.[54] On the homebuilder's second count, the court held:

> The purpose of the declaratory judgment statutes is to provide a mechanism for resolving uncertainty in controversies over legal rights, without requiring one party to invade the asserted rights of another in order to permit an ordinary civil action for damages. [I]n the circumstances of the present case declaratory judgment affords an adequate remedy. The mixed questions of law and fact in controversy, as well as the resolution of the legal disputes between the parties, remain pending before the circuit court . . . . A declaratory judgment will decide those disputes and guide the parties in their future courses of action.[55]

The distinction between the plaintiff subdivider in *Umstattd* and the neighbors in *Miller* and *Shilling* is that the subdivider

43. *Id.* at 208.
44. *See* Mitchell Mountain, Ltd. Liab. Co. v. Board of Supervisors of Madison Co., 70 Va. Cir. 294 (Va. Cir. Ct. 2006) (presented with parties relying on *Parker* and *Shilling* for a motion for intervention, Judge Daniel Bouton noted "the somewhat difficult question of how to interpret and reconcile the two cases . . . .").
45. 274 Va. 355, 650 S.E.2d 532 (Va. 2007). *See* Part I(A), *supra*, discussing §15.2-2232.
46. *Miller*, 274 Va. at 369.
47. *Id.* at 370 (citing Cupp v. Board of Supervisors, 227 Va. 580, 592, 318 S.E.2d 407, 413 (Va. 1984); Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 419, 177 S.E.2d 519, 522 (Va. 1970); Williams v. Southern Bank of Norfolk, 203 Va. 657, 662, 125 S.E.2d 803, 807 (Va. 1962).
48. *Miller*, 274 Va. at 371.
49. *Id.* at 371-72.
50. 274 Va. 541, 650 S.E.2d 527 (Va. 2007).
51. *Id.* at 544.
52. *Id.*
53. *Id.* at 543. The trial court awarded the writ of mandamus and did not decide motion for declaratory judgment. *Id.* at 545.
54. *Id.* at 543, 545-47. The court explained:
    > Mandamus is an extraordinary remedy that may be used to compel a public official to perform a purely ministerial duty imposed by law. The use of the remedy is limited. It is not awarded as a matter of right but only in the exercise of a sound judicial discretion. It is not awarded in a doubtful case. It is not available where the applicant has an adequate remedy at law. A significant limitation upon the use of mandamus is the requirement that the duty to be enforced must be one in which the public official must act as a matter of course, without the exercise of his own judgment or discretion. Where the official duty involves the necessity on the part of the officer to make some investigation, to examine evidence and form his judgment thereon, mandamus will not be awarded to compel performance of the duty. To do so would improperly transfer to the court the discretion the law has committed to the officer.

    Id. at 545-46 (citations omitted).

    The court affirmed the availability of a writ of mandamus to compel an official to act. For example, mandamus was the proper remedy in Board of Supervisors v. Hylton Enterprises, 216 Va. 582, 221 S.E.2d 534 (Va. 1976), to compel an official to act on site plans that were pending over two years. *Umstattd*, 274 Va. at 547. The distinction depends on whether the petitioner is seeking to compel an official to act where mandamus provides a proper remedy or if the petitioner is seeking to compel an official to act in a particular way that involves discretion and judgment.
55. *Id.* at 548 (citing Va. Code. Ann §8.01-191; Miller v. Highland County, 274 Va. 355, 650 S.E.2d 532 (Va. 2007); Hoffman Family, Ltd. Liab. Co. v. Mill Two Assocs., 259 Va. 685, 693, 529 S.E.2d 318, 323 (Va. 2000); Cupp v. Board of Supervisors, 227 Va. 580, 592, 318 S.E.2d 407, 413 (Va. 1984); and Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 419, 177 S.E.2d 519, 522 (Va. 1970)).

is provided a right of appeal under Virginia Code §15.2-2260 while the third-party plaintiffs cannot point to a statute that authorizes their appeal. The lesson to learn from the September 14, 2007, *Miller* and *Umstattd* decisions is that there must be clear statutory authority for any challenge to a local government decision. Specifically, the *Shilling* and *Miller* rulings decree that there is no authority for third-party challenges to subdivision and planning commission actions, respectively.[56]

3. *Logan*: No means NO!

In 2008, the Virginia Supreme Court had another opportunity to address the question of "whether neighboring landowners may seek a declaratory judgment regarding a locality's application of a subdivision ordinance."[57] In *Logan v. City Council of the City of Roanoke*,[58] a developer obtained approval of a subdivision plat and nearby homeowners who opposed the housing development filed a bill of complaint for declaratory judgment to challenge the subdivision plat approval. The complaint named the city council, the planning commission, the local subdivision agent R. Brian Townsend and the developer.[59] The presence of the local government defendants in *Logan* distinguishes the case from *Shilling* in which the locality was not named. Both complaints involved challenges by neighboring landowners to a subdivision approval.

The *Logan* neighbors appealed from an adverse ruling and the defendants, assigning cross-error, argued that the trial court improperly held that the neighbors possessed a right-of-action to challenge a local subdivision decision.[60] The Virginia Supreme Court affirmed its previous holdings in *Shilling* and *Miller*. With respect to the third-party appeal by Jacqulyn Logan, the court ruled that "the declaratory judgment statutes do not create such rights, and in the absence of statutory authority granting her a right of appeal to actions taken under the Subdivision Ordinance, Logan remained a stranger to the subdivision approval process and was not authorized to challenge Townsend's actions under that Ordinance."[61] The court's ruling makes it clear that third parties such as neighboring landowners have no right of action to challenge land use decisions unless there is a statute authorizing the challenge such as the procedures set forth in the Virginia Code for zoning appeals.[62]

IV. Analysis: Should Third-Party Rights of Action Be Created to Allow Neighbors to Challenge Local Land Use Decisions?

The decisions in *Shilling*, *Miller*, and *Logan* raise the question whether third-party rights of action should be created by the legislature to allow neighbors to appeal other types of land use decisions in addition to the existing zoning appeals procedures. Subdivision approvals, planning decisions, and conditional use permits, like zoning decisions, have considerable effects on property values of adjacent real estate, local traffic patterns, and the aesthetics and demographics of the surrounding areas. However, this reason alone does not mean that it would be prudent to extend third-party lawsuits from zoning to other land use decisions as some commentators suggest. Any decision to significantly expand rights of action should carefully consider the nature of the land use decision at issue and weigh the unintended consequences of inviting additional litigation against local governments.

The fundamental difference between zoning actions and other land use decisions justify why a third party is able to challenge a zoning amendment but not a decision of the planning commission or a subdivision approval. Zoning regulates the permissible uses of land and divides land into categories such as rural-agricultural, residential, commercial, and industrial, and subcategories and overlay districts. A rezoning to a more intensive use allows a landowner to use his land in additional ways. The zoning ordinance sets forth the permissible uses for each zoning district, often including laundry lists of uses that are permitted by right or pursuant to a special exception or special use permit. Zoning decisions are legislative in nature, and the local governing body is required by law to make its zoning decisions after adjacent and nearby landowners and the general public are notified and provided an opportunity to be heard.[63]

If an adjacent landowner proposes a rezoning to permit a more intensive use, a neighboring citizen and taxpayer has obvious interest in the proposed use and, assuming the neighbor can establish legal standing, it is appropriate and fair that the neighbor should be able to challenge the zoning amendment. For example, if a rezoning is proposed that would allow

56. The decisions are not properly applied in petitions for writ of certiorari from board of zoning appeals decisions where aggrieved neighbors who are able to establish standing have a right of action. The author served as counsel for a group of residents of a surrounding community in a case in which *Miller* was relied on by the developer in an unsuccessful attempt to block the neighbors' petition for writ of certiorari filed to challenge a rezoning. Hale v. Board of Zoning Appeals of Blacksburg, No. CL07002112-00 (Montgomery Cir. Ct. Feb. 25, 2008). In the case, Judge Robert M.D. Turk held that the neighbors had standing and a right of action under Virginia Code §15.2-2314. The trial court's decision on the merits is pending on appeal as Va. Sup. Ct. No. 081000.

57. Logan v. City Council of the City of Roanoke, 275 Va. 483, 488, 659 S.E.2d 296, 298 (Va. 2008). The trial court held that "*Shilling* does not say that a landowner may not bring a declaratory judgment action to challenge the locality's actions—something that Va. Code §8.01-184 specifically says can be done—i.e., '[c]ontroversies involving the interpretation of . . . statutes, municipal ordinances and other governmental regulations, may be so determined.'" Logan v. City Council for the City of Roanoke, 2006 Va. Cir. LEXIS 205, at *17 (Va. Cir. Ct. 2006).

58. 275 Va. 483, 488-90, 659 S.E.2d 296 (Va. 2008).

59. *Id.* at 489-90.

60. *Id.* at 497-98.

61. *Id.* at 499.

62. An argument exists that because Virginia Code §15.2-2285(F) does not create a new cause of action, following *Logan* a person must have authorization elsewhere in the Code to appeal the decision of a local governing body. However, in light of the long history in Virginia of third-party challenges to local governing body zoning decisions, *see, e.g.,* Riverview Farm Ass'n v. Board of Supervisors of Charles City County, 259 Va. 419, 528 S.E.2d 99 (Va. 2000), it is unlikely that the court's rationale would be applied to zoning challenges under §15.2-2285(F). This is particularly true when appeals from BZA zoning decision are widely available to any aggrieved person or taxpayer under §15.2-2314. In Rohr v. Board of Supervisors, 2008 Va. Cir. LEXIS 48 (Fauquier Cir. Ct. Apr. 24, 2008), a resident's challenge to a board's approval of a special exception was allowed to proceed under §15.2-2285(F). The case was decided just five days after the *Logan* decision by the Virginia Supreme Court.

63. *Miller*, 274 Va. 355, 365 (referring to a locality's "legislative exercise of a zoning power." Notice-and-hearing requirements: Va. Code Ann. §§15.2-2204 and 15.2-2285.

a large commercial development near a residential neighborhood, the residents may have concerns about increased traffic, lighting, and noise, and the effect on their property values. Zoning applications for industrial uses or to allow adult establishments are often subject to substantial public opposition. The state-law notice-and-hearing requirements ensure that supporters and opponents alike have an opportunity to be heard, and local officials should consider public comments as part of the zoning action. If either the applicants or the neighbors are dissatisfied with the result, they may petition the circuit court for review and further appeal from there by petition to the Virginia Supreme Court.

Planning commission decisions which address more specific aspects of development, such as approval of site plans, are less suitable to third-party challenge for several reasons. The use of a parcel of property is either by right or per a zoning permit. In either event—the adoption of the zoning ordinance or the issuance of the zoning permit—the public was previously provided with notice and an opportunity to be heard, and could have appealed from the zoning decision. If a third party did not object to the rezoning allowing a variety of uses on the property, she has no ground to complain after the specifics of the development take shape and the developer applies for approval of his site plan and other development details. The planning commission makes recommendations on zoning proposals to the local governing body while the elected body makes the final decision. There is no compelling reason to expand the right of neighbors to appeal from commission recommendations on zoning actions, when there is an appeal procedure from the governing body's final decision.[64]

Subdivision actions are likewise inappropriate for expanded third-party litigation. Administration of the subdivision ordinance address development details in the form of subdivision plats and site plans, which can be intricate and technical. In many cases, as contemplated by the Code of Virginia, the applicant is required to resubmit plats or plans to the planning commission before all of the requirements are satisfied.[65] Ultimately, if the applicant complies with the standards of the local ordinance and the Virginia Code, the plans are approved. Most deficiencies can be cured by a resubmission with changes or corrections. It is in the interest of local government efficiency, for the subdivision agent and staff to carry out administration and enforcement of the subdivision ordinance without interference from third parties. Further, as Senior Justice Charles S. Russell noted in the *Shilling* decision: "Third-party suits challenging subdivisions long after their approval and recordation could have a profound effect on the vested property rights of innocent purchasers and lenders."[66]

This is not to discredit valid arguments for extending third parties the right to challenge administrative land use actions such as subdivisions as they may challenge zoning actions. Setting aside for a moment the consequences of expanding third-party rights-of-action, it seems fair that a citizen other than the applicant should be able to challenge a subdivision approval that does not conform with the local ordinances or bring an action when subdivision approval results from an abuse of discretion by a local official who blatantly disregards the ordinance. The availability of a third-party challenge in such cases would provide a check and balance on improper local government action. The right of citizens to challenge actions under the zoning ordinance may not provide an adequate remedy against improper governmental action in land use because legislative zoning actions carry a presumption that they are correct. The challenging party faces a difficult burden of proof to have a zoning action reversed and the change of success is slim.[67] If challenges to administrative actions, such as subdivisions, were restricted to a reasonably short time period of 30 to 60 days, the concerns expressed by Justice Russell in *Shilling* could be curbed for the most part.

It is true that providing citizens with a legal remedy to challenge improper actions provides accountability in government, but extending these rights too far can overwhelm a local government with increased operating costs and litigation. We operate under a representative form of government and citizens must permit their elected officials to represent them. In a recent zoning appeal by third parties, the Virginia Supreme Court stated: "In our system of representative government, the voters must of necessity rely on their elected legislative representatives to protect their interests, to defend their freedoms, to advocate their views and to keep them informed."[68] There must be sensible limits on the rights of citizens to challenge the decisions their local officials make if representative government is to operate effectively and efficiently. The local governing body appoints members to the planning commission who make administrative land use decisions on matters such as subdivisions. If the commission or its agent does not adhere to the local subdivision ordinance, the offending officials should be removed by the governing body. In the case of malfeasance or inadequate representation by a member of the governing body, the appropriate remedy of the people is to vote the official out of office.

Expanding third-party rights to challenge non-zoning land use decisions would be a particularly slippery slope as it would open the door for NIMBY lawsuits at virtually every stage of land development. There would be significant poten-

64. Under Virginia Code §15.2-2232(B), the governing body may overrule the action of a planning commission by a majority vote. If a right to appeal the commission's recommendation existed, such appeal could be rendered moot by the governing body later deciding the case against the recommendation of the commission.

65. Va. Code Ann. §15.2-2259(A)(3).

66. *Shilling*, 268 Va. at 208.

67. Va. Code Ann. §15.2-2314:

> [T]he findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo.

Board of Supervisors v. Greengael, Ltd. Liab. Co., 271 Va. 266, 284, 626 S.E.2d 357, 367 (Va. 2006):

> When a court reviews the legitimacy of a zoning amendment, it presumes the action is "valid so long as it is not unreasonable and arbitrary." The opponent of the action bears the burden of proving that the action 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 uphold the ordinance if its reasonableness is "fairly debatable."

68. Jakabcin v. Town of Front Royal, 271 Va. 660, 667, 628 S.E.2d 319, 322 (Va. 2006). The author served as counsel, on brief, for the town residents on appeal.

tial for abuse by feuding neighbors seeking to fight every approval their neighbor sought. These appealable challenges would encompass not only zoning permits, but exceptions or variances from the subdivision ordinance standards and conceivably such administrative approvals as boundary line adjustments. The efficiency of local government would be severely compromised if every land use decision resulted in protracted third-party litigation. Virginia localities rely almost entirely on real estate taxes to fund their budgets, so the costs resulting from the defense of additional lawsuits would almost certainly result in higher property taxes or budget cuts in other areas. The increased litigation costs incurred by developers would ultimately be passed on to homebuyers and consumers, an unintended economic impact that would affect everyone, including the litigant neighbors.

V. Conclusion

Under existing Virginia law, third parties have a right to appeal zoning decisions but not planning commission decisions or approvals under the subdivision ordinance. The Virginia Supreme Court has recently clarified the law in this area and local governing bodies should review their ordinances to ensure their appeal provisions are consistent with state law and do not encourage litigation from parties who lack a right-of-action.[69] It is now clear that the appropriate time for a land use appeal is when the permissible land use changes, not after the use is approved and the applicant is seeking approval for the details of his development. Following *Logan,* in Virginia if neighbors object to a proposed development, they must speak at the zoning stage and appeal from the zoning decision or forever hold their peace. Considering the administrative and even ministerial nature of many subdivision actions and planning commission decisions, the undesirable consequences of increased litigation against localities and the existing ability of neighbors to challenge zoning actions, it would be unjustified and imprudent to expand third-party rights-of-action with respect to land use decisions in Virginia.

69. As of the publication deadline for this Article, Loudoun County had not amended its ordinance that gives "any person" the right to petition for appeal from decisions under the subdivision ordinance "as provided by law." Loudoun County, Va., Land Subdiv. & Dev. Ordinance §1242.04(1)(a). As drafted, the ordinance may encourage litigation from third-party strangers who read the local ordinance and believe they have a right-of-action, when under state law, they do not.