Virginia's Stance on Third-Party Challenges to Local Land Use Decisions

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Not long ago, many members of Virginia's land use bar operated under the assumption that Virginia's Declaratory Judgment Act[1] was the proper vehicle for challenging local land use decisions.[2] The Virginia Declaratory Judgment Act provides that "[i]n cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right . . . . Controversies involving the interpretation of . . . municipal ordinances and other governmental regulations, may be so determined. . . ."[3] Even though the declaratory judgment statutes do not create any independent right-of-action,[4] this position appeared, until recently, to be consistent with other Virginia law affording citizens the right to sue localities for controversies related to governmental duties.[5] The apparent consistency is because a large array of duties related to land use is imposed on counties and municipalities in Virginia by the state Code.[6] As such, a comprehensive scheme for challenging municipalities in the execution of those duties made sense. It was also seemingly consistent with statutory and common-law precedent for aggrieved persons[7] other than the subject landowner to challenge local government land use decisions.[8] In a series of recent decisions, however, the Virginia Supreme Court has addressed this assumption and answered in the negative.[9]

This Article explains the current law with respect to standing in common land use matters, discusses whether aggrieved neighboring landowners should be able to challenge certain land use actions, and concludes that statutory clarification and revision is needed on the state and local level. Part I of this Article details the recent history of land use challenges by neighboring and nearby landowners. Part II provides the background and discusses the holding of the Virginia Supreme Court's most recent decision on the issue: *Logan v. City Council of the City of Roanoke*.[10] Part III offers discussion of the implications and consequences of the state of land use law after the *Logan* decision and Part IV concludes.

I. The Court's Past Land Use Decisions

A. Good Cause for Confusion: Parker *and* Shilling

1. *Parker v. County of Madison*

In 1992, the Supreme Court of Virginia issued its decision in *Parker v. County of Madison*.[11] The *Parker* case was initiated by neighboring landowners who sought an interpretation of a county subdivision ordinance through a declaratory judgment suit.[12] In *Parker*, the developer submitted a preliminary subdivision plat to the county administrator seeking to subdivide a parcel zoned agricultural into 11 residential lots.[13] Three days later, the county board of supervisors amended the subdivision ordinance to prohibit the subdivision of any tract zoned for agricultural use into more than four parcels within any four-year time period.[14] The amendment became effective upon adoption and contained no provision indicating that pending applications were excepted.[15] Following approval of a final plat showing a subdivision into eight lots before the

1. Va. Code Ann. §§8.01-184 through 191 (2008).
2. That is, land use decisions other than appeals to zoning amendments that are otherwise set forth expressly in Virginia Code §15.2-2314. *See also* Va. Code Ann. §15.2-2285(F) (2008).
3. Va. Code Ann. §8.01-184 (2008). The Act is to be liberally interpreted and administered. *Id.* §8.01-191.
4. *See, e.g.*, Liberty Mutual Ins. Co. v. Bishop, 177 S.E.2d 519, 522, 211 Va. 414, 419 (Va. 1970).
5. *See* Va. Code Ann. §15.2-1404 (2008) (providing that "[e]very locality may sue or be sued in its own name in relation to all matters connected with its duties.").
6. *See, e.g.,* Va. Code Ann. §15.2-2240 (requirement for adoption of subdivision ordinance); *id.* §15.2-2258 (requirement of submission of subdivision plat and site plan).
7. An "Aggrieved Party" is generally understood as an adjacent or nearby landowner who is impacted in a separate and distinct manner than the general community.
8. *See, e.g.,* Va. Code Ann. §15.2-2314 (2008) (certiorari to review decisions of board of zoning appeals); Jakobcin v. Town of Front Royal, 628 S.E.2d 319, 271 Va. 660 (Va. 2006) (land and business owners successfully challenged zoning amendments); Riverview Farm Assocs. Va. Gen. Partnership v. Board of Supervisors, 528 S.E.2d 99, 259 Va. 419 (Va. 2000) (landowners challenged rezoning on nearby land).
9. *See, e.g., infra* notes 10, 11, 25 and 47.
10. 659 S.E.2d 296, 275 Va. 483 (Va. 2008).
11. 418 S.E.2d 855, 244 Va. 39 (Va. 1992).
12. *Id.* at 856, 244 Va. at 41.
13. *Id.* at 855, 244 Va. at 40.
14. *Id.*, 244 Va. at 40.
15. *Id.*

planning commission and board, an adjacent landowner filed a declaratory judgment suit naming the developers and the county as defendants.[16] The landowner sought declaration that the actions of the planning commission and board of supervisors were invalid and that the subdivision plat was not entitled to recordation.[17]

At trial level, the defendants in *Parker* raised the issue of whether plaintiffs, as owners of adjacent land, could appeal a subdivision decision.[18] In response, the plaintiffs argued that the Declaratory Judgment Act provided the appropriate vehicle for their action.[19] The trial court agreed with the plaintiff landowners and ruled that they could maintain their action under the declaratory judgment statutes.[20] The court would decide which version of the subdivision ordinance was applicable to the contested subdivision plat.[21]

On appeal, the Supreme Court of Virginia questioned neither the right-of-action asserted by the neighbors in *Parker*, nor their legal standing. Instead, the court, citing Virginia Code §1-16,[22] held that "[a] local governing body's obligation to act in accordance with the new law, not the former, is not reduced by the mere filing of a subdivision application before the new law becomes effective, unless the new law expressly so provides."[23] Thus, the court issued a declaratory judgment that the subdivision approval was invalid, holding that the approved final plat was not entitled to recordation in the clerk's office.[24]

2. *Shilling v. Jimenez*

In *Shilling v. Jimenez*,[25] owners of land neighboring a proposed subdivision filed a bill of complaint for declaratory judgment against the subdividers, the purchaser, the lender, and the trustees. The complainants alleged that the approval of the subdivision by the county was undeserved because the subdividers made false affidavits in their application to qualify as a family subdivision under the county ordinance.[26] Complainants sought a decree that the subdivision approval was therefore void.[27] It is important to note that in *Shilling*, neither the county board of supervisors nor any county officers were made parties to the suit.[28] On demurrer, the developers asserted that the adjacent landowners lacked standing and a valid right-of-action, stating that "[t]here is no provision of Virginia law that permits an adjacent landowner, or anyone else, to contest the approval of a subdivision by the authorized officials of a Virginia locality."[29] The trial court sustained the demurrers.[30]

The issue presented to the Virginia Supreme Court on appeal was "whether a landowner, aggrieved by the local governing body's approval of a subdivision of neighboring lands, may attack such an approval *indirectly by suit against the subdividers* and their successors in title."[31] The court held that "[n]owhere 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."[32] The court clarified that "[t]hird-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."[33] Further, the court refused to "impute to the General Assembly an intent to create such an effect in the absence of express statutory language."[34]

The enabling act to which the court refers is Virginia Code §15.2-2259, which sets forth the procedures for approval or disapproval of proposed subdivision plats. Section 15.2-2259(D) provides:

> 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 and the court shall hear and determine the case . . . .[35]

The court relied on the plain language of §15.2-2259 to conclude that the General Assembly only intended to create a right of appeal for the subdivider or an agent thereof.[36]

If the *Parker* decision provided a precedent in support of a neighbor's right-of-action to challenge a subdivision approval, the *Shilling* decision provided an argument against such a challenge. However, neither case provided a definitive answer on whether a declaratory judgment was available to aggrieved adjacent and nearby landowners to challenge land use decisions affecting neighboring land and it was not uncommon for litigants in land use disputes to rely on either case to support

16. *Id.* at 856, 244 Va. at 40-41.
17. *Id.*, 244 Va. at 41.
18. *See* Defs.' Motion for Summary Judgment, May 13, 1990; County of Madison Motion for Summary Judgment, May 13, 1990. The defendants' motion was styled as an attack on standing, but it is clear from the record that it was also a challenge to the right-of-action asserted. *See, e.g.,* Defs.' Mem. of Dec. 12, 1990, at 1.
19. Pl.'s Mem. in Response to Defs.' Motion for Summary Judgment, Apr. 27, 1990, at 2.
20. Decree Denying Defs.' Motion for Summary Judgment, Oct. 26, 1990; Op. of Sullenberger, J., May 30, 1991.
21. *Id.*
22. Va. Code Ann. §1-239 (2008).
23. *Parker*, 418 S.E.2d at 857, 244 Va. at 42 (citing Chesterfield Civic Ass'n v. Board of Zoning Appeals, 209 S.E.2d 925, 927, 215 Va. 399, 402 (Va. 1974)).
24. *Id.*, 244 Va. at 43.
25. 597 S.E.2d 206, 208, 268 Va. 202, 205 (Va. 2004). *See also* Pls.' Compl., Feb. 11, 2003, at 1.
26. *Shilling*, 597 S.E.2d at 208, 268 Va. at 205-06. *See also* Pls.' Compl. at 3-5.
27. *Id.* at 208, 268 Va. at 206. *See also* Pls.' Compl. at 8.
28. Instead, only the developers were named. *See Shilling*, 597 S.E.2d at 206, 268 Va. at 206.
29. Mem. in Support of Defs.' Dem., Apr. 21, 2003, at 2; Defs.' Demurrer, Mar. 14, 2003, at 2.
30. *Shilling*, 597 S.E.2d at 208, 268 Va. at 206.
31. *Id.* at 207, 268 Va. at 204 (emphasis added).
32. *Id.* at 209, 268 Va. at 208.
33. *Id.* at 210, 268 Va. at 208 (emphasis added).
34. *Id.*
35. Va. Code Ann. §15.2-2259(D) (2008). The appeal must be filed within 60 days of the disapproval. *See also id.* §15.2-2260(E).
36. The express inclusion of "subdivider" in this statute limits its scope and excludes other aggrieved persons under the principle of *expressio unius est exclusio alterius. See, e.g.,* Jackson v. Fidelity & Deposit Co. of Md., 608 S.E.2d 901, 906, 269 Va. 303, 313 (Va. 2005) ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.").

their respective positions. For example, in a 2006 case, *Logan v. City Council of the City of Roanoke*,[37] landowners brought a declaratory judgment action against the Roanoke City Council, the planning commission and the developer to challenge approval of a subdivision adjacent to their neighborhood and the trial court interpreted *Shilling* as follows:

> *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."[38]

This interpretation was ultimately overruled, but it was certainly a reasonable reading of *Shilling*. In another case, *Mitchell Mountain, Ltd. Liability Co. v. Board of Supervisors of Madison Co.*,[39] the parties relied on *Parker* and *Shilling* in a motion for intervention, and although Judge Daniel R. Bouton ruled that neither case was applicable given the procedural posture of the case, he recognized "the somewhat difficult question of how to interpret and reconcile the two cases . . . ."[40]

The difficulty in reconciliation was compounded by the fact that although it came later in time, the *Shilling* opinion had not been followed in any reported decision.[41] The defendants in *Shilling* distinguished their case from *Parker v. Madison County* by pointing out that "*Parker* was brought against the County, as well as the developer. The Complainants have not sued the County here."[42] Uncertainty over interpretation of the *Shilling* decision arose because it was debatable whether *Shilling* was limited to indirect attacks by adjacent landowners against the subdivider, as the court's opinion seemed to suggest, or whether it applied to direct attacks against the locality as well.

The issue was further complicated in instances when a locality's subdivision ordinance purports to allow subdivision appeals by any aggrieved person, not only the subdivider. For example, the Loudoun County Subdivision Ordinance provides "[a]ny 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."[43] Moreover, there is judicial precedent from Loudoun County that supports the right of an adjacent landowner to challenge land use actions other than zoning actions under the Declaratory Judgment Act. For instance, in 1994, a group of landowners in Loudoun County attacked the approval of a subdivision plat for adjoining land by suit against both the subdivider and the county.[44] Prior to that, in 1992, several Loudoun County landowners were permitted to challenge the approval of a site plan for the construction of 48 condominium units on adjacent property. That circuit court held:

> 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.[45]

So, prior to the recent decisions issued by the Virginia Supreme Court discussed below, third-party standing and the right of an adjacent or nearby landowner to bring suit for declaratory judgment in land use matters was uncertain and contradictory opinions were plentiful.

B. A Bit of Clarification: Miller v. Highland County

The decision in *Miller v. Highland County*[46] clarified much of the confusion that *Parker* and *Shilling* failed to resolve regarding adjacent and nearby landowners' ability to challenge local land use decisions. The *Miller* decision was issued on September 14, 2007, and though the issue directly addressed was narrow and succinct, it is clear that the Virginia Supreme Court took advantage of the opportunity to address the larger question of whether third parties can challenge governmental action related to nearby property through a declaratory judgment action.

In *Miller*, several owners of adjacent property filed a bill of complaint for declaratory judgment to challenge the Highland County planning commission's determination that a conditional use permit[47] was in substantial accord with the comprehensive plan as required by Virginia Code §15.2-2232(A).[48] After trial, the circuit court ruled in favor of the

37. 2006 Va. Cir. LEXIS 205 (Va. 2006).
38. *Id.* at *17.
39. 70 Va. Cir. 294 (Va. 2006).
40. *Id.* The author served as lead counsel in a recent case in which neighboring landowners made an argument virtually identical to the claim advanced by the *Parker* plaintiffs, i.e., that a subdivision approval did not comply with the current effective ordinance. The trial court was confronted with the issue of how to reconcile *Parker* and *Shilling* and granted a demurrer based on *Shilling*. The Supreme Court found no reversible error and soon thereafter issued the *Miller* decision. Rosemont Homeowners Ass'n v. Loudoun County, No. 062467 (Va. Feb. 26, 2007).
41. Prior to *Miller*.
42. Mem. in Support of Demurrer of Cox et al., Apr. 21, 2003, at 7, n.4.
43. Loudoun Co., Va., Land Subdivision and Development Ordinance §1242.04(1)(a) (2000). Such an ordinance is to be liberally interpreted. *See* Charles A. Rathkopf et al., Rathkopf's Law of Zoning and Planning §37.03 (4th ed. 1999).
44. Rackham v. Vanguard Ltd. Partnership, 34 Va. Cir. 478 (Va. 1994).
45. Barton v. Town of Middleburg, 27 Va. Cir. 20, 22 (Va. 1992).
46. 650 S.E.2d 532, 274 Va. 355 (Va. 2007). The *Miller* decision addressed two consolidated cases. The first named the County as a defendant and the second named the county plus the permit applicant and property owners. With respect to the former case, the court held that the Board of Supervisors was a required party, as opposed to the County itself, and required dismissal of the case. This holding, while significant, is beyond the scope of this article.
47. The developer in *Miller* was "Highland New Wind Development," which sought the permit to build an electric substation in a location zoned as agricultural. The plan (which was approved) included the erection of twenty wind turbines, all of which were to exceed the maximum height restrictions for the area. *Id.* at 533, 274 Va. at 361.
48. Va. Code Ann. §2232(A) (2008) provides, in pertinent part:
> Whenever a local planning commission recommends a comprehensive plan or part thereof for the locality and such plan has been approved and adopted by the governing body, it shall control the general or approximate location, character and extent of each

applicant, landowners and County and the adjoining property owners appealed.[49]

One of the issues presented on appeal was "whether neighboring landowners may file a declaratory judgment action contesting a county planning commission's decision that a certain conditional use is in 'substantial accord' with that county's comprehensive plan."[50] The Virginia Supreme Court rejected the adjoining property owners' argument that the declaratory judgment action provided a viable right of action to challenge the commission's determination and ruled:

> Under the plain language of these statutory provisions [§15.2-2232(A) & (B)], 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.[51]

The Virginia Supreme Court's opinion goes further and discusses the purpose of the declaratory judgment statutes as well as the court's prior decision in *Shilling*.[52] In its discussion of *Shilling*, the court left no doubt that the decision was not to be limited to attacks "indirectly by suit against the subdivider" or even to subdivision appeals.[53] Instead, in referring to its *Shilling* opinion, the court explained: "We have previously held 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."[54]

Following the *Miller* decision, the status of the law in Virginia is that a neighboring landowner may only challenge a land use decision by the local governing body where there is specific statutory authority allowing such a challenge. A declaratory judgment action may not be used to seek an interpretation of a municipal ordinance unless there is specific statutory authorization for the challenge elsewhere in the Code.

II. The *Logan* Decision

In its *Logan* decision in late April of 2008, the Virginia Supreme Court revisited the issue of third-party standing and the right of adjacent or nearby landowners to challenge land use decisions under the Declaratory Judgment Act.[55] In *Logan*, a developer obtained approval from the city of Roanoke to subdivide a plat in anticipation of large-scale residential development.[56] The approval included several exceptions to the city's subdivision guidelines.[57] In response, landowners residing near the proposed subdivision filed a bill of complaint for declaratory judgment against the Roanoke City Council, the City Planning Commission, the subdivision agent who had granted approval, and the developer.[58] The nearby residents alleged (1) that the city's subdivision ordinances were facially invalid, (2) that the exceptions to the city's ordinances were granted with insufficient authority and without just cause, and (3) that the subdivision as planned created unsafe and inappropriate conditions for the mountainside terrain on which it was situated.[59] The circuit court granted the city's demurrer on the challenge to its ordinances as facially invalid.[60] In so doing, the lower court held that plaintiffs were able to seek declaratory judgment (under Virginia Code §8.01-184) in order to determine the adequacy of the city's standards for granting exceptions to its Subdivision Ordinance generally and the decision at issue in particular.[61]

On appeal by the landowners, defendants assigned cross-error, reiterating their argument from trial that the nearby landowners had no right of action to challenge the application of the City Subdivision Ordinance.[62] In a decisive affirmation of its *Shilling* and *Miller* decisions, the Virginia Supreme Court found for the defendants:

> Because the declaratory judgment statutes do not create such rights [of appeal for nearby landowners], and in the absence of statutory authority granting [Logan] 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 [defendants'] actions under that Ordinance.[63]

In its holding, the Virginia Supreme Court emphasized that the Declaratory Judgment Act does not "create or alter any substantive rights, or bring any other additional rights into being."[64] As such, the court solidified its rejection of the declaratory judgment statutes as an acceptable vehicle for adjacent and nearby landowners to challenge a locality's application of subdivision ordinances. Instead, the court affirmed, specific authority granting third parties the right to appeal local land use decisions is required to initiate a valid suit challenge such decisions.[65]

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feature shown on the plan. Thereafter, unless a feature is already shown on the adopted master plan or part thereof or is deemed so under subsection D, no street . . ., park or other public area, public building or public structure, public utility facility or public service corporation facility . . ., whether publicly or privately owned, shall be constructed, established or authorized, unless and until the general location or approximate location, character, and extent thereof has been submitted to and approved by the commission as being substantially in accord with the adopted comprehensive plan or part thereof.

49. *Id.* at 534-35, 274 Va. at 363.
50. *Id.* at 533, 274 Va. at 360-61 (quoting Va. Code Ann. §15.2-2232(A)).
51. *Id.* at 539-40, 274 Va. at 371.
52. *Id.* at 540, 274 Va. at 372.
53. *Id.*, 274 Va. at 372.
54. *Id.*, 274 Va. at 371-72.
55. Logan v. City Council of the City of Roanoke, 659 S.E.2d 296, 275 Va. 483 (Va. 2008).
56. *Id.* at 298-99, 275 Va. at 488-89.
57. Among the exceptions were a relaxing in the locality's minimum street width requirements, minimum cul-de-sac parameters, and maximum allowed street grade standards. *Id.* at 299, 275 Va. at 489.
58. *Id.*, 275 Va. at 489-90.
59. *Id.*, 275 Va. at 490.
60. *Id.* at 300, 275 Va. at 490.
61. And thus, agreed that plaintiffs had standing and a valid right-of-action to bring suit, despite defendants' objections. *Id.*, 275 Va. at 491.
62. *Id.* at 303-04, 275 Va. at 497-98.
63. *Id.* at 304-05, 275 Va. at 499.
64. *Id.* at 304, 275 Va. at 499 (quoting *Miller*, 650 S.E.2d at 539, 274 Va. at 370).
65. *See id.*, 275 Va. at 498-99 (citing *Shilling*, 597 S.E.2d at 209-10, 268 Va. at 208).

III. Discussion and Analysis of the Law

A. The State of the Law

Planning, subdivision and zoning are three separate and distinct land use processes that are governed by different sections of the Code of Virginia. Planning commissions are governed by Virginia Code Title 15.2, Chapter 22, Article 2, §§15.2-2210 through 15.2-2222.1 and the comprehensive plan requirements and procedures are set forth in Article 3, §§15.2-2223 through 15.2-2232. The provisions for land subdivision and development are set forth in Article 6, §§15.2-2240 through 15.2-2279. Zoning is contained in Article 7, §§15.2-2280 through 15.2-2316.

Planning, subdivision and zoning each have their own distinct appeal procedures. Virginia Code §15.2-2232(B) provides the procedures for appealing a planning commission action and provides an appeal only for the "owner or owners or their agents" as explained by *Miller*.[66] Similarly, under the subdivision statutes, §15.2-2259(D) and 15.2-2260(E) only provide an appeal for the "subdivider" as discussed in *Shilling*.[67] However, with respect to zoning actions, §15.2-2314 provides an appeal for "[a]ny 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."[68]

Despite this statutory scheme and the clear language of Virginia Code §15.2-2314 allowing any aggrieved person or taxpayer to file a petition for writ of certiorari, the *Miller* holding[69] was recently used in an attempt to block the right of adjacent landowners to challenge a board of zoning appeals (BZA) decision in the town of Blacksburg.[70] In that case, the neighboring landowners were found to have standing and the right to challenge the BZA decision.[71] However, similar disputes are likely to arise in the future about how to reconcile *Miller* and *Logan* with §15.2-2314 until there is statutory clarification. These cases present an ideal opportunity for the General Assembly to decide whether aggrieved third parties should have the right to challenge land use actions such as subdivision approvals on neighboring lands.

B. Analysis, Policy Considerations, and How to Move Forward

The *Miller* and *Logan* decisions raise important questions about whether third parties should be able to challenge land use actions, such as subdivision approvals, in which they are not directly involved. There are reasons for denying third-party standing in suits other than zoning decisions and arguments in favor of granting standing and a valid right-of-action to aggrieved adjacent and nearby landowners.

On the one hand, decisions concerning subdivisions, planning, and conditional uses have considerable effects on local traffic patterns and the aesthetics and demographics of the area. In certain circumstances, these alterations can equate to a monetary loss to adjacent and nearby landowners, and they also may raise valid safety concerns. Citizen suits such as *Parker* can also advance significant public policies by ensuring governing bodies adhere to local ordinances and state law. Such suits foster accountability in local government and increase the public's confidence in their local officials. Further, citizen participation in land use decisions promotes trust and a sense of civic responsibility in the general community, and, arguably, leads to more efficient use of land resources.

On the other hand, allowing unfettered third-party suits to challenge all land use decisions would likely have an adverse impact on the local community, its development, and economy. The high cost and uncertainly associated with litigation may serve to deter investors unwilling to commit the time and financial resources to complete a proposed development project. Localities confronted with serious budgetary constraints would likely be faced with difficult tax increase decisions as a result of increased litigation costs necessarily incurred to defend the third-party challenges.

Following *Miller* and *Logan*, amendments are required to Virginia Code §§15.2-2232(B), 15.2-2259(D), and 15.2-2260(E) if the General Assembly determines that aggrieved third parties should have the ability to challenge planning and subdivision actions, as they can with respect to zoning decisions.

If authorization for such third-party challenges is created, certain safeguards should be put in place to address potential adverse impacts on landowners, developers, localities and the citizens of the commonwealth. First, third-party actions should be subject to the same filing deadlines as the owner or subdivider as set forth in Virginia Code §§15.2-2232(B), 15.2-2259(D), and 15.2-2260(E).[72] A reasonably short period of 30 to 60 days to file would minimize the likelihood of third-party challenges occurring after a developer has incurred substantial expenditures in furtherance of a project following the governmental approval.[73] The existing statutory protections of vested rights would continue to protect the landowner from subsequent governmental action that occurred beyond the statutory appeal period.[74] Second, any third-party plaintiff must satisfy the "aggrieved" test enunciated in *Virginia Beach Beau-*

66. Va. Code Ann. §15.2-2232(B).
67. *Id.* §§15.2-2259(D) & 2260(E).
68. *Id.* §15.2-2314.
69. *Logan* was not cited, as that decision was not yet issued.
70. Hale v. Board of Zoning Appeals of Blacksburg, No. CL07002112-00 (Montgomery Cir. Ct. Feb. 25, 2008), *appeal docketed*, No. 081000 (Va. May 27, 2008). The author served as lead counsel in that litigation. At trial, Judge Robert M.D. Turk ruled that the adjacent landowners have the right to challenge the BZA decision. No appeal was taken on that particular holding.
71. *Id.*
72. This is necessary to bar any argument that the suit is subject to Virginia's five-year statute of limitations for actions for injury to property. *See* Va. Code Ann. §8.01-243(B).
73. As an aside, the General Assembly has authorized a procedure for the vacation of subdivision plats that can occur even after lots in the subdivision have been sold that can have a very profound effect on vested property rights. *See id.* §15.2-2272 (providing that in cases where any lot has been sold, "any interested person" may apply to the local governing body for an ordinance vacating a subdivision plat or any part thereof). There is no apparent statute of limitations for such an action. *See, e.g.,* Dotson v. Harman, 350 S.E.2d 642, 232 Va. 402 (Va. 1986) (Board of Supervisors vacated subdivision plat eight years after plat was recorded and four years after lots were sold; the Virginia Supreme Court allowed suit to proceed challenging the vacation five years later).
74. Va. Code Ann. §15.2-2307.

tification Commission v. Board of Zoning Appeals,[75] and *Cupp v. Board of Supervisors of Fairfax County*.[76] Conversely, under current law, adjacent landowners are not required to be notified of subdivision or site plan applications as they are with zoning applications. In order to provide equivalent procedural safeguard to *neighbors* who would be affected by such land use actions, similar notice requirements should be enacted.

Conclusion

Following *Miller* and *Logan*, the writ of certiorari under §15.2-2314 is one of the few rights of action a landowner has to challenge a land use action on neighboring land. However, this right extends only to zoning decisions. There is no expectation that NIMBY[77] attitudes will disappear, rezoning applications will become more contentious and appeals at the rezoning stage will become more frequent. At the very least, to avoid confusion and surplus litigation costs, localities should review their local ordinances to ensure that they do not appear to allow third parties to challenge a governmental action when such right does not exist under state law. This, at least, will better assist citizens in understanding what types of land use decisions they have the right to challenge.

75. 344 S.E.2d 899, 902, 231 Va. 415, 419 (Va. 1986).
76. 318 S.E.2d 407, 411, 277 Va. 580, 589 (Va. 1984). *See also* Riverview Farm Assocs. v. Board of Supervisors of Charles City County, 528 S.E.2d 99, 259 Va. 419 (Va. 2000) (held neighbor 2,000 feet from subject property was "aggrieved").
77. NIMBY is an acronym that stands for "Not in my Backyard."