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## HOUSE BILL NO. 2159

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Counties, Cities and Towns  
on February 4, 2005)

(Patrons Prior to Substitute—Delegates Reese, Amundson [HB 2152], and Keister [HB 2839])

A BILL to amend and reenact §§ 15.2-2286, 15.2-2311 and 15.2-2314 of the Code of Virginia, relating to modifications of zoning requirements.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 15.2-2286, 15.2-2311 and 15.2-2314 of the Code of Virginia are amended and reenacted as follows:**

§ 15.2-2286. Permitted provisions in zoning ordinances; amendments; applicant to pay delinquent taxes.

A. A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

1. For variances or special exceptions, as defined in § 15.2-2201, to the general regulations in any district.

2. For the temporary application of the ordinance to any property coming into the territorial jurisdiction of the governing body by annexation or otherwise, subsequent to the adoption of the zoning ordinance, and pending the orderly amendment of the ordinance.

3. For the granting of special exceptions under suitable regulations and safeguards; notwithstanding any other provisions of this article, the governing body of any locality may reserve unto itself the right to issue such special exceptions. Conditions imposed in connection with residential special use permits, wherein the applicant proposes affordable housing, shall be consistent with the objective of providing affordable housing. When imposing conditions on residential projects specifying materials and methods of construction or specific design features, the approving body shall consider the impact of the conditions upon the affordability of housing.

The governing body or the board of zoning appeals of any city with a population between 260,000 and 264,000 may impose a condition upon any special exception relating to retail alcoholic beverage control licensees which provides that such special exception will automatically expire upon a change of ownership of the property, a change in possession, a change in the operation or management of a facility or upon the passage of a specific period of time.

The governing body of any city with a population between 200,000 and 210,000 may impose a condition upon any special use permit issued after July 1, 2000, relating to retail alcoholic beverage licensees which provides that such special use permit shall be subject to an automatic review by the governing body upon a change in possession, a change in the owner of the business, or a transfer of majority control of the business entity. Upon review by the governing body, it may either amend or revoke the special use permit after notice and a public hearing as required by § 15.2-2206.

4. For the administration and enforcement of the ordinance including the appointment or designation of a zoning administrator who may also hold another office in the locality. The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance. His authority shall include (i) ordering in writing the remedying of any condition found in violation of the ordinance; (ii) insuring compliance with the ordinance, bringing legal action, including injunction, abatement, or other appropriate action or proceeding subject to appeal pursuant to § 15.2-2311; and (iii) in specific cases, making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under § 15.2-2307. Notwithstanding the provisions of § 15.2-2311, a zoning ordinance may prescribe an appeal period of less than thirty days, but not less than ten days, for a notice of violation involving temporary or seasonal commercial uses, parking of commercial trucks in residential zoning districts, or similar short-term, recurring violations.

Where provided by ordinance, the zoning administrator may be authorized to grant a ~~variance~~ *modification* from any ~~building setback requirement~~ *provision* contained in the zoning ordinance with respect to physical requirements on a lot or parcel of land, including but not limited to size, height, location or features of or related to any building, structure or improvements, if the administrator finds in writing that: (i) the strict application of the ordinance would produce undue hardship; (ii) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; and (iii) the authorization of the ~~variance~~ *modification* will not be of substantial detriment to adjacent property and the character of the zoning district will not be changed by the granting of the ~~variance~~ *modification*. Prior to the granting of a ~~variance~~ *modification*, the zoning administrator shall give, or require the applicant to give, all adjoining property owners written notice of the request for ~~variance~~

60 *modification, and an opportunity to respond to the request within twenty-one days of the date of the*  
61 *notice. If any adjoining property owner objects to said request in writing within the time specified*  
62 *above, the request shall be transferred to the Board of Zoning Appeals for decision. The zoning*  
63 *administrator shall make a decision on the application for modification and issue a written decision*  
64 *with a copy provided to the applicant and any adjoining landowner who responded in writing to the*  
65 *notice sent pursuant to this paragraph. The decision of the zoning administrator shall constitute a*  
66 *decision within the purview of § 15.2-2311, and may be appealed to the board of zoning appeals as*  
67 *provided by that section. Decisions of the board of zoning appeals may be appealed to the circuit court*  
68 *as provided by § 15.2- 2314.*

69 The zoning administrator shall respond within ninety days of a request for a decision or  
70 determination on zoning matters within the scope of his authority unless the requester has agreed to a  
71 longer period.

72 5. For the imposition of penalties upon conviction of any violation of the zoning ordinance. Any  
73 such violation shall be a misdemeanor punishable by a fine of not less than \$10 nor more than \$1,000.  
74 If the violation is uncorrected at the time of the conviction, the court shall order the violator to abate or  
75 remedy the violation in compliance with the zoning ordinance, within a time period established by the  
76 court. Failure to remove or abate a zoning violation within the specified time period shall constitute a  
77 separate misdemeanor offense punishable by a fine of not less than \$10 nor more than \$1,000, and any  
78 such failure during any succeeding ten-day period shall constitute a separate misdemeanor offense for  
79 each ten-day period punishable by a fine of not less than \$100 nor more than \$1,500.

80 6. For the collection of fees to cover the cost of making inspections, issuing permits, advertising of  
81 notices and other expenses incident to the administration of a zoning ordinance or to the filing or  
82 processing of any appeal or amendment thereto.

83 7. For the amendment of the regulations or district maps from time to time, or for their repeal.  
84 Whenever the public necessity, convenience, general welfare, or good zoning practice requires, the  
85 governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or  
86 classifications of property. Any such amendment may be initiated (i) by resolution of the governing  
87 body, (ii) by motion of the local planning commission, or (iii) by petition of the owner, contract  
88 purchaser with the owner's written consent, or the owner's agent therefor, of the property which is the  
89 subject of the proposed zoning map amendment, addressed to the governing body or the local planning  
90 commission, who shall forward such petition to the governing body; however, the ordinance may  
91 provide for the consideration of proposed amendments only at specified intervals of time, and may  
92 further provide that substantially the same petition will not be reconsidered within a specific period, not  
93 exceeding one year. Any such resolution or motion by such governing body or commission proposing  
94 the rezoning shall state the above public purposes therefor.

95 In any county having adopted such zoning ordinance, all motions, resolutions or petitions for  
96 amendment to the zoning ordinance, and/or map shall be acted upon and a decision made within such  
97 reasonable time as may be necessary which shall not exceed twelve months unless the applicant requests  
98 or consents to action beyond such period or unless the applicant withdraws his motion, resolution or  
99 petition for amendment to the zoning ordinance or map, or both. In the event of and upon such  
100 withdrawal, processing of the motion, resolution or petition shall cease without further action as  
101 otherwise would be required by this subdivision.

102 8. For the submission and approval of a plan of development prior to the issuance of building  
103 permits to assure compliance with regulations contained in such zoning ordinance.

104 9. For areas and districts designated for mixed use developments or planned unit developments as  
105 defined in § 15.2-2201.

106 10. For the administration of incentive zoning as defined in § 15.2-2201.

107 11. For provisions allowing the locality to enter into a voluntary agreement with a landowner that  
108 would result in the downzoning of the landowner's undeveloped or underdeveloped property in exchange  
109 for a tax credit equal to the amount of excess real estate taxes that the landowner has paid due to the  
110 higher zoning classification. The locality may establish reasonable guidelines for determining the amount  
111 of excess real estate tax collected and the method and duration for applying the tax credit. For purposes  
112 of this section, "downzoning" means a zoning action by a locality that results in a reduction in a  
113 formerly permitted land use intensity or density.

114 12. Provisions for the clustering of single-family dwellings so as to preserve open space.

115 a. A locality may, at its option, provide in its zoning or subdivision ordinance standards, conditions  
116 and criteria for clustering of single-family dwellings and the preservation of open space developments.  
117 In establishing such standards, conditions and criteria, the governing body may, in its discretion, include  
118 any provisions it determines appropriate to ensure quality development, preservation of open space and  
119 compliance with its comprehensive plan and land use ordinances. The density calculation of the cluster  
120 development shall be based upon the same criteria for the property as would otherwise be permitted by  
121 applicable land use ordinances. As a locality determines, at its option, to provide for clustering of

single-family dwellings and the preservation of open space developments, it may vary provisions for such developments for each different zoning area within the locality.

If proposals for clustering of single-family dwellings and the preservation of open space developments comply with the locality's adopted standards, conditions and criteria, the development and open space preservation shall be permitted by right under the local subdivision ordinance. The implementation and approval of the cluster development and open space preservation shall be done administratively by the locality's staff and without a public hearing. No local ordinance shall require that a special exception, special use, or conditional use permit be obtained for such developments. However, any such ordinance may exempt developments of two acres or less from the provisions of this subdivision.

b. Additionally, in any zoning or subdivision ordinance adopted pursuant to subdivision A 12, a locality may, at its option, provide for the clustering of single-family dwellings and the preservation of open space at a density calculation greater than the density permitted in the applicable land use ordinance. To implement and approve such increased density development, the locality may, at its option, (i) establish and provide in its zoning or subdivision ordinance standards, conditions, and criteria for such development, and if the proposed development complies with those standards, conditions and criteria, it shall be permitted by right and approved administratively by the locality staff in the same manner provided in subdivision A 12 a, or (ii) approve the increased density development upon approval of a special exception, special use permit, conditional use permit or rezoning.

c. Any locality that provides for clustering of single-family dwellings and preservation of open space upon approval of a special exception, special use permit, conditional use permit or rezoning shall no later than July 1, 2004, amend its applicable land use ordinance to comply with the provisions of subdivision A 12. Any land use provisions for clustering of single-family dwellings and preservation of open space adopted after the effective date of this act shall comply with subdivision A 12. Notwithstanding any of the requirements of subdivision A 12 to the contrary, any local government land use ordinance in affect as of January 1, 2002, that provides for the clustering of single-family dwellings and preservation of open space development by right without requiring either a special exception, special use permit, conditional use permit or other discretionary approval may remain in effect at the option of the locality.

B. Prior to the initiation of an application for a special exception, special use permit, variance, rezoning or other land disturbing permit, including building permits and erosion and sediment control permits, or prior to the issuance of final approval, the authorizing body may require the applicant to produce satisfactory evidence that any delinquent real estate taxes owed to the locality which have been properly assessed against the subject property have been paid.

§ 15.2-2311. Appeals to board.

A. An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article ~~or~~, any ordinance adopted pursuant ~~thereto~~ to this article, or any modification of zoning requirements pursuant to § 15.2-2286. Notwithstanding any charter provision to the contrary, any written notice of a zoning violation or a written order of the zoning administrator dated on or after July 1, 1993, shall include a statement informing the recipient that he may have a right to appeal the notice of a zoning violation or a written order within thirty days in accordance with this section, and that the decision shall be final and unappealable if not appealed within thirty days. The appeal period shall not commence until the statement is given. The appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

B. An appeal shall stay all proceedings in furtherance of the action appealed from unless the zoning administrator certifies to the board that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the board or by a court of record, on application and on notice to the zoning administrator and for good cause shown.

C. In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after sixty days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The sixty-day limitation period shall not apply in any case where, with the concurrence of the attorney for the

183 governing body, modification is required to correct clerical or other nondiscretionary errors.

184 § 15.2-2314. Certiorari to review decision of board.

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

189 Upon the presentation of such petition, the court shall allow a writ of certiorari to review the  
190 decision of the board of zoning appeals and shall prescribe therein the time within which a return  
191 thereto must be made and served upon the realtor's attorney, which shall not be less than 10 days and  
192 may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision  
193 appealed from, but the court may, on application, on notice to the board and on due cause shown, grant  
194 a restraining order.

195 The board of zoning appeals shall not be required to return the original papers acted upon by it but it  
196 shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called  
197 for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to  
198 show the grounds of the decision appealed from and shall be verified.

199 If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition  
200 of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and  
201 report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a  
202 part of the proceedings upon which the determination of the court shall be made. The court may reverse  
203 or affirm, wholly or partly, or may modify the decision brought up for review.

204 In the case of an appeal from the board of zoning appeals to the circuit court of an order,  
205 requirement, decision or determination of a zoning administrator or other administrative officer in the  
206 administration or enforcement of any ordinance or provision of state law, *or any modification of zoning*  
207 *requirements pursuant to §15.2-2286*, the decision of the board of zoning appeals shall be presumed to  
208 be correct. The appealing party may rebut that presumption by proving by a preponderance of the  
209 evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred  
210 in its decision. Any party may introduce evidence in the proceedings in the court.

211 In the case of an appeal by a person of any decision of the board of zoning appeals that denied or  
212 granted an application for a variance, or application for a special exception, the decision of the board of  
213 zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by showing  
214 to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or  
215 where the discretion of the board of zoning appeals is involved, the decision of the board of zoning  
216 appeals was plainly wrong and in violation of the purpose and intent of the zoning ordinance.

217 Costs shall not be allowed against the board, unless it shall appear to the court that it acted in bad  
218 faith or with malice in making the decision appealed from. In the event the decision of the board is  
219 affirmed and the court finds that the appeal was frivolous, the court may order the person or persons  
220 who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the  
221 record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the  
222 return, the board may request that the court hear the matter on the question of whether the appeal was  
223 frivolous.

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