

TWENTY-SEVENTH JUDICIAL CIRCUIT
OF VIRGINIA

ROBERT M.D. TURK, JUDGE
MONTGOMERY COUNTY COURTHOUSE
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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT FOR THE COUNTIES OF
BLAND, CARROLL, FLOYD, GILES,
GRAYSON, MONTGOMERY, PULASKI, AND WYTHE

CIRCUIT COURT FOR THE CITIES OF
GALAX AND RADFORD

January 24, 2008

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Re: Hale, et al. v. Board of Zoning Appeals, et al
Case No. CL07-2112

Town of Blacksburg, et al v. Board of Zoning Appeals, et al
Case No. CL07-2105

Dear Ladies and Gentlemen:

This matter came before the court on December 19, 2007 pursuant to a Petition for a *Writ of Certiorari* filed by the Town of Blacksburg; the Town Council of the Town of

Blacksburg; the Town of Blacksburg, Department of Planning and Engineering; Steven M. Hundley, Zoning Administrator for the Town of Blacksburg; and Edward Hale, et al, hereinafter referred to as petitioners, for this court to review and reverse The Town of Blacksburg, Board of Zoning Appeals' decision dated July 31, 2007. Diversified Investors 13, LLC, Fairmont Properties, LLC, Fairmont University Realty Trust, LLC, and Llamas, LLC have all filed their answers to the writ. Oral argument was heard on December 19 with each party filing memoranda and exhibits for the court to consider. The record of the Board of Zoning Appeals' meetings on July 25, 2007 and July 31, 2007 had previously been filed with the court.

I have reviewed the record of the meetings, the memoranda of the parties, the various exhibits referred to, and the applicable law in arriving at my decision in this case.

In early 2005, Llamas, LLC obtained controlling rights to a certain parcel of land containing approximately 39.63 acres located in the Town of Blacksburg. Llamas, LLC requested a change of the zoning classification of approximately 26.53 acres from R-4 low-density residential and office to general commercial. Along with this request was a proffer statement dated May 3, 2006. On May 9, 2006, the Town of Blacksburg passed Ordinance 1412 which rezoned the requested property to conditional and general commercial.

Paragraph two of the ordinance states:

“This is a conditional rezoning and the terms and provisions of a proffer statement dated ~~April 6~~ May 3, (which incorporates the Proffer Plan by Anderson and Associates, Inc., Document Number 22559-100, dated February 27, 2006 and ~~last~~ as revised on March 10, March 21 and April 27, 2006) and the application dated ~~January 17~~ May 9, 2006 shall govern the development and use of this land”.

After the passage of the ordinance and up to May, 2007, the respondents submitted various letters from developers to the Town concerning issues about the development itself. On May 29, 2007, the Town of Blacksburg adopted Ordinance 1450, amending sections 2103 and 3151 of the zoning ordinance, defining retail sales, large format, as “retail sales, uses, including those used as classified more specifically by these used-type classifications, located in one structure in access of 80,000 square feet gross floor area, whether on a single lot or contiguous lots owned or operated as an associate, integrated and cooperative business enterprises.” These uses would be allowed in general commercial districts by special use permits only.

The respondents filed suit in the Circuit Court of Montgomery County requesting this court to declare that they had vested rights in the property as zoned pursuant to Ordinance

1412 and that the special use permit requirement as set forth in Ordinance 1450 would not be applicable to their property. The court heard argument and found that the respondents had failed to exhaust their administrative remedies. The respondents then requested a determination by the zoning administrator, Steven Hundley. On June 18, 2007, Steven Hundley issued his opinion that the respondents did not have vested rights pursuant to the rezoning of May 9, 2006 and that any retail use structure in excess of 80,000 square feet gross floor area would be subject to the special use provision as required by recently adopted Ordinance 1450. The respondents appealed the Board of Zoning Administrator's decision to the Board of Zoning Appeals. On July 25, 2007 and July 31, 2007, meetings were held, at which time the parties submitted their exhibits and arguments before the Board of Zoning Appeals. On July 31, 2007, the Board of Zoning Appeals issued its opinion, finding that the respondents had, in fact, obtained vested rights in the use of their property pursuant to the May 9, 2006 rezoning. They essentially found that the respondents were not subject to the requirements of Ordinance 1450 as adopted on May 29, 2007. The petitioners have now filed a Petition for *Writ of Certiorari* in the Circuit Court, requesting this court to reverse the Board of Zoning Appeals' finding and to reinstate the findings of the Zoning Administrator.

Section 15.2-2314 grants this court the authority to review the decision of the Board of Zoning Appeals. In reviewing this case, "The court shall hear any arguments on questions of law *de novo*". The parties have all agreed on the specific facts which have been presented. There is no real disagreement as to what any of the facts are. The parties simply disagree as to whether the facts stipulated to by the parties are legally sufficient to support the finding by the Board of Zoning Appeals.

It is a well-recognized principle that "Privately held land is subject to applicable zoning, local zoning ordinances, whether enacted before or after the property was acquired. Generally, landowners have no property right in anticipated uses of their land since they have no vested property right in the continuation of the land's existing zoning status". *The Board of Zoning Appeals of Bland County v. Caselin Systems, Inc.*, 256 Va. 206 (1998)... "However, in limited circumstances, private landowners may acquire a vested right in planned uses of their land that may not be prohibited or reduced by subsequent zoning legislation". *Holland v. Board of Supervisors*, 247 Va. 286 (1994).

The parties agree that Sec. 15.2-2307 of the Code of Virginia sets forth the applicable standard for determining vested rights. The Supreme Court's decision in *City of Suffolk v. Board of Zoning Appeals*, 266 Va. 137 (2003) is the first case that discusses the newest amendments to Sec. 15.2-2307. Both parties in this instance have cited the *City of Suffolk* case as the controlling case on their respective positions. The court in *Suffolk* stated specifically,

"In 1998, the General Assembly enacted subsequent changes to Code Sec. 15.2-2307 that established certain criteria which,

when satisfied, conclusively vests property rights in a landowner regardless of changes in the otherwise applicable zoning ordinance.”

“A landowner’s rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in affect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act”.

City of Suffolk, Page 143.

Section 15.2-2307 specifically states, “For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or Board of Zoning Appeals has granted a special exemption or use permit with conditions; (iv) the Board of Zoning Appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner’s property and the applicant diligently purses approval of the final plat or plan within a reasonable period of time under the circumstances; or (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner’s property.”

In this particular instance, the respondents have argued that they have acquired vested rights pursuant to Sec. 15.2-2307. The petitioners allege that under the facts the respondents have not acquired such rights. In analyzing Sec. 15.2-2307, the statute essentially requires three findings before vested rights can be established. The only real issue between the parties in this instance is “whether or not a significant affirmative governmental act which remains in affect allowing development of a specific project” has occurred. The other two elements, the reliance in good faith on that act and the incurring of extensive obligations or substantial expenses, are not in question, as neither party argued them.

Based upon the evidence and the record, the court finds that there is sufficient evidence in the record indicating that the May 9, 2006 adoption of Ordinance 1412 constituted a “significant affirmative governmental act”, thereby creating a vested right in the landowners to develop their property pursuant to that zoning. This case, in the court’s mind, is very similar to the situation as set out in the *City of Suffolk* case. The facts in this case clearly

indicate that the May 9, 2006 rezoning of the property at Llamas' request was not a general rezoning as the petitioners have claimed. Pursuant to the ordinance itself, it was a "conditional rezoning" concerning a specific tract of land. It went further to limit the use of this property to be governed by the "proffer statement dated May 3, 2006". At that particular time, the record is clear that the Town was aware of the specific request being made by the respondents and was aware that they intended to develop the property according to the plans that had been presented. Petitioners have argued that the proffer statement submitted has no meaning, as it does not limit the use of the property. However, it is clear that the proffer statement does, in fact, limit certain uses of the property that would normally be allowed under the general commercial zoning for the Town. Further, the proffer statement limits the residential density of the proposed project and further provides for safeguards such as buffering zones, etc. throughout the course of the project in order to protect the surrounding residential areas.

The court further finds that there is sufficient evidence that from the date that the ordinance was passed up until the passage of Ordinance 1450, which would now require a special use permit, the respondents were continually supplying the Town with information about the particular project being developed and the respondents were diligently pursuing input from the Town on this project. Essentially from the passage of Ordinance 1412, the Town was well aware that the respondents were pursuing the development of this property in reliance on that ordinance, and the Town was well aware of what that project would entail.

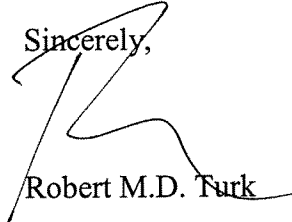
The respondents have requested the court to apply a very strict reading of the statute when it refers to "specific project" and find that the Town had to be aware of the actual plan that was going to be used in developing this property at the time of the rezoning. There is nothing in the statute or case law that this court can find, that requires such a strict definition of "specific project". The petitioners herein have argued essentially that the respondents needed a "ready to build" plan in order for the rezoning to constitute a significant governmental act. Clearly under *City of Suffolk*, that is not the case.

Essentially the court finds there is sufficient evidence in the record allowing the Board of Zoning Appeals to find that the rezoning of the property, pursuant to Ordinance 1412, constituted a significant governmental act which grants the respondents a vested right in a land use that is not affected by subsequent amendments to the zoning ordinance. With this finding, the court need not address the other issues raised by the parties.

I would ask Mr. Cowan or Mr. Cranwell to please prepare the appropriate order pursuant to the court findings herein.

With kindest regards, I am

Sincerely,

A handwritten signature in black ink, appearing to be 'R.M.D. Turk', written over the printed name.

Robert M.D. Turk

RMDT/j