

THE STATE OF VESTED RIGHTS LAW IN 2010: AFTER HALE, CRUCIBLE, AND HB 1250

I. BACKGROUND AND PRE-VESTED RIGHTS CASES, 1950 – 1971.

A. It is an accepted rule of law in Virginia that privately held land is subject to applicable local zoning ordinances whether enacted before or after the property was acquired. *See West Brothers Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881 (Va. 1937). Generally, landowners have no property right in anticipated uses of their land because they have no vested property right in the continuation of the land's existing zoning status. *Snow v. Amherst County Bd. of Zoning Appeals*, 248 Va. 404, 408, 448 S.E.2d 606, 608-09 (1994); *Town of Vienna Council v. Kohler*, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978).

B. 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 ordinance amendments. *See Holland v. Board of Supervisors*, 247 Va. 286, 290-91, 441 S.E.2d 20, 22-23 (1994).

C. Prior to 1998, Virginia Code § 15.2-2307 and its predecessor statutes (e.g., Virginia Code § 15.1-492) recited that “[n]othing in this [zoning] article shall be construed to authorize the impairment of any vested right....” However, there was no statutory definition of what constituted a “vested right.”

D. Therefore, until Virginia Code § 15.2-2307 was amended in 1998 (Acts, ch.801), the law of vested rights developed as a common law principle in case law developed by the Virginia Supreme Court over the years.

II. 1972: VESTED RIGHTS EMERGE AS A COMMON LAW PRINCIPAL.

A. Two cases from Fairfax County, Virginia, decided by the Supreme Court of Virginia on the same day, established the first common law rule for determining when property rights vest and are protected from a subsequent zoning change.

1. *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972).

2. In *Board of Supervisors v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972).

III. GREATER DEFERENCE TO LEGISLATIVE ACTION: VESTED RIGHTS LIMITED IN THE 1980s AND BEYOND.

- A. *Notestein v. Board of Supervisors*, 240 Va. 146, 393 S.E.2d 205 (1990).
- B. *Town of Stephens City v. Russell*, 241 Va. 160, 399 S.E.2d 814 (1991).
- C. *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994):

a significant official governmental act that is manifested by the issuance of a permit or other approval authorizing the landowner to conduct a use on his property that otherwise would not have been allowed [...and...] that he has diligently pursued the use authorized by the government permit or approval and incurred substantial expense in good faith prior to the change in zoning.

Town of Rocky Mount v. Southside Investors, Inc., 254 Va. 130, 487 S.E.2d 855 (1997): “A significant governmental act... authorizes the specific use to be made of the property, rather than the general categories of development allowed in a given zoning classification.”

- D. *Board of Zoning Appeals v. CaseLin*, 256 Va. 206, 501 S.E.2d 397 (1998), the Virginia Supreme Court again addressed the criteria for a “significant governmental act” and what is meant by “other approval.” Virginia Supreme Court found there was no “*significant governmental act*” that was manifested by the issuance of a “*permit or other approval*” authorizing the landowner to conduct the use.

IV. 1998 – VIRGINIA GENERAL ASSEMBLY ENACTS WATERSHED VESTED RIGHTS LEGISLATION IN CODE SECTION 15.2-2307.

- A. Senate Bill 570 from the 1998 Session of the General Assembly amended Va. Code 15.2-2307 and largely transformed the law on vested rights from a common law/judicial doctrine to legislative policy. The provisions of SB 570 remain unchanged in section 15.2-2307.

- B. As adopted, SB 570 retained the common law requirements that to be vested in a specific land use, a landowner must have relied in good faith on a significant governmental act and must have incurred substantial expenses in diligent pursuit of the specific project prior to the change in zoning. Except for delineating the significant affirmative governmental acts allowing development of a specific project, SB 570 did not define these terms, leaving them to the courts for interpretation.

V. POST-CODIFICATION: CITY OF SUFFOLK *ex rel* HERBERT V. BOARD OF ZONING APPEALS, HALE AND CRUCIBLE

A. In *City of Suffolk, ex rel Herbert v. Board of Zoning Appeals*, 266 Va. 137, 580 S.E.2d 796 (2003), a property owner rezoned 164 acres from Rural Residential to Planned Development Housing, as part of a joint project to build a planned unit development [King’s Landing]. After the joint project fell through, the property owner rezoned 10 acres to “General Business,” and amended the Master Land Use Plan for the project to change the proposed residential development areas for the remaining acreage from mixed density to low density.

1. A preliminary recreation plan and traffic impact analysis based on full build-out of the property was approved by the City. The preliminary plat for part of the remaining 154 acres was submitted and approved, and property was deeded to VDOT for road improvements.
2. Before final site plan approval was obtained, the City changed the zoning of the property to Commerce Park and Office-Institutional.
3. On appeal, the City argued that while the original rezoning constituted a “rezoning for a specific use or density,” it was not for the development of a “specific project.” The City argued that the approval of the zoning and a proffered master land use plan was inadequate for a SAGA.
4. On a close 4-3 vote, the Virginia Supreme Court disagreed with the City, finding that the zoning originally requested “was specifically directed to an identifiable property and project” and therefore met the “specific project” requirement under Virginia Code § 15.2-2307.
5. The 3-justice minority in *Herbert* criticized the majority for allowing vesting based upon a general land use plan rather than a “specific project” as required by the statute, and for finding due diligence despite a five-year lapse in activity.

B. In *Hale v. Board of Zoning Appeals for Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009), the Virginia Supreme Court addressed the actions enumerated in Virginia Code § 15.2-2307 as being significant affirmative governmental actions, specifically (i) the “accept[ance] of proffers or proffered conditions which specify use related to a zoning amendment and (ii) where “the governing body has approved an application for a rezoning for a specific use or density.”

1. In *Hale*, the developer conditionally rezoned the property at issue from Low-Density Residential to General Commercial in order to build a mixed use “Towne Center.”
2. The developer proffered to increase setbacks, construct perimeter fences, buffers, a multi-use path, limit traffic, and the placement of private drives or private roads.

- a. The proffers also restricted building height and “proffered out” certain uses that would otherwise have been permitted.
- b. The project was to be built in accordance with the submitted concept plan, which included “Retail Sales,” but showed no single retail structure as being greater than 80,000 square feet.

3. After the rezoning was approved, the preliminary site plan changed the concept plan and proposed a “big box” store of 176,000 sq. ft. The Zoning Administrator found that the “site appears to comply” with zoning requirements.

4. After Town Council amended the zoning ordinance to require a special use permit for “Retail Sales, Large Format [greater than 80,000 sq. ft],” the Zoning Administrator found that the developer had not obtained vested right to build a “big box” store. The BZA overturned the Zoning Administrator’s decision, and the matter was appealed.

5. The trial court ruled that the developer had acquired a vested right.

6. The Virginia Supreme Court reversed the trial court, finding that the “proffering out” of certain uses does give rise to a “negative inference” that all other permitted uses were specifically intended to be developed. The Virginia Supreme Court also rejected the developer’s argument that the proffer of limited density gave rise to the vested right to build unrestricted “Retail Sales” as permitted under general zoning, finding that even if the developer’s argument was valid, the only right that would vest would be the permitted density.

C. In *Stafford County v. Crucible*, 278 Va. 152 (2009), the Virginia Supreme Court addressed whether the owner of property zoned for agriculture acquired a vested right to use its property to operate a security training facility after obtaining a zoning verification letter from the Zoning Administrator confirming that the proposed use would be classified as a “school” under the current ordinance, and permitted by right.

1. After Crucible purchased the property and over a year after receiving the Zoning Administrator’s letter, on August 24, 2005, the Board of Supervisors amended the zoning ordinance to require a conditional use permit for schools in the A-1 District.

2. The Virginia Supreme Court re-iterated that there is “no vested property right in the continuation of the land’s existing zoning status,” and ruled that the zoning verification letter was merely a statement of zoning classification and was not a significant affirmative governmental act allowing the development of a specific project under Section 15.2-2307.

VI. 2010 GENERAL ASSEMBLY ENACTS HB 1250 TO EXPAND VESTED RIGHTS TO INCLUDE ZONING ADMINISTRATOR ACTIONS.

A. The 2010 General Assembly’s House Bill 1250 This bill was introduced to legislatively overturn the Virginia Supreme Court’s opinion in *Crucible*.

B. HB 1250 amends Section 15.2-2307 by adding a seventh classification to the list of “significant affirmative governmental acts allowing development of a specific project:”

(vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner’s property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of Section 15.2-2311.

VII. BREAKDOWN OF HB 1250, VIRGINIA CODE § 15.2-2307, AS AMENDED

A. All of the opening paragraph of 15.2-2307 still applies: “Without limiting the time when rights might otherwise vest, 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 effect 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.”

B. The specific language of the newest SAGA actually sets forth parameters of the scope of the new SAGA from HB 1250:

vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.

1. **“The zoning administrator or other administrative officer...”**
 - a. Plainly, a zoning or other administrative officer must be authorized to issue such orders, requirements, decisions and determinations.
2. **“has issued a written...”**
 - a. To be a SAGA, the determination *must* be in writing.
3. **“order, requirement, decision or determination”**

- a. Not everything written by the zoning administrator may constitute an “order, requirement, decision or determination” of the zoning administrator.
 - b. Localities should determine where the line should be drawn between opinions that are merely advisory and ones that trigger the requirement to appeal to the BZA in Virginia Code § 15.2-2311 and therefore could also be a potential SAGA under Virginia Code § 15.2-2307.
4. **“regarding a specific use or density”**
- a. This appears to be the same or similar to the existing “specific use” and “specific density” terms elsewhere in Virginia Code § 15.2-2307.
5. **“of the landowner’s property”**
- a. This limits HB 1250 to landowners’ claims of vested rights.
6. **“that is no longer subject to appeal”**
- a. Only an official “order, requirement, decision or determination” that is “no longer subject to appeal” to the BZA can be a SAGA.
 - b. Confirms that only an “order, requirement, decision or determination” appealable under Virginia Code § 15.2-2311(A) has the potential to be a SAGA.
7. **“and”**
- a. Yes, “and!” To be a SAGA, the official determination must be “no longer subject to appeal” AND “no longer subject to change, modification or reversal under subsection C of § 15.2-2311.
 - b. *Both* are mandatory. *Either* can be a defense to a claim of vested rights under HB 1250.
8. **“no longer subject to change, modification or reversal under subsection C of § 15.2-2311.”**
- a. This is a complex statute that has only recently been interpreted by the Virginia Supreme Court.
 - b. This is a narrow exception to the “no estoppel” rule in Virginia, and is the most consequential barrier to a zoning administrator determination becoming a SAGA under HB 1250.

VIII. ESTOPPEL (aka “NO LONGER SUBJECT TO REVERSAL”) UNDER 15.2-2311(C)

A. As a general and well-settled rule, “estoppel does not apply to a local government when it acts in a governmental capacity,” such as zoning. *Wolfe v. Board of Zoning Appeals*, 260 Va. 7, 532 S.E.2d 621 (2000), citing *Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach*, 238 Va. 493, 503, 385 S.E.2d 561, 566 (1989); *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 413 (1988).

1. The breadth of Virginia Code § 15.2-2311(C) has become all the more important since the adoption of HB 1250, as it now can lead to a SAGA and vested rights binding on the locality. Some cases have interpreted Virginia Code § 15.2-2311(C).

2. In its proper application, Virginia Code § 15.2-2311(C) vests rights where discretion is required in the interpretation of the zoning ordinance and reasonable people may differ as to that interpretation.

B. The text of Virginia Code § 15.2-2311(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 60 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 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical or other nondiscretionary errors.

C. Statutory Estoppel/Vesting Requirements in Virginia Code § 15.2-2311(C):

1. “Written Order, Decision, Requirement or Determination.” See Virginia Code § 15.2-2311(A).

2. “Materially Changed His Position.” This is a standard requirement for estoppel.

3. “In Reliance on the Action of the Zoning Administrator.” The claimant under Virginia Code § 15.2-2311(C) must have reasonably relied in good faith upon the action of

the zoning administrator. The action of the zoning administrator must establish the right that the claimant is seeking to affirm.

4. “Would Have Known” and “Waiver” Requirements. Interestingly, *Goyanga* established a requirement – also likely springing from the “reliance” requirement – that under Virginia Code § 15.2-2311(C), the claimant must prove that the zoning administrator “would have known” that he was authorizing a use not permitted under the zoning ordinance (i.e., complete destruction and reconstruction of a nonconforming structure) sufficient to show a “waiver, albeit an improper one, of the requirements of the [local zoning ordinance].” *Goyonaga*, 275 Va. at 244, 657 S.E.2d at ____.

D. Three major statutory exceptions to the application of Virginia Code § 15.2-2311(C) exist: (i) malfeasance of the zoning administrator, (ii) fraud, and (iii) clerical or other nondiscretionary errors:

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 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is **required to correct clerical or other nondiscretionary errors**.

IX. RETROACTIVITY

A. As a general rule, unless there is some express statement of intent that an action of the General Assembly is retroactive it is considered prospective only:

A determination whether a newly enacted statute may be applied retroactively requires a two-step analysis. It must first be determined whether the General Assembly intended the statute in question to have retroactive effect. *Eaton v. Davis*, 176 Va. 330, 336, 10 S.E.2d 893, 896 (1940). If the requisite legislative intent is found, the statute then only may be applied retroactively if such application does not impair substantive or vested rights. *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 38, 360 S.E.2d 325, 328 (1987).

1987-88 Va. AG op. 308, 310. On its face, there does not appear any intent within HB 1250 to indicate an intent for retroactive application. (Note that impairing vested rights also is a bar to retroactivity.)

B. Retroactivity not likely to be a significant issue in an analysis under Virginia Code § 15.2-2307 after HB 1250 because of the reasonable reliance requirement for vested

rights. It seems logical that until AFTER the effective date of HB 1250, it should be difficult to prove to a court that you reasonably relied on something the Virginia Supreme Court said in *Crucible* was NOT a SAGA.

X. BEST PRACTICES FOR 2010 AND YEARS TO COME

A. Caveat. All localities are different, in staffing, board/council governance, policy. These suggestions are for you to consider, take to your zoning staff or local government attorney, and determine what works for your locality.

B. Be Proactive.

C. Adopt a Local Policy for Zoning Administrator Orders, Requirements, Decisions or Determinations.

D. Consider utilizing a form or standard format for an order, requirement, decision or determination, with appropriate disclaimers and warnings.

E. Local government review of official written orders, requirements, decisions and determinations of the zoning administrator, by other staff persons and local government attorney.

F. HB 1250 is a vesting statute, which only comes into play when the ordinance is amended. So, governing body may be able to help avoid or mitigate HB 1250 vesting issues when the amendment is being considered.

Sands Anderson Vested Rights Webinar Faculty
May 19, 2010

Annemarie Cleary



Annemarie Cleary of the Business and Professional Litigation team focuses her practice on commercial and civil litigation, business disputes and land use and development. Annemarie was author of an *amicus* brief filed on behalf of the LGA in support of Stafford County in the *Board of Supervisors of Stafford County, Virginia, et al. v. Crucible, Inc.*, decided by the Virginia Supreme Court in June 2009. In that opinion, the Supreme Court ruled in favor of Stafford County and overturned a ruling by the trial court that Crucible's rights had vested in a particular development plan.

Ann Neil Cosby



Ann Neil Cosby of the Local Government team focuses her practice on land use, land planning and zoning. She is on our Environmental and Land Use teams and, in those capacities, handles code enforcement and environmental law litigation. Ann Neil works closely with Zoning and Community Development staff drafting ordinances and policies to implement zoning and land use concerns, as well as state mandates including the Chesapeake Bay Act and other state law enactments. She prosecutes code and regulatory violations before appellate boards and in courts throughout the state.

Karen J. Harwood



Karen Harwood has served with others for two decades representing Fairfax County and the Board of Supervisors before the Virginia General Assembly during its annual sessions and at various General Assembly subcommittees and commission meetings. As an attorney specializing in land use, she has advised the Fairfax County Board of Supervisors, Fairfax County Planning Commission, Board of Zoning Appeals, other County boards and commissions, County officials and staff on a regular basis concerning all matters related to the land development process.

Andrew McRoberts



Andrew McRoberts of the Local Government team focuses his work on land use and zoning, subdivision, real estate, tax assessment, special service districts, and other specialized advice and litigation for local governments in Virginia. Prior to joining the firm, Andrew served over eight years as the County Attorney for Goochland County.

Contact Sands Anderson at (800) 296-1636 or www.SandsAnderson.com/contact_us.html