RECENT DEVELOPMENTS IN LAND USE LAW

FALL CONFERENCE OF THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA

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There have been numerous developments in land use law over the past twenty-four months which should be brought to your attention.

THE ENABLING LEGISLATION

Title 15.1 Recodified

The enabling legislation contained in Chapter 11 of Title 15.1, from which all Virginia zoning and planning powers derive, was recodified as of Title 15.2 of the Code, effective December 1, 1997. As Members know from previous programs presented by Liz Whiting, despite assurances that this was a pure recodification without substantive change, there were such changes even if relatively minor. One change which has affected some localities is the decision to define terms such that "locality" now generically includes all counties, cities, and towns. This has meant that certain powers and duties formerly applicable only to one or the other or some combination, are now applicable to all.

Zoning Ordinances

Va. Code § 15.2-2286 sets out in detail those things which zoning ordinances may specifically include. According to a 1996 opinion of the Virginia Attorney General, § 15.2-2286(7) does not authorize a governing body to refuse to consider a rezoning petition withdrawn after planning commission review but before legislative consideration. Nor can a zoning ordinance limit the period during which a rezoning petition may be withdrawn. 1996 Op. Va. Att'y Gen. 56

Va. Code § 10.1-1126.1 prohibits a locality using its zoning power to prohibit or unreasonably limit silvicultural activity conducted in accordance with best management practices. 1997 Va. Acts, c. 7

Historical District Ordinances

The provisions authorizing counties and municipalities to enact ordinances for the preservation of historical sites and areas have been amended to authorize the governing body to provide compensation to the local architectural review board. Va. Code § 15.2-2306; 1997 Va. Acts, c. 676.

According to a 1997 opinion of the Virginia Attorney General, a county must obtain the permission of a town's architectural review board before erecting temporary courthouse facilities at the county courthouse located in the town's historic district. 1997 Op. Va. Att'y Gen. 139.

Local architectural review boards may not dictate the types of materials or manner of construction of a building or structure and may not establish "building regulations" under Va. Code § 36-97. 1996 Op. Va. Att'y Gen. 139.

COMPREHENSIVE PLANNING

Town of Jonesville v. Powell Valley Village L.P., 254 Va. 70, 487 S.E.2d 207 (1997)

Since 1980, the state's statutory scheme has required that a comprehensive plan must be adopted prior to the adoption of a zoning ordinance. Here, the town's zoning ordinance, while a comprehensive zoning regulation, did not contain a number of elements required to be included in a comprehensive plan and did not constitute a comprehensive plan under Va. Code § 15.1-446.1 (Va. Code § 15.2-2223). Since a comprehensive plan is required prior to adoption of a zoning ordinance, the town's zoning ordinance was *void ab initio*. The holding in this case -- that adoption of a comprehensive plan is a prerequisite to the adoption of a zoning ordinance -- is limit to the instant case and shall operate prospectively only. The effect of the trial court's decision was to return the land to the same unzoned status it held prior to the enactment of the void ordinance. The building inspector had denied a building permit for the sole reason that the landowner did not have a zoning permit under the zoning ordinance, so when the trial court's decision eliminated the requirement for a zoning permit, issuance of the building permit was no longer discretionary but ministerial and mandatory. Therefore, the trial court did not err in issuing a writ of mandamus requiring the town to issue the building permit upon payment of the building permit fee.

Guest v. King George County Bd. of Supervisors, 42 Va. Cir. 348 (King George County 1997)

A comprehensive plan is one of approximately ten relevant factors required to receive "reasonable consideration" by a governing body in zoning matters. A comprehensive plan is merely a guide for development, rather than an instrument of land use control.

A board of supervisors has no duty to undertake a formal "456 review" or make any specific written finding overruling the recommendation of the Planning Commission. A governing body need only be aware of the recommendations of the planning commission, and here the record make definite that the Board was clearly aware of the recommendations of the Planning Commission and the conclusion of that body that the rezoning was not in accord with the Comprehensive Plan when it considered the rezoning.

Va. Code § 15.2-2232(F), adopted by 1998 Va. Acts, c. 683.

On any application for 456 review (now § 15.2-2232 review) of a telecommunications facility, the planning commission must act within 90 days, unless the governing body extends the period for no more than 60 days, or the application is deemed approved. The commission must comply with the requirements of the Telecommunications Act of 1996.

STANDARD OF REVIEW

Richardson v. City of Suffolk, 252 Va. 336, 477 S.E.2d 512 (1996)

When a city council reserves to itself the right to issue a conditional use permit, action on a request for such a permit is a legislative function and judicial review of the grant of a conditional use permit follows the same standards applicable to review of any local governing body's legislative zoning decision -- the fairly debatable standard. Rather than construe the ordinance itself (at issue was the associated words doctrine), the Virginia Supreme Court held that the City's construction was sufficiently reasonable, and thus fairly debatable, to justify the granting of the conditional use permit for an automobile racetrack.

City Council of Salem v. Wendy's of Western Virginia, Inc., 252 Va. 12, 471 S.E.2d 469 (1996)

The Council had refused an upzoning from residential to commercial for a property in an area which had changed over time to commercial and industrial uses, and the landowner sued. The trial court made detailed findings that the underlying zoning of the property was unreasonable, and remanded the case to the Council for reconsideration. On appeal, however, the Supreme Court reversed, conducting an independent review of the record to conclude that the underlying zoning was, in fact, reasonable, and that the Council had sustained its burden of proving that zoning to be fairly debatable. The decision is principally significant for its clear demonstration of the full extent to which the Court may go in reassessing, and delimiting, the actions of the lower courts as they adjudicate legislative decisions in the zoning arena.

Guest v. King George County Bd. of Supervisors, 42 Va. Cir. 348 (King George County 1997)

"A court should not 'substitute its judgment for that of a legislative body' in zoning matters. And it is disturbing that, in these times, litigants too often reject the democratic process and ask a court to usurp that process and nullify or reverse the decisions of those elected to make them."

Campbell v. Fairfax County Bd. of Zoning Appeals, 41 Va. Cir. 155 (Fairfax County 1996)

A decision of the BZA is presumed correct and can be reversed only if the challenger shows that it was plainly wrong or based on erroneous principles of law. A "fairly debatable" action will not be deemed "plainly wrong". Here, the appellant failed to meet his burden of producing probative evidence of unreasonableness, and the issue determined by the BZA was fairly debatable. Thus, the petition for certiorari was denied.

AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach, ______ (4th Cir. 1998).

The City's denial of a special use permit for a monopole does not violate the Telecommunications Act of 1996, nor constitute discrimination against the plaintiff digital provider. This decision reverses AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 979 F. Supp. 416 (E.D. Va. 1997), in which the district court found that the denial violated the Act.

Virginia Metronet, Inc. v. Board of Supervisors of James City County, 984 F. Supp. 966 (E.D. Va. 1998).

Although a county's denial of a special use permit for a cellular tower did not constitute a general ban on the provision of wireless telecommunication services in contravention of the Telecommunications Act, the county's failure to provide an adequate written decision setting forth reasons for the denial violated the Act. Even if a letter from the county's planning director were a sufficient written decision, the reasons given for the denial were unsupported in the record.

American PCS, L.P. v. Fairfax County Bd. of Zoning Appeals, 40 Va. Cir. 211 (Fairfax County 1996)

Denial of a special use permit for a "monopole" in a residential district is not a violation of the Telecommunications Act of 1996 because the Act was not signed into law at the time of the decision of the BZA, nor was it signed into law at the time American PCS filed it petition for a writ of mandamus.

PROCEDURAL ISSUES

Town of Madison v. Ford, 255 Va. 429, 498 S.E.2d 235 (1998).

Minutes which reflected at the beginning that all members were present and which later reflected that a zoning ordinance was passed unanimously does not meet the state constitutional requirement that each member's name and vote be recorded. To say that a proposition was adopted by a "unanimous" vote does not always mean that everyone present voted for the proposition. Because the minutes did not reflect which of the council members actually voted for adoption of a zoning ordinance, whether any member abstained, or if any member was absent when the voted was taken, the minutes did not comply with the constitutional requirement of Article VII, § 7 of the Constitution of Virginia, and accordingly the ordinance was *void ab initio*. The Court held that the decision should operate prospectively only and that ordinances adopted prior to this decision with the same deficiencies shall not be affected. See also Town of Madison v. Ford, 40 Va. Cir. 423 (Madison County 1996).

Va. Code § 15.2-1427

Virginia Code § 15.2-1427 has been amended to clarify that, unless otherwise required by law, a recorded voice vote satisfies the requirement that the final vote of each member on an ordinance or resolution be recorded, unless a member calls for a roll call vote. 1998 Va. Acts, c. 823.

Town of Jonesville v. Powell Valley Village, L.P., 254 Va. 70, 487 S.E.2d 207 (1997).

Exhaustion of administrative remedies is not required when the suit challenges the validity of the zoning ordinance itself. No statute confers the authority to rule on the validity of zoning ordinances upon zoning administrators or board of zoning appeals. That is a determination within the sole province of the judiciary.

Chicago v. International College of Surgeons, 118 S.Ct. 523 (1997).

In this case concerning the denial of demolition permit, the Supreme Court stated that federal courts have supplemental jurisdiction to conduct an on-the-record review of local administrative decisions. The Court noted, however, that while the deferential nature of a review of state administrative claims did not bar supplemental jurisdiction, the principles of abstention expounded in Quackenbush v. Allstate Insurance Co., 116 S.Ct. 712 (1996) may result in the state claims not being heard.

VARIANCES

Spence v. Board of Zoning Appeals of Virginia Beach, 255 Va. 116, 496 S.E.2d 61 (1998).

The Virginia Supreme Court, in upholding the decision of the BZA to grant a variance, found that an owner who purchased property at a low price with foreknowledge that it

could not be developed without a variance (knowing, in fact, that a previous variance request had been denied), nonetheless acted in good faith. The Court distinguished Steele v. Fluvanna County Bd. of Zoning Appeals, 246 Va. 502, 436 S.E.2d 453 (1993), Alleghany Enterprises, Inc. v. Board of Zoning Appeals, 217 Va. 64, 225 S.E.2d 393 (1976), and Board of Zoning Appeals v. Combs, 200 Va. 471, 106 S.E.2d 755 (1959), by declaring that a self-inflicted hardship existed when an owner violated the zoning ordinance and then sought relief via a variance from the consequences of the zoning violation. Unlike the landowners in those cases, the landowner in this case did not violate a zoning ordinance provision and then seek relief from the consequences of that unlawful act. Therefore, this landowner did not create a self-inflicted hardship.

NONCONFORMING USES

Board of Zoning Appeals of Norfolk v. Kahhal, 255 Va. 476, 499 S.E.2d 519 (1998)

Following a fire, the owner's lessee abandoned his lease and surrendered his business licence to operate a grocery. The owners then decided to operate the grocery store themselves and secured a loan to finance the necessary repairs to the property. The property was zoned residentially, but the grocery had been a nonconforming use. The City's ordinance stated that a nonconforming use shall not be renewed or reestablished if discontinued for a period of two years. During the two year period, the owners obtained construction financing, business licenses and building permits and paid a meal tax cash bond, but the grocery store had not been reopened. The zoning inspector issued a Notice of Violation informing them that they had lost their nonconforming status, and the Board of Zoning Appeals affirmed. The circuit court disagreed and concluded that the property had retained its nonconforming status. Without determining if the circuit court's interpretation of Va. Code § 15.1-492 (§ 15.2-2307) was correct, the Virginia Supreme Court held that the circuit court did not err in the means and methods it used to determine that the period during which preparatory actions were taken to reopen the business after a fire did not constitute a discontinuance of the business.

City of Chesapeake v. Gardner Enterprises, Inc., 253 Va. 243, 482 S.E.2d 812 (1997).

In this case, a cemetery was operating as a nonconforming use. An amended city zoning ordinance prohibited the construction of additional structures to support a nonconforming use. The City argued that the ordinance prevented the cemetery from constructing new mausoleums. The Virginia Supreme Court held that while Va. Code § 15.1-492 (§ 15.2-2307) does not expressly address additional structures to support a nonconforming use of land, the authority to limit such structures was necessarily and fairly implied from the statute whose general purpose is to allow the government to regulate changes in nonconforming uses.

Emerson v. Board of Zoning Appeals of Fairfax County, Law No. 154173 (Fairfax County Cir. Ct. February 13, 1998)

> A business conducted on the property since 1949 was an unlawful nonconforming use because the landowner could not show that it was lawful when the zoning ordinance was enacted, and because the landowner has enlarged the business as to scope and extent since that time.

Wheelabrator Clean Water Sys., Inc. v. King George County, 43 Va. Cir. 370 (King George Co. 1997).

> The character of a legal nonconforming use which allows biosolids storage and application of biosolids on the same property would be impermissibly changed by the transport of biosolids from the storage facility to other properties. While the transportation of biosolids from the storage facility to other sites for land application may be "related to" the use permitted, it is not merely an "accessory or incidental use" to the nonconforming use. There is no substantive due process violation because the landowner has not been deprived of a protected property interest. There is also no equal protection violation despite the fact that a similar facility has the right to transport from its storage facility within a 60 mile radius. The landowner has failed to carry its burden of proving that it is being treated differently from others "similarly situated". Note that the Virginia Supreme Court denied plaintiff's petition for leave to appeal on June 8, 1998, finding no reversible error.

Grigorovich-Barsky v. Board of Zoning Appeals of Northumberland County, 43 Va. Cir. 24 (Northumberland County 1997).

> An otherwise lawful nonconforming use must partly terminate because the nonconforming use had not been catalogued and permitted by the county as required by ordinance. The degree to which the use must cease, however, is governed by the extent the property rights had "vested" under § 15.1-492 (§ 15.2-2307).

Hughey v. Fairfax County Bd. of Zoning Appeals, 41 Va. Cir. 138 (Fairfax County 1996)

> To be a lawful non-conforming use of land, the lawful use must have existed on the effective date of the zoning restriction and continued since that time in nonconformance. Here, the BZA neither specifically affirmed nor reversed the Zoning Administrator's ruling that the use was in violation of the ordinance, since the BZA voted 3 to 3 on a motion to affirm. However, the BZA did act, and thus the matter was properly before the circuit court. In addition, the decision of the Zoning Administrator was unchanged and *de facto* affirmed. The landowners failed to meet their burden of proving that the nonconforming use existed prior to the enactment of that zoning ordinance and that it

continued uninterrupted from that time, and thus the BZA's decision was not "plainly wrong".

VESTED RIGHTS

Va. Code § 15.2-2307 (§ 15.1-492); 1998 Va. Acts, c. 801; The Famous (or Infamous) Senate Bill 570

In 1998, the General Assembly codified the law regarding when rights vest, and in doing so expanded the circumstances under which rights vest from that established by case law. The law now provides that a landowner's rights are deemed vested when he (1) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project; (2) relies in good faith on such act; and (3) incurs extensive obligations or substantial expenses pursing the project in reliance on the affirmative act. The non-exclusive list of significant affirmative acts are: (a) acceptance of proffers; (b) approval of an application for rezoning for a specific use or density; (c) granting of a special use permit with conditions; (d) approval of a variance; (e) approval of a preliminary subdivision plat, site plan or development plan with diligent pursuit of approval of the final plat or plan; and (f) approval of a final subdivision plat, site plan or development plan. The statute to a great extent negates the holdings in Stevens City (preliminary subdivision plat); Snow v. Amherst County Bd. of Zoning Appeals, 248 Va. 404, 448 S.E.2d 606 (1994) (variance); and possibly Town of Rocky Mount v. Southside Investors, Inc., 254 Va. 130, 487 S.E.2d 855 (1997) (if interpreted as a density rezoning).

Board of Zoning Appeals of Bland County v. Caselin Systems, 256 Va. 206, 501 S.E.2d 397 (1998)

Here the issue was whether the landowner had acquired a vested property right to build and operate its planned medical waste incinerator before the enactment of a county zoning ordinance precluding such use. A landowner who seeks to establish a vested property right in a land use classification must (1) identify 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 (2) establish 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. Here, the Virginia Supreme Court found that the term "other approval" is of similar character and formality as a permit. The board of supervisors had adopted resolutions stating that it would give the landowner a "letter of support" regarding his proposal and send a "certification" to the state agency stating that the proposed use was in accordance with all local ordinances. Relying on the Board's actions, Caselin had purchased the land, contracted to build an access road, applied for the required state agency approvals, and cleared some of the land, but it had not yet obtained the required

state approvals at the time the zoning ordinance was enacted prohibiting the planned incinerator. In response to citizen objections, the Board rescinded its earlier support. The Court held that the Board's initial actions did not constitute a significant governmental act or "other approval" of Caselin's planned incinerator. "Other approval" must be an official response to a detailed request for a use of a particular property that would not otherwise be allowed by law.

Town of Rocky Mount v. Southside Investors, Inc., 254 Va. __, 487 S.E.2d 855 (1997)

The significant governmental act must authorize the specific use to be made of the property rather than the general category of development allowed; thus the town's rezoning of property to a classification where the use was permitted by right was not a significant governmental act that created a vested right in the use after a subsequent amendment allowed the use only by special permit.

Grigorovich-Barsky v. Board of Zoning Appeals of Northumberland County, 43 Va. Cir. 24 (Northumberland County 1997).

A commercial use in a residential area was allowed to continue in part because the landowner had acquired certain vested rights under Va. Code § 15.1-492 (§ 15.2-2307). A determination of the extent of that commercial use and whether there had been a significant expansion of that use was remanded to the Board of Zoning Appeals.

Salem Fields, L.L.C. v. Spotsylvania County Bd. of Zoning Appeals, 40 Va. Cir. 289 (Spotsylvania County 1996)

Subdivision developer who obtained preliminary plat approval and expended substantial funds toward development had a vested right to proceed with the project despite an intervening zoning reclassification. The circuit court rejected the argument that "substantial" be determined by a proportion of total costs or a consideration of costs that could be recovered. Instead, each case must be decided on its merits according to the particular facts of the case, giving due deference to the presumed correctness of the BZA decision.

Lynch v. Spotsylvania County Bd. of Zoning Appeals, 42 Va. Cir. 164 (Spotsylvania County 1997)

Va. Code § 15.1-491(d) (now § 15.2-2286(A)(4) empowers a zoning administrator to make a quasi-judicial determination that a person is entitled to vested rights under a existing set of facts. Here the zoning administrator exceeded his authority when he responded affirmatively to a developer's request for a vested rights determination based on a set of nonexistent facts. While the developer had acquired vested rights to proceed

with its development in conformance with its approved preliminary plat, it did not have vested rights to revise its plans for the remainder of the development.

GRANDFATHERING

Hanover County v. Bertozzi, ___ Va. ___, 1998 Lexis 112 (September 18, 1998)

Where the plain and unambiguous language of a "grandfather clause" requires a landowner to have filed an application for final subdivision approval before the close of business on a particular date, the application had to be complete and in compliance with all substantive zoning and subdivision ordinance requirements and filed on or before that particular date in order to comply with the requirements necessary to receive the benefit of the grandfather clause. Here, the landowner did not file applications or plats for two sections of his proposed subdivision before the applicable deadline. Neither his cursory statement in a letter filed on the deadline date stating that the final plats would be "forthcoming", nor his tentative drawings previously filed, constituted a complete application. Thus, the lower court erred in ordering the County to review those two sections under the terms of the zoning and subdivision ordinances in effect prior to the deadline date.

ADMINISTRATION AND ENFORCEMENT

Va. Code § 15.2-2286(A)(4) (§ 15.1-491(d)); 1998 Va. Acts, c. 385

The zoning administrator must make a decision or determination on zoning matters within 90 days of a request unless the requestor has agreed to a longer period.

Va. Code § 15.2-2286(A)(5) (§ 15.1-491 (e)); 1997 Va. Acts, c. 529

In response to an opinion of the Virginia Court of Appeals that enabling legislation did not authorize a county's zoning ordinance to classify each day's violation as a separate misdemeanor, Lawless v. County of Chesterfield, 21 Va. App. 495, 465 S.E.2d 153 (1995), the General Assembly amended § 15.1-491(e) (§ 15.2-2286) to provide that if the violation is uncorrected at the time of conviction, the court shall order abatement of the violation within a specified time and failure to so abate shall constitute a separate misdemeanor, as will failure to do so within any succeeding 30 day period.

Middleburg Town Council v. Board of Zoning Appeals of Middleburg, 42 Va. Cir. 56 (Loudoun County 1997).

The Town Council was not allowed to intervene in a § 15.1-497 (§ 15.2-2314) proceeding because third party interventions are not allowed in certiorari proceedings to review the action of a BZA. Va. Code § 15.1-497 sets forth a specific procedure which an aggrieved party must follow in order to have the court review the decision of the BZA.

Salem Fields, L.L.C. v. Spotsylvania County Bd. of Zoning Appeals, 40 Va. Cir. 289 (Spotsylvania County 1996)

Here, the submission of a final plat was rejected, not disapproved. Because the plat had not been disapproved, judicial review under Va. Code § 15.1-475(B)(3) (now § 15.2-2259) was not available.

SUBDIVISION PLATS

Hanover County v. Bertozzi, ___ Va. ___, 1998 Lexis 112 (1998)

Va. Code § 15.2-2259 limits the circuit court's review of the county's disapproval of a subdivision application and plat to a determination of whether the county's disapproval was "not properly based on the ordinance applicable thereto, or was arbitrary or capricious." In this case, the trial court never enunciated any finding that the county's disapproval was either not based on the applicable ordinance, or was arbitrary or capricious. In fact, the Virginia Supreme Court found that the trial court could not have made any such finding because it did not receive sufficient evidence from either party upon which to base a decision. Having a record devoid of any evidence and factual findings, the Virginia Supreme Court reversed the trial court and remanded the case for an evidentiary hearing regarding whether the county's disapproval of the subdivision application and plat was not properly based on the ordinance applicable thereto, or was arbitrary and capricious.

Helmick v. Town of Warrenton, 254 Va. 225, 492 S.E.2d 113 (1997)

The decision of a locality not to consent to the vacation of a subdivision plat is a legislative act. Vacation of a recorded subdivision plat requires the decision-maker to consider the desires of the landowner in conjunction with the interests of the community in light of the circumstances existing at the time of the proposed vacation. Such balancing of interests is characteristic of legislative decision-making. In addition, the determination whether to vacate a subdivision plat is a decision which regulates or restricts the use of property, and an ordinance that regulates or restricts conduct with respect to property is purely legislative. Here, the trial court properly sustained the Town's demurrer because the allegations in the pleadings did not support claims that the Town's action in denying the vacation was arbitrary, capricious, unwarranted, or discriminatory, and were insufficient to overcome the presumption of reasonableness

afforded the legislative action of the Town. In addition, the Town's ordinance, which states that any plat of record may be vacated in accordance with the provisions of the Virginia Land Subdivision Act, is valid, even though it contains no specific guidelines or criteria to be following in vacating a subdivision plat. The Ordinance and the Act are valid without specific guidelines because the nature of decisions regarding the subdivision and development of land requires the local governing body's knowledge of local conditions and the needs of its individual community.

TAKINGS LAW

City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414 (1998).

Again construing Lucas, the Virginia Supreme Court held that the denial of a permit under the Sand Dune Protection Act could not be a categorical taking because the landowner acquired the property after the regulation was in effect. In other words, the regulation was part of the "bundle of rights" that came with the title. The Court rejected the argument that the landowner, as a 50% shareholder in the company from which the title was transferred, in substance owned the property before the regulation was effective.

Board of Supervisors of Prince William County v. Omni Homes Inc., 253 Va. 59, 481 S.E.2d 460, cert. denied, 118 S.Ct. 58 (1997).

A developer of property (property 1) to which there was not road access informally agreed with the owner of the adjoining property (property 2) to jointly share road and utility access. After the preliminary plat for property 2 was approved, the preliminary plat for property 1 was filed, but was not accepted because it did not show approved bonded road access through property 2. Because of new county regulations, an inverse condemnation suit was filed by the owner of property 2. A settlement was reached which resulted in the county buying property 2. The owner of property 1 then sued the county and the trial court held that the county's purchase of property 2 was a regulatory taking that damaged property 1 because the developer could not afford to subdivide the property without road access through property 2.

The Virginia Supreme Court sidestepped the issue of whether a county's purchase of property could be classified as regulatory action. The Court first held that the county action was not a categorical taking a la Lucas because the land had economically viable uses, even if the particular owner could not afford to effectuate the original plan of development. The Court then rejected the county and LGA position that a regulatory taking must deprive property of all economic use to be compensable; it held that a partial regulatory taking is compensable and is to be evaluated under the three factor test outlined in Penn Central. The Court held, however, that the county's action was not a partial taking because (1) gaining road access was always a risk, not an investment

backed expectation, and (2) the economic diminution was not significant because the impact analysis could not include a fair market value calculation that assumed road access -- again because access was a contingency, not assured. Under the State Constitution, the Court in Omni declined to expand the concept of "damage" to include frustrated business development expectations that are unsecured by any sort of appurtenant property right.

Front Royal Indust. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998).

This case initially arose from the plaintiffs' 42 U.S.C. § 1983 action claiming an unconstitutional taking and violations of substantive due process and equal protection, predicated upon the Town's failure to construct sewer lines to the plaintiffs' lots as mandated by the 1978 Virginia Annexation Court. The district court granted the landowner's motion for summary judgment on its takings claim, after finding that alternative uses of the property were neither economically realistic nor realistically available. The Fourth Circuit reversed, finding, among other things, that the Town's failure to install the sewer lines did not deprive the landowners' land of all economic value. The government had not done anything to deny the landowner the right to use its property for an industrial park, and no government regulation prevented the landowner from installing the sewer lines itself. When the landowner acquired title to the lots before annexation by the Town, it had no legitimate expectations that land came with the public provision of sewer service. Instead, inherent in that title was the implied limitation that the owner would have to provide for its own water and sanitary waste disposal. The Court concluded that despite the character of the Town's action in this instance, the economic impact of the deprivation of the sewer service had been relatively minimal and certainly far from total. Moreover, that deprivation had not affirmatively interfered with the landowners distinct investment-backed expectations.

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997).

Here, the Supreme Court held that a Nevada landowner's regulatory taking claim was ripe for adjudication because she had obtained a final decision from the agency which had denied her the right to construct a house on her lot. Although the landowner had made no effort to transfer any of her TDRs (Transferable Development Rights), the Court found that a final decision had been made when the TDRs were granted to the landowner, and that the landowner need not try to use the rights before her claim became ripe.

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), cert. granted 118 S. Ct. 1359 (1998).

This case was argued in early October, and focusses on certain technical, but important, issues involving takings cases. The City of Monterey, California, denied Del Monte Dunes efforts to develop a 37.6 acre parcel on the Pacific Ocean. The case was tried to a

jury, which awarded the landowner $1.45 M. Thereafter the trial judge decided that the denial of development on the property did not violate the landowner substantive due process rights, but concluded that its determination did not conflict with the jury verdict since the case had been submitted to the jury on undifferentiated equal protection, due process, and takings claims.

The Supreme Court has been asked by the landowner to decide whether one is entitled to a jury trial on claims such as those presented here, brought under 42 U.S.C. 1983, and whether a jury is free to determine the factual issues underpinning such a claim. The City, to the contrary, has identified the question presented as whether liability for a regulatory taking can be based upon a standard that allows a court or jury to reweigh evidence concerning reasonableness of municipal land use actions. It also sees in the case an opportunity to consider whether the rough proportionality standard of Dolan v. City of Tigard, 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994), is properly applied in an inverse condemnation claim based upon a regulatory taking.

Decision will come next spring.

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