

**OP. NO. 04-093**

**COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – ZONING.**

**CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.**

**Landowner who has secured rezoning of properties for specific use before effective date of subsequent amendment to zoning ordinance and has pursued project committing and expending significant resources has obtained vested right; whether landowner incurs extensive obligations or substantial expenses is factual determination for county, subject to review by courts. Amendments to existing Chesapeake Bay Preservation Act zoning ordinance only affect landowner after amendments are adopted by local ordinance.**

The Honorable Bradley P. Marrs  
Member, House of Delegates  
March 25, 2005

#### **Issues Presented**

You ask whether the rights of an owner to make a specific use of property that was rezoned, and upon which the landowner committed and expended significant resources before adoption of amendments to a locality's Chesapeake Bay Preservation Act<sup>1</sup> zoning ordinance, vested prior to the applicability of the amended zoning ordinance.

#### **Response**

It is my opinion that a landowner who has secured rezoning of properties for a specific use before the effective date of a subsequent amendment to the zoning ordinance, and who has pursued the project committing and expending significant resources has obtained a vested right with respect to such use. Furthermore, amendments to an existing Chesapeake Bay Preservation Act section of a zoning ordinance only affect a landowner after the amendments are adopted by local ordinance. Finally, it is my opinion that whether a landowner incurs extensive obligations or substantial expenses is a factual determination for the county, subject to review by the courts.

#### **Applicable Law and Discussion**

##### **1. Vesting**

Generally, a landowner has no property right in an anticipated use of land because an owner has no vested property rights in the continuation of a parcel's zoning status.<sup>2</sup> In certain circumstances, however, a landowner may acquire vested rights in a particular use of land that may not subsequently be abrogated by a change in the land's zoning.<sup>3</sup> A determination of the vested rights of a landowner depends upon the facts of each particular case. In 1998, the General Assembly established certain criteria that, if met, will establish a landowner's vested rights.<sup>4</sup>

Section 15.2-2307 lists the criteria and specifically provides that a landowner's rights shall be deemed vested 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 governmental act.

## **2. Significant Governmental Act**

Section 15.2-2307 provides guidance regarding activities which constitute a significant governmental act:

[W]ithout 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 exception 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 pursues 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.

The Virginia Supreme Court has decided its first case examining the new requirements of § 15.2-2307.5 The Court has stated that the plain language of § 15.2-2307 now makes clear that the occurrence of one of the six types of actions listed in the second paragraph satisfies the first requirement for vested rights.<sup>6</sup> Such actions, which expressly include "rezoning for a specific use or density," constitute significant affirmative governmental acts allowing development of a project.<sup>7</sup> In the past under common law, rezoning of a property may not have been deemed a significant governmental act for purposes of vesting; however, under the amended vesting statute, the rezoning of a property for a specific use or density satisfies one of the criteria necessary to prove vesting.

## **3. Reliance**

Having benefited from a significant governmental act, a landowner must also rely in good faith on that act,<sup>8</sup> i.e., the landowner must take actions designed to move the project forward. Examples of actions that may show good faith reliance include commissioning consultants and engineers to develop site plans, stormwater plans, marketing plans, environmental information or other actions designed to advance the completion of the project if such actions result in the landowner incurring extensive obligation or expense.<sup>9</sup>

The fact that changes in an ordinance are pending or contemplated by a legislative body, which may preclude certain activities, does not undermine a landowner's good faith reliance on the governmental act.<sup>10</sup>

## **4. Significant Expense**

Further, § 15.2-2307 requires that a landowner incur extensive obligations or substantial expenses pursuing the project in reliance on the governmental act. The statute does not define “substantial expense”; but, in *Suffolk*,<sup>11</sup> the Court concluded that a developer had incurred substantial expense when the developer spent \$158,000 over the course of five years on subdivision plats, construction plans, recreation plans and other plans that were designed for the benefit of the developer’s project as a whole.<sup>12</sup>

In *Suffolk*, the funds were spent on the development of plans.<sup>13</sup> Other expenditures, such as the closing on the property if it was under option subject to rezoning or the development of environmental information needed for land development, may also qualify provided the landowner can relate the expense to the development of the project.<sup>14</sup>

Ultimately, whether a landowner incurs extensive obligations or substantial expenses is a factual determination for the county and subject to review, if necessary, by the courts. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.<sup>15</sup>

### Conclusion

Accordingly, it is my opinion that a landowner who has secured rezoning of properties for a specific use before the effective date of a subsequent amendment to the zoning ordinance, and who has pursued the project committing and expending significant resources has obtained a vested right with respect to such use. Furthermore, amendments to an existing Chesapeake Bay Preservation Act section of a zoning ordinance only affect a landowner after the amendments are adopted by local ordinance. Finally, it is my opinion that whether a landowner incurs extensive obligations or substantial expenses is a factual determination for the county, subject to review by the courts.

<sup>1</sup>See VA. CODE ANN. tit. 10.2, ch. 21, §§ 10.1-2100 to 10.1-2115 (Michie Repl. Vol. 1996 & LexisNexis Supp. 2004).

<sup>2</sup>*Bd. Zoning Appeals v. Caselin Systems, Inc.*, 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998), *quoted in* *City of Suffolk v. Bd. Zoning Appeals*, 266 Va. 137, 143, 580 S.E.2d 796, 798 (2003).

<sup>3</sup>*Id.*

<sup>4</sup>See 1998 Va. Acts ch. 801, at 1923, 1923 (amending and reenacting § 15.2-2307); *see also* VA. CODE ANN. § 15.2-2307 (LexisNexis Supp. 2004).

<sup>5</sup>See *City of Suffolk*, 266 Va. 137, 580 S.E.2d 796.

<sup>6</sup>*Id.* at 145, 580 S.E.2d at 799.

<sup>7</sup>*Id.* (quoting § 15.2-2307).

<sup>8</sup>See § 15.2-2307.

<sup>9</sup>See *infra* note 12 and accompanying text.

<sup>10</sup>This conclusion is consistent with prior opinions of this Office. *See, e.g.*, 1990 Op. Va. Att’y Gen. 33, 34-35.

<sup>11</sup>See *supra* note 5.

<sup>12</sup>*City of Suffolk*, 266 Va. at 148-49, 580 S.E.2d at 801-02.

<sup>13</sup>*Id.*

<sup>14</sup>See *id.*

<sup>15</sup>See, e.g., 1991 Op. Va. Att'y Gen. 122, 124.

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