



# COMMONWEALTH of VIRGINIA

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The Honorable Stephen D. Newman  
Member, Senate of Virginia  
P.O. Box 480  
Forest, Virginia 24551

Dear Senator Newman:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether a landowner is deemed vested in a land use classification upon the filing of a site plan, which thereafter prohibits subsequent amendments to the current zoning ordinance.

## Response

It is my opinion that the filing of a site plan of development does not create a vested property interest in a land use classification. Therefore, such filing does not preclude subsequent amendments to the current zoning ordinance.<sup>1</sup> The legal analysis in this opinion is limited to the issue of zoning. Particularly, I note that there other issues presented by facts herein related to state and federal fair housing statutes that require careful consideration, but are not addressed here.<sup>2</sup>

## Background

You relate that a developer<sup>3</sup> has filed a preliminary site plan with the Planning Department of the City of Lynchburg in furtherance of its plan to construct a multi-family housing development (the

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<sup>1</sup>You also ask whether an application for low-income housing credits ("credits") under § 36-55.63 precludes subsequent zoning amendments to the subject property. I find no authority creating a vested interest in a particular land use based on the Virginia Housing Development Authority reserving credits for a pending project. The initial reservation of credits is not a vested right and may be terminated by the agency director under certain circumstances. *See* 13 VA. ADMIN. CODE §§ 5-170-60, 5-170-80 (2001).

<sup>2</sup>Both the federal and state fair housing laws are remedial in the sense that they seek to suppress the denial of housing opportunities to persons falling within the classifications designated in these laws. 2000 Op. Va. Att'y Gen. 141, 142. Neither the federal nor the state fair housing laws are intended to be land use or zoning statutes. *Id.*

<sup>3</sup>You further relate that the developer in question is the contract purchaser for the subject property. For purposes of this opinion, however, the developer will be treated as the landowner since it is assumed that the contract includes an assignment of any development rights that are vested or may vest in the current owner.

“Project”) and that under the current zoning ordinance, the Project is a “by right use” subject only to administrative review and approval. You further relate that the adjacent neighborhood strongly opposes the Project and that the City Council of Lynchburg recently has voted unanimously to amend the current zoning ordinance to prohibit multi-family housing at this particular location.

### **Applicable Law and Discussion**

Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316, contains the enabling statutes that govern zoning in Virginia. It is well established in Virginia law that “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.”<sup>4</sup> In certain limited circumstances, however, private landowners may acquire vested rights to use their real estate in a planned, desired way that may not subsequently be prohibited or reduced by a change in the zoning laws.<sup>5</sup> To establish a vested right in a land use classification, a landowner must identify a significant affirmative governmental act authorizing the planned use, demonstrate good faith reliance on the governmental act, and diligently pursue the planned use as evidenced by substantial expense or incursion of extensive obligations.<sup>6</sup>

Thus, the initial question in determining a vested right is whether a significant affirmative governmental act has occurred. In 1998, the General Assembly established certain criteria that, if met, will establish a landowner’s vested rights.<sup>7</sup>

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

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.

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

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<sup>4</sup>City of Suffolk v. Bd. Zoning Appeals, 266 Va. 137, 143; 580 S.E.2d 796, 798 (2003) (quoting Bd. Zoning Appeals v. CaseLin Sys., Inc., 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998)), cited in 2005 Op. Va. Att’y Gen. 59, 60.

<sup>5</sup>*Id.*

<sup>6</sup>City of Suffolk, 266 Va. at 143-44, 580 S.E.2d at 798-99.

<sup>7</sup>See 1998 Va. Acts ch. 801, at 1923, 1923 (amending and reenacting § 15.2-2307); see also VA. CODE ANN. § 15.2-2307 (Supp. 2006).

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. [Emphasis added.]

Thus, the General Assembly has identified six governmental acts that are significant and affirmative and, that, "when relied upon by the developer and diligently pursued at some expense to the landowner, warrant development in accordance with prior zoning."<sup>8</sup> The Supreme Court of Virginia 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>9</sup>

You relate that the developer has *filed* a preliminary site plan of development in furtherance of the Project. The General Assembly did not include the mere filing of a preliminary site plan as a significant affirmative governmental act in § 15.2-2307. Rather, § 15.2-2307 specifically includes *approval* of the preliminary site plan as the "earliest point in the overall process when vesting may occur."<sup>10</sup> When enacting the amendments to § 15.2-2307, the 1998 Session of the General Assembly considered whether the *filing* of a preliminary site plan or subdivision plat should be included in the classification of a significant affirmative governmental act. Senate Bill 570, as originally presented, provided that:

[A] landowner's rights shall be deemed vested in his zoning and not affected by a subsequent amendment to a zoning ordinance when ... the landowner in good faith has *filed* a preliminary or final plat or plan of subdivision, *a preliminary* or final *site plan*, or plan of development for such landowner's property and he has materially changed his financial position in reliance on such plat or plan.<sup>(11)</sup>

The enacted version of the bill, however, requires *approval* of a preliminary site plan as the initial requirement for a vested rights claim.<sup>12</sup> This clear amendment to the legislation, as introduced, indicates that the General Assembly intended to exclude earlier reviews and approvals in the category of unspecified significant governmental acts that may establish a vested property right in a particular land use.<sup>13</sup>

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<sup>8</sup> *In re Zoning Ordinance Amendments*, 66 Va. Cir. 375, 378 (2005).

<sup>9</sup> *City of Suffolk*, 266 Va. at 145, 580 S.E.2d at 799.

<sup>10</sup> *In re Zoning Ordinance Amendments*, 66 Va. Cir. at 378-79 (interpreting filing of preliminary plat).

<sup>11</sup> See 1998 S.B. 570 (as offered Jan. 26, 1998) (emphasis added), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?981+ful+SB570+pdf>.

<sup>12</sup> See 1998 Va. Acts, *supra* note 7, at 1923; see also § 15.2-2307.

<sup>13</sup> *In re Zoning Ordinance Amendments*, 66 Va. Cir. at 379; see also *Bd. of Supvrs. v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006) (holding that developer had no vested right within meaning of § 15.2-2307 to prior zoning of land after county denied approval of preliminary site plan and subdivision application to build mixed residential development and subsequently rezoned property in question from residential to light industrial).

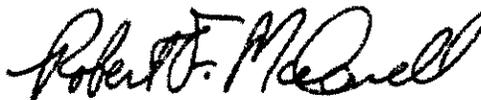
Furthermore, the Virginia Supreme Court has held that the filing and partial processing of a proposed site plan does not constitute the necessary government approval.<sup>14</sup> Therefore, a preliminary site plan must be *filed and approved* before a significant affirmative governmental act occurs that forms the basis of a vested right in a land use classification.<sup>15</sup> Since it is my opinion that the filing of a preliminary site plan does not establish a significant governmental act, I need not address the requirements for good faith reliance and diligent pursuit required by § 15.2-2307.<sup>16</sup>

### Conclusion

Accordingly, it is my opinion that the filing of a site plan of development does not create a vested property interest in a land use classification. Therefore, such filing does not preclude subsequent amendments to the current zoning ordinance.<sup>17</sup> The legal analysis in this opinion is limited to the issue of zoning. Particularly, I note that there other issues presented by facts herein related to state and federal fair housing statutes that require careful consideration, but are not addressed here.<sup>18</sup>

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:875; 1:941/06-080

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<sup>14</sup>*CaseLin*, 256 Va. at 212, 501 S.E.2d at 401. Although *CaseLin* was decided before the 1998 amendment to § 15.2-2307 was enacted, to the extent it is consistent with § 15.2-2307, it remains relevant to a vested rights analysis; particularly, with respect to the unspecified governmental acts that the General Assembly has declared may give rise to a vested property right. *CaseLin* intended to construct and operate a medical waste incinerator facility on the subject property. *Id.* at 208, 501 S.E.2d at 399. Although *CaseLin* had not received the necessary government approvals, the zoning administrator certified that the operation of the incinerator facility was consistent with the local ordinance. *Id.* Moreover, the board of zoning appeals issued a resolution supporting the project and sent letters to state agencies in support of the project. *Id.* *CaseLin* argued that such actions represented “other approval” and constituted a significant governmental act. *Id.* at 212-13, 501 S.E.2d at 401. The Court held that “other approval” as it was used in the Court’s identification of a significant governmental act in previous cases, implied that such approval needed to be of similar character and formality as a permit to constitute a significant governmental act. *Id.* at 211, 501 S.E.2d at 401. Resolutions and letters in support of the project did not constitute “other approval” and a zoning certification letter was merely a statement of fact and not an authorization to proceed. *Id.* at 212, 501 S.E.2d at 401. In support of this characterization, the Court reiterated a prior holding that, similarly, the partial processing of a subdivision plat and site plan also does not constitute “approval” of the same. *Id.* (referencing *Town of Stephens City v. Russell*, 241 Va. 160, 164, 399 S.E.2d 814, 816 (1991)). In short, the Court held that filing an application, even in a purely administrative review process, does not equate to approval of that application. *Id.* This distinction remains relevant to a determination of vested rights in zoning, notwithstanding the amendment of § 15.2-2307, as the legislature has indicated that the six enumerations of significant affirmative governmental acts are not exhaustive. Therefore, previous case law on the identification of significant governmental acts remains dispositive on situations falling outside of the six enumerations of § 15.2-2307.

<sup>15</sup>*See id.* at 206, 501 S.E.2d at 397.

<sup>16</sup>I note, however, that a 2005 opinion of the Attorney General addresses such issues. *See* 2005 Op. Va. Att’y Gen., *supra* note 4, at 59.

<sup>17</sup>*See supra* note 1.

<sup>18</sup>*See supra* note 2.