

OP. NO. 04-019

TAXATION: TAX EXEMPT PROPERTY

**CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE
(EXEMPT PROPERTY).**

**COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF
LAND AND ZONING — GOVERNING BODIES OF LOCALITIES –
ORDINANCES AND OTHER ACTIONS BY THE LOCAL
GOVERNING BODY.**

**Amendment by county board of supervisors of zoning
designation of property rezoned by prior board to more
intensive use; repeal of ordinance adopted by prior board
authorizing tax exemption by designation. Vested rights of
property owner in prior zoning.**

Mr. John R. Roberts
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May 10, 2004

Issues Presented

You inquire regarding actions by the Loudoun County Board of Supervisors. First, you ask whether the newly elected county board ("current board") of supervisors may, on its own initiative, amend the zoning designation of property rezoned to a more intensive use by the prior board; if so, you inquire whether the property owner would have a vested right in the uses designated under the prior zoning. Next, you ask whether the current board may repeal an ordinance adopted by the prior board pursuant to § 58.1-3651 exempting property from taxation by designation.

Response

It is my opinion that the current board of supervisors may, on its own initiative, amend the zoning designation of property rezoned by the prior board, provided the subsequent rezoning does not constitute piecemeal downzoning without adequate justification. If the current board rezones the property, the property owner would have a vested right in the uses permitted under the prior zoning designation if the owner satisfies the elements of the test set forth in the first paragraph of § 15.2-2307. It is further my opinion that the

current board of supervisors may repeal, through proper procedures, the ordinance adopted by the prior board pursuant to § 58.1-3651 exempting property from taxation by designation.

Background

You relate that the current members of the Loudon County Board of Supervisors began serving their terms of office on January 1, 2004. The current board of supervisors is planning to rescind certain actions taken by the prior board. The prior board, at its last regular meeting, granted a landowner's request to rezone property to a more intensive use. As part of the rezoning, the prior board accepted certain proffered conditions offered by the landowner. The current board desires to rezone the property to its prior classification.

At the same meeting, the prior board also adopted an ordinance exempting from taxation property owned by a nonprofit organization and designated for the uses prescribed by § 58.1-3651(A). The current board seeks to repeal this ordinance.

Applicable Law and Discussion

1. Rezoning

A. May the Current Board of Supervisors Rezone the Property?

A board of supervisors may, upon its own initiative, rezone property by amendment of the county's district maps.¹ Section 15.2-2286(A)(7) authorizes the governing body to amend district boundaries by ordinance whenever required by "the public necessity, convenience, general welfare, or good zoning practice."

Typically, zoning decisions by a governing body are considered legislative actions, and are, therefore, presumed to be reasonable.² When challenging a zoning decision, the challenger must produce sufficient evidence of unreasonableness to overcome this presumption of reasonableness.³ A zoning decision will be found reasonable if the matter is fairly debatable.⁴ "An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions."⁵

A local governing body, however, may be held to a higher standard if a rezoning is found to constitute piecemeal downzoning. Among

the factors that may be considered when determining whether a rezoning is piecemeal are whether the new zoning ordinance (i) is initiated by the zoning authority on its own motion, (ii) affects a single or two adjacent parcels, and (iii) reduces the allowable residential density below that prescribed by the locality's master plan.⁶

If the zoning amendment is found to be a piecemeal downzoning, the test for assessing the validity of the ordinance favors the landowner more so than the test typically applied to zoning challenges. The Supreme Court of Virginia has articulated the following test for assessing the validity of a piecemeal downzoning:

[W]hen an aggrieved landowner makes a *prima facie* showing that since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward with evidence of such mistake, fraud, or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained. If not, the ordinance is unreasonable and void.^[7]

This rule

promotes the policy and purposes of the zoning statutes. While the landowner is always faced with the possibility of comprehensive rezoning, [this] rule ... assures him that, barring mistake or fraud in the prior zoning ordinance, his legitimate profit prospects will not be reduced by a piecemeal zoning ordinance reducing permissible use of his land until circumstances substantially affecting the public interest have changed. Such stability and predictability in the law serve the interest of both the landowner and the public.^[8]

Based on the limited facts you present, the situation you describe, i.e., adoption of a new zoning ordinance by the current board of supervisors, may contribute to a finding of piecemeal zoning. You have not, however, provided sufficient information for me to analyze this issue fully. Furthermore, I would need additional information to determine whether there has been sufficient mistake, fraud, or changed circumstances since the prior ordinance to validate the downzoning, if it is, in fact, piecemeal.

B. Does the Property Owner Have Any Vested Rights in the Prior Zoning?

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.⁹ 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.¹⁰ Section 15.2-2307 sets forth criteria which, when met, "conclusively vest property rights in a landowner regardless of changes in an otherwise applicable zoning ordinance."¹¹ Specifically, the first paragraph of § 15.2-2307 provides:

[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.

Thus, the first step in establishing a vested right is to show that the landowner has obtained or is the beneficiary of a significant affirmative governmental act. Section 15.2-2307 further provides:

[T]he 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. [Emphasis added.]

In the situation you present, it appears that the landowner could show that the governing body has taken significant governmental action in two of the ways set forth in § 15.2-2307. Based on the facts you relay, the prior board of supervisors accepted proffers related to the initial zoning amendment. The prior board, furthermore, approved the owner's application for rezoning for the more intensive use.¹² It appears, therefore, that in the situation you present, the landowner likely would be able to show that it was the beneficiary of significant affirmative governmental acts. You have not provided information sufficient for me to determine whether the owner has relied on the locality's acts, or whether it has incurred extensive obligations or substantial expenses in pursuit of the project.

2. Tax Exemption

The 2001 and 2002 Sessions of the General Assembly agreed to an amendment¹³ to Article X, § 6(a)(6), relating to property made exempt from taxation "by classification or designation by ... *an ordinance adopted by the local governing body*"¹⁴ "on and after January 1, 2003."¹⁵ The voters ratified the amendment to § 6(a)(6) at the general election held on November 5, 2002¹⁶ ("ratified amendment"). Prior to ratification,¹⁷ Article X, § 6(a)(6) required that property tax exemptions be granted by "a three-fourths vote ... of the General Assembly."¹⁸

The ratified amendment to Article X, § 6 provides:

(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

....

(6) Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by ~~a three-fourths vote of the members elected to each house of the General Assembly~~ *an ordinance adopted by the local governing body* and subject to such restrictions and

conditions as ~~may be prescribed~~ *provided by general law.*^[19]

The 2003 Session of the General Assembly added Article 4.1 in Chapter 36 of Title 58.1, consisting of § 58.1-3651.²⁰ Section 58.1-3651(A) limits property tax exemptions to "the real or personal property, or both, owned by a nonprofit organization that uses such property for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes." Section 58.1-3651(B) establishes certain requirements for notifying the public of a hearing regarding the proposed adoption of an ordinance exempting property pursuant to subsection A, and sets forth questions to be considered by the local governing body before adopting such an ordinance. Section 58.1-3651 does not affect the validity of designation exemptions granted by the General Assembly prior to January 1, 2003.²¹

You ask whether an ordinance adopted pursuant to § 58.1-3651 subsequently may be repealed. Section 58.1-3651(A) provides that property is exempt from taxation by designation "by ordinance adopted by the local governing body."²² Section 15.2-1427(D) provides that a local "ordinance may be amended or repealed in the same manner, or by the same procedure, in which, or by which, ordinances are adopted." "Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."²³ The General Assembly has placed no restriction on the repeal of ordinances adopted pursuant to § 58.1-3651. Therefore, it is clear that ordinances adopted pursuant to § 58.1-3651 are subject to amendment or repeal in the same manner as the ordinance was adopted.

Conclusion

Accordingly, it is my opinion that the current board of supervisors may, on its own initiative, amend the zoning designation of property rezoned by the prior board, provided the subsequent rezoning does not constitute piecemeal downzoning without adequate justification. If the current board rezones the property, the property owner would have a vested right in the uses permitted under the prior zoning designation if the owner satisfies the elements of the test set forth in the first paragraph of § 15.2-2307. It is further my opinion that the current board of supervisors may repeal, through proper procedures, the ordinance adopted by the prior board pursuant to § 58.1-3651 exempting property from taxation by designation.

¹ See Va. Code Ann. § 15.2-2286(7) (LexisNexis Repl. Vol. 2003).

²*City Council v. Wendy's of W. Va., Inc.*, 252 Va. 12, 14, 471 S.E.2d 469, 470 (1996); *Bd. of Supvrs. v. Int'l Funeral Servs., Inc.*, 221 Va. 840, 843, 275 S.E.2d 586, 588 (1981).

³*Wendy's*, 252 Va. at 14-15, 471 S.E.2d at 470; *Int'l Funeral Servs.*, 221 Va. at 843, 275 S.E.2d at 588; *Bd. of Supvrs. v. Lerner*, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980).

⁴*Wendy's*, 252 Va. at 15, 471 S.E.2d at 470; *Int'l Funeral Servs.*, 221 Va. at 843, 275 S.E.2d at 588; *Lerner*, 221 Va. at 34, 267 S.E.2d at 102.

⁵*Lerner*, 221 Va. at 34, 267 S.E.2d at 102; *see also Wendy's*, 252 Va. at 15, 471 S.E.2d at 470-71; *Bd. of Supvrs. v. Williams*, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975).

⁶*Turner v. County Bd. of Supvrs.*, 263 Va. 283, 289, 559 S.E.2d 683, 686 (2002) (finding zoning ordinance affecting .22% of land in county to be piecemeal downzoning) (quoting *Bd. of Supvrs. v. Snell Constr. Corp.*, 214 Va. 655, 658, 202 S.E.2d 889, 893 (1974)). An ordinance adopted by "a newly-elected Board of Supervisors, proceeding on its own motion, ... reducing the high density authorized by the old Board" constitutes piecemeal downzoning. *Snell Constr. Corp.*, 214 Va. at 657, 202 S.E.2d at 891-92.

⁷*Snell Constr. Corp.*, 214 Va. at 659, 202 S.E.2d at 893, *quoted in Turner*, 263 Va. at 291, 559 S.E.2d at 687.

⁸*Id.*

⁹*Bd. of Zoning Appeals v. CaseLin Sys., Inc.*, 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998), *quoted in City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals for Suffolk*, 266 Va. 137, 143, 580 S.E.2d 796, 798 (2003).

¹⁰*Id.*

¹¹*Herbert*, 266 Va. at 143, 580 S.E.2d at 798; *see also Moore v. Zoning Appeals Bd.*, 49 Va. Cir. 428, 429 (1999).

¹²*See Herbert*, 266 Va. at 146, 580 S.E.2d at 800 (Rezoning "specifically directed to an identifiable property and project," as opposed to general rezoning, constitutes "a significant affirmative governmental act creating a deemed vesting of land use rights.").

¹³Article XII, § 1 authorizes the General Assembly to submit any proposed constitutional amendment(s) to "the voters qualified to vote in elections by the people ... not sooner than ninety days after final passage by the General Assembly."

¹⁴2001 Va. Acts ch. 786, at 1074, 1075; 2002 Va. Acts ch. 825, at 1999, 2000 (proposing amendment to Article X, § 6, relating to tax-exempt property); *id.* ch. 630, at 895, 896 (providing for submission to voters of proposed amendment to § 6).

¹⁵Va. Code Ann. § 58.1-3651(A) (LexisNexis Supp. 2003).

¹⁶A "general election" is held "on the Tuesday after the first Monday in November ... for the purpose of filling offices regularly scheduled by law to be filled at those times." Va. Code Ann. § 24.2-101 (LexisNexis Repl. Vol. 2003).

¹⁷See 2002 Va. Acts ch. 630, § 1, *supra* note 14, at 896 (directing officers of election to "take the sense of the qualified voters upon the ratification or rejection of the proposed amendment to [Article X, § 6]" at the November 5, 2002, election).

¹⁸2002 Va. Acts, *supra* note 14, at 2000, 896; 2001 Va. Acts, *supra* note 14, at 1075 (replacing language in Article X, § 6(a)(6), requiring that exemptions be granted by "a three-fourths vote of the members elected to each house of the General Assembly," with "*an ordinance adopted by the local governing body* and subject to such restrictions and conditions as ... *provided by general law*").

¹⁹2002 Va. Acts, *supra* note 14, at 1999-2000, 896; 2001 Va. Acts, *supra* note 14, at 1075.

²⁰2003 Va. Acts ch. 1032, at 1696, 1696-97 (declaring in § 3 that "emergency exists and this act is in force on and after January 1, 2003").

²¹See 2004 Va. Acts ch. 557, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+CHAP0557> (amending § 58.1-3651 by deleting subsection D and adding subsection E, providing that "[n]othing in this section or in any ordinance adopted pursuant to this section shall affect the validity of ... a designation exemption granted by the General Assembly; prior to January 1, 2003"). The 2004 amendments to § 58.1-3651 are retroactive to January 1, 2003. See *id.* § 2 (declaring that act "is in force beginning January 1, 2003," and that ordinances adopted pursuant to act are effective on same date).

²²"The Dillon Rule of strict construction controls our determination of the powers of local governing bodies. This rule provides that [local governments] have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *City of Chesapeake v. Gardner Enters., Inc.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997). The ratified amendment to Article X, § 6(a)(6) makes no reference to any authority on the part of a locality to repeal any property tax exemption previously established by the General Assembly. The General Assembly is vested with the power to repeal any law that it previously has passed. See *Op. Va. Att'y Gen.*: 2003 at 32, 32, 35, *available at* <http://www.vaag.com/media%20center/Opinions/2003opns/03-049.htm> (concluding that only General Assembly has authority to repeal classification or designation tax exemptions granted before January 1, 2003); 1980-1981 at 70, 71 (noting that General Assembly has plenary power to enact, amend, and repeal legislation). After January 1, 2003, the General Assembly no longer enacts certain property tax exemptions.

²³*Sykes v. Commonwealth*, 27 Va. App. 77, 80, 497 S.E.2d 511, 512 (1998) (quoting *Last v. Va. State Bd. of Med.*, 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992)).

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