Land Use In Virginia In The New Millennium

By John H. Foote

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Many years ago, I took pen in hand to bring together in one place an outline of the law of planning and zoning in Virginia. Little did I think, yea truly I did not think, that some two decades later I would still be contemplating and writing about the subject on a daily basis, from the dual, and sometimes conflicting, perspectives of both a public and a private practitioner. As outside counsel to several Virginia localities, and in private practice representing folks touched by the tender mercies of the democratic process, I have had ample occasion to consider planning, zoning and subdivision law for more than two decades.

My seasoning on both sides has revealed the validity of competing points of view, and has made me ever more conscious of the need for fundamental fairness in the land use process. While there are manifestly public goals to be achieved in land use decision-making, it is equally true that government can, and often does, crush the individual as the wheel of public justice rolls on its mighty course.

The judiciary has dropped into and out of this most fascinating of inquiries. When I began my study, a group of county and city attorneys, sitting at lunch with the private bar, might have cordially listed the same general principles of land use practice. There would have been general agreement that Virginia circuit courts stood as the arbiter of reasonableness in the land use process. When a landowner felt that denial of a land use application had been arbitrary and capricious, and it appeared that his interests had been sacrificed to political necessity, the landowner could hope that the judiciary would prevent local governments from overstepping.

The public lawyers would have sighed that, yes, this was perhaps true. And in consequence of the willingness of the courts to protect the landowner's "right" to make as great a return as the land and the market would yield, taxpayers and their elected representatives had no recourse but to find the means of financing the infrastructure costs and community disruption that were necessary spin-offs of development patterns.

But not long after, the Virginia Supreme Court began an unmistakable shift in its approach to many land use issues. For five years or so, from 1975 to 1980, practitioners found themselves unable to agree on what rules have evolved. The Court's articulated formulation of legal standards seemed not to have changed. The results, however, had. The private bar continued to press a hope that land rights might receive reasonable judicial protection, and local governments increasingly, if warily, flexed their rediscovered political muscles. Starting with the Court's decisions in Board of Supervisors of Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980), Board of Supervisors of Fairfax County v. Jackson, 221 Va. 328, 269 S.E.2d 381 (1980), and Board of Supervisors of Roanoke County v. IFS, 221 Va. 840, 275 S.E.2d 586 (1981), and progressing through its most recent decisions, a handful of which are chronicled here, the Court has played an exceptionally limited role in the policing of discretionary local land use decisions.

The nature of this shift can be very roughly quantified.[1] The shape of land use shortly before 1980 reflected a clear bent toward the landowner. A very informal survey of reported Supreme Court decisions involving legislative decision making, board of zoning appeals decisions, and claims of vested rights, (not including subdivision cases), between Board of Supervisors v. Williams, 216 Va. 49, 58, 216 S.E.2d 33 (1975), Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975), and the Lerner decision, reveals that the Court decided 14 zoning cases. Of these, the private party prevailed in nine, and the locality five. Since Lerner, however, 61 decisions have been rendered, and the locality has prevailed in all but 14, more than 75 percent. Moreover, even in those cases where the private party has prevailed, a significant majority has involved procedural error by the locality.

Thus it is again possible to distill identifiable rules of the game. They would be relatively simple in theory—and painfully complex in practice. First, it is apparent that where the properly tested evidence supports a rezoning decision of a local government based on the fairly debatable standard, the Supreme Court will not reverse the locality. Second, there is no procedural defect that it will condone or permit.

A closer look at a couple of recent decisions will amplify these observations.

Legislative Discretion

As noted, for many years now, when the challenge has been purely to the substantive merits of a land use decision regarding the upzoning of property, the locality has won the bulk of the cases. Among the most recent examples of the court's treatment of legislative discretion by localities is City Council of Salem v. Wendy's of Western Virginia, Inc., 252 Va. 12, 471 S.E.2d 469 (1996). There, the city had denied a commercial rezoning to a parcel of residentially zoned ground located adjacent to an intersection of a multi-lane divided road, and a neighborhood street. Homes existed on the two parcels comprising the lot Wendy's sought to rezone, and access to the parcel was from the neighborhood street. The trial court reversed the council's decision on the grounds that it was arbitrary and capricious.

Despite evidence of the commercialization and industrialization of the area, and the unsuitableness of the Wendy's parcels for continued residential use, on appeal the Supreme Court concluded the city had demonstrated that the property continued to be suitable for such residential purposes. Moreover, there was testimony from the city's planning director that "eventually" the area would be industrial, and not commercial. The court also took specific notice of the fact that the rezoning request was not "conditional" (limited to a fast food restaurant through conditional zoning) and thus any commercial use under the B-3 zoning category sought would be legally permissible, potentially leading to commercial pressure on other nearby properties and defeating the city's efforts to rezone to industry several properties at a time. The Court found that the council's action had served to "protect an existing, established, and stable residential neighborhood. In addition, the city elected to adhere to the standards of its comprehensive plan, a matter within the council's discretion [citing Board of Supervisors of Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980)]."

Similarly, in Richardson v. City of Suffolk, 252 Va. 336, 477 S.E.2d 512 (1996), the court held that the fairly debatable standard which applies to the substance of specific legislative actions is equally applicable to a locality's legal interpretation of its own ordinances. In Richardson, the Suffolk Council granted a conditional use permit for an automobile racetrack, under a provision of its zoning ordinance permitting CUPs for "[c]ommercial recreational uses including bowling alleys, miniature golf, golf driving ranges, pool halls, billiard parlors, dance halls, penny arcades and similar forms of public amusement." 252 Va. at 338.

Affected neighbors challenged the issuance of the CUP on the ground that the language of the ordinance did not specifically authorize the approved track, and that it could not fairly be considered of equivalent nature to those uses which were listed. The Supreme Court upheld the council, holding that the racetrack was a commercial recreational activity, since the zoning ordinance "clearly" contemplated permission of other such uses than those specifically listed. 252 Va. at 338. Although this would seem to be a question only of law susceptible to routine judicial interpretation, the Court concluded that council's reading of its ordinances was to be tested by the fairly debatable standard, and it was fairly debatable whether the language of the ordinance contemplated the track.

Procedural Regularity

For stellar examples of the Court's devotion to procedural regularity, one need only look to Town of Madison v. Ford, 255 Va. 429, 498 S.E.2d 235 (1998), and Town of Jonesville v. Powell Valley, 254 Va. 70, 487 S.E.2d 207 (1997).

In Ford, the Court held that because the minutes recording actions of a town council failed to reflect the actual vote taken, by name of council member and vote cast, the council's effort to enforce a zoning ordinance requirement against Ford was ineffective, because the ordinance itself was void. Article VII, § 7 of the Virginia Constitution provides that

> [n]o ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body . . . .
>
> On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded.

The minutes of the meeting in question reflected that all members of the council were present, that named members made the motion to adopt and seconded that motion, and that the issue carried "unanimously", making it seem clear who voted for what. But the Court held (a) that the second paragraph of Article VII, § 7 is not limited to the motions that are specified in the first paragraph (though that meaning could have easily been ascribed to it given the structure of the provision) and (b) that a record which does not specifically identify individual members and their votes does not satisfy the constitutional requirements. Among other things, a reference to a "unanimous" vote does not indicate that all members present actually voted for it, whether anyone abstained or was absent at the moment of the vote.

In Jonesville, the Court held that a town without a comprehensive plan cannot validly have adopted a zoning ordinance. Jonesville enacted such an ordinance in 1989, and the landowner obtained a zoning permit for the construction of low- and moderate-income housing. In 1992, the town amended that ordinance to require a special use permit for such uses, and denied the landowner building permits. The landowner sued, claiming a vested right to its previous permits, or, alternatively, that the ordinance and all its amendments were void because the town had no comprehensive plan. The Supreme Court agreed with the latter argument, finding that Va. Code Ann.

§ 15.1-490 (now § 15.2-2284), mandates that a locality adopting a zoning ordinance must give "reasonable consideration" to the local plan. If there is no plan, then there can be no consideration given to it, and the ordinance is void ab initio.

Each of these cases reflects the rigor with which the Court will view procedural issues. Perhaps neither is particularly exceptionable, and it is sound policy to expect localities to play by the rules, but it is also safe to say that either could have been decided the other way. The Court could have concluded that the record was clear who voted for what in Ford, or that the requirement for recorded vote only applies strictly to money ordinances. It could also have concluded that a locality need only give reasonable consideration to its comprehensive plan, if it has one. Despite the avoidance of an entire zoning ordinance on the facts of Jonesville, would the Court declare a zoning ordinance void if it could be shown that the locality had not in fact given "reasonable consideration" to any of the other matters which the General Assembly has equally mandated be considered, such as "the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies . . . ."? § 15.2-2284. In some jurisdictions it is probable that no such studies have been done, or what studies have been were given no real consideration. The implication of the decision, however, is that a zoning ordinance is susceptible to challenge if it can be shown no "reasonable consideration" was indeed given to any of the listed factors.

Perhaps, however, the importance of comprehensive planning, and the fact that all localities are required to have one, gives it a particular importance. Certainly where there is self-evidently no such plan, then there is a bright line test for whether it has been suitably considered and the Court was not compelled to pursue more difficult questions.

The Saga of Cash Proffers in Conditional Zoning

Most land use practitioners are aware that Virginia, alone among all of the states, possesses a unique form of land use regulation known as conditional zoning. The landowner may voluntarily submit written "proffers" as part of a rezoning application which, once accepted by the locality, become a part of the zoning of the property and take on the character of development restrictions running with the land. See Board of Supervisors v. United States, 23 Cl. Ct. 205 (1991).

As the conditional zoning system has evolved, many localities and zoning applicants have developed elaborate proffer statements which are designed to eliminate or reduce uncertainty as to the nature of the use proposed, and to identify and mitigate impacts. Conditional zoning has, in the view of many, been crucial to successful land use practice for all parties over the past twenty-five years, for it has been the means by which difficult issues of use impact have been resolved to the mutual satisfaction of the public and private sectors.

It is also true that as time has passed, proffers have tended to become formulaic, and to become a sine qua non of approval. Over time they have also become a de facto impact fee system, and an inefficient one at that.

The General Assembly has been ambivalent about aspects of the proffer system, and most expressly so about the use of the system to raise money. After its creation of conditional zoning in 1975, then applicable only to a handful of jurisdictions, when it extended conditional zoning to other jurisdictions in 1978 the legislature expressly forbade them to accept cash proffers. See § 15.2-2297(A)(iii). When conditional zoning was extended to "high growth" jurisdictions in 1989, they were authorized to accept proffers (including cash or real property dedication), but only if they had adopted capital improvements plans, and neither money nor land may transfer

> until the facilities for which the property is dedicated or the cash is tendered are included in the capital improvements program . . . . If proffered conditions include the dedication of real property or the payment of cash, the proffered conditions shall provide for the disposition of the property or cash in the event the property or cash payment is not used for the purpose for which proffered,

§ 15.2-2298(A).

In contradistinction to these newer forms of conditional zoning, "old" conditional zoning jurisdictions, those whose authority derives from the original proffer legislation now found at § 15.2-2303, have accepted cash proffers, without restriction, virtually since the inception of the system. Recently, however, some jurisdictions have begun to insist—with varying degrees of formality—that each residential (and often each commercial) rezoning applicant must agree to proffer a substantial amount of cash, which they contend is required to offset the capital costs which new development brings. These sums range from $5,000 per proposed unit, to in excess of $10,000.

At the same time they have imposed increased cash demands, those advocating them decry the fact that although millions of dollars may have been proffered, only a relatively small percentage of those proffered dollars have been collected. But proffers are not, and were never intended to be, the source of an income stream, and will necessarily ever be an inefficient source of one. Proffers are, rather, mitigation measures, and proffered cash is only paid when the development occurs to which it is appended. If cash proffers are not paid, it is because the impact of a given project has not yet been experienced.

The Supreme Court has now considered two cases which turned on cash proffers. In the first of these, Board of Supervisors of Powhatan County v. Reed's Landing, Inc., 250 Va. 397, 463 S.E.2d 668 (1995), the Powhatan County Board of Supervisors had adopted a formal set of "proffer guidelines" which established a "recommended" cash payment of $2,349 per residential unit "to help defray costs of capital facilities related to new development." 250 Va. at 399. The landowner refused to make the recommended proffer, and his rezoning was denied. The trial court found as a matter of fact that the "sole reason" for the denial was the refusal to proffer the cash. Powhatan County appealed, and the Supreme Court held that under the facts and circumstances of the case, it was clear that the proffer was really

nothing more than an "impact fee," for which there was no enabling legislation. It affirmed the trial court's determination that denial of the rezoning had been unlawful.

Several years passed, and Reed's Landing turned out to have no practical implications anywhere, so far as I am aware, but Powhatan County. Then in Gregory v. Board of Supervisors of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (1999), the Court considered a case in which the board denied a rezoning where the landowner refused to proffer a cash payment of $5,156 per residential unit, pursuant to a written policy which established a "methodology for calculating the cost to the county of providing public services to each new residence in a proposed subdivision." 257 Va. at 533. Despite the fact that this sounds remarkably like a plan "to help defray costs of capital facilities related to new development" held impermissible in Reed's Landing, the Court found it an acceptable approach in Gregory. Although the trial court found "persuasive evidence" that the cash proffer, or lack thereof, was a "key factor" in the board's action, it sustained the denial because although the proffers appeared to be "expected," the evidence on the point was "not as definitive" as it had been in Reed's Landing. Indeed, the evidence was to the effect that some 51% of the lots which had been approved since the adoption of the county's proffer policy had achieved compliance without payment of cash proffers, or with less than the calculated amount. Moreover, the Court found that there were other sufficient planning bases upon which to justify the denial. The Supreme Court found these facts dispositive, noting that the trial court had not found as a fact that the "sole" reason for denial was the failure to proffer—as had been the finding in Reed's Landing.

I am not intimately familiar with practice in Chesterfield County, but I know of no land use practitioner in Northern Virginia who is under any illusion that cash proffers are nothing more than a casual request from one's friendly locality. News headlines and practical experience, not to mention express policies regarding requirements for growth to pay more of its "share" of public costs, belie the proposition that monetary proffer guidelines or policies are, in any material sense, voluntary. But after Gregory it would appear that the contest will be the extent to which the landowner can make its case appear to be Reed's Landing, and the extent to which the locality can make it appear to be Gregory. If the touchstone of proffer validity is truly the voluntariness of cash proffers, then it would seem hard to characterize the current practice in some localities as aught but an impact fee system.

Conclusion

The Supreme Court has held that local governments are entitled to play at the joints in legislative decision making. But the legal standard in a land use case should be more than an inquiry into whether the local government showed up for trial with an expert witness in tow. To the extent that land use decisions are to constitute a fair balance between the interests of the landowner and the interests of the public as expressed through local government, the judiciary must intervene. In Virginia there is no other realistic or viable source of check and balance in the face of unreasonable legislative actions.

The trial court's inquiry is an essentially factual one into the validity of the grounds of defense asserted by the locality—an inquiry that subjects the facts to both the quantitative and a qualitative standards that the Court recognized in Jackson. Since the rule that permits legislative action to be tested according to anything that the governing body "knew or could have known" at the time of decision is not itself unreasonable (if sometimes exasperating)—these are, after all, citizen legislatures with staff resources of differing depth—a decision that is found to be fairly debatable based on properly tested evidence will survive. However, where they are revealed to the trier of fact as rationales cobbled together by able counsel to defend the flanks of the legislative process, or to justify discriminatory treatment of properties similarly situated, then the freedom of movement properly afforded to localities should not be permitted to stand behind ritualistic formulations. We should seek to achieve at least a rough approximation of fairness and balance between private and public rights. ⚖

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Endnotes

1 Mere quantification of decisions does not give a complete picture, since much depends on the questions presented and those the Court chooses to take. But taking such an informal count at least imparts a flavor of the Court's direction.