In the

Supreme Court of Virginia

At Richmond

Record No. 081743

BOARD OF SUPERVISORS OF STAFFORD COUNTY, VIRGINIA
and
STAFFORD COUNTY, VIRGINIA,

Appellants,

– v. –

CRUCIBLE, INC.,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE NATURE OF THE CASE AND FACTS

Crucible, Inc. ("Crucible"), owns and operates security schools, where it educates individuals in high risk environmental skills and individual protective training measures (Appendix at 235). After operating in Stafford County since 1999, to meet the ever increasing demand for such training the Crucible found itself in need of expanded facilities to carry out its program (Appendix at 236). Thus, in 2003 the Crucible began a search for property that would be suitable for a new facility (Appendix at 236).

In order to avoid futile effort and unnecessary expense, before focusing on any specific property the Crucible began its task by meeting with officials from Stafford County. These officials included the Assistant Zoning Administrator, Ms. Rachel Hudson, and the Director of Economic Development, Mr. Tim Baroody, who were informed on what they proposed to do at the new facility so that the Crucible might obtain an idea of where such a facility would be permitted to locate and operate under Stafford County's Zoning Ordinance (the "Zoning Ordinance") (Appendix at 237). Ms. Hudson was already familiar with the Crucible's existing facility because she certified for zoning part of their operation and had been working with them since 1999 (Appendix at 237). As a result of that meeting, and the statements made by County representatives the Crucible

was assured and believed that it would be allowed to build a school by-right on agriculturally zoned property (Appendix at 238).

In early 2004, the Crucible believed it had located a suitable parcel, Assessor's Parcel 36-57 (the "Property") (Appendix at 238). As part of the Crucible's investigation of the suitability of the Property, during its study period under a contract to purchase the Property, the Crucible, by letter dated March 3, 2004, requested a zoning verification for the Property (Appendix at 239). In addition to the zoning verification the request included an inquiry as to whether the facilities that the Crucible proposed to erect on the Property met the definition of a "School" under the Zoning Ordinance and could thus be constructed on a "by-right" basis, i.e., without additional discretionary approvals by the County (Appendix at 448).

A meeting was held on May 5, 2004 for the specific purpose of determining whether the Crucible's proposed project and facility met the definition of "School" under the Zoning Ordinance (Appendix at 239-40). This meeting was attended by a number of members of the Stafford County government, including two representatives from the Planning Department, the County Administrator's Office, Tim Baroody the Director of the Economic Development Office, Dan Schardein, the Stafford County Zoning

Administrator, Rachel Hudson, the Deputy Zoning Administrator, and representatives of the Crucible (Appendix at 240-41).

The meeting lasted between one and two hours, during which plans for the school were shown and explained, including a schematic layout, the Property was identified, and the exact nature of the facility was discussed (Appendix, at 239-242, 375). Additionally, the Crucible's representatives were asked extensive questions by the County officials concerning the proposed facility (Appendix, at 239-242, 375). All of those officials thus knew the specific of the proposed school as of this time.

After consideration of the matter, on May 11, 2004, Daniel Schardein, the Stafford County Zoning Administrator, issued a zoning determination for the Property (the "Determination") (Appendix at 243). The Determination confirmed that the Property was zoned A-1. Further, and in response to the Crucible's request, the Zoning Administrator concluded that the proposed use of the Property met the definition of a "School" under the Zoning Ordinance (Appendix at 377).

In reliance on the written Determination, the Crucible proceeded with the expensive process for the development of the proposed facility on the Property (Appendix at 244-49). The actions taken by the Crucible included the preparation of a complete survey of the Property, a geotechnical report

and a Phase I Cultural and Historical survey (Appendix at 244-49, & 378-447). Applications and supporting data were also assembled and submitted for Army Corps of Engineers, Virginia Department of Environmental Quality, and Virginia Marine Resource Commission permits for the project (Appendix at 244-49, & 378-447). Additionally, after the Determination, the Crucible prepared and submitted to Stafford County a Stormwater Management Concept Plan, required by §21.5-4(a)(1) of the Stafford Code, a Water Quality Impact Assessment, and a Major Site Plan application (Appendix at 244-49 & 378-447).

The Crucible also retained and paid a number of consultants to design and engineer various aspects of the proposed site in order to submit a plan pursuant to §28-249 of the Zoning Ordinance, that was necessary to be approved before construction could start. In total, the Crucible, as of the date of the adoption of Ordinance O05-37, spent over $1,100,000.00 in pursuit of the development, not including the $2,225,000.00 spent to purchase the Property (Appendix at 257-58, & 378-447).

After the Crucible filed an application for a Major Site Plan for the Property, in compliance with the § 28-250 of the Zoning Ordinance, notices were sent to adjoining property owners advising them of the filing. Upon learning of the nature of the Crucible's proposed facility several of these

property owners contacted members of the Board requesting their aid in preventing the approval of the site plan, although the Board has no direct role in the approval process, which is ministerial in nature.

On June 20, 2005, several property owners (the “Neighboring Landowners”) filed an appeal of the Determination. On June 29, 2005, the Board itself also filed an appeal of its own agent’s Determination to the BZA. These constituted deliberate attempts to block the use of the property for a school proposed by the Crucible on the Property. While both of these appeals were patently untimely, having been filed over a year after the Determination, and long after the expiration of the 30 day limitation period provided for in §15.2-2311(a) of the Code of Virginia (1950), as amended, for challenging determinations of the Zoning Administrator, Mr. Schardein nevertheless accepted and processed the appeals.

As a result of the appeals filed by the Board and the Neighboring Landowners the County imposed an immediate stay on the review of the site plan by the County pursuant to § 15.2-2311(B) ("An appeal shall stay all proceedings in furtherance of the action appealed from …"). In accordance with the stay Jeffrey A. Harvey, the Director of Planning and Community Development for Stafford County, instructed his staff to stop such review and so advised the Crucible.

During the pendency of the challenges to the Determination and while the stay imposed by the County prevented any possibility of the Crucible's application for site plan approval being processed on June 21, 2005, the Stafford County Board of Supervisors (the "Board") initiated on its own motion Ordinance O05-37, which altered the permissibility of schools in the A-1 Zoning District by amending the Zoning Ordinance to require the approval of a Conditional Use Permit for schools located in the A-1 Zoning District. In an effort to implement quickly Ordinance O05-37, and to stave off the approval of the Crucible's plans, the Board and the Planning Commission of Stafford County, Virginia, adopted the unusual procedure of conducting a joint public hearing on the Zoning Amendment on August 24, 2005. At the conclusion of the joint public hearing, the Planning Commission voted to recommend the adoption of Ordinance O05-37, and immediately subsequent to the vote by the Planning Commission, the Board unanimously voted 6-0 to enact Ordinance O05-37 (Appendix at 490-91).

In September of 2005, the Crucible filed a Bill of Complaint for Declaratory Judgment, Injunctive and Other Relief (the "Complaint"). The Complaint contained seven counts, including a claim that the Property was

vested under §15.2-2307 of the Code of Virginia (1950), as amended, and asked the Court to so rule (Appendix at 1-14).

Prosecution of Present Case Delayed by Board's Appeal of Determination

Meanwhile the challenges to the Determination were heard by the BZA on September 22, 2005. After dividing three to three on a motion to find the appeals were time barred the BZA voted with separate five to one decisions in each of the appeals to overturn the Zoning Administrator's Determination that the Crucible's proposed facility was a school as such is defined in the Stafford County Zoning Ordinance.

On September 28, 2005, the Crucible, in accordance with §15.2-2314 of the Code, petitioned the Circuit Court for two separate Writs of Certiorari. The Certiorari proceedings were heard by Judge Randy Bellows on May 25, 2006. After the conclusion of the Certiorari proceedings Judge Bellows issued an opinion letter dated May 31, 2006 finding that the BZA had applied erroneous principles of law and was plainly wrong in its determination that the appeals filed by the Board and the Neighboring Landowners were timely. Consequently, Judge Bellows entered an order, dated May 31, 2006, granting the Crucible's appeal, and overturning the BZA decision.

The prosecution of the present case was thus on hold for almost two years as the challenge to the Determination itself worked its way through the appeal process, ultimately resulting in this Court's refusal of the twin Petitions for Appeal filed by the Neighboring Landowners and the Board on May 10, 2007 (Record No. 061780 & 061801).

Resumption of Present Case

In response to the Complaint, the Board filed a combined Plea in Bar and Demurrer (Appendix at 15-30). The Demurrer filed by the Board asserted six grounds challenging the adequacy of the Complaint, including an allegation that the Crucible allegedly failed to exhaust its administrative remedies by not requesting a determination of vested rights status from the Zoning Administrator.[1]

A hearing was conducted on October 1, 2007 on the Demurrer and Plea in Bar. Upon the conclusion of the hearing, the Trial Court held that the Circuit Court had jurisdiction to rule on the issue of whether a property was vested as a matter of original jurisdiction without the requirement that a locality's zoning administrator first make a determination of vested rights. Accordingly, it overruled that part of the Demurrer (Appendix at 199). The

[1] Subsequent to the filing of the Plea in Bar and Demurrer, the Board filed an Addendum amending the Plea in Bar to assert a new ground of mootness. Neither the Addendum to the Plea in Bar nor the other grounds contained in the Demurrer are at issue in this appeal (Appendix at 31-40).

Trial Court also concluded, and the parties agreed, that the gateway issue in the case was whether the Property was vested under §15.2-2307 in that if the Property was vested there was no need to address the remaining counts of the Complaint. Subsequently, on December 20, 2007, the Trial Court held a hearing on the issue of whether the Property was vested, at the conclusion of which the Trial Court held that the Property was vested under §15.2-2307 (Appendix at 363-74).

As part of the Court's ruling Judge Bellows specifically found:

- The Determination constituted more than just a simple verification that it was "a decision, a determination by the zoning administrator that this facility would be classified a school by definition in the Stafford county Zoning Ordinance." (Appendix at 368). Additionally"…although this document is entitled zoning verification it really – what it really is, is a zoning determination and interpretation and a decision; decision is probably the most important term. A decision by the zoning administrator that the description of this facility constitutes a school." (Appendix at 364-65) (emphasis added).
- That for the project proposed by the Crucible, the obtaining of the determination and answering the question of whether the

proposed facility was a school was the "single most important[2] question" in the course of the proposed project (Appendix at 366).

- That the determination was the result of a detailed meeting at which the County officials asked "the questions that they needed to ask in order to render the decision they were being asked to, render…" (Appendix at 367).
- That the Determination was not a casual decision (Appendix at 371).
- That the decision became final in the absence of an appeal (Appendix at 371).
- That the Determination constituted a significant affirmative governmental act for the purposes of §15.2-2307. (Appendix at 368), and that there was nothing more the Crucible needed to do once they got the decision (Appendix at 371).
- That the Determination was "certainly as momentous as a variance" (Appendix at 372).

[2] Merriam Webster's Collegiate Dictionary, Deluxe Edition (1998) defines important as "marked by or indicative of ***significant*** worth or consequence". (emphasis added).

- That the Determination was “substantially similar and equally serious to the significant affirmative governmental action listed explicitly in §15.2-2307, given the “…seriousness about which the county considered this,…” and “..the ultimate finality of that decision” and the fact that ..there was nothing else the Crucible needed to do.” (Appendix at 371-72).
- That the Crucible relied in good faith on the Determination (Appendix at 368), and that they would not have proceeded any further with the facility had the determination found that the proposed facility was not a school (Appendix 370).
- That the Crucible was up front with the County concerning the nature of the facility (Appendix at 369).
- That the Crucible incurred $1.1 million dollars in the expenses associated with proceeding with the development. (Appendix 369).

Finally it should be noted that the Board has continued to tinker with the way the Zoning Ordinance addresses schools and where it permits them, including the complete banning of the Crucible’s operation on the Property. Each time the Board has once again acted against the Crucible it

has responded with a Complaint challenging such persecutions, the latest of which is still pending before the Stafford County Circuit Court.[3]

STANDARD OF REVIEW

The standard applicable to a review by the Virginia Supreme Court of a decision of a Circuit Court is a long established one; it was recently reiterated in the case of City of Suffolk v. Board of Zoning Appeals for the City of Suffolk, 266 Va. 137, 580 S.E.2d 796 (2003), in which the Court stated, "[o]ur standard of appellate review is well established. A Circuit Court's judgment is presumed to be correct and we will not set that judgment aside unless it appears from the record that the judgment is plainly wrong or unsupported by the evidence." (at 143, 798).

In instances in which this Court interprets statutory language that involves questions of pure law, such review is de novo. "In interpreting the various statutory provisions, we are presented with pure questions of law that we consider de novo on appeal." Hale v. Board of Zoning Appeals for the Town of Blacksburg et al., Record No. 081001, (February 27, 2009) However, findings of facts by the Trial Court must be accepted as given if

[3] The other challenges were non-suited after the Board stipulated and agreed that each ordinance amendment completely repealed the previous one in such a matter that if the last challenge was successful the state of the ordinance would return to the form it was in May of 2004.

there is any support for such finding. As this Court stated in Commercial Underwriters Insurance Company v. Hunt & Calderone, P.C., et al., 261 Va. 38, 540 S.E.2d 491 (2001): "[p]rinciples of appellate review require that we affirm determinations of fact made by the trial court unless there is no support for such determinations in the record." (at 44, 494).

SUMMARY OF ARGUMENT

This case is the story of the struggles of the Crucible to complete its project once blessed by officials of Stafford County and now under siege by the same County after the political winds shifted, and the Crucible had expended millions of dollars pursuing a new facility. Wrapped within that story are questions of vested rights, when do they accrue and who may determine their status.

Vested rights is a fundamental constitutionally protected right of a property owner to be free from unwarranted intrusion by government.[4] A vested right in its essence is the right to complete a project notwithstanding a subsequent amendment to the locality's zoning ordinance. As was stated

[4] Like other such rights as freedom of speech, freedom of religion and equal protection, the protection against the taking of property (and, therefore, property rights) without due process is found in the Fifth Amendment as applied through the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the Constitution of Virginia. See, C. Simon, W. Larsen and D. Porter, *Vested Rights -- Balancing Public and Private Development Expectations*, 49 (1982), § 6.12, Note 6, at 58-61.

by this Court just last year in the case of Goyonaga v. Board of Zoning Appeals for the City of Falls Church, 275 Va. 232, 657 S.E.2d 153, (2008), "[t]he clear intent of [§15.2-2307] is to provide a property owner with protection from a subsequent amendment to a zoning ordinance when the owner has already received approval for and made substantial efforts to undertake a use of the property permitted under the prior version of the ordinance" (at 243, 160).

As this Court stated in Holland v. Johnson, 241 Va. 553, 403 S.E.2d 356 (1991), "[a] vested right in land use is a property right which is created and protected by law" (at 556, 358). Vested rights, as property rights, are afforded constitutional protections. As stated in the case of School Board of the City of Norfolk, et al. v. United States Gypsum Company, et al., 234 Va. 32, 360 S.E.2d 325 (1987) "[t]his Court has consistently held that the due process clause of the Virginia Constitution protects not only rights that have vested, but also substantive property interests which may ripen into vested rights" (at 38, 328). Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984), holds that the retroactive application of an enactment in a way

that adversely affects a substantive right violates due process and is invalid (at 121, 754).[5]

In 1998, the General Assembly adopted an amendment to §15.2-2307, setting out a statutory three part test for establishing vesting for zoning purposes: first, there must be a significant affirmative governmental act which remains in effect allowing development of a specific project; second, the landowner must rely in good faith on that act; and, finally, the landowner must incur extensive obligations or substantial expenses in diligent pursuit of the specific project.

There is no requirement in the portion of the code that permits zoning administrators to render opinions on vested rights, §15.2-2286(A)(4), requiring such requests to be submitted to him for review. Additionally, the power to determine vested rights has always resided with the circuit court and continues to so reside, Levy & Co. v. Davis, 115 Va. 814, 80 S.E. 791, (1914), "[w]hen a statute gives a new remedy, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two" (at 821, 794). The

[5] It is clear that constitutional protections attach to even unvested substantive rights, which may yet vest. In Shiflet it was noted that a joint tort-feasor's right to seek contribution arose substantively the moment the tort was committed; however that right to seek contribution did not vest until the tort-feasor and had paid more than his share of the damages.

trial Court properly held that it had jurisdiction to hear the matter of vested rights without the Crucible having to obtain a opinion on vested rights from the zoning administrator first.

The Determination constituted a significant affirmation governmental act upon which the Crucible was entitled to rely. The six specific actions listed in §15.2-2307 as significant affirmative governmental actions are not exhaustive. The Determination, given the facts of this case, was substantially similar and equally serious to the six listed acts, and the most important and momentous event in the development of the project, and constituted a significant affirmative governmental act. Additionally, the Crucible relied in good faith on the Determination, and expended over $1.1 million in reliance thereon. Thus the Property was vested under §15.2-2307.

Additionally, §15.2-2311 and its limitation on appeals, as well as its ability to vest projects, is indicative of the importance the General Assembly place on zoning determinations, In addition §15.2-2311 provides a second independent basis for the vesting of the Crucible's project.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT IT HAD JURISDICTION TO MAKE A DETERMINATION OF VESTED RIGHTS UNDER §15.2-2307 OF THE CODE OF VIRGINIA (1950), AS AMENDED.

As stated above, the Trial Court specifically held that there was no requirement for the Crucible to first request a determination from the Zoning Administrator concerning their vested rights under §15.2-2307 of the Code of Virginia (1950), as amended, before proceeding to Circuit Court. This ruling was in response to one of the grounds of the Board's Demurrer, which argued that the Crucible allegedly failed to exhaust its administrative remedies by not requesting a determination concerning the Property's vested rights status from the Zoning Administrator.

In 1991, this Court held that zoning administrators, despite the fact that they had been making vested rights determinations, did not actually have the power to make such determinations and that such decision could only be made by the courts, Holland v. Johnson, 241 Va. 553, 403 S.E.2d 356 (1991).[6]

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[6] The Holland decision resulted partially from the fact that there was no existing enabling legislation granting zoning administrators such power. The Holland opinion is also grounded in the concept of separation of powers, "A vested right in a land use is a property right which is created and protected by law. An adjudication regarding the creation, existence, or

Subsequent to the Supreme Court's ruling in Holland, in 1993 the Virginia General Assembly amended §15.1-491 (now §15.2-2286(A)(4)) to add the authority currently granting the zoning administrator the power to "in specific cases, mak[e] findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under 15.2-2307." Although this Code change conferred upon a zoning administrator the authority to make vested rights determinations, it did not operate to divest the courts of their original jurisdiction over the issue. If the General Assembly had intended to make the remedy exclusive, it would have added words to the statute so stating. It chose not to do so.[7]

It is a long established principle of statutory interpretation that "[a] statute prescribing a new remedy for an existing right should never be construed to abolish a pre-existing remedy in the absence of express words or necessary implication." Charlottesville v. Marks' Shows, 179 Va. 321, 331, 18 S.E.2d 890, 896 (1942) quoting Levy & Co. v. Davis, 115 Va.

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termination of that right can be made only by a court of competent jurisdiction." at 556, 358.

[7] The Court in the recent case of Logan v. City Council of the City of Roanoke, 275 Va. 483, 659 S.E.2d 296, (2008), states as follows: "[w]e may not add words to a statute or ignore any of the statutory language." (at 492, 301).

814, 80 S.E. 791, (1914). Levy further provides, "[w]hen a statute gives a new remedy, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two" (at 821, 794).

Thus, the Trial Court was correct when it determined that "…the vested rights issue is properly before this Court; that the statute in response to Holland did not place exclusive jurisdiction in the zoning administrator for vesting decision in the first instance; that if it intended to place exclusive jurisdiction in the hands of the zoning administrator it would have done so explicitly." (Appendix, at 199).[8]

Despite these principles the Board argues that the General Assembly's enactment of the present day language in §15.2-2286(A)(4) permitting Zoning Administrator to opine on vested rights, was the establishment of an exclusive process for the determination of such, in response to this Court's decision in Holland. (Board Brief at 12-14, & 17-21). There simply is no evidence of this. The General Assembly's enactment was a correction of the fault noted in Holland, i.e., "[n]othing in

[8] As the amendment to §15.2-2286(A)(4) only addressed the lack of enabling legislation, and did not address the constitutional concerns, related to allowing a mere zoning administrator and a county attorney to rule on constitutional issues, its validity remains unsettled.

the [15.1-491(d)] authorizes the zoning administrator to adjudicate property rights." (Holland at 556, 358).

Section15.2-2286(A)(4) ***permits*** localities to establish the office of zoning administrator and contains the powers of a zoning administrator, including the ability to make vested rights determinations; however, it is not an exclusive grant of such power, nor mandatory. Contrary to the claim of the Board in its brief, nothing in §15.2-2286(A)(4) requires that a property owner first submit a claim regarding vested rights determination to a locality's zoning administrator for adjudication prior to proceeding to judicial review.[9] Virginia Courts have long had the ability to adjudicate, as a matter of original jurisdiction, claims of vested rights, and shall continue to have such power until they are clearly divested of it by the General Assembly.

Further, it should be noted that §15.2-2286(A)(4) is a permissive provision, permitting the establishment of a locality's zoning administrator and endowing him with certain powers. Section 15.2-2286(A)(4) does not require that localities establish the position of zoning administrator.

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[9] This is in direct contrast to §15.2-2311 of the Code of Virginia (1950), as amended, which specifically requires appeals of orders, requirements, decisions or determinations of the Zoning Administrator to be made to the Board of Zoning Appeals. Thus, the General Assembly clearly delineates situation in which it has determined that a specific exclusive procedure must be followed.

Accordingly, it cannot follow that all vesting determinations must be made by the locality's zoning administrator, and that the Circuit Courts have been stripped of their jurisdiction to hear such matters, when localities are not even required to create the office of zoning administrator.

The Board also argues as a matter of policy that zoning administrators and BZAs are well suited to make rulings concerning vested rights through their "local experience, knowledge, and expertise in zoning matters" (Board Brief at 20-21). The Board even goes so far as to cite this Court's discussion of the role of the zoning administrators and BZAs in Lamar Co. LLC v. Board of Zoning Appeals, City of Lynchburg, 270 Va. 540, 620 S.E. 2d 753 (2005), in which the Court states that they "develop expertise in the relationship between particular textual language and local government's overall plan." (at 547, 757). However, such is not the situation with vested rights determinations. Vested rights determinations are made under the provisions of state code, and do not necessarily involve any application of a locality's zoning ordinance, or the locality's overall plan; in fact vested rights are usually at odds with the government's plan.

While the Crucible has great respect for the job BZA's do, their members are not experts in state zoning law, which has been borne out in

the Stafford BZA's failure to correctly apply the 30-day limitation period for filed appeals (see the predecessor cases to this matter Record Nos. 061780 & 061801).[10]

Accordingly, for the above stated reasons the Trial Court correctly ruled that the Circuit Courts have jurisdiction to make a determination of vested rights under §15.2-2307 as a matter of original jurisdiction without the requirement that a locality's zoning administrator first review the matter.[11]

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[10] Additionally, BZA members are generally ordinary citizens volunteering their time. They do not have the same expertise in applying the law as the courts of this Commonwealth. Additionally, in the instance of vested rights there is no "local expertise" to be applied; rather, such cases involve the application of state law to a particular set of facts. (Contrast this with appeals of the zoning administrator's interpretation of a zoning ordinance, which indeed must be appealed to the BZA under §15.2-2311.)

Additionally, it is not uncommon that local political pressures will present obstacles to a BZA correctly applying the law. During the time period the Board contends the Crucible should have requested a vested rights determination from the Zoning Administrator, his determination that the proposed facility was a school was already under attack by the Board, his employer. Thus, the General Assembly has proven its wisdom in insuring that landowners have avenues to obtain vesting determinations free from such local political pressures.

[11] Furthermore, if this matter had been submitted to the Zoning Administrator for an initial determination of the status of vested rights there is no doubt that regardless of the determination, this matter would have ended up in Circuit Court after an immediate appeal to the BZA. Given the fact that under §15.2-2314 of the Code of Virginia (1950) as amended, in

II. THE PROPERTY IS VESTED IN ACCORDANCE WITH §15.2-2307 OF THE CODE OF VIRGINIA (1950), AS AMENDED

Prior to July 1, 1998, the Virginia Courts considered vested rights on a case by case basis. A broad spectrum of property rights claims were made and determined by these common law based cases; however, the fundamental issue in determining vested rights has primarily centered around the meaning of significant affirmative governmental act.

Under the statutory test in determining what constitutes a significant affirmative governmental act, §15.2-2307 details six different acts, which conclusively qualify as such. In the present case the Crucible obtained and was the beneficiary of the Determination that its proposed facility and plans

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appeals from the BZAs the Circuit Court can take evidence, and hears matters of law in the case de novo, even if the matter should have been submitted to the zoning administrator initially, at worst failure to require such constitutes harmless error.

Additionally, the matter could have been submitted directly to the Circuit Court for a determination of vested rights protected under §15.2-2311, as zoning administrators are only just now even being given the ability to make vesting determinations under §15.2-2311(C). SB1524 which will rewrite §15.2-2286(A)(4) to read "…(iii) in specific cases, making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under §15.2-2307 *or subsection C of §15.2-2311*." (newly added language emphasized). As of the writing of this brief SB1524 had been approved by unanimous votes in both chambers of the General Assembly, and awaits action by the Governor.

constituted a school, and as such could be constructed on a by-right basis on the Property. While a zoning administrator's determination is not one of the enumerated actions listed in §15.2-2307 that qualify as a significant affirmative governmental act, the list is not exhaustive.[12] In relevant part §15.2-2307 states "[f]or purposes of this section ***and without limitation***, the following are deemed to be significant affirmative governmental acts allowing development of a specific project…" (Emphasis added.) The clear meaning of the phrase "without limitation" is that there are other acts apart from the six specifically listed acts that may qualify as significant affirmative governmental acts for the purposes of vesting a property.

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[12] The six enumerated acts are:

> (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.

A. THE DETERMINATION BY THE ZONING ADMINISTRATOR IN THIS CASE IS A SIGNIFICANT AFFIRMATIVE GOVERNMENTAL ACT UNDER §15.2-2307 OF THE CODE OF VIRGINIA (1950), AS AMENDED.

The Trial Court held that the Determination under the specific facts in this case was a significant affirmative governmental act (Appendix, at 364-365, 371). As previously noted, the Trial Court cut through the Board's semantics concerning the term "zoning verification" and quickly concluded that "… what this really is, it is a decision, a determination by the zoning administrator that this facility would be classified a school by definition in the Stafford County zoning ordinance" (Appendix, at 368).

Despite the factual finding by the trial court the Board and the Amicus continue to play semantic games in an effort to obscure the issue in this case. Not only is this contrary to the rule that findings of fact are accepted as given if there is any support for such finding under Commercial Underwriters Insurance Company, but the Board failed to note any objection to the Trial Court's finding that a Determination had been made.[13] As the Board failed to object to this holding it may not challenge it on

[13] In a further example of the extent to which the Board has continued its persecution of the Crucible, the Board, after having no reservations pursuing belated appeals of the Determination, now apparently believes the same document that qualified as a determination for the purposes of its ability to appeal to the BZA is no longer a determination for the purpose of the Crucible's vesting.

appeal, Rule 5:25 of the Rules of the Supreme Court of Virginia. Mr. Schardein's decision must be taken as a determination and not the "simple verification" the Board now wishes to characterize it as.

In deciding if the Determination fit within §15.2-2307's "without limitation" provision the Trial Court, at the behest of the Board, applied the doctrine of *noscitur a sociis* under which provides that:

> …when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words. **…**Thus, if a statute provides an illustrative list of persons or things to which its provisions should apply, an unenumerated person or thing must be 'similar in nature' to those expressly listed in order to fall within the scope of the statute. Surles v. Mayer, 48 Va. App. 146; 165, 628 S.E.2d 563, 572 (2006).

The Trial Court held that the Determination under the facts of this case was, in the words the Board had used to summarize the doctrine, "substantially similar and equally serious."

> And I do find that this, in the context of this case, in terms of the request that was made, the seriousness about which the county considered this, the decision they made, the ultimate finality of that decision, in terms of there not being any challenge to that decision, and the zoning administrator's testimony that, on that issue, there was nothing else Crucible needed to do. I do find it fits the criteria of substantially similar and equally serious action, as that term is used in the Board of Supervisor's brief (Appendix, at 371-72).

The Trial Court was correct. The list of acts in §15.2-2307 encompass a widely varied range of acts, from those at the very beginning of the developmental process, i.e., variances and rezoning, to those granted as the development enters its final stages, i.e., approval of final subdivision plats, and site plans. These acts include actions representing the entire spectrum of review from those that are completely discretionary, i.e., special use permits, to those that are ministerial, i.e., preliminary subdivision plans, site plans, and final plats. Despite their differences, however, these acts, like the Determination in this case, all represent governmental actions that result in an outcome serving to advance fundamentally the development process if granted or otherwise approved, and constitute significant decisions in the development of a piece of property, often the most significant decision in such process.

In its extensive exploration of this issue, the Trial Court questioned Mr. Schardein, the Zoning Administrator at the time of the Determination, and the Board's sole witness, concerning the nature of the Determination and its significance to the proposed development of the Property. In response to the Court's inquiry "…on that precise issues, is this school, is there anything else they needed to do once they got the zoning verification from you." Schardein responded "no" (Appendix, at 301).

Accordingly, the Trial Court concluded that the Determination stands as "the single most important decision in regard to the construction of this property…" (Appendix, at 367). Thus, as the Trial Court held, the Determination was "…certainly as momentous as a variance[14]…" (Appendix, at 372).

Further this Court recognized the potential for a zoning administrator's determination to represent a significant affirmative governmental act under §15.2-2307. Rather than dismissing the Goyonagas' argument that the review of the building plans by the zoning administrator and issuance of a building permit was a significant affirmative governmental act as completely without merit, the Court assumed it to qualify..[15] This Court then decided the §15.2-2307 portion of the case on the grounds that §15.2-2307 only protected against changes in the Zoning Ordinance, which had not occurred in Goyanaga. However, in the present case, the governing body has amended the Zoning Ordinance.

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[14] The grant of a variance is one of the six listed significant affirmative governmental acts.

[15] "Assuming, without deciding, that the approval of the building plans by the city officials constituted the 'significant affirmative governmental act[] allowing development of a specific project' contemplated by the statute," Goyonagas at 243, 159.

Further, in Goyonaga this Court also recognized the potential for §15.2-2311(C) to establish a basis for vesting in addition to §15.2-2307, "[c]ode 15.2-2311(C) … does provide for the potential vesting of a right to use property in a manner that 'otherwise would not have been allowed.'" (at 244, 160) [16]

Additionally, to the extent that the zoning administrator may have been aware that the entire structure was potentially going to be demolished and that the approval of the plan constituted a waiver from the ordinance requirements; the zoning administrator was without any authority to approve such a variance from the ordinance requirements, thus the permit in Goyanaga was issued unlawfully (244-45, 159-60).

In the present case there has never been any allegation that Mr. Schardein acted unlawfully. Rather, the Board in its previous appeal challenged the correctness of his Determination. The validity of the Determination has been litigated, including even an unsuccessful appeal to

[16] The Goyonagas were reconstructing their nonconforming house in such a manner that exceeded a provision of the zoning ordinances that limited such reconstruction to 25% of the value of the structure.

The Goyonagas' argument under §15.2-2311 was that in connect with the issuance of building permits for the reconstruction of their house[16] the zoning admistrator had reviewed the plans and must have concluded the proposed construction was in conformity with the ordinance requirements. The Goyanagas failed to prove this as the plans did not reflect the need for total reconstruction.

this Court; accordingly there is no doubt that it is a "thing decided"[17] and must be taken as a given.[18]

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[17] Lilly v. Caroline County, 259 Va. 291, 296, 526 S.E.2d 743, 745 (2000) "If [the] mandatory appeal is not timely filed, the administrative remedy has not been exhausted and the zoning administrator's decision becomes a "thing decided" not subject to court challenge. Dick Kelly Enter. v. City of Norfolk, 243 Va. 373, 378, 416 S.E.2d 680, 683 (1992)."

[18] Virginia is not alone in recognizing the potential for a zoning determination to provide the basis for vested rights. The Federal Courts in Florida, which has similar test to vested rights as is found in §15.2.2307, held in the case of Resolution Trust Corporation v. Town of Highland Beach, 18 F.3d 1536 (1994) that a zoning determination had in fact ripened into a vested right.

In Highland Beach the original landowner obtained approval for a residential planned unit development. Subsequently the Town Commission, as the governing body amended such approval and provided that construction had to be completed within 10 years.

After new owners purchased the property in 1980, and obtained approval for a new design for the project, the Town Commission met and discussed when the 10 year period for construction should end. The Town Commission interpreted such deadline as requiring the completion of the project within ten years from the issuance of the first construction permit resulting in a deadline of August 8, 1990. This determination was conveyed to the landowners by means of a letter from the Town's Mayor dated October 29, 1980. Based upon this determination the landowner then invested over $8,000,000 in site work and construction. However in early 1984 the Town Commission revisited the completion date, and after referring the issue to the Town's Planning Board, determined the completion date was July 1, 1985.

The Florida Courts have adopted a three pronged vested rights test very similar to the test contained in §15.2-2307 of the Code of Virginia, which the 11th Circuit Court of Appeals applied in Highland Beach. As Federal Court noted:

For these reasons, the Trial Court was correct in holding that the Determination as it relates to the facts in this particular case is on equal footing with the explicitly listed actions, and constituted a significant affirmative governmental act under §15.2-2307.

B. THE CRUCIBLE RELIED IN GOOD FAITH ON THE SIGNIFICANT AFFIRMATIVE GOVERNMENTAL ACT.

This case has always focused on whether under this particular set of facts the Determination constituted a significant affirmative governmental act under §15.2-2307. In an unspoken concession to overwhelming importance of such fact, the Board expends a combined total of a mere six paragraphs on both remaining prongs of the test for vested rights under

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Under Florida law, a municipality is equitably estopped from exercising its zoning power when a property owner (1) relying in good faith, (2) upon an act or omission of the government (3) has made a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights the owners acquired. City of Lauderdale Lakes v. Corn, 427 So.2d 239, 243 (Fla. 4th D.C.A. 1983).

The district court in Highland Beach held that based upon the Town Commission's determination in 1980, the landowner had obtained the right to continue to develop the project under the 1990 deadline. The Court of Appeals upheld this ruling. Thus, in a vested rights test very similar to the one in Virginia, the United States Court of Appeals has held that a zoning ordinance interpretation can provide the basis for vesting property.

§15.2-2307, while the Amicus fails to make any independent argument on either prong (Board Brief at 38-40, Amicus at 22). Nevertheless, the Crucible will address the Board's arguments on the remaining prongs of §15.2-2307.

The occurrence of good faith reliance almost goes without saying if any action advancing the development occurs. Of course the Crucible relied on the Determination; as it expended over $1.1 million in pursuing the project after the Determination was made, and undertook a long litany of actions (Appendix at 378-447). Additionally, it is clear that had the Determination not approved the school, the Crucible would have abandoned its pursuit of the Property (Appendix 370).

Rather than challenging these actions, the Board now argues on Appeal that no party could have reasonably believed that the Determination was a significant affirmative governmental action, as no Court had previously held that a determination could even qualify as a significant affirmative governmental action, and thus the Crucible could not have relied on the Determination (Board Brief at 38).[19]

[19] In fact this argument is so new that it wasn't even raised in the version of the Petition for Appeal that was submitted in April 2008 and subsequently rejected by the Supreme Court after it determined that the Trial Court had yet to enter a final order in this matter (Record No 80719).

Such a proposition would present the ultimate catch 22. If the court was to find that every time a non-listed action under §15.2-2307 was argued to be a significant affirmative governmental action that it could not be relied upon since no other court had previously found it to qualify as such, it would be impossible to ever have a non-listed qualifying action. Thus, the "without limitation" language in §15.2-2307 would be completely eviscerated. As previously noted, "[the Court] may not add words to a statute or ***ignore any of the statutory language***." (Logan at 492, 301) (emphasis added).

Additionally, the Board's position completely ignores the facts, as the court found: 1) that the Crucible did understand the significance of the Determination and its import to be that the Crucible was authorized to proceed with this specific project and;[20] 2) more importantly, the Crucible would not have gone any further with the project, and would have terminated its purchase contract on the Property at the end of the study period, had the Determination not found that the proposed specific facility qualified as a by-right school (Appendix at 248, 252, & 271).

[20] However, it should be noted that the requirement under §15.2-2307 is simply that the act is relied upon. There is no requirement that the landowner understand that the act qualifies as a significant affirmative act at the time it occurs.

Additionally the Board states that the language at the foot of the Determination that it was "subject to change" defeats the ability of the Crucible to rely on the Determination. As Schardein testified the subject to change language is only for actions occurring in the sixty day time period before the Determination becomes final. (Appendix at 296). At trial the court explored the meaning of and reason for the "subject to change" language. Trial Court's inquired, "...if they don't change what they're going to build, and the ordinance doesn't change, the county is stuck with your interpretation if there was no – ***if nothing changed in the 60 days***." (emphasis added). Schardein answered "[a]nd there were no appeals, I would agree" (Appendix at 296). Thus the "subject to change" language is clearly present due to the sixty day period provided by §15.2-2311(c) during which a determination is subject to modification, and such language ceases to be of any significance after the passage of sixty days assuming no appeal has been filed within the sixty days.

While there was good faith reliance by the landowner in City of Suffolk, such did not begin until six years after the significant affirmative governmental action in that year. In contrast the Crucible immediate began work in reliance on the Determination.

Accordingly, the Crucible relied in good faith on the Determination in proceeding with the development of the Property, and the Trial Court was correct in holding that the Crucible had satisfied the second prong of the test for vested rights under §15.2-2307.

C. THE CRUCIBLE INCURRED EXTENSIVE OBLIGATIONS AND/OR SUBSTANTIAL EXPENSES IN DILIGENT PURSUIT OF THE SPECIFIC PROJECT IN RELIANCE ON THE SIGNIFICANT AFFIRMATIVE GOVERNMENTAL ACT.

As previously stated, the third prong of the statutory vesting test requires a showing on the part of the landowner that he incur ". . . extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the . . . governmental act." (§15.2-2307).

The Crucible incurred extensive obligations or substantial expenses in diligent pursuit of their proposed facility. The actions taken above, in pursuit of the development of the Property, cost the Crucible over $1,100,000.00, not including the purchase price of the Property (Appendix at 378-501).

The Board's argument concerning whether the Crucible incurred extensive obligations or substantial expenses in diligent pursuit of the Project is misleading. First, the Board uses the circular logic that since, in

its opinion, there was no significant affirmative governmental act; there could be no expenses or obligations incurrence in reliance on it (Board Brief at 39). While this may be a true enough proposition in the abstract, it ignores the fact that the Trial Court held that there was indeed a significant affirmative governmental act in the present case. Additionally, this argument also ignores the fact that if the Board is correct and there was no significant affirmative governmental act, this Court does not reach the point in its analysis of determining whether the expenses were significant.

Capping off the Board's parade of unfounded assertions it suggests that for a Property to vest, the landowner needs to pursue it for 11 years as was done in the City of Suffolk[21] case (Board Brief at 40). This argument is beyond the pale. Certainly expending over $1,100,000.00 regularly pursuing a project during the course of a little over a year, is far more diligent than spending $158,000.00 in the sporadic pursuit of a project over 11 years.[22] Accordingly, the Trial Court was correct in holding that the

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[21] In City of Suffolk, the one Virginia Supreme Court determining a property was vested under §15.2-2307, such vesting was based on expenditures totaling $158,000.00. While City of Suffolk does not set this amount as a floor for the determination of vested rights, in the current case, the Crucible's expenses far exceed those in City of Suffolk.

[22] In the City of Suffolk, there was a six year period of inactivity from the time the property was rezoned until the first action in pursuit of the project occurred.

Crucible has satisfied the third prong of the test for vested rights under §15.2-2307.

III. THE VIRGINIA GENERAL ASSEMBLY HAS RECOGNIZED THE IMPORTANCE OF ZONING DETERMINATIONS TO THE DEVELOPMENT PROCESS THROUGH THE PROTECTIONS PROVIDED IN §15.2-2311 OF THE CODE OF VIRGINIA (1950), AS AMENDED

Section 15.2-2311 of the Code of Virginia (1950), as amended, addresses among other issues the long term status of determinations of zoning officials. Section 15.2-2311(A) provides that all appeals of written zoning orders, requirements, decisions and determinations such as the one in this case are to be filed with 30 days of the date of the determination. Section 15.2-2311(C) then provides that in cases where there is a material change in position in reliance on a determination that the determination cannot be changed, modified or reversed by the locality's zoning officials. Section 15.2-2311(c) of the Code of Virginia, states:

> In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative

> officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical or other nondiscretionary errors.

In §15.2-2311(C) the General Assembly acknowledges the fact that determinations made by a locality's zoning officials are important steps in the development process. In acknowledgement of this fact determinations, which are relied upon, become binding and cannot be changed, modified, reversed or otherwise undone by the locality.

While §15.2-2311(C) by its terms prevents changes, modifications, and revision only by the zoning officials, it is important to remember that the zoning officials are acting as the agents of the governing body in administering the locality's zoning ordinance. In providing for the creation of the office of zoning administrator the Code of Virginia makes it quite clear that the powers held by the zoning administrator are those emanating from the governing body when it provides in §15.2-2286(4) that "[t]he zoning administrator shall have all necessary authority ***on behalf of the governing body*** to administer and enforce the zoning ordinance." (Emphasis added)

Thus, zoning officials are only exercising powers delegated to them by the governing body. It is oxymoronic to permit the Board to undo a determination indirectly, when they are at the same time prohibited from a

direct attack on the determination through directing their agent to reverse the determination after the passage of sixty days (§15.2-2311(C) or through appeal after the passage of thirty days (§15.2-2311(A)).

Further once the sixty days have passed assuming the beneficiary of the determination has satisfied the remaining second and third prongs of the vesting test in §15.2-2307, such section further bars the governing bodies from undoing the determination by ordinance change or otherwise.[23]

However, and perhaps of just as great importance, §15.2-2311(C) mirrors the vesting test in §15.2-2307. Section 15.2-2311(C) requires (1) a significant affirmative governmental action i.e., a "…written order, requirement, decision or determination;" (2) extensive obligations or substantial expenses in diligent pursuit, i.e., "…where the person aggrieved has materially changed his position…" and (3) good faith reliance on the act, i.e., "... in good faith reliance on the action of the zoning administrator or other administrative officer."

[23] As Virginia permits locality's Planning Commissions and governing bodies to hold joint public hearings on proposed ordinance changes and only required that notices be published twice, an amendment to the zoning ordinance can easily be accomplished in under two weeks, which of course is much shorter than the sixty day window provided in §15.2-2311.

Additionally, as noted in detail above, in Goyonaga this Court itself has recognized the importance of the §15.2-2311(c) in the vested right arena.[24]

IV. THE BOARD AND AMICUS ADDITIONAL ARGUMENTS ALLEGING ERROR IN THE TRIAL COURT'S RULING ARE SPECIOUS AND MEANINGLESS.

A. THE DETERMINATION WAS THE RESULT OF A DELIBERATIVE PROCESS BASED UPON A THOROUGH REVIEW AND ANALYSIS

The Amicus argues that the Determination varies from the six specific acts found at §15.2-2307 in that it is not deliberative and does not occur after a thorough review and analysis (Amicus Brief at 6). This is not the case and ignores these unique facts. As the Trial Court held, the Determination was made after an extensive briefing by the Crucible including answering every question the county asked (Appendix 240-43, 367, & 371). Additionally, the Determination was not issued until the

[24] Further, in recognition of the fact that §15.2-2311(C) is a vested rights statute the General Assembly this last session added §15.2-2311(C) to the list of statutes in §15.2-2286(A)(4) of which the zoning administrator can make determination of vested right, with the concurrence of the attorney for the governing body. As previously noted SB1524 has been approved by unanimous votes in both chambers of the General Assembly, and awaits action by the Governor.

Zoning Administrator had reviewed the matter and considered it over the course of an additional six days after the briefing[25] (Appendix 240-42).

This is more deliberation and study than many of the listed acts receive. Variances are usually, heard and decided in less than an hour, i.e., half the time of the briefing by the Crucible. Finally subdivision plans are often approved in less time than Mr. Schardein employed to issue its Determination. But above all there was no evidence before the Trial Court that the County was missing any information necessary in order to make its decision, or that the Determination was rushed or was anything other than the result of careful consideration of the permissibility of what the Crucible was proposing.

Additionally the Amicus attempts to downplay the significance of the Determination because it was made on ”no more than a completed form” (Amicus Brief at 16). Once again the Amicus ignores the factual holdings of the Trial Court, as well as the fact that the Determination that the proposed facility constituted a school was

[25] While there is no evidence on this point in the record the Crucible is willing to concede that Mr. Schardien did not spend the entirety of the six days working on only this issue. Rather, attention is drawn to the period of time in order to illustrate the deliberative nature of the Determination, and the fact that it was definitely not a quick off the cuff answer.

language added to the form, rather than a standard part of the form. One is left wondering what the Amicus believes the form of the Determination should have been. However, it is clear, under Virginia law that the form of a zoning determination need not take any any particular format, See Lilly v. Caroline County, 259 Va. 291, 526 S.E.2d 743 (2000) in which an oral recitation by a zoning administrator was held to constitute a zoning decision or determination.

Thus, as the Trial Court specifically found "[the Determination] was not a causal decision" (Appendix at 371). Accordingly, there is no merit to the Amicus' contentions concerning the deliberative nature of the Determination.

B. §15.2-2307 DOES NOT REQUIRE THAT A PROJECT HAVE AN APPROVED SITE PLAN IN ORDER TO BE VESTED.

The Board and the Amicus both argue that the Crucible cannot be vested due to the fact that they had not obtained approval of a site plan (Board Brief at 28, 30, Amicus at 20). Obviously the mere submission of a site plan standing alone is insufficient to vest a project. However, also obvious is that a site plan approval is not

required for vesting if there is another significant affirmative governmental act, such as the Determination, upon which to rely.

To require an approved site in every vesting case would gut the meaning of §15.2-2307. Each of the four categories of significant affirmative governmental acts that do not include the approval of a site plan (final or preliminary) is a precursor to the site plan. Rezoning with proffers (category i), rezoning for specific use or density (category ii), special exceptions or special uses permits (category iii), and variances (category iv), all precede the site plan stage in a development. The shear foolishness of this argument is highlighted by the Board's citation of the seminal common lawvesting cases of Board of Supervisors v. Medical Structures 213 Va. 355, 192 S.E.2d 799 (1972) and Board of Supervisors v. Cities Service Oil Co. 213 Va. 359, 193 S.E.23d 1 (1972), in support of the this proposition (Board Brief at 32, 33). In both of these cases a special use permit had but approved. However, in neither Medical Structures nor Cities Service was there an approved final site plan. Yet this Court held the projects to be vested. In fact in Cities Service the final site plan was not filed with the County until after the locality had rezoned the property in question to a zoning district that did not allow the

proposed service station at all within the district. (at 361, 3). The significant affirmative governmental act in both cases was the approval of the special use permit, as there was no final site plan approval it was relevant only as to the landowners reliance, and incursion of expenses.

Accordingly, it is pure folly to contend that a site plan is an absolute necessity for vesting.

C. NEITHER CASELIN NOR NOTESTEIN ARE RELEVANT AS TO THIS CASE.

The Board and the Amicus rely on the cases of BZA of Bland County v. CaseLin Sys., Inc., 256 Va. 206, 501 S.E.2d 397 (1998), and Notestein v. Board of Supervisors, 240 Va. 146, 393 S.E.2d 205 (1990); such reliance is unwarranted. The Trial Court found CaseLin to be completely unpersuasive holding that "…I don't see what happened in CaseLin as coming remotely close to what we have here…" (Appendix at 370).

In CaseLin,[26] the Board of Supervisors issued a mere letter of support for a proposed incinerator, which the Virginia Supreme Court

[26] The 1998 amendment to §15.2-2307 represented an extensive departure from the common law effectively reversing many previous holdings in the area of vested rights. Snow v. Amherst County Board of Zoning Appeals, 248 Va. 404, 448 S.E.2d 606 (1994), was reversed as §15.2-2307 (iv) now allows a variance to be a significant affirmative

correctly noted was non-binding, and a statement by the County officials that the proposed use was listed in the Zoning Ordinance. That is not what happened in this case; instead, the Zoning Administrator determined after a specific request from the Crucible and a detailed inquiry and presentation of its plans that the proposed facility met the definition of a school. The Zoning Administrator also determined that a school was a by-right use in the A-1 Zoning District.

Likewise in Notestein there was no interpretation of a provision in the Zoning Ordinance; in fact there was no affirmative finding at all. Instead, in Notestein there was the simple statement by the County Administrator and the Board of Supervisors that there was nothing in the county ordinances that would prohibit the proposed use.

Further it is not insignificant that the language from Notestein, which was subsequently repeated in CaseLin, was the basis for this Court holding a variance was not a significant affirmative governmental act in the case of Snow, et al. v. Amherst County Board of Zoning Appeals, 248 Va. 404, , 448 S.E.2d 606 (1994).,

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governmental act. Similarly, Board of Supervisors of Chesterfield County v. Trollingwood Partnership, 248 Va. 113, 445 S.E.2d 151 (1994) was reversed by §15.2-2307 (iii) which now allows a special use permit on its own to be a significant affirmative governmental act. Thus, it is not clear whether CaseLin is still good law.

> … in Notestein, Town of Stephens City, and Holland, we held that the landowners had not obtained vested property rights because they failed to show that a governmental entity had committed a significant official act, manifested by the issuance of a permit or other approval authorizing the landowner to engage in a specific use that otherwise would not have been allowed. (Snow, at 408, 608).

The General Assembly by including variance as one of the six listed significant affirmative governmental acts in §15.22307 has reversed this test as it has been previously applied, thus severely diminished, if not destroying the precedential value of CaseLin and Notestein.

Accordingly, the Trial Court correctly held the factual situation in CaseLin was not analogous to the present case, and in not applying CaseLin and Notestein to the present case.

CONCLUSION AND RELIEF REQUESTED

The Trial Court correctly applied the law in accordance with appropriate and relevant case law and statutes, in holding that it had jurisdiction to determine whether the Property was vested, and in holding that the Property was vested. It carefully applied its ruling to the specific and unique facts before it. Thus, the Trial Court's ruling was neither plainly wrong, nor unsupported by the evidence.

Accordingly, Crucible, Inc. respectfully prays that this Court reject the Appeal filed by the Board of Supervisors of Stafford County, and Stafford County, and affirm the decision of the Trial Court.

CRUCIBLE, INC.

by */s/ H. Clark Leming*

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CERTIFICATE

I certify that three copies of this Brief of the Appellee were mailed or delivered to:

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Additionally, 15 copies of this Brief of the Appellee were hand delivered to the Office of the Clerk of the Supreme Court, and a copy was filed electronically via email at scvbriefs@courts.state.va.us, all in accordance with the provisions of Rule 5:26(d) of the Rules of the Virginia Supreme Court.

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