IN THE

Supreme Court of Virginia

RECORD NO. 081743

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

Appellants,

v.

CRUCIBLE, INC.,

Appellee.

REPLY BRIEF OF APPELLANT

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CRUCIBLE, INC.,

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REPLY BRIEF OF APPELLANTS

Appellants Board of Supervisors of Stafford County, Virginia, *et al.* ("Board of Supervisors" /"Board"), by counsel, submit this Reply Brief in response to the Brief filed on behalf of Appellee Crucible, Inc. ("Crucible"), and the Brief of *Amici Curiae* Virginia Chamber of Commerce ("Chamber") and Home Builders Association of Virginia ("HBAV") ("*Amici* Brief"). Rather than repeat its Opening Brief arguments, the Board focuses on specific points in Crucible's Brief.

STATEMENT OF FACTS

Several factual contentions made by Crucible require response.

First, the Board does not challenge Crucible's current operation, which is located on land zoned Industrial Light. The

contentious issue between the parties is solely the incompatibility of this use on the Subject Property, which is zoned Agricultural.

Second, in a new twist Crucible suggests a separate inquiry from the zoning verification was made to the zoning administrator. *Crucible Brief*, p. 2. The administrator's response to the inquiry(ies) made appears on the zoning verification that the proposed use was "classified as a school" in the Agricultural district, "as of May 11, 2004, and is subject to change." *Joint Appendix* ("*J.A.*"), p. 377.[1]

Third, the zoning verification has not been held to be correct. In an earlier case, the trial court held that appeals of the verification by the Board and neighbors were not timely, so it did not rule on the validity of the zoning verification itself.[2] Upon learning of the verification, the Board acted to change the ordinance to require a Conditional Use Permit ("CUP") for facilities of this type.

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[1] HBAVs' and the Chamber's suggestion that the verification "can be viewed as an approval of a preliminary plan of development" is over the top. *Amici Brief*, p. 13. Nothing in the record bears this out. The sketch, which Crucible showed at the time of verification, differed from the Major Site Plan that it submitted incompletely a year later.

[2] Although not relevant to this Appeal, Exhibit A of the *Amici* Brief includes the lower court's decision that it did not rule on the substance of the verification. *Amici Brief*, Ex. A, p. 9.

Fourth, the Circuit Court misstated the zoning administrator in holding that there was nothing more Crucible needed to do once it got the zoning verification. *Crucible Brief*, p. 10; *J. A.*, p. 371. *See* in contrast Schardein testimony at *J. A.*, pp. 295-296. Crucible had not even submitted a site plan or begun development steps at that time. *See also Opening Brief*, p. 7-9.

STANDARD OF REVIEW

Crucible's reference to this Court's decision in *Hale v. Town of Blacksburg*, issued after this appeal was granted, is apt. Record No. 081001 (February 27, 2009); *Crucible Brief*, p. 12.

ARGUMENT

Crucible, with the Chamber and HBAV in support, asserts in its Brief that, unless it obtains a vested rights determination without following the administrative process in § 15.2-2286 VA Code Ann., its constitutional rights are at risk. It also insists that the zoning verification is the equivalent of the other specified significant affirmative governmental acts ("SAGAs") in § 15.2-2307 VA Code Ann. and for the first time in § 15.2-2311 VA Code Ann.

I. Crucible's Support for the Trial Court's *Ad Hoc* Decision-making Is Inconsistent with the Legislature's Actions to Make Vested Rights Determinations Predictable.

Crucible, HBAV and the Chamber desire additional bases for establishing a SAGA as well as the ability to bypass the statutory administrative process for determining vested rights at will. However, the General Assembly, enacting §§ 15.2-2307 and 2286(A)(4) VA Code Ann., has made clear that such decisions are now legislative.[3]

> The tension that exists between the right of a landowner to make use of his property to his advantage and the necessity that local governments be permitted to restrict the use of land within their borders in order to assure orderly and beneficial growth and redevelopment has resulted in the General Assembly, beginning in the early twentieth century, creating a statutory framework for zoning and development which places responsibilities on both landowners and localities. (Emphasis added.).

Hale v. Town of Blacksburg, pp. 27-28 (without citations). Crucible, HBAV and the Chamber now, as the trial court erroneously did, adopt a results-oriented posture, and ignore the predictability intended by §§ 15.2-2286(A)(4) and -2307 VA Code Ann.

II. Crucible Wants to Ignore the Requirement to Exhaust Administrative Remedies.

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[3] If one assumes their premise that localities fight vested rights, clearly localities did not originate this legislation, which expands vesting beyond prior court decisions and affords a developer a quick decision on vested rights rather than a lengthy/costly court process, necessary after *Holland v. Johnson* held that the Code provided for no process other than court. 241 Va. 553, 403 S.E.2d 356 (1991). Chamber and HBAV efforts are apparent in this legislation.

Charlottesville v. Marks Shows, 179 Va. 321, 331, 18 S.E.2d 890, 896 (1942), does not support Crucible's failure to exhaust its administrative remedies by seeking a vesting determination from the zoning administrator before proceeding to court; it deals with tax law. Plaintiffs must exhaust administrative remedies prior to seeking a declaratory judgment on land use matters. *Opening Brief*, pp. 17-18.

The constitutional argument of Crucible, the Chamber and HBAV is misplaced. *See Opening Brief*, p. 19. *Holland v. Johnson* did not find a constitutional right to proceed directly to court and bypass an administrative process. Crucible's citation to *Holland* makes clear that that case does not go so far; rather the Court expressed the constitutional right of the judiciary to adjudicate cases generally. *Id.* at 554, 403 S.E.2d at 357. Crucible's failure to exhaust administrative remedies on grounds that the remedy is unconstitutional should not be considered. This Court would have to hold § 15.2-2286(A)(4) unconstitutional *sua sponte* because the trial court did not. Finally, any property right asserted by Crucible would have been determined by the Circuit Court had Crucible followed the administrative process and been dissatisfied. While this Court has

not ruled on § 15.2-2286(A)(4) VA Code Ann., it has noted use of the process, most recently in *Hale*, without criticism.

Also citations by Crucible, HBAV and the Chamber do not equate a vested right in a particular land use to a constitutional right. *School Bd. of the City of Norfolk v. United States Gypsum Company*, 234 Va. 32, 360 S.E.2d 325 (1987), has nothing to do with vested rights in the land use context; it involved asbestos. *Shiflet v. Eller* dealt with car accident injuries. 228 Va. 115, 319 S.E.2d 750 (1984).[4]

Crucible does not substantiate its illegal taking argument with Virginia or federal law. If Crucible is not vested, it must seek a CUP or rezoning to use the Subject Property for an anti-terrorist training facility. In any event, it is entitled to all of the uses permitted in the Agricultural district; there is no illegal taking of the property.

III. Crucible's § 15.2-2311 Claim Is Untimely and Misplaced.

Crucible now claims vested rights pursuant to § 15.2-2311(C) VA Code Ann. *Crucible Brief*, pp. 16, 37-40.[5] It did not raise this below or even in its Brief in Opposition to Appeal, and the judge did

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[4] *Levy & Co. v. Davis*, predates both § 15.2-2286(A)(4) and *Holland* and relates to an action in detinue. 115 Va. 814, 80 S.E. 791 (1914).

[5] The Chamber and HBAV echo this claim. *Amici Brief*, pp. 18-19.

not rule based on it. This argument should be ignored.[6] The analysis fails anyway because the verification was temporal, and it was never upheld as substantively valid. A legally incorrect zoning administrator's opinion cannot be valid and bind the Board. *See Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968). Board action amending the ordinance makes clear that the zoning verification has no ongoing imprimatur, and § 15.2-2311(C) does not prevent the Board from changing the ordinance.

IV. Crucible Does Not Have a SAGA.

Crucible seeks to win this Court's sympathy by claiming to be the victim of changes in political whims after a "thing decided," and the *Amici* suggest that the Board's argument creates some peculiar new endangerment for landowners.[7] *Crucible Brief*, pp. 13, 25, 29-

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[6] Crucible is inconsistent. At the lower court, Crucible argued §15.2-2311 "requires appeals of orders, requirements, decisions or determinations of the Zoning Administrator to be made to the Board of Zoning Appeals" in contrast to its Brief now where it argues the requirement is one of new legislation. *See J.A.*, p. 84, ft. 7 (Crucible Brief in Opposition to Plea in Bar and Demurrer, As Amended), in contrast to *Crucible Brief*, p. 23, ft. 11. Also this Court should not consider law not yet in effect. *Crucible Brief*, p. 23.

[7] Of course, this allegation ignores the statutory process in Title 15.2, Chapter 22 VA Code Ann., the Board must follow to change a zoning ordinance.

30; *Amici Brief*, pp. 4, 11-12. Yet all Crucible has is a statement as to the use permitted in a zoning district at a point in time.

> [W]hen a landowner has only a future expectation that he will be allowed to develop his property in accord with its current classification under the local zoning ordinance, there is 'no vested property right in the continuation of the land's existing zoning status. (Emphasis added.).

Hale, p. 28*, citing Bd. of Zoning Appeals v. Caselin Systems*, Inc., 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998). This Court held that § 15.2-2307 provides for vesting but continued,

> However, "'[t]he mere reliance on a particular zoning classification, whether created by ordinance or variance, creates no vested right in the property owner.'"

(Emphasis added.). *Hale,* p. 29*, citing City of Suffolk*, 266 Va. at 145, 580 S.E.2d at 799 (*quoting Snow v. Amherst County Bd. of Zoning Appeals*, 248 Va. 404, 408, 448 S.E.2d 606, 608-09 (1994)). A decision in favor of the Board would be consistent with case law.

Whether one calls the zoning verification a determination or interpretation or a zoning administrator review process[8], the substance of the instant zoning verification is that it was only a

[8] The *Amici* propose this new term. It does not restrict the Board's ability to change the zoning, which the *Amici* admit in their citation to *Bd. of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 657-658, 202 S.E.2d 889, 892 (1974), on page 3 of their Brief.

snapshot of what the Zoning Ordinance permitted on the date it was issued.[9] That decision is not recognized as an enumerated SAGA under § 15.2-2307 VA Code Ann. and does not merit equivalent status under the "without limitation" provision. As Crucible indicates, the General Assembly clearly knew about zoning determinations and provided for them elsewhere in the Code, but not as one of the SAGAs in § 15.2-2307. *Crucible Brief*, pp. 16, 37-39. Setting aside Crucible's protestations of reliance, telling a landowner the uses permitted on a parcel bears no similarity to the other six designated acts.[10] The General Assembly's specific omission as a SAGA appears deliberate. The trial court's *ad hoc* finding that Crucible has a SAGA is also inconsistent with the General Assembly's categorization of SAGAs. The "without limitation" catches situations that would satisfy the common law test under the case law prior to

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[9] Crucible's posturing how long it took the administrator to make this statement and who was with him during discussions does not change the nature of the statement. *See Crucible Brief*, pp. 40-42.

[10] Crucible is again inconsistent. It claims the zoning verification was "momentous." *Crucible Brief*, p. 28, J.A. 367. It could not have been momentous when the lower court limited its decision only to Crucible. *J. A.*, p. 364. Crucible noted *Goyanaga v. Bd.of Zoning Appeals,* 275 Va. 232, 657 S.E.2d 153 (2008). In that case, this Court held that an improperly issued building permit did not give vested rights to the landowner. Crucible can at best claim to be at the earliest stage of its development with a building permit very far in the future.

§ 15.2-2307 VA Code Ann., and should be interpreted in that context. 2006 Op. Att'y Gen. 80 at 4, n. 14. A verification made before a development application is ever filed is not "significant", "not an approval" like any of the enumerated SAGAs or under prior law, and should not be permitted to obscure a "bright line" legislative test.

Crucible misunderstands the Board's argument that it cannot demonstrate a SAGA because Crucible did not even obtain site plan approval, one of the enumerated SAGAs in § 15.2-2307 VA Code Ann. It also ignores that in the key cases of *Bd. of Supervisors v. Medical Structures*, 213 VA. 355, 192 S.E.2d 799 (1972), and *Bd. of Supervisors v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1(1972) (prior to adoption of § 15.2-2307), this Court required at least the filing of a site plan as well as possession of a special use permit ("SUP"). Under § 15.2-2307, a SUP with conditions is alone a SAGA.

In *Hale* this Court held a developer to a strict construction of its proffers and found that no SAGA has been achieved. Record No. 081000, at 33-34. Surely a zoning determination, which by its terms is temporal, cannot be "rewritten" by a court to be a permanent authorization, which its maker never intended, and then included in an expanded interpretation of § 15.2-2307 VA Code Ann.

Because the threshold criteria of a SAGA is not met, the Circuit Court should not even have reviewed consistency with the other two criteria for vested rights in § 15.2-2307 VA Code Ann.

CONCLUSION

A ruling by this Court for the Board would comport with General Assembly actions and decisions of this Court. It would assure that zoning action consistent with a rural residential neighborhood is not arbitrarily thwarted by a vested anti-terrorist training facility without any conditions on the use or attendant public process.

For the foregoing reasons and as set forth in its Opening Brief, the Board requests this Court to reverse the Circuit Court, and hold that a landowner, including the Crucible, must seek a vested rights determination from the zoning administrator in the first instance. If the Court reaches the vested rights issue, the Board further asks that this Court reverse the Circuit Court's determination and find that Crucible does not have vested rights to proceed with its proposed facility based on the zoning administrator's zoning verification.

Respectfully submitted,

BOARD OF SUPERVISORS OF STAFFORD COUNTY, VIRGINIA & STAFFORD COUNTY, VIRGINIA

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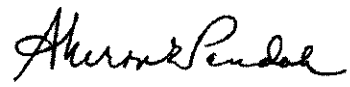
RULE 5:29 CERTIFICATE

Appellants hereby certify the following, as required by Rules 5:29 of the Rules of the Supreme Court of Virginia: Fifteen (15) Copies of the foregoing Reply Brief of Appellants were filed in the Office of the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed on March 31, 2009, to all opposing counsel as required by Rule 5:26(d). Furthermore in accordance with that rule an electronic copy of the brief and appendix has been filed with the Clerk contemporaneous with this Reply Brief of Appellants.



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