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,

BRIEF AMICUS CURIAE OF LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

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PRELIMINARY STATEMENT

The Local Government Attorneys of Virginia, Inc. (the "LGA"), by counsel, submits this *amicus curiae* brief in support of the Appellants, Board of Supervisors of Stafford County, Virginia and Stafford County, Virginia in this matter (collectively, "the Board") seeking reversal of the Trial Court's ruling.

IDENTITY OF AMICUS CURIAE, INTEREST IN CASE AND SOURCE OF AUTHORITY TO FILE

As a threshold matter, and in accordance with Rule 5:30 of the *Rules of the Supreme Court of Virginia,* a motion seeking the leave of this Court to file this brief has been concurrently filed.

The LGA is a non-profit, professional corporation founded in 1975. Its members represent 150 localities, including counties, cities, and towns located throughout the Commonwealth. The LGA was created to promote continuing legal education of local government attorneys, to offer a forum for members to meet and exchange ideas of importance to Virginia local governments and to initiate, support or oppose legislation or litigation that, in the judgment of the LGA, is significant to local governments.

The LGA is regularly asked by the Virginia General Assembly and state agencies to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study

committees and commissions. The LGA often submits *amicus curiae* briefs or letters of support in cases that implicate issues of special importance to Virginia's local governments.

The LGA files this brief to address to the issues of 1) whether a determination as to vested rights may be obtained directly from the circuit court without first being a vested rights determination sought from the zoning administrator and 2) whether an administrative zoning determination or verification is a "significant affirmative governmental act allowing development of a specific project" pursuant to Virginia Code § 15.2-2307. Should this Court adopt the position asserted by the Appellee and affirm the Trial Court's decision, the effect of that ruling would have significant adverse impact on local governments, in that it would elevate, for the first time in Virginia, a rudimentary zoning interpretation to the status of a "significant governmental act" such that vested rights attach. While this Court has acknowledged that vested rights may be granted under "limited circumstances," it has consistently affirmed the overarching principle that "privately held land is subject to applicable local zoning ordinance whether enacted before or after the property was acquired." If the Trial Court's decision is not reversed, administrative verifications intended only to advise landowners as to the uses permitted in a particular zoning district as of a

particular date, and not intended to allow or permit any particular project, could give rise to the vesting of property rights far beyond those ever intended by the General Assembly.

Zoning verifications like the one at issue in this case are made every day by zoning staff throughout Virginia. While not required by law, they are routinely made, and are based on as much or as little information as may be presented to the zoning official for consideration. Thus, LGA and the members it represents have a significant interest in the outcome of this controversy.

Accordingly, in accordance with the LGA's practices and procedures, the LGA's *Amicus* Committee and the LGA Board of Directors authorized the LGA's participation as *amicus curiae* in this case.

ASSIGNMENTS OF ERROR

The *Amicus* adopts the Assignments of Error contained in the Opening Brief of the Board.

STATEMENT OF THE NATURE OF THE CASE & MATERIAL PROCEEDINGS

The *Amicus* adopts the Statement of the Nature of the Case & Material Proceedings contained in the Opening Brief of the Board.

QUESTIONS PRESENTED

The *Amicus* adopts the Questions Presented contained in the Opening Brief of the Board.

STATEMENT OF FACTS

The *Amicus* adopts the Statement of Facts contained in the Opening Brief of the Board.

STANDARD FOR REVIEW

The *Amicus* adopts the Standard of Review contained in the Opening Brief of the Board.

THE PRINCIPLES OF LAW, THE ARGUMENT AND THE AUTHORITIES RELATING TO EACH QUESTION PRESENTED

SUMMARY OF ARGUMENT

The Trial Court erred in holding that Virginia Code § 15.2-2286(A)(4) allows an individual to obtain a vested rights determination from the Circuit Court without having to first obtain a vested rights determination from the zoning administrator. The Trial Court also impermissibly expanded the definition of a "significant affirmative governmental action" under Virginia Code § 15.2-2307 when it decided that a zoning verification form (the "Zoning Verification Form") completed by the Director of Code Administration, vested Crucible's rights in the zoning of its property in

Stafford County. In light of the language of the statute, prior case law, and the facts of this case, the Trial Court's decision was in error.

The Zoning Verification Form verified only that, as of its date, Crucible's proposed facility would be classified as a "school" under the Stafford County Zoning Ordinance. The completed form did not "allow" the development of Crucible's training facility, or any other facility or use. It only confirmed that the use being proposed was included in the definition of a "school," as that term is used in the Zoning Ordinance. The Zoning Verification Form did not consider or address the merits of Crucible's proposed use.

Crucible's expenditures cannot elevate the form's stature to that of a significant governmental act allowing the development of the specific project. Like any other property owner who invests money in the pre-development process, Crucible was subject to the possibility that legislative zoning amendments might be enacted before its project was approved. Crucible was on notice of this potential by the express terms of the form which unequivocally stated that the determination was "subject to change."

As a matter of law, the Zoning Verification Form is not a "significant governmental act allowing development of a specific project" because, unlike the actions enumerated in Virginia Code § 15.2-2307, it did not

address or approve of the merits of the project. By comparison, all of the governmental acts referenced in the the Code are acts taken at the completion of the development process (*e.g.* the acceptance of proffers, the final stage of a rezoning for a specific use, the approval of a variance, preliminary or final subdivision plat, site plan or plan of development). All of these actions occur only after a thorough review and analysis of the project application has occurred, and when required, a public hearing has been held. By comparison, a zoning verification does not address the merits of a specific project, it only verifies the extent to which a use would be permitted in a particular zoning district

It is imperative that this Court not permit the expansion of what constitutes a "significant affirmative governmental action allowing development of a specific project" under Virginia Code § 15.2-2307 to include preliminary zoning verification which may or may not speak to a specific project, but only to a particular use. Throughout Virginia, these zoning verifications are made every day, typically before a development application is ever filed. Even with a concomitant investment of signifiicant funds, the two together do not merit a vesting of property rights. To the contrary, they reflect the routine course of land development in Virginia.

If not reversed, the LGA is concerned that the Trial Court's decision will lead to perfunctory and routine zoning verifications (in this case, a completed form) giving rise to vested rights, instead of such rights occurring under the "limited circumstances" anticipated by this Court in prior rulings and set out in Virginia Code § 15.2-2307. For all of these reasons, the Trial Court's decision should be reversed.

ARGUMENT

I. THE CRUCIBLE CANNOT OBTAIN A VESTED RIGHTS DECISION FROM THE CIRCUIT COURT WITHOUT HAVING FIRST SOUGHT A VESTED RIGHTS DETERMINATION FROM THE ZONING ADMINISTRATOR.

The *Amicus* adopts the arguments, points and authorities contained in the Brief of the Appellants, Board of Supervisors of Stafford County, Virginia, and Stafford County, Virginia. In short, the General Assembly's amendment, in 1993, of Virginia Code § 15.2-2286, to add to the powers of Virginia's zoning administrators the power to make vesting determinations under Virginia Code § 15.2-2307 was in direct response to this Court's ruling in *Holland v. Board of Supervisors,* 247 Va. 286, 290-91, 441 S.E.2d 20, 22-23 (1991). The amendment leaves no room for doubt that the legislature intended that landowners proceed administratively before involving the judiciary in vested rights determinations. *Dick Kelly Enterprises v. City of Norfolk*, 243 Va. 373, 378, 416 S.E.2d 680, 683

(1992) (It is the "settled rule that *exhaustion of administrative remedies where zoning ordinances are involved is essential* before a judicial attack may be mounted against the interpretation of such ordinances.")(emphasis added); *Phillips v. Telum, Inc.*, 223 Va. 585, 589, 292 S.E.2d 311, 314 (1982) ("[A] zoning applicant in a case involving ordinance interpretation must exhaust administrative remedies by appealing to the appropriate board of zoning appeals before resorting to court action.").

II. CRUCIBLE DOES NOT HAVE VESTED RIGHTS TO PROCEED WITH ITS FACILITY BECAUSE IT CANNOT SATISFY THE REQUIREMENTS OF VIRGINIA CODE §15.2-2307.

A. IN VIRGINIA, LANDOWNERS GENERALLY HAVE NO PROPERTY RIGHT IN ANTICIPATED USES OF THEIR LAND SINCE THEY HAVE NO VESTED PROPERTY RIGHT IN THE CONTINUATION OF THE LAND'S EXISTING ZONING STATUS.

This Court has consistently recognized that "[p]rivately held land is subject to applicable local zoning ordinances whether enacted before or after the property was acquired. Landowners have no property right in anticipated uses of their land since they have no vested property right in the continuation of the land's existing zoning status." *Board of Zoning Appeals of Bland County v. CaseLin Systems, Inc.,* 256 Va. 206, 210, 501 S.E.2d 397, 411 (1998) (citing *Snow v. Amherst County Bd. of Zoning Appeals,* 248 Va. 404, 408, 448 S.E.2d 606, 608-09 (1994); *Town of*

Vienna Council v. Kohler, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978)).

However, in *limited circumstances*, private landowners may acquire a vested right in planned uses of their land that may not be prohibited or reduced by subsequent zoning legislation. *Id.* (citing *Holland v. Board of Supervisors,* 247 Va. at 290-91, 441 S.E.2d at 22-23)(emphasis added).

Now the ultimate question in this case is whether this private landowner, Crucible, acquired such a vested right prior to the enactment of subsequent zoning legislation merely on account of seeking verification of present zoning.

B. VIRGINIA CODE § 15.2-2307 REQUIRES A SIGNIFICANT AFFIRMATIVE GOVERNMENTAL ACT ALLOWING DEVELOPMENT OF A SPECIFIC PROJECT BEFORE A FINDING OF VESTED RIGHTS CAN BE MADE.

In 1998, the Virginia General Assembly amended Virginia Code § 15.2-2307, to expressly set forth the criteria that must be met in order for a claim of vested rights to be established. That section provides:

> [A] landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

> For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals 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.

Thus, the statute lists six specific actions that are deemed to be significant affirmative governmental acts allowing development of a specific project. Plainly, none of these actions took place in this case. [1]

C. PRE-1998 CASE LAW MAKES CLEAR THAT THE ZONING VERIFICATION FORM DOES NOT SUPPLY THE REQUISITE GOVERNMENTAL APPROVAL.

While the list enumerated in Virginia Code § 15.2-2307 was enacted in 1998 "without limitation," in considering the statute in *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d

[1] Although the Crucible subsequently submitted a site plan to the County, it was not approved because, *inter alia,* the storm water management plan was incomplete. J.A., pp. 250, ll. 4-9; 262, ll. 12-22; 263, ll. 1-19, 456-463; 502.

153 (2008), this Court reaffirmed that governmental approval of a project is still a prerequisite to rights vesting:

> The clear intent of the statute 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.

(Emphasis added). Plainly, then, pre-1998 case law is instructive when determining whether a given governmental action meets the "without limitation" clause of the statute, that is, when the action is not one of the six actions expressly enumerated in the statute.

This unremarkable proposition is supported by the Attorney General of Virginia, who in 2006 opined that prior case law not inconsistent with the statute is still applicable:

> Although *CaseLin* was decided before the 1998 amendment to § 15.2-2307 was enacted, to the extent it is consistent with § 15.2-2307, *it remains relevant to a vested rights analysis*; particularly, with respect to the unspecified governmental acts that the General Assembly has declared may give rise to a vested property right ...Therefore, previous case law on the identification of significant governmental acts remains dispositive on situations falling outside of the six enumerations of § 15.2-2307.

2006 Op. Att'y Gen. 80 at 4, n. 14 (Virginia October 19, 2006) (emphasis added).

As this Court is well aware, prior to the 1998 amendments to Virginia Code § 15.2-2307, the Court sought to establish a "bright line test" to enable landowners to determine the point at which they had acquired a vested right. *See Town of Rocky Mount v. Southside Investors, Inc.*, 254 Va. 130, 132, 487 S.E.2d 855, 856 (1997); *Holland*, 247 Va. at 292, 441 S.E.2d at 23.

Thus, in a case such as this, when none of the six enumerated actions apply, the Court should determine whether an approval meeting the high standard of Virginia Code § 15.2-2307 occurred, to wit, whether the "approval" was "an *official response* to a *detailed request* for a use of a particular property that would not otherwise be allowed under the law." *CaseLin*, 256 Va. at 212, 501 S.E.2d at 401.

As articulated by this Court in *Snow v. Amherst County Bd. of Zoning Appeals, supra*, the test requires the following:

> [A] landowner who seeks to establish a vested property right in a land use classification must identify a *significant official governmental act* that is manifested by the issuance of a *permit or other approval* authorizing the landowner to conduct a use on his property that otherwise would not have been allowed. Additionally, and equally important, our test requires that the landowner establish that he has diligently pursued the use authorized by the government permit or approval and incurred substantial expense in good faith prior to the change in zoning.

248 Va. at 407, 448 S.E.2d at 608 (emphasis added). And while the

issuance of special use and other permits was found to give rise to vested rights, this Court rejected "a number of claims of 'approval' within the meaning of the test giv[ing] further evidence that the scope of an "approval" is limited to an *official response* to a *detailed request* for a use of a particular property that would not otherwise be allowed under the law." *CaseLin*, (emphasis added).

One instance of the Court's rejection of a claim of "approval" was addressed in *Notestein v. Board of Supervisors of Appomattox County,* 240 Va. 146, 393 S.E.2d 205 (1990). Despite the county administrator, who was also the zoning administrator, stating to the landowners that the county had no legal basis to prevent the operation of a landfill on their property and the landowners securing financing for their project, this Court found the necessary governmental approval necessary for vesting lacking. *Id.* at 149, 393 S.E.2d at 206.

When the Notesteins began to pursue the process of developing a landfill on their property, no zoning ordinance existed which would prohibit the project. The county, however, subsequently adopted a new zoning ordinance which created numerous classifications and placed the Notesteins' property in an agricultural classification in which a landfill was not a permitted use, despite earlier assurances from county officials that

the ordinance would not impact the Notesteins' ability to develop and operate a landfill. The Notesteins sued. This Court ultimately held that the Notesteins had not acquired a vested right in the previous land classification because they had failed to identify a significant official governmental act to support their claim of a vested property right. *Id.* at 152, 393 S.E.2d at 208.

A year later, in *Town of Stephens City v. Russell,* 241 Va. 160, 399 S.E.2d 814 (1991), this Court applied the same principles to determine that the filing of a proposed subdivision plat and site plan, *neither of which had been approved* by the local planning commission as required by law, did not give rise to a governmental "approval" of the subdivision such that the plat or plan were vested under the new zoning ordinance. *Id.* at 164, 399 S.E.2d at 816 (emphasis added).

Later, in *CaseLin*, *supra* the board of supervisors, through its chairman, wrote state and regional agencies informing them of the board's support of CaseLin's medical waste incinerator project, and certifying that the project was "in accordance with all local ordinances." *CaseLin*, 256 Va. at 208, 501 S.E.2d at 399. Relying on those actions, CaseLin purchased land, contracted to build a road, and applied for the requisite state agency

approvals. The county administrator also wrote state agencies regarding CaseLin's permit applications. *Id.*

The board later rescinded its resolution amid significant citizen opposition. Finally, four years after rescinding its resolution, the board rezoned the land to a classification that did not permit the incinerator use. *Id.* at 209, 501 S.E.2d at 399-400. This Court still found governmental approval wanting. Recognizing that it had never before defined the term "other approval," this Court held that the context "impl[ies] that such 'approval' is of similar character and formality as a 'permit.'" *Id.* at 211, 501 S.E.2d at 400-01 (emphasis added).

> [T]he [zoning] administrator's certification that the location and operation of the planned incinerator were in accordance with the local ordinances was nothing more than a statement of the facts existing at that time, not an authorization to proceed.

Id. at 212, 501 S.E. 2d at 401. Of course, the same can be said of the Zoning Verification Form in this case.

D. THE ISSUANCE OF THE ZONING VERIFICATION FORM PLAINLY DOES NOT CONSTITUTE A SIGNIFICANT AFFIRMATIVE GOVERNMENTAL ACT.

When properly considered in accordance with the language of Virginia Code § 15.2-2307, and controlling case law (including *CaseLin*), it is clear that the Zoning Verification Form does not rise to the level of a

"significant affirmative governmental act allowing development of a specific project."

First, the completed form does not reflect a "significant" act at all. To the contrary, it reflects a rudimentary verification of the sort that is given on a daily basis by zoning staff throughout the Commonwealth of Virginia. Such verifications constitute no more than a competed form filled out at the request of a property owner or a potential purchaser, based solely on a request as to whether a particular use is permitted in a particular zoning district.

While in this case Crucible may have presented significant information to the zoning officer regarding its proposed use, the zoning officer would have been required to provide a response to Crucible's request had the request been made over the phone or in a one paragraph (or less) summary of the proposed use. *See* Virginia Code § 15.2-2286(A)(4)(The zoning administrator must respond to a request for a zoning decision or determination within ninety (90) days.)[2]

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[2] Notably, and if Crucible's arguments are to be accepted, ironically, the zoning verification form comes nowhere close to meeting the level of detail required when a zoning administrator makes a determination of vested rights under Virginia Code § 15.2-2286(A)(4), to wit, the zoning administrator is authorized to "make findings of fact, and with the concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under §15.2-2307."

There is no requirement in the Virginia Code that a zoning interpretation request be accompanied by any specific information, any plan of development or any timetable for completion, for example. It is simply a request as to whether the zoning ordinance *would* permit *a* particular use (in this case an anti-terrorist training facility as a "school"), not whether *the* particular use *is* permitted or "allowed." In this case, the Zoning Verification Form merely identified the current zoning classification of the property at issue and acknowledged that the proposed facility would meet the then-existing definition of a "school." The Zoning Verification Form also made clear that the zoning classification was "subject to change," and, therefore, could not remain in effect after such a change.

Second, a zoning verification is not a "governmental action" of the type enumerated in Virginia Code § 15.2-2307. For each of the six (6) acts deemed by the legislature to be significant affirmative governmental acts allowing development of a specific project, the act is taken by the entity or individual authorized by the Code of Virginia to approve the requested action, and only after the request is considered by the approving body or individual on its merits, and in accordance with the approval requirements set forth in the general laws.

For example, in the case of conditional and non-conditional re-zonings, requests are approved legislatively, and may only be approved by the local governing body after a recommendation is received from the planning commission, and after the statutory notice and public hearing requirements are met.[3]

Likewise, before a special exception or use permit is approved by the governing body or a board of zoning appeals (which are the only entities authorized to approve such permits), public notice must be given and a hearing held.[4] Before a variance is approved by a board of zoning appeals, the board must hold a public hearing to consider the merits of the application.[5]

Similarly, subdivision plats, plans of development, and site plans, while they may be administratively approved, may only be approved after the statutory requirements related to such reviews are met.[6] Once approved the plats are recorded in the land records.

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[3] *See, e.g.,* Virginia Code §§ 15.2-2285, 15.2-2286, 15.2-2296-2298 and 15.2-2303.

[4] *See, e.g.,* Virginia Code §§ 15.2-2286, 15.2-2309 and 15.2-2310.

[5] *See, e.g.*, Virginia Code §§15.2-2309 and 15.2-2310.

[6] *See, e.g.,* Virginia Code § 15.2-2246, ***Site plans [and plans of development] submitted in accordance with zoning ordinance***; § 15.2-2258, ***Plat of proposed subdivision and site plans to be submitted for approval***; § 15.2-2259, Local planning commission [or other agent] to act

By comparison, there are no similar statutory requirements governing administrative zoning verifications, and the reason is clear – because such verifications are not "approvals" for which submission and/or approval requirements are necessary. Zoning verifications are administrative actions taken prior to or at the beginning of the development process and are intended to advise an applicant of the current "lay of the land." They are not intended to be, nor are they, "significant governmental actions" that speak to the merits of any one particular application.

Third, the purpose of a zoning verification is not to ascertain whether a "specific project" *is* permitted in a particular zoning district, but only whether a specific "use" *would* be permitted. In practice, a request for a zoning verification may request confirmation as to whether a use is a legal non-conforming use or, as in this case, request a verification as to whether a use is included in a defined use included in a particular zoning district. Zoning verifications are, by their nature, limited to interpretations as to existing *uses*, not proposed *projects*.

While Crucible provided zoning staff with a presentation as to its proposed project, this information was not required, and did not, and could not, change the character and/or significantce of the zoning verification

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on proposed plat; § 15.2-2260 ***Localities may provide for submission of preliminary subdivision plats; how long valid***.

form. On the form, the director advised only that "your facility would be classified a 'school' by definition in the Stafford County Zoning Ordinance." Compared to the statements and assurances which this Court found *did not* constitute significant affirmative governmental acts in *Notestein* and *CaseLin,* the mere statement that Crucible's facility "would be classified a 'school'" falls far short of any "approval" of Crucible's the project.

In addition, while Virginia Code § 15.2-2307 provides that the approval of a site plan might constitute a significant affirmative governmental act, this Court held that the mere filing of a proposed subdivision plat and site plan, *neither of which had been approved* by the local planning commission as required by law, did not give rise to a governmental "approval" of the subdivision such that the plat or plan were vested under the new zoning ordinance. *Town of Stephens City v. Russell,* 241 Va. at 164, 399 S.E.2d at 816.

In this case, while a site plan was submitted to County staff for approval after the zoning verification was provided, it had not been approved because the storm water management plan was incomplete and Crucible never sufficiently completed the application for the review to occur. J.A. pp. 250, ll. 4-9, 262, ll. 12-22; 263, ll. 1-19; 456-463; 502. It is axiomatic that a zoning verification rendered prior to the submission of a

site plan cannot give rise to vested rights, when those same rights would not vest based on the mere submission of a site plan absent approval.

Finally, while the Trial Court appeared to appreciate that its ruling might elevate rudimentary zoning interpretations to a status reserved for only a "limited" number of acts, and attempted not to "make a generic ruling that all zoning verifications constitute vested rights" (Tr. at p. 176), the ruling did just that.[7] The Trial Court ultimately decided that "a determination by the zoning administrator that this facility would be classified a school by definition in the Stafford County zoning ordinance...constitutes a significant affirmative governmental act." Tr. at 180.

If the Trial Court's decision is not reversed, then administrative decisions made every day by zoning staff run the risk of being considered an "*official response* to a *detailed request* for a use of a particular property that would not otherwise be allowed under the law," *CaseLin*, 256 Va. at

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[7] Nor can the amount of time that passed between the issuance of the zoning verification form and the passing of the amendments to the zoning ordinance somehow be used to estop the County from applying the amended ordinance to the Crucible, as it well established that "estoppel does not apply to a local government when it acts in a governmental capacity, the capacity involved here." *Wolfe v. Board of Zoning Appeals*, 260 Va. 7, 18, 532 S.E.2d 621, 627 (2000).

212, 501 S.E.2d at 401, in clear contravention of the prior rulings of this Court, and the plain language of Virginia Code § 15.2-2307.

E. CRUCIBLE DOES NOT HAVE VESTED RIGHTS BECAUSE IT COULD NOT AND DID NOT RELY IN GOOD FAITH ON THE ZONING VERIFICATION FORM PURSUANT TO THE SECOND CRITERIA FOR A VESTED RIGHT IN VIRGINIA CODE § 15.2-2307.

The *Amicus* adopts Section III.B of the Argument contained in the Opening Brief of the Board.

F. CRUCIBLE DOES NOT HAVE VESTED RIGHTS BECAUSE IT DID NOT INCUR EXTENSIVE OBLIGATIONS OR SUBSTANTIAL EXPENSES IN DILIGENT PURSUIT OF A SPECIFIC PROJECT PURSUANT TO THE THIRD CRITERIA FOR A VESTED RIGHT IN VIRGINIA CODE § 15.2-2307.

The *Amicus* adopts Section III.C of the Argument contained in the Opening Brief of the Board.

CONCLUSION

Day after day, zoning administrators are asked for interpretations of the zoning ordinance and how the ordinance may apply to a particular property. Helping a property owner to understand the restrictions on his or her property is important and cannot, and should not, be elevated to the level of a determination that vests particular land use rights in the property owner.

In this case, the zoning administrator was asked to verify the existing zoning permitted on the property in question. A response was given that as of May 11, 2004, no variance or special permit was required and that the proposed use was consistent with the definition of a "school." The fact that this guidance was reduced to writing and placed on a form does not elevate the verification to the stature of an "approval" or a "grant" of authority to proceed as contemplated under Virginia Code § 15.2-2307.

The type of determination that is required for vested rights to attach is set forth in Virginia Code § 15.2-2286(A)(4); the zoning administrator is authorized to "make findings of fact, and with the concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under §15.2-2307." There is no evidence in the record that the verification of zoning provided on May 11, 2004, was a finding of fact regarding a determination of rights. There was no fact-finding done; all the form communicated was that activities then described fell within the definition of a school.

If this Court should hold that such routinely occurring communications between a zoning official and a property owner vests rights in that property, the decision would seriously hamper the important role that zoning officials play in bringing understanding and comprehension to a very detailed and

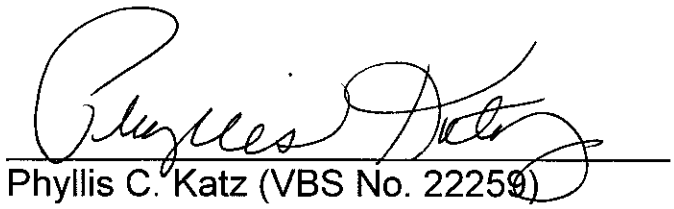
complex set of rules. A decision in favor of Crucible on this point would stifle any communications by zoning officials outside of the formal review and approval process embraced in the various sections of the zoning ordinance. Surely, this is not the result that the General Assembly contemplated when it enacted Virginia Code § 15.2-2307. Local governments must be able to provide guidance and advice to property owners to help them understand the implications of the zoning ordinances on what uses may be allowed and what structures may be erected on their property.

Both Virginia Code §§ 15.2-2286(A)(4) and 15.2 2307 embrace deliberative official actions based on detailed factual analysis and the application of the law which are made by the ultimate decision maker - the governing body or the subdivision agent. With the exception of approval of a subdivision plat, these types of decisions are made with public notice and an opportunity for adjacent property owners to express their opinions. They have a stature and dignity that a vesting of rights should have. The Zoning Verification Form at issue here can not as a matter of law rise to such a level. For these reasons, the decision of the trial court should be reversed.

Respectfully submitted,

LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

By Counsel



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RULE 5:26(d) CERTIFICATE

I, Phyllis C. Katz, counsel for Local Government Attorneys of Virginia, Inc., certify the following:

1. The Appellants are the Board of Supervisors of Stafford County, Virginia, and Stafford County, Virginia.

2. The address and telephone number for counsel for the Appellant is:

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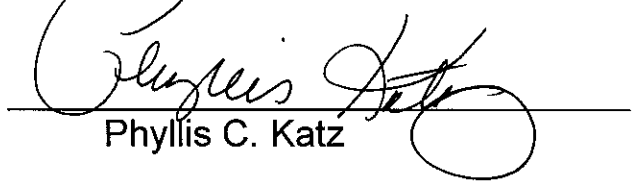
5. Twelve copies of this Brief Amicus Curiae of Local Government Attorneys of Virginia, Inc. were filed by hand delivery with the Clerk of this

Court on this 23rd day of February, 2009. An electronic copy of this Brief is being contemporaneously filed with the Clerk.

6. Three copies of this Brief Amicus Curiae of Local Government Attorneys of Virginia, Inc., were mailed, postage pre-paid, to counsel for the Appellant, and counsel for the Appellee at the addresses listed above on this 23rd day of February, 2009.



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