In The

Supreme Court of Virginia

RECORD NO.: 091502

AROGAS, INC. and PAT MANNING,

Appellants,

v.

FREDERICK COUNTY BOARD OF ZONING APPEALS

and

FREDERICK COUNTY BOARD OF SUPERVISORS,

Appellees.

REPLY BRIEF OF APPELLANT

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The arguments of Appellees and Amicus distract from the two basic issues—whether the challenged proffer was void ab initio and, if not, whether the court should interpret the proffer. Both characterize the issue as whether the rezoning ordinance itself, in its entirety, is void. (See Appellees' Br. at 10-11 n.2; Amicus Br. at 7-8, 29.) The question raised, however, has always been whether the challenged proffer was void. (See Amicus Br. at 2.) The question is proper, and, under the governing laws and the undisputed facts, the proffer was void ab initio. Without providing authority, Appellees and Amicus largely either make unsupported assertions or attempt to distinguish Appellants' cases on nonmaterial or nonrelevant bases, misinterpreting the law and mischaracterizing the facts and the issues.

I. MISSTATEMENTS OF THE UNDERLYING PRINCIPLES

Appellees assert that a proffer must be substantively illegal or invalid, not just procedurally invalid, in order to be void ab initio. (Appellees' Br. at 10-11 n.2.) Amicus, similarly, while admitting that a failure to follow a statutory requirement is fatal, asserts that proffers are void only where the enacting body was without the legislative power to act and that a failure to follow a local requirement is harmless unless a "substantive," as opposed to a procedural, challenge can be raised. (Amicus Br. at 16-17, 18, 22-23.) These assertions are simply wrong since it is well established that a board which does not

comply with its own code requirements, whether procedural or substantive, exceeds it authority, and the defective provision is, therefore, rendered void. (Appellants' Br. at 17-18 (quoting Northampton County Bd. of Zoning Appeals v. E. Shore Dev. Corp., 277 Va. 198, 202-03, 671 S.E.2d 160, 162-63 (2009); Chang v. Bd. of Suprv'rs of Fairfax County, 26 Va. Cir. 456, 1988 WL 619146, at *2-4 (1988)). Because the Board of Supervisors ("Board") was without authority to accept an amended proffer after the close of the public hearing, that portion of the rezoning is void.

Certainly, the effect of finding any legislative provision invalid can be profound (see Amicus Br. at 25), particularly if the entire ordinance or statute were to be invalidated due to a defect in only one part, as suggested by Appellees and Amicus, but the effect of enforcing an invalid provision can also be profound. To balance competing policies of finality and validity, the law insists that invalid provisions must be excised but only to the extent necessary to ensure the validity of the remainder. The argument that the invalidity of a severable portion of an ordinance requires invalidation of the entire ordinance (see Appellees' Br. at 10-12 & n.2; Amicus Br. at 25, 29) is, therefore, wholly contrary to the law and to good reason. (See Appellants' Br. at 24-28.) Invalidation of the whole rezoning ordinance would result not only in the injustice of drastically reducing Appellants' property value, which was

purchased in reliance on B-2 permitted uses, but would undoubtedly deny other landowners their constitutional rights to due process and equal protection by changing the parts of the classification of their property which were properly enacted, all without notice or an opportunity to be heard.

Striking down provisions whose enactment involved the violation of a procedural requirement would be wholly salutory by incentivizing adherence to all legal requirements. Failing to do so would encourage localities to not take code requirements seriously and would result in inevitable contempt for the law. Finally and importantly, severance of the invalid proffer in the present case would, in fact, return the rezoning to conformity with the uniformity requirements of the statute.

II. MISINTERPRETATION OF THE ORDINANCE REQUIREMENT

After quoting the language of the ordinance, including the provision that "[f]inal proffers shall be received in writing, signed . . . at least five (5) days prior to the advertised hearing," Appellees argue, essentially, that the ordinance really means that "proposed" proffers must be submitted for consideration and possible revision. (See Appellees' Br. at 14-15.) The ordinance, however, is unambiguous. (A. 252.) When the language of a provision is unambiguous, the courts are bound by its plain meaning and may not assign a construction that amounts to holding that the drafters did not

mean what they actually said. E.g., Dodge v. Trs. of Randolph-Macon Woman's Coll., 276 Va. 10, 15-16, 661 S.E.2d 805, 808 (2008). Appellees' argument turns the proffer submission requirement on its head by redefining "final" as "final before the hearing" or as "proposed," or as "final before revision"—in other words, as "not necessarily final."

Assertions that the ordinance does not provide that submitted proffers cannot be amended (see Appellees' Br. at 15; Amicus Br. at 14) are surprising, given the ordinance's unambiguous terms. Since a proffer which is later changed is, by definition, not final, and since the undisputed facts clearly establish that the proffer submitted before the hearing was changed after the hearing, Appellees' further assertion that the Amended Petition fails to state that the requirement was not met is disingenuous at best (see Appellees' Br. at 15), since the very basis for the challenge has always been, precisely, that the requirement was not met.

More importantly, the suggested interpretation defeats the very purpose of the County ordinance requirement. While Appellees and Amicus attempt to characterize the requirement as a merely administrative or housekeeping detail (see Appellees' Br. at 14-17; Amicus Br. at 14-15, 22), its larger purpose, also reflected in the governing statutes, is to ensure transparency and accountability at all stages of the process. This is particularly relevant to

rezoning, as the court explained in distinguishing zoning actions, where the purpose of notice requirements is to invite the views of residents generally:[1]

> A rezoning is a different matter. The purpose of the notice provisions is to attract specific persons to the hearing, i.e. the landowner of the parcel affected by the zoning change and his adjacent neighbors. Since the decision of the Board is deemed to affect not only the landholder but his neighbors also, they are as important to the process as the landowner directly affected. The defect in notice in these cases is jurisdictional.

Chang, 1988 WL 619146, at *2-4. Moreover, as the court went on to state, boards of supervisors are bound by their own rules—including procedural rules. Id. at *4; (see also Appellants' Br. at 16-18). Therefore, even if proffer changes were allowed under the statute, because they were prohibited under the County ordinance and nevertheless made, the challenged proffer is void.

Contrary to the assertion by Amicus that prohibiting changes in proffers after they are submitted would be inconsistent with the underlying policies of the statute (see Amicus Br. at 15), such prohibition serves the underlying policies well. It ensures transparency and precludes last-minute dealings in which applicants may feel compelled to make changes, ensures carefully and thoughtfully submitted proffers, and ensures the opportunity for interested and

[1] The argument of Amicus that governing bodies should be able to consider input from citizens prior to taking action relies on the statutory provisions applicable to zoning actions. (See Amicus Br. at 9-10 & n.1.) Since only rezoning allows proffers, the considerations necessarily are different, as both statutory and County provisions indicate.

affected persons to participate meaningfully so that they will not be affected by changes without notice or the chance for public comment.

Although Appellees argue that the requirement is not really a notice requirement (see Appellees' Br. at 16-19), it is difficult to ascertain what else it could be—particularly in light of the fact that proffers which are properly accepted under the statutory scheme are intended to be as much a part of the rezoning as any other part of the ordinance, including district classification. See Va. Code Ann. §§ 15.2-2303(A), 15.2-2297(A). Having notice of what proffers will attach can be equally as important as having notice of district classification changes—particularly where, as here, the proffer actually prohibits uses otherwise allowable in the district. For example, if a "final" proffer were submitted to require a 400-foot setback in order to mitigate noise or odor issues and then changed after the hearing to a 100-foot setback, persons who might object to the latter, but not to the former, would lose the opportunity to object. It is for that very reason that the County provision that proffers submitted before the hearing be final is a substantive requirement[2]

[2] While Appellees and Amicus clearly do not view the requirements for submission and amendment of proffers as substantive, the requirements do clearly address substantive matters, particularly when they implicate the zoning scheme by affecting permitted uses. In fact, using proffers as a means of disallowing otherwise permitted uses would necessarily violate statutory uniformity requirements. (See Appellants' Br. at 49 n.13.)

and that, even under the statutory amendment, only changes that do not materially affect the overall proposal can be made to the original proffer.

It is undisputed that the proffer which was submitted before the hearing disallowed all diesel fuel sales. The final proffer disallowed only sale of diesel fuel to over-the-road truck carriers. Any neighbor who would have been satisfied with no diesel fuel sales, but not with some diesel fuel sales, would not have had the information needed in order to determine whether to attend the public hearing.

III. MISINTERPRETATION OF THE REZONING STATUTES

While the statutes provide particular flexibility for conditional zoning (Amicus Br. at 11-12), they also impose correlative restraints, undoubtedly for the very purpose of protecting against abuses. Thus, while the more general statutory provision on zoning provides that the governing body may make appropriate changes or corrections after the public hearing,[3] the more specific one provides that the governing body may accept amended proffers once the public hearing has begun only if they do not materially affect the overall proposal. Va. Code Ann. §§ 15.2-2303(A), 15.2-2298(A). There are three reasons why the argument by Amicus fails. First, the 2006 amendment of

[3] (Amicus Br. at 11-12 (quoting Va. Code Ann. §§ 15.2-2285(C), 15.2-2296) (without citation)).

§ 15.2-2303 cannot properly be applied to the rezoning in issue, which occurred in 2004. Second, even if it were applicable, the result would not change, because the amended proffer did materially affect the overall project. (See Amicus Br. at 4.) Finally, even if the Board's action complied with the statutes, that does not negate the Board's obligation to comply with its own code requirements.

Amicus asserts that the 2006 amendment was merely a clarification of existing law, rendering the Board's 2004 actions legitimate. (Amicus Br. at 13.) The law, however, is directly contrary. (See Appellants' Br. at 22-23.) In fact, it has long been the rule that legislation is presumed to effect a change unless there is a clear indication that the intent was merely to declare or explain existing law. See City of Richmond v. Sutherland, 77 S.E. 470, 472 (Va. 1913); Cooper v. Adler, 44 Va. App. 268, 280-81, 604 S.E.2d 747, 753 (2004). As this Court explained in concluding that another amendment effected a change, rather than merely a clarification, "[n]othing in the 2003 amendment, such as the words 'declaratory of existing law,' indicates that the General Assembly enacted the amendment as a clarification of existing law. Therefore, applying the presumption, we conclude that a change in the law, not a clarification, was intended by the amendment." Horner v. Dep't of Mental Health, 268 Va. 187, 193, 597 S.E.2d 202, 205 (2004); see also

Chappell v. Perkins, 266 Va. 413, 420, 587 S.E.2d 584, 587-88 (2003) (same).

While Amicus notes the principle that where the law is amended in response to a need for interpretation it constitutes a clarification, rather than a change, in the law (see Amicus Br. at 13-14), it points to no decision even addressing the interpretation of the relevant provisions. Given the presumption that the legislature chose the language of the above provisions intentionally, the absence of an indication of need for interpretation, and the absence of any words in the amendment indicating that it was intended to be merely declaratory of existing law, the presumption that the 2006 amendment effected a change clearly applies, requiring prospective-only application.

Even under the amendment, the provision that amended proffers may be accepted "once the public hearing has begun" implies that they must be offered during the public hearing, while there is still an opportunity for the public to comment. (See Appellees' Br. at 16.) Finally, even if the Board's actions were proper under the statutory provisions, they were improper under the County provision, and both must be complied with in order to enact a valid rezoning. (Cf. Appellees' Br. at 15-16, 19; Amicus Br. at 14-15.)

The policies behind conditional zoning, rather than negating procedural requirements (see Amicus Br. at 12, 15), actually heighten the need for such

requirements. The very fact that conditional zoning allows imposition of constraints that do not apply to other land similarly zoned makes it even more important that all affected parties be informed and have the opportunity to be heard. The very power to zone is based on the exercise of the police power, in accordance with a comprehensive zoning plan which imposes mutual restrictions and confers mutual benefits on property owners uniformly within each district. San Remo Hotel L.P. v. City of San Francisco, 27 Cal. 4th 643, 675, 41 P.3d 87, 108-09, 117 Cal. Rptr. 2d 269, 294-95 (2002). There is a wide difference between those social compact zoning actions and rezoning which prohibits one owner from doing what other owners in the same district are allowed to do—because that power is particularly susceptible to abuse, based on the pleasure of neighbors or the whim of decision makers. Nowhere is that susceptibility more problematic than in the use of "voluntary" proffers.[4] See, e.g., Mears v. Town of Oxford, 52 Md. App. 407, 416-17, 449 A.2d 1165, 1171-72, cert. denied, 294 Md. 652 (1982). Accordingly, all procedural requirements for conditional rezoning must be strictly complied with.

There is therefore no merit to the argument that so long as the district classification, as advertised and as passed, is the same, the requirement that

[4]The concept of "voluntary" proffers is essentially a legal fiction and, under certain circumstances, may constitute unconstitutional conditions. (See Appellants' Br. at 27 n.10.)

a change to more intensive use be advertised is not triggered.[5] (See Appellees' Br. at 17; Amicus Br. at 4 (acknowledging that ordinance proffer allows a more intensive use than the submitted proffer).) That argument would have merit only if accepted proffers were not enforceable parts of the ordinance, which is clearly not the Appellees' position, as this very action arose from the zoning administrator's attempt to enforce his interpretation of a proffer.

A B-2 district proffered to exclude the sale of diesel fuel is, in fact, a different use classification from a B-2 district which allows the sale of diesel fuel. (Cf. Appellees' Br. at 17.) The latter, although otherwise permitted in B-2 zoning, results in a more intensive use. When a more intensive use than that submitted and put forward at a public hearing is enacted, whether by classification change or by amended proffer, it not only violates the procedural requirements imposed by law but also negates the provision in Va. Code Ann. § 15.2-2303 that proffers are part of the ordinance.

[5]Conditional rezoning provisions, which allow conditions to be placed on permitted uses, must be distinguished from special uses, which are not permitted in a particular district except by grant of a special exception. Va. Code Ann. § 15.2-2201.

IV. RECHARACTERIZATION OF ISSUES AND/OR FACTS

Both Appellees and Amicus erroneously assert that Appellants "stand in the shoes of the Sempeles with regard to the rezoning" (Appellees' Br. at 23; Amicus Br. at 5, 27) and therefore look to time of passage for standing. (Appellees' Br. at 22.) Whether or not the statement might be correct as to the 30-day limitation on a reasonableness challenge to a rezoning, it is clearly incorrect as to a validity challenge, which can be brought at any time. (See Appellants' Br. at 13-14.)

Courts that have addressed the standing of a subsequent "owner" to challenge the validity of a zoning provision have found standing. See, e.g., Henrico County v. F. & W., Inc., 222 Va. 218, 278 S.E.2d 859 (1981) (option sufficient); Renard v. Dade County, 261 So. 2d 832, 838 (Fla. 1972) (any affected person or property owner has standing to challenge zoning ordinance provision which is void because not properly enacted); Kioutas v. City of Chicago, 59 Ill. App. 2d 441, 445-46, 208 N.E.2d 587, 589 (1965) (any property owner has right to question validity of zoning provision restricting his use of property). Clearly, a subsequent owner whose property is subject to an invalid provision, or who is subjected to enforcement of a provision based on an invalid interpretation, is aggrieved and has standing to challenge the provision.

Appellees, further, attempt to reframe the issues by arguing that Appellants had failed to allege that advertising was defective or that written proffers were not timely provided. (See Appellees' Br. at 18.) The implication that Appellants did not allege a violation of the ordinance is patently incorrect. Appellants have always alleged that the final written proffer was not provided five days before the hearing, was amended after the public hearing was closed, and was not signed until six days after the vote. (A. 88, 324-30.) The important distinction between a proffer and a final proffer is at the very core of the validity issue and Appellants' cause of action.

Additionally, Appellees' attempt to make the lower court's decision look reasonable by characterizing its requirement that Appellants go back through the review process as an opportunity for them to provide input before the administrator makes his determination (see Appellees' Br. at 26-27) ignores the critical fact that he has already interpreted the proffer to disallow the use. (See A. 64-65, 216, 224, 201-04, 223-24, 237-29, 241; see also Amicus Br. at 1 (administrator determined that plans contemplated sale of diesel fuel to over-the-road trucks).)

Appellees and Amicus, finally, continue to imply—contrary to facts—that the sale of diesel fuel to trucks is disallowed and, therefore, truck stops are disallowed. (See Appellees' Br. at 2, 10; Amicus Br. at 1, 5.) Quite to the

contrary, truck stops are specifically authorized in the B-2 district, and the rezoning proffer excepted only uses involving "the retail and wholesale of diesel fuel for over-the-road truck carriers." (A. 89, 249-314.) Therefore, should the Court determine that the proffer was not void ab initio, the issue before the Court will be the meaning of "over-the-road truck carriers" and its application in this matter.

Accordingly, for all of the above reasons, as well as those presented in Appellants' initial brief, this Court should grant the Appellants the relief requested.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 5:26(d)

I hereby certify, pursuant to Rule 5:26(d) of the Supreme Court of Virginia, that fifteen (15) copies of Appellants' Reply Brief have been hand-delivered for filing with the Office of the Clerk of the Supreme Court of Virginia, together with an electronic copy of the same, and that three copies of the Appellants' Reply Brief have been mailed to:

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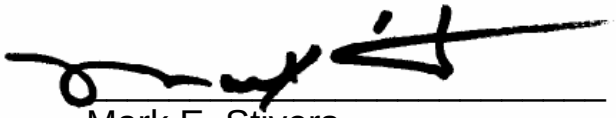

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