IN THE

Supreme Court of Virginia

RECORD NO. 181043

LOCH LEVAN LAND LIMITED PARTNERSHIP;
WELLESLEY LAND LIMITED PARTNERSHIP;
HHH LAND, LLC; and HHHUNT CORPORATION,

Appellants,

v.

BOARD OF SUPERVISORS OF HENRICO COUNTY,
VIRGINIA and THE COUNTY OF HENRICO,

Appellees.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

This case is about Henrico County's attempt to deprive HHHunt of its vested rights in completing a road that is integral to its Wyndham development. Vested rights are individual property and liberty interests protected by the Virginia and United States Constitutions.[1] The Virginia General Assembly has enshrined the doctrine of vested rights variously in Title 15.2 of the Code of Virginia to protect the liberty interests of land developers from unjustified local government interference. Even before its codification, this Court has applied the vested rights doctrine in the land use context and advanced the doctrine's aim to provide certainty, stability, fundamental fairness, and secure the reasonable investment-backed expectations of landowners.

HHHunt has for decades made clear to Henrico County its plans to extend Dominion Club Drive into Hanover County. This was depicted on the first conceptual maps submitted to the County in 1989 to obtain zoning approval for Wyndham. Several subdivision plats later submitted to the County also depicted Dominion Club Drive extending into Hanover County. And until 2017, and the filing of this litigation, the County required HHHunt to bond the entirety of Dominion Club Drive. The County even required

[1] *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 (1992); *School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 39 (1987).

HHHunt to first dedicate and maintain a bond on the uncompleted portion of Dominion Club as a condition for completion of certain subdivision communities within Wyndham.

The County offers several flawed legal claims and constructions of statutory language to justify its trammeling of HHunt's vested rights in the name of political expediency. But HHHunt's vested rights and liberties should not be made subject to the vicissitudes of political conflict. If allowed to stand, the circuit court's ruling endorsing the County's overreach would eviscerate HHHunt's vested rights and defeat the policy goals of the vested rights doctrine recognized by this Court and the General Assembly. That ruling should be reversed.

I. HHHunt possessed a vested right to the continuation of Dominion Club Drive under Va. Code § 15.2-2261.

The County spills much ink addressing ancillary issues and attacking strawmen by citing various canons of statutory construction. Yet, at its heart this case turns on the application of Virginia Code § 15.2-2261(F). That the County would attempt to draw attention elsewhere is understandable as its application of § 15.2-2261(F) falls apart under scrutiny.

A statute must be read fairly and reasonably in light of the specific facts and circumstances. A. Scalia & B. Garner, *Reading Law*: *The*

Interpretation of Legal Texts § 33–41 (2012) (stating statutory text should be read fairly in light of context, not in a hyperliteral manner that "kills the text"). The reader must also consider the "purpose for which a statute is enacted" as this is of "primary importance in its interpretation or construction." *Luttrell v. Cucco*, 291 Va. 308, 313 (2016) (quotation marks and citation omitted). Indeed, when interpreting a statute, the words used "should receive their ordinary acceptation and significance, where such construction is consonant, and not at variance, with the purpose of the statute." *Id*. (quotation marks, citation, and alteration omitted).

Attempting to persuade the Court to adopt its reading of the statute, the County ignores the statutory purpose as expressed plainly by the text. Because of the housing crisis and the numerous challenges faced by homebuilders, the General Assembly amended § 15.2-2261 by adding subsection (F). This provision provides:

> An approved final subdivision plat that has been recorded, from which any part of the property subdivided has been conveyed to third parties (other than to the developer or local jurisdiction), shall remain valid for an indefinite period of time unless and until any portion of the property is subject to a vacation action as set forth in §§ 15.2-2270 through 15.2-2278.

Va. Code § 15.2-2261; *see also id*. § 15.2-2209.1 (extending approval periods in for §§ 15.2-2260 and 15.2-2261 "to address housing crisis").

Endorsing a cramped reading of the text, the County contends that subsection (F) does not apply because HHHunt recorded the subdivision plats dedicating the road network necessary for the Wexford and Manor Park subdivisions separately from the plats dedicating the subdivision lots. (Appellee's Br. at 16.) It makes this claim even though it *required* HHHunt to dedicate the roads servicing the subdivisions first. So, under the County's reading, a developer has an indefinite period in which to build the dedicated lots, but it must build the roads necessary for the subdivision to function within 5 years. This reading of the statute, however, entirely negates the purpose for which subsection (F) was enacted—to address problems associated with the housing crisis, such as the lack of demand for housing and the inability of home builders to obtain financing. *See generally Simultaneous Distress of Residential Developers and Their Secured Lenders*: *An Analysis of Bankruptcy and Bank Regulation*, 15 Fordham J. Corp. & Fin. L. 617 (2010).

Indeed, under the County's theory, an insolvent developer would have its plat showing the planned community's lots deemed valid indefinitely. But if the developer could not muster the financing to build the roads necessary to service the community within 5 years because the roads were dedicated on a separate plat, the relief granted it by the statute

would be illusory.[2] Under that theory, this result would obtain even though the roads were depicted on all approved plats, *even the plats dedicating the subdivided lots*. This Court should not countenance such an absurd construction. *See Meeks v. Commonwealth*, 274 Va. 798, 802 (2007) ("The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results.").

Furthermore, the facts adduced at trial showed that as a procedural matter HHHunt filed the plats in the logical order required by the County, and the plats depicting the subdivision road system and lots were *in pari materia* and inextricably linked. HHHunt recorded Plat 1-C-1, which dedicated the right of way for Dominion Club Drive extending to the Hanover County line, as well as the other roads that formed the skeleton of the community. (J.A. 829; 1066; 1716.) HHHunt then recorded the plat for

[2] The County surprisingly tries to defend its claim by pointing out that § 15.2-2261(C) grants developers the right to "commence and complete" a development within a five-year period and a developer "would surely build [the roads for the development] within the five-year period." (Appellees' Br. at 16.) Through this statement, the County itself proves HHHunt's point—the County's interpretation of the statute is contrary to the intent of the General Assembly. The hypothetical insolvent homebuilder mentioned above would be unable to take advantage of the "indefinite period of time" provided by subsection (F) because it would still have to expend substantial resources to build the subdivision road system or lose the ability to build the subdivision at all.

the Wexford community lots, which also depicted Dominion Club Drive. (J.A. 1068.) HHHunt filed the plats in this order because Condition 20 of the County's approval letter stated that acceptance of the Wexford plat was conditioned on the dedication and construction of the roads necessary for the subdivision. (J.A. 1067–68.)

Similarly, HHHunt recorded Plat 1-C-2 that showed Dominion Club Drive extending into Hanover County. (J.A. 1069–70.) Next, HHHunt recorded the subdivision plat for Manor Park, which also depicted the already dedicated Dominion Club Drive. (J.A. 1717–18.) HHHunt recorded the plats in this order because the County imposed the following condition: "The Final Phase Of Dominion Club Drive Must Be Dedicated And Bonded Prior To The Recordation Of This Development . . . No Exception Will Be Granted, So Plan Your Schedule Accordingly." (J.A. 1723.)

These facts—and common sense—lead ineluctably to the conclusion that the plats depicting the subdivision road network are inseparably linked to the plats depicting the subdivision lots. The language of the statute and its clear purpose show that the General Assembly was concerned with the practical realities of land development and the statute must be applied in that light. *See Abramski v. United States*, 573 U.S. 169, 183 (2014) (explaining that statute should be construed in light of the practical realities,

rather than "legal niceties"). By permitting the County to sever the road dedication plats from the community plats (which also depicted the roads), the circuit court ignored the General Assembly's goals and the reality of land development. (Br. of Amici at 9.) This Court should reverse.[3]

II. HHHunt possessed a constitutionally vested right to the continuation of Dominion Club Drive.

On brief, the County takes issue with HHHunt's claim to have a constitutionally vested right in the continuation of Dominion Club Drive. It even seems to cast doubt on whether such a constitutionally protected right exists. This Court has found that vested rights generally emanate from the due process clause of the Virginia Constitution. *School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 38 (1987). Applying the doctrine in the land use context, and implicitly recognizing the right as constitutionally based, the Court has found that "[a] vested right in a land use is a property

[3] In its Opening Brief, HHHunt pointed out that the County's interpretation of § 2261 would defeat the General Assembly's goal of protecting land owners from arbitrary local government action. HHHunt noted that under the County's view of the statute a developer could record his plats in reliance of § 15.2-2261(F), but if he waits more than 5 years to begin the development of the community and does not complete the roads within that time-period, the County could stop the project by abandoning the roads that would provide "access to the development." (Op. Br. at 29–30.) The County's response is essentially, "So what?" It claims that § 15.2-2261 contemplates this absurd result because the statute says "nothing about access." (Appellees' Br. at 22.) The County again ignores the realities of land development, and the General Assembly's purpose, in favor of securing power to impair developers from exercising their vested rights.

right which is created and protected by law." *Holland v. Johnson*, 241 Va. 553, 556 (1991).[4]

The County then claims that even if a constitutionally based vested right exists, it somehow cannot apply here because this case involves a public road abandonment under Title 33.2. In making this argument, the County continues its claim that Dominion Club Drive was not built as part of a subdivision plat protected by § 15.2-2261(F) and thus subject only to the vacation procedures of Title 15.2.

That said, while the circuit court correctly recognized constitutionally based vested rights exist in the land use context, it incorrectly held that HHHunt possessed no vested rights because it failed to diligently pursue the construction of Dominion Club Drive. This narrow focus caused the Court to ignore the undisputed evidence demonstrating that HHHunt diligently pursued that construction by taking actions and expending funds to build the entire Wyndham development, of which the construction of Dominion Club Drive and its connection to Hanover County are an integral part. This included diligently pursuing property in Hanover County on which to build the Hanover section of Wyndham.

[4] The United States Supreme Court has identified the Takings Clause as another source for vested rights in property. *See Landgraf v. USA Film Prods*., 511 U.S. 244, 266 (1994).

The County, however, argues that this Court must use a microscope rather than a telescope to evaluate HHHunt's diligence in pursuing its rights in the development, and claims HHHunt's activities in planning and building other portions of Wyndham are irrelevant. The County's claim entirely ignores *Herbert v. Board of Zoning Appeals*, where this Court found a land owner possessed vested rights in an entire project despite a significant delay in developing specific sections of the development. 266 Va. 137, 147 (2003). The Court explained that the expense and effort expended developing some, but not all, portions of a 310-acre tract qualified as diligent pursuit of the entire development. *Id*. at 147–49 (finding that "regular, although not constant, events occurring in the period of some [14] years" was sufficient to confer a vested right to complete the entire project).

Regarding the unfinished portion of Dominion Club Drive specifically, HHHunt made substantial expenditures by posting a performance bond for many years. The County dismissed this with a wave of its sovereign hand, but as the Court recognized in *Herbert*, any affirmative action, such as expenditures in preparation of construction, demonstrates diligence. The County's insistence that HHHunt surrendered its vested rights to complete the road by not building it to the Hanover County line years earlier—when it

was impracticable to do so—is simply contrary to this Court's precedent.[5]

III. Because HHHunt's right to complete Dominion Club Drive was vested under Virginia Code § 15.2-2261(F), only the vacation procedures of Title 15.2 could apply.

The County's use of Title 33.2 to abandon a sliver of Dominion Club Drive was entirely improper and contrary to the purpose of § 15.2-2261(F). As noted, because of the struggles facing developers during the housing crisis, and to further protect developers from overreaching local governments, the General Assembly provided in § 2261(F) that an approved plat could be vacated only pursuant to the procedures in Title 15.2. These protections for developers are significant, which is why the County formulated its bizarre theory to separate the plats dedicating the subdivision road systems from the communities to which they are linked.

Indeed, under Virginia Code § 15.2-2270(2), "no interest shall be

[5] The County's portrayal of a performance bond as being little more than administrative paperwork with no legal significance is puzzling. The County insisted that HHHunt dedicate and bond Dominion Club Drive before it would approve the Manor Park subdivision plat. (J.A. 1723.) In addition, on February 1, 1996, HHHunt asked the County to release the bond for the completion of Dominion Club Drive because the project had been "postponed indefinitely." (J.A. 490.) The County refused, saying it would not release the bond until HHHunt had completed the road. (J.A. 491.) The County also periodically increased the amount of the performance bond for completion of the road and demanded the bond's renewal as recently as 2015. (J.A. 2143–44.) The County cannot shut its eyes to the fact it demanded that HHHunt expend substantial resources to maintain a performance bond on a road the construction of which it now claims is useless and must be stopped.

vacated in an area in which facilities, for which bonding is required . . . have been constructed." Because HHHunt had spent hundreds of thousands of dollars on performance bonds securing construction of Wyndham, its subdivisions, and Dominion Club Drive the County knew it could not vacate the road under this provision. Moreover, even if the County had used this provision, HHHunt could have appealed the decision to the circuit court. And under § 15.2-2270(2), any vacation decision is subject to reversal if "the owner of the property, which has been developed or is to be developed in accordance with the approved site plan, will be *irreparably damaged*." Va. Code § 15.2-2270(2) (emphasis added). The County knew that HHHunt could readily establish irreparable harm. So, understanding it could not achieve the goals of its politically motivated scheme through Title 15.2, it conjured up its legal theory of abandoning the road under Title 33.2. In doing so, the County attempted to circumvent the protections afforded by Title 15.2 and strip HHHunt of its vested rights. This Court should preserve the rights afforded to HHHunt by Title 15.2 and reverse.

IV. Contrary to the County's representations, the trial court found that the abandonment was a "legislative action."

The County characterizes HHHunt as having "confusion about the trial court's ruling" because the "trial court did not find that the abandonment was legislative in nature and subject to the fairly debatable

standard." (Appellees' Br. at 35.) But that simply is not true. While the circuit court referenced *de novo* review and the considerations of public necessity and welfare found in § 33.2-920, it concluded that it was reviewing a "legislative action." (J.A. 1665–66.) In stating that it was reviewing a legislative act, it noted that it considered whether the board's "action was arbitrary and capricious." (J.A. 1666.) Further, the court said, "[a]s this was a legislative action, the standard of proof is clear and convincing." *Id*.

The record reveals that the trial court erroneously blended the standard applicable to a review of an abandonment under Virginia Code § 33.2-920 with the standard of review for a legislative act. The seeds of this confusion were sown by the County's own argument at trial that its action in abandoning the road under Virginia Code § 33.2-920 was a legislative act. In its opening, the County argued that the abandonment was legislative in nature, and referenced case law to the Court that held legislative actions must be upheld if fairly debatable. (Tr. of 3/26/18 at 42–43 (referencing *inter alia Indus. Dev. Auth. of City of Richmond v. La France Cleaners & Laundry Corp*., 216 Va. 277, 282 (1975).) And in closing, the County argued that even though the statute expressly required *de novo* review, the court was still "a judicial body reviewing a legislative action." (Tr. 3/29/18 at 1027.)

There is further evidence in the record that the trial court did not, in fact, conduct a *de novo* review as required by § 33.2-920. While referencing § 33.2-920, the court stated: "One could argue that with future development in Hanover County the welfare of the public would be best served by the road, but I don't think the statute was de[signed] to make judges the transportation planners for future development." (J.A. 1665–66.) But that is precisely what the statute does because of the General Assembly's distrust of local government decision making in this specific context. In fact, the statute grants to the circuit court the authority to appoint "viewers to make such investigation and findings as the court requires of them." Va. Code § 33.2-920.

Despite the County's protestations, the record shows that the circuit court's application of § 33.2-920 was plainly in error. This provides an additional ground for reversal.

V. The County's decision to abandon Dominion Club Drive was arbitrary and capricious.

The County argues forcefully that its decision to abandon Dominion Club Drive was reasonable and not a purely politically motivated decision. As support, the County first points to evidence showing that over 2,000 Wyndham residents signed petitions opposing the road extension. (Appellees' Br. at 37.) But "[t]he simple fact that community members

oppose a landowner using his land for a particular purpose is not a legally sufficient reason" to stop construction that has been planned for decades. *Amoco Oil Co. v. City of Minneapolis*, 395 N.W.2d 115, 118 (Minn. App. 1986).

It is also notable that from the beginning, the County was working hand in hand with Wyndham residents to develop a strategy to prevent HHHunt from completing Dominion Club Drive. At the behest of County Supervisors, the County Attorney's Office counseled Wyndham residents to petition the Board of Supervisors to remove part of Dominion Club Drive from the County's Major Thoroughfare Plan and have the removed section abandoned. (J.A. 1423–26.)

The County also points to evidence regarding traffic congestion on Dominion Club Drive. But this testimony was simply that if the road was extended to Hanover County there would be more cars using the road; thus, there may be a higher potential for accidents. (J.A. 1282, 1316.) This evidence proves nothing. The same could be said for the construction of any new road or an extension of an existing road.

The evidence adduced by HHHunt showed that it had decades earlier anticipated an increase in traffic volume when Dominion Club Drive was completed. (J.A. 847; 921.) Thus, Dominion Club Drive was designed and

built to handle far greater traffic than currently exists. The small increase in traffic associated with the age-restricted portion of Wyndham would remain well within the road's design and construction specifications. (J.A. 936–39; 1897.)

Despite having conducted no traffic study, the County attempted to paint a dark and foreboding picture of what would occur if Dominion Club Drive was completed. But this evidence was simply unreliable. One witness testified that the connection to Hanover County would cause more than a 100% increase in traffic, but he had to admit that he had no real basis for his opinion. (J.A. 1295–96; 1330.) The County also attempted to prove that the soil beneath Dominion Club Drive could not support additional traffic. But this evidence was so flimsy that the circuit court stated it did not use it as a basis for its ruling. (J.A. 1473–80.)

In fine, under the fairly debatable standard the County's decision to abandon a portion of Dominion Club Drive cannot stand.

CONCLUSION

The trial court's decision is replete with factual and legal errors, and this Court should reverse the decision below and protect HHHunt's vested rights.

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CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of April, 2019, that the foregoing Reply Brief of Appellant complies with Rule 5:26, and a copy of the foregoing Reply Brief of Appellant has been served on opposing counsel via email this same day.

/s/ Joseph R. Pope