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In the

Supreme Court of Virginia

At Richmond

Record No. 190580

KATHLYN ROWLAND, et al.,

Appellants,

– v. –

TOWN COUNCIL OF WARRENTON, et al.,

Appellees.

RESUBMITTED BRIEF OF AMICUS CURIAE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC. IN SUPPORT OF APPELLEE TOWN COUNCIL OF WARRENTON

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Comes now the Local Government Attorneys of Virginia, Inc. ("LGA"), by counsel, and respectfully submits its Brief *Amicus Curiae*, pursuant to Rule 5:30 of the Supreme Court of Virginia, in support of Appellee, Town Council of Warrenton ("Town Council"), on the issues raised by Appellants' ("Rowland") First Assignment of Error. Rowland asserts that the trial court improperly sustained the Town Council's demurrers to Count IX of the Amended Complaint and Count V of the Second Amended Complaint. Rowland's First Assignment of Error argues that the trial court erred by "allow[ing] the Town Council to accept proffered conditions that modified or reduced the requirements of the applicable zoning district." Rowland Br. At 2.

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae LGA is a not-for-profit corporation created to provide for the continuing legal education of local government attorneys in Virginia and to offer a forum through which LGA members may meet and exchange information and ideas pertaining to local government law and practice.

LGA was founded in 1975. Its 800 public and private sector attorney members represent over 150 of the Commonwealth's local governments and regional authorities or otherwise practice in the field of Virginia local government law. LGA is often asked by the Virginia General Assembly and agencies of the

Commonwealth to offer legal input on matters of state policy pertaining to local governments and to recommend knowledgeable attorneys from its membership to serve on legislative study committees and commissions.

LGA, as part of its mission of service to localities, occasionally submits briefs on matters pending before the Court that are important, not only to the litigants, but to all Virginia local governments.

The LGA has requested and obtained consent from counsel for all to file this brief A*micus Curiae*.

STATEMENT OF THE *AMICUS CURIAE*

In her First Assignment of Error, Rowland argues that localities, to which conditional zoning authority is granted by Virginia Code Section 15.2-2297 or -2298, cannot accept proffered conditions in "modification of" the regulations provided for in the zoning ordinance for the requested zoning district. Rowland Br. At 15. The overwhelming majority of Virginia localities derive conditional zoning authority from Section 15.2-2297 or -2298, the only exceptions being those few Northern Virginia and Eastern Shore localities for which authority is granted by Section 15.2-2303. Rowland's novel interpretation of these statutes would unreasonably constrain the ability of localities to use conditional zoning to

harmonize potentially conflicting land use, perhaps the single most important function of conditional zoning.

Zoning applicants routinely proffer conditions such as increases in the required setbacks, enhancements to landscaping and open space requirements, reduced building heights, etc., in order to mitigate the potential impacts of a proposed rezoning on other properties. These are examples of proffers that *modify* the standard zoning ordinance requirements for the requested district as envisioned by the definition of "conditional zoning" in Section 15.2-2201 and the statement of its purpose in Section 15.2-2296. Va. Code Ann. §§ 15.2-2201, 2296 (1950). Had the General Assembly intended to curtail so severely conditional zoning for localities governed by Sections 15.2-2297 and -2298, it certainly would have done so expressly as it did with the far less impactful limitations that are expressly enumerated in these sections. Va. Code Ann. §§ 15.2-2297-7 (1950).

Rowland conflates her argument that these localities cannot accept *any* proffers that modify zoning ordinance requirements with an argument that localities cannot accept proffers that modify zoning requirements to make them less restrictive. The governing statutes do not specify that modifications must be more restrictive. Moreover, it is often not clear whether a given proffer is more or less restrictive than the zoning ordinance, especially when it is viewed in the context of other proffers and the proposed development plan. The appropriate test is whether a

locality's approval of any given rezoning, as proffered, is consistent with the policies and purposes of conditional zoning expressly enumerated in Virginia Code Section 15.2-2296. Va. Code Ann. § 15.2-2296 (1950).

STATEMENT OF THE CASE

The LGA adopts the Statement of the Case submitted by the Town Council of Warrenton in its Brief.

STANDARD OF REVIEW

The LGA adopts the Standard of Review submitted by the Town Council of Warrenton in its Brief.

ARGUMENT

I. Conditional zoning allows localities to accept proffers in addition to or in modification of the regulations applicable to the requested zoning district.

The General Assembly clearly stated the policy and purpose of conditional zoning in Virginia Code Section 15.2-2296:

> It is the general policy of the Commonwealth in accordance with the provisions of § 15.2-2283 to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and the same time to recognize effects of change. *It is the purpose of §§ 15.2-2296 through 15.2-2300 to provide a more flexible and adaptable zoning method* to cope with situations

> found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. *The exercise of authority granted pursuant to §§ 15.2-2296 through 15.2-2302 shall not be construed to limit or restrict powers otherwise granted to any locality, nor to affect the validity of any ordinance adopted by any such locality which would be valid without regard to this section.* The provisions of this section and the following six sections shall not be used for the purpose of discrimination in housing.

Va. Code Ann. § 15.2-2296 (1950). (Emphasis added.)

The reference to Section 15.2-2283 in this statement of the policy and purpose of conditional zoning, which sets forth the overall purpose of zoning ordinances, is significant. The General Assembly clearly recognized that the development of land to accomplish the many goals listed in Section 15.2-2283 will necessarily result in circumstances where "conflicting and competing land uses" are in proximity to one another and that "more flexible and adaptable methods" are needed. *Id.*

Conditional zoning is defined in Section 15.2-2201:

> "Conditional zoning" means, as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, *such conditions being in addition to, or modification of the regulations* provided for a particular zoning district or zone by the overall zoning ordinance.

Va. Code Ann. § 15.2-2201 (1950). (Emphasis added.)

In the arguments pertaining to her First Assignment of Error, Rowland argues that Town Council cannot accept proffers "in modification" of Warrenton's zoning

regulations because those words do not appear in Virginia Code Section 15.2-2297 and -2298. Rowland Br. At 24. Section 15.2-2298 applies to Warrenton because its population growth rate meets the criterion set forth in the statute. Section 15.2-2298 states:

> A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of 5% or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. However, any such locality may by ordinance choose to utilize the conditional zoning authority granted under § 15.2-2303 rather than this section.
>
> In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, *in addition to the regulations provided for the zoning district* or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223.

Va. Code Ann. § 15.2-2298(A) (1950). (Emphasis added.)

Rowland argues initially that the wording of this specific statute, Section 15.2-2298, which does not include the words "or modification of," controls the general definition of conditional zoning in Section 15.2-2201 and, therefore, Warrenton cannot accept proffers that modify the zoning regulations. Rowland Br. At 24.

There are three state code sections conveying conditional zoning authority to Virginia localities. Section 15.2-2303, which provided the original conditional zoning authority to several Northern Virginia and Eastern Shore localities, Section 15.2-2297, which provides limited conditional zoning authority to all other localities and Section 15.2-2298 which removes some of the limitations in Section 15.2-2297 for high growth localities.

Each of these three enabling statutes use the same, or virtually the same, phrase, "in addition to the regulations provided for the zoning district…" as is used in Section 15.2-2298, applying to Warrenton. Va. Code Ann. §§ 15.2-2303, 2297-98 (1950). Accordingly, if Rowland's interpretation were correct, then no Virginia locality could accept proffers that modify the regulations of the requested zoning district. Rowland's interpretation would completely nullify the phrase "in addition to, or modification of the regulations…" in the definition of condition zoning and would frustrate its very purpose, as set forth in Section 15.2-2296, of providing a "more flexible and adaptable method…" Va. Code Ann. §§ 15.2-2201, 2296 (1950).

Had the General Assembly intended that no locality could accept proffers that modify zoning regulations, it would not have used that phrase in the definition of condition zoning. Had the General Assembly intended that any of the three statutes authorizing conditional zoning not include the authority to accept proffers modifying

zoning regulations, it would have clearly enumerated this limitation, as it did for other restrictions on the general authority in Sections 15.2-2297 and -2298.

Proffers that modify the zoning regulations of the requested zoning district are common. Most routinely they take the form of increased setback requirements, enhanced landscaping or buffering requirements, reduced building heights, the elimination of certain uses otherwise permitted in the district, etc. These are all modifications of the regulations as envisioned by the definition of conditional zoning and the statement of its purpose.

II. Proffers that modify zoning regulations are not limited to those that are more restrictive.

There is no provision in the Code of Virginia stating that proffered modifications of zoning regulations in the requested district must make those regulations more restrictive. LGA acknowledges that proffered modifications do, in fact, typically make physical limitations on the development of property, e.g. setbacks, height limits, screening, etc., more restrictive, but not necessarily so.

Rowland cites to the Albemarle Land Use Handbook for the proposition that the phrase "in modification of" in Section 15.2-2201 does not mean that proffers can relax zoning standards. Rowland Br. At 25. However, the Albemarle Land Use Handbook is not controlling law, even in Albemarle County. Virginia localities range from highly populated cities and urban counties to small rural towns and

counties, and land use policies and practices are correspondingly diverse across the state. Fairfax County, for example, expressly provides for the reduction of building setback and open space requirements by proffer in its zoning ordinance. Fairfax Ordinance §§ 2-309, 2-414.

Even if the modification phrase in the definition of conditional zoning within Section 15.2-2201 were interpreted to mean that modifications cannot make zoning regulations less restrictive, in many circumstances, it is not clear whether proposed modifications are less or more restrictive. For a simple example, if an office building were proposed on property near to an existing residential development and the applicable zoning ordinance provision called for a maximum building height of 50 feet and a building setback of 50 feet, the applicant might proffer a site plan for the property featuring a setback of 100 feet but a building height of 60 feet, seeking to minimize impact but still retain a viable project. Would such proffered site plan be considered more, or less, restrictive than the existing zoning requirements? It would have significantly less visual impact from the perspective of the nearby residences, but the building would be taller than permitted by the unmodified ordinance. Such modifications would seem to further the purpose of the flexibility envisioned when conditional zoning authority was granted to Virginia localities.

The challenge of determining whether the proffered site plan for a single building cited above is more or less restrictive is magnified many times when

considering the give and take of the development review process for a large multiple parcel, mixed-use, planned development project where the factors include internal and external transportation components, open space and landscaping, public facility improvements, design elements, lighting, accommodations for topography and natural features and much more. Zoning policies frequently offer density bonuses or other allowances in return for increased open space, community facilities, or enhanced landscaping. The local governing body must consider all of these factors, together with public input and the recommendations of staff and its planning commission, in an effort to accomplish the purposes of zoning ordinances enumerated in Section 15.2-2283.

In this case, the developers proffered a development mix with 39% industrial, as opposed to the 50% industrial that the applicable zoning ordinance would otherwise require. Warrenton Ordinance § 3-5.2.4.1. With the remainder of the project dedicated to varying percentages of commercial, residential and open space, it is not obvious that this modification of the amount of industrial development is either more or less restrictive, especially given the extensive off-site transportation improvements, landscaping, and other features of the plan. Rowland describes the two existing office buildings on the 31-acre subject property as compatible with the "peaceful neighborhoods" on Walker Drive. Rowland Br. At 4. However, if the entire parcel were developed with the types of permitted and permissible industrial

uses provided in the Town of Warrenton's industrial zone, industrial zoning might not seem so compatible with the existing residential developments. Warrenton Ordinance §§ 3-4.12.2-3. Accordingly, the reduction in the amount of acreage devoted to industrial uses, in the context of the features of this planned development, might very well be compatible with the policy and purpose of conditional zoning described in Section 15.2-2296. That question can and should be resolved by the local governing body, pursuant to its zoning and land use authority.

III. This Court adopted the standard for review of proffered conditions that modify the requirements of the requested zoning district in *Board of Supervisors v. Robertson.*

Local governing bodies have clear authority under Virginia Code Section 15.2-2286 to grant exceptions from zoning ordinance requirements. Va. Code Ann. § 15.2-2286 (1950). This section states that zoning ordinances may include provisions:

> For the granting of special exceptions under suitable regulations and safeguards; notwithstanding any other provisions of this article, the governing body of any locality may reserve unto itself the right to issue such special exceptions. …

Id.

Virginia Code Section 15.2-2296 creates the authority for condition zoning but expressly states that:

> …The exercise of authority granted pursuant to §§ 15.2-2296 through 15.2-2302 shall not be construed to limit or restrict powers otherwise granted to any locality, nor to affect the validity of

> any ordinance adopted by any such locality which would be valid without regard to this section….

Va. Code Ann. § 15.2-2296 (1950).

The "special exception(s)" authorized by Section 15.2-2286 are also commonly termed "special use permits" or "conditional use permits." *Bd. of Supervisors v. Southland*, 224 Va. 514, 521, 297 S.E.2d. 718 (1982). Section 15.2-2286 does not specify the exact process by which requests for special exceptions must be considered but does require "suitable regulations and safeguards" which certainly must include notice as specified in Section 15.2-2204 and public hearing. Va. Code Ann. § 15.2-2286 (1950). The governing body may reserve the power to grant special exceptions to itself and referral to the planning commission is not required.

Warrenton's zoning ordinance provides that the Town Council may approve modifications to the I-PUD land use mix requirements "making the criteria more, less or equally restrictive" and states the factors for the Council to consider. Warrenton Ordinance 3-5.2.4.3(5). The proffered modification of the land use mix specifications in the I-PUD zoning district requested by the applicants in this case is, in effect, a request for a special exception as authorized by Section 15.2-2286. Va. Code Ann. § 15.2-2286 (1950).

In *Board of Supervisors v. Robertson*, Robertson filed a zoning application in Fairfax County with proffers that would have reduced the otherwise applicable

setback requirements for his property located adjacent to the Dulles Airport Access Road. *Bd. Of Supervisors v. Robertson*, 266 Va. 525, 528, 587 S.E.2d. 570 (2003). The Fairfax County Zoning Ordinance provides that deviations from the required setback from the Dulles Airport Access Road are permitted, if proffered and approved by the Board of Supervisors. Fairfax Ordinance § 2-414. The Board of Supervisors denied the application, but the circuit court held that its decision was arbitrary, capricious and unreasonable. *Robertson*, 266 Va. at 529, 531 (2003).

On appeal, this Court recognized that a request for a proffered modification of the requirements of the requested zoning district was not substantively different from a request for a special exception and applied the same test for evaluating the Board's decision as it had applied to the decisions of governing bodies on a request for a conditional use permit in *Cowardin* and a request for a special use permit in *Bratic*. *Id.* at 533; *Cty. Of Lancaster v. Cowardin*, 239 Va. 522, 523, 391 S.E.2d 267, 268 (1990); *Cty. Bd. of Arlington Cty. v. Bratic*, 237 Va. 221, 222, 377 S.E.2d 368 (1989). This Court stated, "[a]ccordingly, we will presume, as we did in both of those cases, that Robertson's request to deviate from the 200 foot setback requirement by building, with proffered conditions, four dwelling units is an appropriate use of his property and that the denial of his application is probative evidence of unreasonableness. Thus, the dispositive inquiry is whether the defendants produced dispositive evidence of reasonableness to make the Board's

rejection of Robertson's request fairly debatable." *Id.* at 533-34. Internal citations omitted.

As was the case in *Robertson*, the Warrenton Zoning Ordinance authorizes the Town Council to approve modifications to the I-PUD, pursuant to the criteria established in the Ordinance. In this case, unlike *Robertson*, the Town Council approved the requested modification, so there is no probative evidence of unreasonableness. The standard for review of the governing body's decision regarding proffered conditions that modify the requirements of the requested zoning district should be the same in this case as applied in *Robertson*, i.e., whether the legislative decision was fairly debatable.

IV. Conclusion

For these reasons, the Local Government Attorneys of Virginia, Inc., respectfully requests that this Court sustain the rulings of the trial court as they pertain to the issues raised in Rowland's First Assignment of Error.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26 of the Supreme Court of Virginia has been complied with. Three (3) copies of the Resubmitted Brief Amicus Curiae were filed via hand delivery to the Clerk of the Supreme Court of Virginia on February 10, 2020. An electronic PDF copy of the Brief Amicus Curiae was filed with the Clerk of the Supreme Court of Virginia using the Virginia Appellate Courts eBriefs System (VACES) on February 10, 2020.

An electronic PDF copy of the Brief Amicus Curiae was served via e-mail to counsel for all parties at the e-mail addresses below on February 10, 2020.

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