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Annual Survey of Virginia Law: Planning, Zoning and Subdivision Law

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PLANNING, ZONING AND SUBDIVISION LAW

Woodrow W. Turner, Jr.*

I. INTRODUCTION

The philosophy which guided the Supreme Court of Virginia in reviewing land use cases in the decade of the 1970's is exemplified by the Court's reasoning in *Fairfax County v. Snell Corp.*:¹

The statutes recognize that public power over private property rights should be exercised judiciously and equitably. That policy springs not only from public respect for personal rights and individual integrity but also from enlightened public self-interest. The General Assembly has recognized that it is in the public interest that private land not required for public use be put to its optimum use to fulfill societal needs. . . . Under the private enterprise system, land use is influenced by the profit motive. Profit flows from investments of time, talent, and capital. Landowners venture investments only when the prospects of profit are reasonable. Prospects are reasonable only when permissible land use is reasonably predictable.²

At the beginning of the 1990's, however, land use decisions made by local governments and the Virginia General Assembly and conflicts in decisions between the federal and state courts leave the outcome of land use cases far from predictable. Decisions in 1989 and 1990 at each of these levels of government evidence a power struggle over where the ultimate authority over land use decisions in Virginia will rest. At stake are the limits of public power over

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1. 214 Va. 655, 202 S.E.2d 889 (1974).

2. *Id.* at 657-58, 202 S.E.2d at 892. Two decades later, in 1990, the Supreme Court of Virginia followed *Snell* in overturning another piecemeal downzoning action. *City of Virginia Beach v. Virginia Land Inv. Ass'n*, 239 Va. 412, 389 S.E.2d 312 (1990). See *infra* text accompanying notes 24-32.

private property rights and a determination of which public arm of government will exercise the public's power. As will be demonstrated in this survey article, this struggle has resulted in a melange of decisions and legislative enactments.

This survey of planning, zoning and subdivision law discusses significant cases decided recently by the circuit courts of Virginia and by the various federal courts sitting in Virginia. It also reviews important statutory changes made to the Code of Virginia (the "Code") in the most recent session of the General Assembly.

In the opening round of the turf battles, the General Assembly this year asserted its prerogative by enacting several bills reclaiming authority which had traditionally been the function of local governments. One such bill established a permanent Commission on Population Growth and Development,³ and charged the Commission with the preparation of a state-level comprehensive plan which, if implemented by a future Legislature, could significantly reduce the planning and zoning authority which presently rests with local governments.⁴

Another bill, discussed below, retroactively struck down a downzoning action of the Board of Supervisors of Fairfax County.⁵ A third bill stripped localities of their power to change permitted land uses where substantial conditions have been proffered as part of a rezoning.⁶

By contrast this year local governments sought and obtained more authority from the General Assembly in the areas of environ-

3. VA. CODE ANN. § 9-145.11.2 (Supp. 1990).

4. VA. CODE ANN. § 9-145.11; see also REPORT OF THE COMMISSION ON POPULATION GROWTH AND DEVELOPMENT, (H. Doc. No. 40 (1990)). The responsibilities of this Commission apparently will be expanded beyond water quality issues related to the restrictions of the Chesapeake Bay Preservation Act to include the development of more stringent growth management and environmental protection measures which would apply statewide. See *id.* In support of its recommendation for expanded State control, the Commission stated:

Where growth is occurring very rapidly, and especially where land management tools may not be well institutionalized, local governments may be unable to keep pace with the development of needed infrastructure. Then, instead of the locality's comprehensive plan and capital facilities program leading the direction of development in an orderly fashion, independent developer decisions may become the guiding growth force in the area.

Id. at 9.

5. See VA. CODE ANN. §§ 15.1-1372.1 to .13 (Supp. 1990); see *infra* text accompanying notes 19-23.

6. See VA. CODE ANN. § 15.1-491, -491.2, -491.2:1; see *infra* text accompanying notes 70-74.

mental protection,⁷ incentives for the construction of affordable housing,⁸ and subdivision control.⁹ Moreover, an *ad hoc* subcommittee composed of members of the General Assembly and citizens has been established to study proposed land use legislation which was not adopted or which was carried over to the 1991 General Assembly. These bills are aimed at the adoption of a comprehensive vesting law,¹⁰ a law limiting the use of special exceptions,¹¹ a law permitting phased growth through adequate public facilities' requirements,¹² a law permitting transfer of development rights,¹³ and a law permitting impact fees for schools and other public facilities.¹⁴

The activity in the courts this year was also contradictory. The Supreme Court of Virginia struck down a piecemeal downzoning by the City of Virginia Beach¹⁵ and upheld a citizens' referendum nullifying a rezoning action of the City Council of Chesapeake.¹⁶ The court also struck down involuntarily imposed conditions in a rezoning action by the Fairfax City Council.¹⁷ By comparison, the Supreme Court of Virginia upheld cases where the legislative action was tested against the "fairly debatable" rule.¹⁸

The federal courts are becoming more of a factor in Virginia land use decisions, and in constitutional cases appear willing to afford a high degree of protection for property rights.

7. VA. CODE ANN. § 15.1-489(8).

8. *See id.* § 15.1-446.1, -447, -489(10), -491.9.

9. *Id.* § 15.1-466A(c), 466-A(f), -466(G), -480.1.

10. H.B. 1121, 1122, Va. Gen. Assembly, 1990 Sess. (1990); *see infra* note 77 and accompanying text.

11. H.B. 677, Va. Gen. Assembly, 1990 Sess. (1990).

12. H.B. 987, Va. Gen. Assembly, 1990 Sess. (1990).

13. H.B. 164, S.B. 228, S.B. 359, Va. Gen. Assembly, 1990 Sess. (1990).

14. S.B. 48, Va. Gen. Assembly, 1990 Sess. (1990) (amending the charter of Chesterfield); S.B. 304 Va. Gen. Assembly, Sess. (1990) (dealing with road improvements).

15. *Virginia Beach*, 239 Va. 412, 289 S.E.2d 312; *see infra* text accompanying notes 24-32.

16. *R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13*, 239 Va. 484, 391 S.E.2d 587 (1990); *see infra* text accompanying notes 43-48.

17. *Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989); *see infra* text accompanying notes 104-109.

18. *See infra* text accompanying notes 132-42.

II. DOWNZONING

A. *Fairfax County Downzoning Actions*

In one action, the General Assembly retroactively overturned a downzoning effort by the Fairfax County Board of Supervisors to reduce the available development potential and density on certain industrially and commercially zoned land which is located, in part, in the Route 28 special taxing district.¹⁹

On December 11, 1989, the Fairfax County Board of Supervisors adopted an ordinance which reduced, by as much as one-half, the amount of development permitted by right on more than 14,000 acres of land zoned commercial and industrial.²⁰ The ordinance prohibited what was formerly by-right office construction on the affected properties.²¹ The purpose of the downzoning was to give the county greater control over the uses and permitted densities on the affected properties so that the county could regulate more effectively the development's perceived impact on traffic. Over 250 law suits were filed in the Circuit Court of Fairfax County by affected property owners challenging the downzoning. These cases are currently pending.

Despite the pending litigation, the Virginia General Assembly invalidated the action of the Fairfax County Board of Supervisors in a controversial and celebrated legislative decision which retroactively reversed the downzoning to the extent that it applied to properties located within the Route 28 Corridor Tax District.²² This action, if sustained in the courts,²³ will effectively vest permitted uses and densities for property located in the Route 28 Tax District.

B. *The Virginia Beach Downzoning Cases*

A similar local government action occurred in the City of Virginia Beach where the City Council downzoned certain property located within the city, changing the use from planned unit, high

19. See VA. CODE ANN. §§ 15.1-1372.1 to .13 (Supp. 1990).

20. Fairfax County, Va., Zoning Ordinance Amendment ____ (Dec. 11, 1989).

21. *Id.*

22. VA. CODE ANN. § 15.1-1372.1 to .13.

23. This new provision of the Code has survived the first round in the Circuit Court of Fairfax County where the trial judge in an oral ruling from the bench rejected the County's constitutional challenge. *In Re: Zoning Ordinance Amendment*, No. 115184 (Fairfax County Cir. Ct. 1990).

density development to conservation and farming. Again, the downzoning was invalidated—this time by the courts. In *City of Virginia Beach v. Virginia Land Investment Association (VLIA)*,²⁴ the Supreme Court of Virginia sustained the trial court's determination that the zoning action was "piecemeal" and not "comprehensive" as was argued by the city.²⁵ The trial court concluded that the City Council's action was not comprehensive because it downzoned only certain parcels and permitted others similarly situated to retain their prior zoning status.²⁶

The court applied the long-standing rule established in *Board of Supervisors v. Snell Corporation*.²⁷ *Snell* established that in a downzoning case, the threshold question is whether the action of the government was comprehensive or piecemeal.²⁸ If the action is found to be comprehensive, the "fairly debatable" rule applies, which requires that the legislative action be sustained if evidence would lead objective and reasonable persons to reach different conclusions.²⁹ In the case of a piecemeal downzoning where only a limited number of parcels or area of land is rezoned, the standard is much more restrictive. In such cases, the property owner need only make a *prima facie* case that since the enactment of the prior ordinance there has been no change in circumstances "substantially affecting the public health, safety, or welfare."³⁰ Then, the burden shifts to the government to demonstrate fraud, mistake or changed circumstances justifying its zoning change.³¹ In the *Virginia Beach* downzoning, there was no such evidence presented, and the property owner prevailed.³²

III. CONSTITUTIONAL ISSUES AND FEDERAL COURTS

A. Citizen Involvement

The rationale used by state courts in deciding constitutional rights' cases is in clear contrast to the approach taken by the fed-

24. 239 Va. 412, 389 S.E.2d 312 (1990).

25. *Id.* at 417, 389 S.E.2d at 314.

26. *Id.*

27. 214 Va. 655, 202 S.E.2d 889 (1974).

28. *Id.* at 658-59, 202 S.E.2d at 893.

29. *Id.* at 659, 202 S.E.2d at 893.

30. *Id.*

31. *Id.*

32. 239 Va. at 417, 389 S.E.2d at 314.

eral courts in *Marks v. City of Chesapeake*.³³ In *Marks*, the City of Chesapeake denied a conditional use permit for the operation of a palmistry. Marks filed an action under 42 U.S.C. § 1983 seeking injunctive and declaratory relief, compensation and punitive damages. He claimed the city's denial of his permit application was arbitrary and capricious and, hence, a deprivation of property without due process of law.³⁴ The federal district court abstained pending Marks' exhaustion of available state court remedies. Marks then filed suit in the Circuit Court for the City of Chesapeake which dismissed the case finding that under Virginia law a "City Council has wide discretion in the issuance of permits" and that Marks "failed to satisfy his burden of proof to establish that the actions of the City Council in this matter were clearly arbitrary and capricious."³⁵ Marks then returned to federal court renewing his federal claim. The federal trial court reached the conclusion that the City Council had indeed acted arbitrarily in denying Marks' permit application.³⁶ The court granted nominal damages and, pursuant to 42 U.S.C. § 1988, ordered the city to pay Marks' attorney's fees and costs.³⁷ The court determined that the city officials had succumbed to irrational neighborhood pressure founded on religious prejudice in deciding to deny the application. "As a general matter, therefore, the public's negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for local officials' land use decisions."³⁸

The *Marks* case is in stark contrast to the Supreme Court of Virginia's decision in *West v. Mills*.³⁹ In *West*, the trial court heard evidence and argument regarding the disapproval of a subdivision plat and concluded that "the members of this commission evidently were intimidated by these people who spoke in opposition. . . . I know exactly why these plans were not approved, pressure from people who owned some homes around close or in the neighborhood."⁴⁰ Although the decision rested on state land use law rather than constitutional issues, the state trial court found

33. 883 F.2d 308 (4th Cir. 1989).

34. *Id.* at 309-10.

35. *Id.* at 310.

36. *Id.* at 311.

37. *Id.*

38. *Id.* at 311.

39. 238 Va. 162, 380 S.E.2d 917 (1989).

40. *Id.* at 167, 380 S.E.2d at 920.

the disapproval of the subdivision was arbitrary and capricious and ordered the plat to be approved.⁴¹ The Supreme Court of Virginia, "keep[ing] in mind that the members of the Planning Commission are presumed to have acted correctly," reversed the decision of the trial court concluding that "the evidence is insufficient to support the trial court's finding that citizen pressure was the unstated reason for the commission's disapproval of the . . . plat."⁴²

Citizen involvement was also the subject of another Supreme Court of Virginia case. *R. G. Moore Building Corp. v. Committee for the Repeal of Ordinance R(C)-88-13*⁴³ involved the charter of the City of Chesapeake which permits any new ordinance to be approved by the electorate pursuant to a referendum. Under the City of Chesapeake's charter, any ordinance which is passed by the City Council remains ineffective for thirty days during which a petition of fifteen percent of the electorate can be filed.⁴⁴ If filed, the ordinance will then become effective only after it has been modified by the City Council or approved by the electorate in a referendum. The Supreme Court of Virginia affirmed the circuit court's decision that the referendum provision applied to zoning ordinance amendments.⁴⁵ It then found that a popular vote by the citizens did not involve an improper or unconstitutional delegation of legislative power to the electorate.⁴⁶ The court rejected the landowner's argument that application of the referendum provision to rezoning ordinances would result in piecemeal alterations of the city's comprehensive plan because the referendum could not be used to initiate rezonings but only to repeal or amend them.⁴⁷ In addition, the court found no constitutional due process violation in the procedure, finding that the plaintiff has potential relief from the referendum result through a variance procedure or a court challenge to the reasonableness of the referendum result itself.⁴⁸

Another federal case of interest is *Beacon Hill Farm Associates II, Ltd. v. Loudoun County Board of Supervisors*.⁴⁹ In this case, a developer's challenge to the constitutionality of a zoning ordinance

41. *Id.*

42. *Id.* at 168, 380 S.E.2d at 921.

43. 239 Va. 484, 391 S.E.2d 587 (1990).

44. *Id.* at 486-87, 391 S.E.2d at 588.

45. *Id.* at 489, 391 S.E.2d at 589.

46. *Id.*

47. *Id.* at 490, 391 S.E.2d at 590.

48. *Id.* at 493, 391 S.E.2d at 591-92.

49. 875 F.2d 1081 (4th Cir. 1989).

regulating mountainside development was determined by the Court of Appeals for the Fourth Circuit to be ripe for adjudication. The Fourth Circuit held that it was not necessary to determine the application of the ordinance to a specific piece of property and that a facial attack on the constitutionality of the ordinance should have been heard by the lower district court.⁵⁰

B. *Takings*

Interestingly, three recent "takings" decisions involving the question of whether temporary takings are compensable, elicited different results. A federal court and a Virginia circuit court found a temporary taking to be compensable, but the Supreme Court of Virginia reached a contrary conclusion.

In *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*,⁵¹ the United States District Court for the Western District of Virginia, relying on Virginia constitutional law in *Board of Supervisors v. Rowe*,⁵² and upon *First English Evangelical Lutheran Church v. County of Los Angeles*,⁵³ held that a temporary deprivation of use due to an illegal withholding of sewer service was a compensable taking of property.⁵⁴ The court found that the property was worth "so much less that [the landowners] have been deprived of property rights. Therefore, this court finds, as a matter of law, that there was a taking for which Plaintiffs are entitled to compensation."⁵⁵ In *Front Royal*, the landowner was temporarily deprived of the use of public utilities and, as a result, his property could not be used for its highest and best use for development. Although not discussed, it is implicit in the opinion that the property owner could have used his land by leasing it or selling it during the time he was denied the right to use the sewer facilities.

A similar approach was used by the trial court in *Board of Supervisors v. Thompson Associates*.⁵⁶ The court found the county's request for a service road, exacted as a condition of site plan ap-

50. *Id.* at 1085.

51. 708 F. Supp. 1477 (W.D. Va. 1989).

52. 216 Va. 128, 216 S.E.2d 199 (1975).

53. 482 U.S. 304 (1987).

54. *Front Royal*, 708 F. Supp. at 1484.

55. *Id.*

56. 12 Va. Cir. 318 (Fairfax County 1988), *rev'd on other grounds*, Record No. 891329 (June 8, 1990).

proval, to be an unconstitutional taking. Relying upon the Virginia trilogy of *Hylton v. Prince William County*,⁵⁷ *Cupp v. Board of Supervisors*,⁵⁸ and *James City County v. Rowe*,⁵⁹ the court held that the county's actions were "per se" unconstitutional and beyond its powers under the Dillon rule. Relying upon *First English* and *Nollan v. California Coastal Commission*,⁶⁰ the court then held that the county was liable for pecuniary damages and attorneys fees under federal civil rights statutes. The trial court ordered the county to issue building permits which had been withheld and to return bond money which had been seized, but the trial court did not award money damages, however, because the owner failed to give the county the required statutory notice of claim pursuant to section 15.1-554 of the Code.⁶¹ On appeal the Supreme Court of Virginia did not reach the takings or damages questions, ruling instead that the entire action was barred because the property owner failed to utilize the statutory appeals process available under sections 15.1-475 and 15.1-496.1 of the Code, and because the owner waited nine years after the road improvement condition was imposed to file—well beyond the statute of limitations.⁶²

By contrast, in the *Virginia Beach* downzoning case⁶³ the Supreme Court of Virginia concluded that although the landowner was deprived of the use of his land for higher density development during the time it was downzoned to agricultural use, no temporary regulatory taking of the property occurred. The supreme court found that: "At best, VLIA can only show that it was unable to develop its property as a planned unit development. VLIA, however, was able to lease its property after it was downzoned. The city's ordinance did not constitute a taking because VLIA was not deprived of all economically viable use of its property."⁶⁴

Justice Lacy, in a concurring opinion, found that, "An unconstitutional taking or damage did not occur in this case because the

57. 220 Va. 435, 258 S.E.2d 577 (1979).

58. 227 Va. 580, 318 S.E.2d 407 (1984).

59. 216 Va. 128, 216 S.E.2d 199 (1975).

60. 483 U.S. 825 (1987).

61. *Thompson Associates*, 12 Va. Cir. at 324-25.

62. *Thompson Associates*, No. 891329, slip op. at 6.

63. *City of Virginia Beach v. VLIA*, 239 Va. 412, 389 S.E.2d 312 (1990).

64. *Id.* at 416-17, 389 S.E.2d at 314. Notably, none of the United States Supreme Court "takings" cases decided in 1987 (*Keystone Bituminous Coal Ass'n v. DeBenectis*, 480 U.S. 470 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)) were cited by the Supreme Court of Virginia.

owner was not deprived of the use of or right to sell the land. Diminution and salability or potential market value does not rise to the level of a constitutional taking or damage to the property."⁶⁵ If the same reasoning were applied to the *Front Royal* case, there would be no taking, because in *Front Royal*, like in *Virginia Beach*, the landowner was not deprived of his ability to sell or lease his property.

IV. VESTED RIGHTS

The issue of where in the development process rights become protected from changes in land use regulations is unsettled for the most part in Virginia. The steps in the land development process generally proceed as follows: zoning or rezoning approval; special or conditional use permit approval; subdivision approval; site plan and grading approval; and, finally, issuance of a building permit. When new limits are placed on how property can be used, such as reducing allowable density, restricting allowable uses, reducing floor/area ratios, reducing height limitations, or increasing lot size requirements, the development potential and the value of the property can be strikingly curtailed. In turn, reasonable investment backed expectations of property owners can be frustrated.

These actions are commonly but imprecisely called downzonings. When an actual downzoning occurs, Virginia law is fairly well settled: "The Virginia landowner always confronts the possibility that permissible land use may be changed by a comprehensive zoning ordinance reducing profit prospects; yet, the Virginia statutes assure him that such a change will not be made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning."⁶⁶

65. *Id.* at 419-20, 389 S.E.2d at 316. Justice Lacy cited *Bartz v. Bd. of Supervisors*, 237 Va. 669, 379 S.E.2d 356 (1989) where the court held that the filing of a condemnation proceeding and a memorandum of *lis pendens* does not constitute a taking because the owner can still sell or use his land pending the outcome of the condemnation proceeding." *Id.* at 673, 379 S.E.2d at 360.

66. *Fairfax County v. Snell Corp.*, 214 Va. 655, 658, 202 S.E.2d 889, 893 (1974). An attack on a downzoning action is essentially a facial attack on the ordinance itself. A facial attack on other land use ordinances that reduce development potential arguably should obtain the same result. If a locality were to enact a "piecemeal" change in other development regulations such as subdivision control, site planning, site development, grading or even building plans, the rationale in *Snell* would logically apply. To date, *Snell* has only been applied in zoning cases. See e.g., *City of Virginia Beach v. VLIA*, 239 Va 412, 389 S.E.2d 312 (1990).

In *Harrison v. Robinson*, Record No. 860952 (1989), an unreported memorandum opinion that is not to be cited or relied upon as precedent in any case, the Supreme Court of Vir-

Vesting cases are different from downzoning cases in that it is assumed that the land use change itself is valid and the question is what happens to those property owners who are already in the process of developing when the law was changed. At what stage of this process can the local government compel compliance with the new rule, and when is the property owner allowed to continue under the old rule?⁶⁷ It is clear from two 1972 cases in the Supreme Court of Virginia that where a property owner has incurred substantial expense and diligently pursued in good faith the development of his property in accordance with an approved special use or conditional use permit, he is protected from intervening governmental rezoning actions which change the permitted use.⁶⁸ Beyond these limited situations, however, there was little statutory or case law guidance in the area of vested property rights until this year.⁶⁹

A. Legislative Action

1. Rezoning with Proffered Conditions

In a broadly applicable amendment to the Conditional Zoning (Proffer) sections of the Code, the legislature "vested" development rights in rezoned property where substantial conditions have been proffered as part of the rezoning.⁷⁰ Under the amendments, if proffered conditions include a requirement for the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then the zoning

ginia discussed the distinction between zoning and subdivision concepts. It said that subdivision laws are aimed more at the "safe use of property, the minimization of health and other hazards, and placing the burden of safe development upon developers and not upon the local government." *Harrison*, mem. op. at 11. The court cautioned that because the related concepts of zoning and subdivisions differ in their aims, cases from one area cannot be applied "in wholesale fashion" to problems in the other area. *Id.* Nevertheless, because the *Snell* rule will validate a change in the zoning ordinance based upon a change in circumstances "substantially affecting the public health, safety, or welfare," it should be useful in analyzing other ordinance changes where property rights have been adversely affected.

67. Frequently localities will, as a matter of "legislative grace," make this determination by establishing a "grandfather clause" which exempts from the new law property owners already in the development process. For a complete discussion of vested rights, see Hanes & Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989).

68. See *Bd. of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972); *Bd. of Supervisors v. Cities Service Oil Co.*, 213 Va 359, 193 S.E.2d 1 (1972).

69. See, e.g., VA. CODE ANN. §§ 15.1-492, -473(c), 10.1-2115 (Repl. Vol. 1989) (protecting pre-existing uses but not providing guidance as to pre-construction vesting).

70. VA. CODE ANN. §§ 15.1-491, -491.2, -491.2:1 (Supp. 1990).

for the property subject to such conditions and the conditions themselves become vested.⁷¹ After the rezoning is approved, no changes which eliminate or materially restrict, reduce, or modify the uses, floor area ratio, or the density of such property can be imposed by the locality unless there has been a mistake, fraud or a change in circumstance substantially affecting the public health, safety or welfare.⁷²

Landowners who have made such proffers before July 1, 1990, but have not substantially implemented them by that date have until July 1, 1991, to inform the governing body of their intent to proceed with implementation of the proffers. Thereafter, any landowner giving such notice has until July 1, 1995, to substantially implement the proffers. The landowner is then required to diligently pursue the completion of development of the property.⁷³

These provisions are prospective only, and do not apply to any zoning ordinance text amendments adopted prior to March 10, 1990.⁷⁴

2. Property in Special Tax Districts

As previously discussed, the General Assembly retroactively reversed the Fairfax County Board of Supervisors' action which downzoned a number of properties along the Route 28 development corridor.⁷⁵ The legislation effectively "vested" for a period of fifteen years provisions of all zoning ordinance text and regulations (which were in force on the date the tax district was created) relating to commercial and industrial properties in the district. Except with the consent of the owner, no change can thereafter be made to provisions for such properties which reduce, limit or restrict allowable uses, densities, setbacks, building heights, required parking and open space.⁷⁶

3. Legislation Carried Over

Several other legislative proposals dealing with vested rights were carried over to the 1991 Session and, along with other land

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See *supra* text accompanying notes 19-23.

76. VA. CODE ANN. § 15.1-1372.3(C) (Supp. 1990).

use bills, are being studied by an *ad hoc* sub-committee of the General Assembly.⁷⁷

B. Court Action

The Circuit Court of Spotsylvania County, in *Whelan v. Spotsylvania County Planning Commission*,⁷⁸ held that the *submission* of a preliminary plat, as distinguished from the approval thereof, does not as a matter of law confer a vested right upon the landowner to use his property as shown on the plat.⁷⁹ The trial court sustained the action of the county in downzoning (reducing the allowable density of) the developer's property.⁸⁰ The case, decided on summary judgment motions, held only that the landowner had no vested right to the existing zoning.⁸¹ The question of whether the landowner's claim that its subdivision application was treated differently than other subdivision applications similarly situated after the downzoning occurred was left for factual determination by the court.⁸²

In *Dominion Lands, Inc. v. City of Alexandria*,⁸³ the circuit court held that once a site plan is approved, vested rights are acquired: "Under current planning practice, the site plan has virtually replaced the building permit as the most vital document in the development process. When the site plan is approved, the building permit, except in rare situations, will be issued. The landowner cannot be deprived of such use by subsequent legislation."⁸⁴

A federal district court in *Cooke, Inc. v. County of Louisa*,⁸⁵ held that a subdivider has no vested right to record a subdivision which had been prepared but which was neither recorded nor approved by the county prior to a change in the county's subdivision regula-

77. H.B. 1121, 1122, Va. Gen. Assembly, 1990 Sess. (1990), would legislatively define vested rights. H.B. 880, Va. Gen. Assembly, 1990 Sess. (1990), entitled *Approval of Proposed Subdivision Plats and Site Plans* (Counties, Cities and Towns), would carry a presumption of approval of plats and site plans if the local jurisdiction failed to take any governmental action for sixty days (or for seventy-five days if review by state agencies was required).

78. 15 Va. Cir. 271, 274 (Spotsylvania County 1989).

79. *See id.* at 274.

80. *See id.* 273-75.

81. *Id.* at 275.

82. *Id.*

83. No. 18,106 (City of Alexandria Cir. Ct. Feb. 1, 1988) (ltr. op.).

84. *Id.* at 2.

85. No. 89-0017-R (E.D. Va. Aug. 28, 1990) (mem. op), *aff'd*, No. —, (4th Cir. 1990).

tions. The landowner's previously prepared subdivision did not comply with the amended ordinance and the clerk refused to accept it for recordation. The subdivider then filed suit alleging that his rights were vested and that he had been discriminated against.⁸⁶ The case turned on a review of section 15.1-473(C) of the Code exempting subdivisions "lawfully created prior to the adoption of a subdivision ordinance applicable thereto."⁸⁷ The court found the subdivision had not been lawfully created and that the county had acted properly in amending its subdivision ordinance.⁸⁸

V. USE (OR ABUSE) OF PUBLIC UTILITIES AS A GROWTH MANAGEMENT TOOL

Local governments have authority through their comprehensive planning functions to make decisions about the expansion of public utilities. Section 15.1-456 of the Code ("section 456"), entitled *Legal Status of Plan*, provides that after a local jurisdiction adopts its comprehensive plan, no future street, public area, public building or utility facility which is not shown on the plan shall be constructed, established or authorized unless and until the general location, character and extent has been approved by the local Planning Commission as being substantially in accord with the adopted plan.⁸⁹ This section provides a potent tool for management of growth by local governments. The ability to control utilities and other public facilities carries with it the control and timing of development. By requiring that utility extensions be consistent with the comprehensive plan, local jurisdictions arguably may be able to utilize timing constraints which the courts have nullified under previous zoning authority.⁹⁰

A recent Fairfax County action has demonstrated the usefulness of this section of the Code to one local jurisdiction. In *NV Land, Inc. v. Board of Supervisors*,⁹¹ the Circuit Court of Fairfax County upheld the county's denial of a developer's application under section 456 for extension of the county owned sewer facilities.⁹² Sewer

86. *Id.* at IV-42.

87. VA. CODE ANN. § 15.1-473(C) (Repl. Vol. 1989).

88. *Cooke Inc.*, No. 89-0017-R, mem. op. at IV-50.

89. VA. CODE ANN. § 15.1-456(a) (Supp. 1990).

90. See *Bd. of Supervisors v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975); *Bd. of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975).

91. No. 105,959 (Fairfax County Cir. Ct. April 4, 1990) (ltr. op.).

92. *Id.*

service was required in order for the developer to utilize the property for its proposed cluster development. In the same application, the developer sought a special exception which was required under the zoning ordinance to allow the cluster development. The Board of Supervisors reviewed and denied the applications and the developer filed suit.⁹³ Granting partial summary judgment for the county, the court held that the county's decision to deny extension of its sewer service system into a new area beyond the boundaries planned for development was, as matter of law, a discretionary legislative action and not a proprietary or ministerial decision as argued by the landowner.⁹⁴

The property owner contended that the denial of a section 456 application can only be based upon utility related proprietary reasons. The court held, however, that section 456 applications, when tied to other land use applications "as a package" involving considerations of the comprehensive plan and the zoning ordinance, as well as the integrated sewer system, are not ministerial.⁹⁵ The court determined that the "fairly debatable standard" would apply to review the reasonableness of legislative actions involving section 456 reviews.⁹⁶

In another case involving section 456 review, the Circuit Court of Prince William County reached a different result. In *William E. Meyers v. Board of Zoning Appeals*,⁹⁷ the court held that where existing zoning allows high density development through utilization of public sewer and water, section 456 approval is not required to extend utilities even if the comprehensive plan has designated the area for lower density development without public sewer and water.⁹⁸ In this case, the Prince William County Zoning Administrator denied approval of the developer's preliminary subdivision plan because water and sewer extensions were not contemplated or

93. *Id.*

94. *Id.* at 2, 3.

95. *Id.*

96. *Id.* at 2. A similar result was reached in the case of *Caleb Stowe Associates v. County of Albemarle*, 724 F.2d 1079 (4th Cir. 1984), where the county denied approval of a site plan because the extension of public utilities to the property was not "substantially in accord with the Comprehensive Plan's recommended location for such sewage facilities." *Id.* at 1080. The property was zoned for residential development, but recent revisions to the Comprehensive Plan had designated its use for rural agricultural. The Federal District Court held that the Board's action was proper and within its statutory authority. *Id.* at 1080. This decision was vacated by the Fourth Circuit invoking the abstention doctrine. *Id.*

97. No. 2581 (Prince William County Cir. Ct. 1988) (mem. op.).

98. *Id.*

shown on the comprehensive plan. Therefore, the zoning administrator ruled the property could not be developed at the density submitted without an application pursuant to section 456, which had not been done by the developer. The court disagreed stating "that the zoning on the property takes precedence over the Comprehensive Plan, and that by the established practice of the County and the expressed provisions of the statute, they are not required to have to undergo the public hearings required by § 15.1-456."⁹⁹ Further, the court ruled that "the proposed extension of the water and sewer to the subject property in the manner proposed is more in keeping with a normal service extension than the major or substantial changes contemplated by the Statute."¹⁰⁰

Finally, in another case involving an annexation order rather than a section 456 review, *Front Royal and Warren County Industrial Park Corporation v. Town of Front Royal*,¹⁰¹ the federal district court held that the town's failure to connect municipal sewer service to the landowners' property denied the landowners their civil rights, equal protection, and constituted a taking of their property.¹⁰² In this case, the obligation to provide public utilities was specifically and clearly required by an annexation order and no discretionary legislative function was found to be available to assist the town.¹⁰³

VI. CONDITIONAL ZONING

A. Court Action

The case of *Rinker v. City of Fairfax*¹⁰⁴ appears to settle the question of whether jurisdictions which derive their conditional zoning powers under section 15.1-491(a) of the Code can impose conditions in a rezoning without the voluntary consent of the affected property owner. The landowner in *Rinker* had proffered seven conditions on his rezoning application, but added an eighth proffer which stated that the seven previous proffers would be nullified if, after the proffers were submitted, the city implemented a new comprehensive zoning ordinance.¹⁰⁵ Just after the proffers had

99. *Id.*

100. *Id.*

101. 708 F. Supp. 1477 (W.D. Va. 1989).

102. *Id.* at 1487-88.

103. *Id.* at 1486.

104. 238 Va. 24, 381 S.E.2d 215 (1989).

105. *Id.* at 26-27, 381 S.E.2d at 215-16.

been offered to the Planning Commission, the City Council, in turn, amended the zoning ordinance to reclassify the property owner's property. The amendment included a new provision which imposed six conditions, some of which had been the subject of the initial proffers, on the property.¹⁰⁶ The parties agreed for the purposes of demurrer that the proffers had been withdrawn by the time the revision of the zoning ordinance occurred, thus making the conditions of the zoning involuntary. In dealing with section 15.1-491(a), which does not contain the word "voluntary," the court interpreted that section to require "that the proffer shall be voluntary."¹⁰⁷ For its authority, the court cited section 15.1-491.2 of the Code which pertains to general enabling legislation permitting conditional zoning throughout the Commonwealth which does contain the word "voluntary."¹⁰⁸

The supreme court in *Rinker* also reversed the trial court's ruling that the landowner had failed to exhaust his administrative remedies, stating that:

[T]he landowner in this case has fully run the legislative gauntlet once [seeking rezoning], and in the midst of the process there was a comprehensive revision of the City's Zoning Ordinance. Under those circumstances, however, the owner is not required to resort to the legislative process a second time before being permitted to challenge the restrictions being placed on the use of its property, especially when it sought to protect itself against the adverse effect of the anticipated revision."¹⁰⁹

B. *Legislative Actions*

The 1990 General Assembly amended the conditional zoning sections of the Code to vest development rights in connection with rezonings where substantial conditions have been proffered as part of the rezoning.¹¹⁰

106. *Id.*

107. 238 Va. at 29, 381 S.E.2d at 217.

108. *Id.*

109. *Id.* at 30, 381 S.E.2d at 218.

110. See *supra* text accompanying notes 66-69.

VII. SUBDIVISIONS

A. *Legislative Actions*

Responding to pressure from some high-growth jurisdictions which cited alleged abuses to the use of family subdivisions by landowners who were perceived as circumventing the intent of the various subdivision ordinances of those localities, the General Assembly approved a change in the "family subdivision" section of the Code. The amendment now authorizes local governments to establish more stringent regulations for family subdivisions in areas of Virginia where population growth exceeds ten percent or more from 1980 to the most recent year.¹¹¹ The change effectively permits these jurisdictions to avoid the otherwise state-wide requirement that a subdivision ordinance liberally permit divisions among family members and is an indication of the legislature's willingness in some instances to grant greater local authority to those areas of the state which are experiencing rapid population growth and pressure.

The legislature also adopted provisions authorizing counties to exercise more control in reviewing subdivisions plans to assure the coordination of proposed streets with existing or planned streets in adjacent or contiguous subdivisions.¹¹² Further, the legislature provided for subdivision ordinances to permit the creation of common or shared easements for public utilities¹¹³ and added a new method for vacation of plats and interests granted to the governing body in connection with the approval of a site plan.¹¹⁴

B. *Court Actions*

In *West v. Mills*,¹¹⁵ the Supreme Court of Virginia found that the trial court lacked sufficient evidence to rule that a denial of a subdivision plat by the Town of Blacksburg was arbitrary and capricious because it was based on public sentiment rather than the provisions of the ordinance.¹¹⁶ The court relied on the presumptive validity of the town's action and stated that there was sufficient evidence to demonstrate that the denial was based on applicable

111. VA. CODE ANN. § 15.1-466G (Supp. 1990).

112. *Id.* § 15.1-466A(c).

113. *Id.* § 15.1-466A(f1).

114. *Id.* § 15.1-480.1.

115. 238 Va. 162, 380 S.E.2d 917 (1989).

116. *Id.* at 169, 380 S.E.2d at 921.

ordinance provisions rather than public sentiment.¹¹⁷ The court also found that the trial court erred in issuing a writ of mandamus compelling the town to consider another plat regarding the same property when the denial of a previous plat was the subject of an appeal. The court held that simultaneous consideration of two inconsistent plats for the same property by a court and an administrative body could produce conflicting results as to which plat should be recorded.¹¹⁸

In *Crestar Bank v. Martin*,¹¹⁹ the Supreme Court of Virginia decided that a transfer of land to a family member which was exempt under the family-member provision of the local subdivision ordinance was, nevertheless, subject to the controls of the zoning ordinance. In this case, the Martins' conveyance of part of their land to their daughters was held to be valid.¹²⁰ However, the resulting use, erection of a mobile home, violated the zoning ordinance which prohibited the erection of mobile homes "on private lots in subdivisions."¹²¹ Interestingly, in interpreting the use of the word subdivision in the zoning ordinance, the court resorted to its definition in the subdivision ordinance since the word was not defined in the zoning ordinance.¹²² This case followed the rule established in *Leak v. Casiti*,¹²³ which held that subdivision ordinances do not overrule a Virginia court's common law jurisdiction to partition property in kind as long as the resulting subdivision or partition does not violate valid laws relating to land use.¹²⁴

In *Hurd v. Watkins*,¹²⁵ the court held that a parcel marked "reserved" on a subdivision plat had not been dedicated as a street. There was no offer of dedication by the subdivider or acceptance by the local government and thus adjoining landowners could not establish a right of way through the property through the "reserved" parcel.

117. *Id.* at 168, 380 S.E.2d at 921.

118. *Id.* at 170, 380 S.E.2d at 922.

119. 238 Va. 232, 383 S.E.2d 714 (1989).

120. *Id.* at 236, 383 S.E.2d at 716.

121. *Id.* at 235, 383 S.E.2d at 716.

122. *Id.* at 235-36, 383 S.E.2d at 716.

123. 234 Va. 646, 363 S.E.2d 924 (1988).

124. *Id.* at 651, 363 S.E.2d at 927.

125. 238 Va. 643, 385 S.E.2d 878 (1989).

VIII. AFFORDABLE HOUSING

In 1973, the Fairfax County Board of Supervisors acted to address a perceived need to provide affordable housing in the county by adopting legislation which required developers to rent or sell fifteen percent of the dwelling units in the development to low and moderate income families below the market rate without any compensation from the county. The supreme court in *Fairfax County v. DeGroff*¹²⁶ held this action to be an unconstitutional taking of property without just compensation. In 1990, the General Assembly attempted to provide authority to Fairfax and other high-growth counties to require developers to provide affordable housing units, with compensation, based upon allowing increased density beyond what would normally be permitted by the zoning district.¹²⁷ Moreover, other sections of the Code were amended to allow comprehensive plans and zoning ordinances to designate areas for the implementation of measures to promote construction and maintenance of affordable housing.¹²⁸

Another amendment prohibits discrimination against manufactured housing by requiring that in all agricultural zoning districts "the placement of manufactured houses that are nineteen or more feet in width, on a permanent foundation, on individual lots, shall be permitted."¹²⁹ Such houses must comply, however, with development standards equivalent to those applicable to conventional site-built, single-family dwellings within the same zoning districts.¹³⁰

Another new section provides that group homes which house eight or fewer persons in a residential facility for mentally ill, mentally retarded or developmentally disabled persons must be treated in locally adopted zoning ordinances the same as single-family residences.¹³¹

126. 214 Va. 235, 198 S.E.2d 600 (1973).

127. See VA. CODE ANN. § 15.1-491.8, -491.9 (Supp. 1990).

128. See *id.* §§ 15.1-446.1, -447, -489, -489(10), (Repl. Vol. 1989 & Supp. 1990).

129. *Id.* § 15.1-486.4 (Supp. 1990).

130. *Id.*

131. *Id.* § 15.1-486.3.

IX. THE FAIRLY DEBATABLE STANDARD

In the case of *Barrick v. Board of Supervisors*,¹³² disgruntled neighbors challenged the action of the Mathews County Board of Supervisors in rezoning two waterfront parcels from single-lot residential use to multi-family condominium. Suit was filed alleging that illegal spot zoning had occurred. The Supreme Court of Virginia affirmed the circuit court's dismissal of the suit holding that the Board had produced sufficient evidence of reasonableness to make the decision "fairly debatable."¹³³

The Supreme Court of Virginia also applied the fairly debatable standard in another case, *County of Lancaster v. Cowardin*¹³⁴ and upheld the county's decision. In this case, however, an attempt was made to find an exception to the fairly debatable rule where discrimination is alleged. A discrimination argument had been attempted in an earlier case, *County Board of Arlington v. Bratic*,¹³⁵ where the court applied the fairly debatable rule to sustain the county's denial of a conditional use permit. Rejecting the equal protection and discrimination argument, the court in *Bratic* stated that "Bratic makes the final point that the denial of his application for a use permit was discriminatory, constituting a denial of equal protection, because the County Board in 1980 and 1984 granted use permits for two-family dwellings in situations similar to the case at bar."¹³⁶ The court stated that "a claim of unlawful discrimination cannot prevail if there is a rational basis for the action alleged to be discriminatory."¹³⁷ "Here, we think the County Board's effort to preserve the single-family character of the interior of the neighborhood provides a rational basis for the denial of the Bratic's application."¹³⁸ In *Cowardin*, the court held that the plaintiff's discrimination claim lacked merit because there was a "rational basis for the Board's action."¹³⁹ Although the Board had granted one of the plaintiff's neighbors a boathouse permit several months earlier, the court noted that the neighbor's boathouse was located on a different tributary of the same river, where there were

132. 239 Va. 628, 391 S.E.2d 318 (1990).

133. *Id.* at 635-36, 391 S.E.2d at 322.

134. 239 Va. 522, 391 S.E.2d 267 (1990).

135. 237 Va. 221, 377 S.E.2d 368 (1989).

136. *Id.* at 229, 377 S.E.2d at 372.

137. *Id.* at 230, 377 S.E.2d at 372.

138. *Id.*

139. *Cowardin*, 239 Va. at 526, 391 S.E.2d at 269.

no boathouses.¹⁴⁰ From an analysis of *Cowardin*, it is difficult not to ask the question whether the court has substituted "any" basis for "rational" basis.

In *Ames v. Town of Painter*,¹⁴¹ the importance of providing a record in a Board of Zoning appeals ("BZA") case was clearly established. The court affirmed the trial court's overturning of a BZA grant of a special use permit for a migrant labor camp because there was "no basis" in the record for a reviewing court to determine whether the fairly debatable standard could be established.¹⁴²

X. LAND USE TAXATION

Land enrolled in Virginia's land use assessment program receives a reduced real property tax assessment.¹⁴³ Lots over five acres which are farmed or forest lots over twenty acres qualify for this special tax assessment program.¹⁴⁴

The subdivision of land which is enrolled in Virginia's special use assessment program into agricultural lots of less than five acres or forestal lots of less than twenty acres will result in the assessment of roll-back taxes.¹⁴⁵

A 1990 amendment to Virginia's minimum acreage requirements for special use assessments allows a landowner to combine contiguous subdivided lots recorded prior to July 1, 1983, for purposes of the minimum acreage requirements.¹⁴⁶

Furthermore, property rezoned after July 1, 1988, to a more intensive use at the request of the landowner will be subject to roll-back taxes at the time the zoning is changed.¹⁴⁷ Land rezoned to a more intensive use prior to July 1, 1988, at the request of the owner or his agent, however, will only be subject to roll-back taxes when the property's use is changed to a non-agricultural or non-forestal use. To avoid the roll-back taxes, a landowner who rezoned his property prior to 1988 must continue to farm his property for

140. *Id.*

141. 239 Va. 343, 389 S.E.2d 702 (1990).

142. *Id.* at 350, 389 S.E.2d at 706.

143. VA. CODE ANN. § 58.1-3230 (Cum. Supp. 1990).

144. *Id.* § 58.1-3233.

145. *Id.* § 58.1-3241(A). The minimum acreage requirement does not include an area for the house site. Accordingly, a lot with a house must exceed the minimum acreage requirement (five or twenty acres plus the house site).

146. *Id.* § 58.1-3234(2).

147. *Id.* § 58.1-3237(D).

the next five years before changing to a non-qualifying use.

Even land which is not rezoned or subdivided can be subject to a roll-back tax simply by a discontinuance of the farm or forestal use. A commonly held misconception is that if the landowner withdraws from the land use assessment program and elects to be taxed at the fair market value assessment, he need not continue to farm to avoid the roll-back tax. In fact, if he discontinues farming prior to the five-year grace period, roll-back taxes will be assessed.

XI. IMPACT FEES

The use of proffers and conditional zoning is one method utilized by local jurisdictions to control development and growth and to obtain funds for the cost of constructing roads and paying for services normally provided by general tax funds. Property which is to be developed under existing zoning where proffers and conditions are not authorized, however, does not afford the jurisdictions an opportunity to obtain these voluntary contributions for improvements and services such as roads, schools and other public facilities. Many localities have argued that residential development does not generate sufficient local tax base to offset the expenditures which the residential development will require for governmental services, such as schools, police and parks. As a result, the argument goes, existing residents will see their taxes increasing in order to pay for new services ostensibly generated because of new development. High growth jurisdictions have sought to tax or exact money or services from new developments to pay for those perceived additional costs. In response, the 1989 General Assembly adopted a road impact fee provision¹⁴⁸ which became effective July 1, 1990.

Impact fees assessed under this legislation are *involuntary*. In order to charge such fees, however, the locality must first designate the areas within which the fees will be collected and estimate the cost of bringing the road network to a planned standard. Then, fees for off-site road work can be imposed on developments on a pro-rata basis if the need for the off-site improvements are generated by the development itself. This limitation reflects the constitutional constraints on involuntary governmental exactions, such as impact fees, established in the United States Supreme Court's

148. VA. CODE ANN. § 15.1 -498.1 -.10 (Repl. Vol. 1989).

decision in *Nollan v. California Coastal Commission*.¹⁴⁹ As of this writing, no locality is known to have yet adopted the impact fee legislation; but as stated earlier, jurisdictions have asked the General Assembly to expand the permitted uses of those fees beyond roads to include schools and other public needs.¹⁵⁰ A plausible explanation of why jurisdictions have not moved to adopt road impact fees may be because the statute requires as a condition of its use that the local jurisdiction conduct an extensive transportation planning and cost analysis. It must then charge the impact fee on a pro-rata basis by determining the amount of the cost of new road improvements for which the development, itself, would generate the need.

XII. CONCLUSION

Most high-growth jurisdictions have been moderately successful in dealing with growth management without legislative authority by obtaining contributions from developers as a condition to the granting of the desired land use approval. Such exactions, in vogue during the economic boom of the 1980's, will undoubtedly face constitutional challenges in the courts in the more austere decade of the 1990's. Constitutional questions of private property rights versus local zoning authority are also likely to be a major issue in the development of growth management strategy during the legislative sessions and in the courts during the next decade.

149. 483 U.S. 825 (1987).

150. See *supra* text accompanying note 14.