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Virginia Zoning Review and Due Process

ZONING REVIEW AND DUE PROCESS

Recently the Virginia Supreme Court has handed down some very interesting and startling zoning decisions. The Virginia Court for the most part is now finding zoning ordinances as applied to individual property owners invalid as being arbitrary and capricious. The basis for these decisions as seen in the language of the Court is apparently a due process argument. The analysis by the Virginia Court is not in the vein of procedural due process as has been the case in some recent decisions. See, Fasano v. Board of County Commissioners of Washington County, 507 P.2d 23 (Ore. 1973) and "Recent Cases in Zoning," ENP Vol. 2, no. 1 (Nov. 1976), p. 5. It seems the Virginia Court is establishing a unique due process analysis. The only purpose of this article is to show the tip of the iceberg, but there is a more thorough discussion and solution offered in a note entitled "Zoning, Planning and the Scope of Judicial Review in Virginia" 25 Am. L. Rev. 497 (1975).

The leading cases have centered around Fairfax County which is probably the fastest growing county in the State, but the cases certainly have state wide, and perhaps national effect, so they should not be treated as parochial in nature. The first significant case developing this new position was Board of Supervisors of Fairfax County v. Snell Construction Corp., 214 Va. 655 (1974). Here, the newly elected Board of Supervisors, which had been elected to slow the county's rapid growth, moved on its own to rezone certain parcels of land which had the effect of piecemeal down-zoning. The trial court adopted the position that such zoning would be valid if there was a substantial change in circumstances or a mistake, but since the county had shown neither of these then the legislation was invalid. The Virginia Supreme Court accepted that position, but it went on to say that piecemeal down-zoning would have the following effect on the presumption of legislative validity:

> "Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance must be sustained. If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained." 214 Va. at 659.

Normally a court in judging legislative validity would apply the "fairly debatable" test by upholding the legislation if there was any reasonable purpose for the legislation whether presented in evidence or not, see Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Very little violence is committed to this test if applied only to cases of piecemeal down-zoning, but the Virginia Court did not stop there.

The next significant case is Board of Supervisors of Fairfax County v. Allman, 215 Va. 434 (1975). Here the landowners asked for rezoning of a little over 300 acres

from single family dwellings on one acre lots to multi-family use in planned development units. This would have the effect of raising potential family units on the property from 273 to 988. After the Board refused to rezone, the landowners challenged the ordinance and the trial court found it arbitrary and capricious. The petitioning landowners argued that the more intense land use would conform to the Master Plan; that the value of the property was worth considerably more if rezoned; that public facilities were available, or could be built, and that there had been discrimination because similarly situated property nearby had been granted rezoning to higher uses. The County responded by arguing presumption of legislative validity. Also the defendants argued that public facilities were inadequate at present and that the intention of the Board was to permit rezoning as the facilities became available. The Board had rezoned nearby property but those rezonings were to fill in areas around Reston, an already built-up area. One other property of a little over 64 acres which was obviously a much smaller area had also been rezoned. The Board claimed such rezonings had been a mistake.

The Virginia Supreme Court took great pains to point out all the facts which supported the lower court's findings. There was evidence that the landowners could make substantially more money if the property were developed at a higher density. Although the fire protection would be substandard, it would be the same as existed in other areas of the county, and the court believed that it was no obstacle to rezoning. The effect would be to increase the number of people with substandard fire protection or the county would need to correct the matter by a large outlay of capital improvement funds all at once. In either case it denied the county the ability to upgrade fire protection, and protect the public safety in an orderly manner through zoning. The court also pointed out that the sewage system was in fact available. This had the effect of saying that the county's plans of sewer development must give way to a first come first serve basis. The court also found that the school facilities would be adequate since "[t]his could be done, Whitworth a school official testified, by an accelerated building program, temporary classrooms, extending the school day, going on a double shift, realignment of school district lines and transporting children from congested areas to areas where there were vacant or unfilled classrooms" (215 Va. at 438). One of the most interesting aspects of the decision was the use of the master plan against the county. Since the master plan showed that the rezoning was to be made at some time, the court held that the change should take place now. This could well put a chill on future land use plans designed for years in the future. Another argument that was given great weight was that the similarly situated property owners, as the Virginia Court called them, had been granted rezonings. The court called all of this "inconsistent and discriminatory" and then curiously went on to say that this ". . . discriminatory action is an arbitrary and capricious action" (215 Va. at 445). The court then quoted the passage above from its earlier decision that the legislative presumption of validity had been overcome by probative evidence that the county had failed to offer evidence to establish reasonableness of the ordinance.

The next case was Board of Supervisors of Fairfax County v. Williams, 216 Va. 49 (1975). Again the landowners wanted their property rezoned to a higher residential use, the Board refused, the owners made a challenge, and the trial court found the ordinance arbitrary and capricious. The trial court made findings that (1) the public facilities were or soon would be available; (2) nearby similarly situated property had already been rezoned; (3) existing zoning of the land in question was unreasonable (since the land could be developed more profitably with a higher land use); and (4) the zoning was discriminatory and therefore arbitrary and capricious. This case was very similar to the previous case but with two additional attributes. First the master plan specifically called for development over a period of time, but this did not help, the ordinance was still held invalid. Second, the Virginia Supreme Court in upholding the trial court said: "We are of opinion [sic] that the record supports each and every one of these findings of the trial court." (216 Va. at 58). The Virginia Supreme Court, as in the previous case, went over the evidence in detail and then upheld the lower court, since the evidence supported the lower court's opinion.

The formula for a new rule of zoning review laid down by the Virginia Supreme Court seems to go something like this: if (1) petitioners challenging a local zoning ordinance present probative evidence of discrimination, then (2) the burden shifts to the locality to present evidence of reasonableness. This (3) permits the court, no matter what lip service it pays to legislative presumption, the opportunity to weigh the evidence in a balancing test to determine if the ordinance is arbitrary and capricious, and (4) on review the Virginia Supreme Court will determine if the evidence supports the findings of the trial court.

On the surface this appears to be an orderly test, but unfortunately there are a number of difficulties with each step that ought to be treated one at a time. The step which opens with evidence of discrimination follows the familiar path of an equal protec-

tion argument. However, landowners of Fairfax County or of Virginia for that matter are hardly a "suspect" class, and there is no fundamental right which is in issue. The United States Supreme Court in a zoning case, has said as much through Mr. Justice Douglas. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In the absence of a suspect class or a fundamental right the question of discrimination is illusory, because every act of the legislature is discriminatory in some manner, since legislatures deal in classifications. Mr. Justice Douglas in the same case observed that in the areas of economic and social legislation the legislatures have historically drawn lines (416 U.S. at 415). In the second step of the analysis, where the burden shifts to the localities, there occurs an interesting addition to the rules surrounding presumption of legislative validity. The Virginia Court appears to be treating the presumption as it would an evidentiary presumption which permits one party to win until the other party presents rebutting evidence, and the burden shifts to the first party to present evidence or lose. Normally, it is necessary for the petitioner who is attacking an ordinance to show that it is unreasonable. If the law is unreasonable, it is invalid. It is not necessary for the defendant to show reasonableness. Euclid v. Ambler Realty Co., 272 U.s. 365 (1926).

Under step (3) in the analysis, if the matter becomes a duel of evidence then in fact the court becomes a fact finder which will weigh the evidence. And in such deliberations there is the clear danger that the court will substitute its judgment for that of the legislature. There are in Virginia at least seven purposes for zoning which the locality is mandated to take into consideration. Va. Code Ann. 15.1-489 (1975). In deciding what course to follow it becomes necessary for the locality to choose which criteria is to receive greater weight and how each property is to fit into the scheme. In fact the locality is engaged in drawing discriminatory lines, but the question is who is better equipped to make those decisions -- the court or the locality. If localities are forced to permit development by allowing use of public facilities on a first come, first serve, basis there will be chaos. If the localities are forced to expend revenue, and also tax by court order, so as to permit development, then there is little use in drawing up orderly master plans and passing zoning ordinances. The final step in the Virginia Court's analysis is perhaps the most interesting and telling point. The Virginia Supreme Court's review of the trial court will only go to determine if the evidence supports the findings. This indicates that the trial court is engaged in weighing evidence by balancing to determine the validity of the legislation, and the Virginia Supreme Court will not look for itself to see whether circumstances and conditions are such that the validity of the classification is fairly debatable as it should. See, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

It is difficult to determine what really concerns the Virginia Supreme Court. The court seems to be legitimately concerned about due process. Especially evident, in the cases, is a desire to see that low and moderate income families are not excluded by zoning, but this is certainly a peculiar way to go about assuring such an end. Further, the analysis leaves the localities in an uncertain position as to any outcome of a zoning challenge.