VESTED RIGHTS IN LAND USE: MUNICIPALITIES V. DEVELOPERS

INTRODUCTION

Zoning is an area of the law which involves two opposing interests. Walter F. Witt, Jr., a partner in the law firm of Hunton & Williams, aptly summarized this opposition, saying, "The public interest in land use regulations, which is subject to frequent changes because of shifting demands, is set against the interest of landowners and developers which depends on determining with certainty permissible land uses."[1] Nowhere is this conflict more apparent than in the issue of whether rights can vest in uses given by municipal zoning ordinances.

A vested right is defined in Black's Law Dictionary (5th Ed.) as:

> Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law. . . . Such interests as cannot be interfered with by retrospective laws; interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice.

Vested rights, with respect to zoning, have evolved from the 14th Amendment's Due Process clause in the United States Constitution, which prohibits the illegal "taking" of an individual's property without just compensation.[2]

Such rights are normally held protective of only the existing uses made by the landowner. There is no right, generally, to the continued existence of a zoning ordinance and to any prospective uses which are allowed thereunder.

> "[I]t is clear . . . that an amendatory zoning regulation cannot be applied so as to require destruction, removal, or abatement of pre-existing structures or uses. It is equally clear, however, that a landowner who merely hopes or plans to develop his property in a certain way at some time in the future has no protection against zoning changes prohibiting such development."[3]

The question is therefore where to draw the line between pre-existing uses and a "mere hope" of development.

THE LAW IN GENERAL

As mentioned above, there is no right to the continued existence of a given zoning ordinance. The rule in a majority of states allows for such ordinances to

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1. "Vested Rights in Land Uses", *Planning in Virginia*, January, 1988.

2. 4 Rathkopf, *The Law of Zoning and Planning*, Sec.50-03(1).

3. 49 ALR3d 13 Sec. 2(a).

have retrospective effect on properties upon which there is no existing use.[4] Further, a landowner acquires no vested rights to continue or complete construction, or to initiate or continue a use, unless, prior to the effective date of the legislation, he has relied on a validly issued building permit, in good faith, by substantially changing expenditures or obligations. There are two major exceptions to this rule.

According to the "Washington Rule," the right to develop the property vests at the time the permits are applied for in good faith. The ordinance in effect at that time is controlling, rather than any ordinance adopted subsequently.[5] This is the most liberal rule, as it allows the point of vesting to be controlled totally by the developer, without regard to his loss if the subsequent ordinances were held applicable.

The other exception, known as the "Illinois Rule," allows for vesting to occur at the time an application is made in good faith, as long as the landowner's position with regard to the land has substantially changed, either through expenditure or obligation.[6] This rule falls somewhere between the majority and Washington rules, in that it allows for vesting to occur at the earlier period in time (i.e., when the application is made), but requires the landowner to show the harmful affects from applying the subsequent ordinance.

Many scholars and academics who have written on this subject have made a distinction between equitable estoppel and vested rights. Equitable estoppel focuses on the equities of the situation while upholding the municipality's right to rezone retrospectively. The vested rights issue focuses on the property interest of a landowner and the consequential lack of governmental police power to take such property away.[7] Equitable estoppel is normally used in states which follow the majority rule, in order to give relief from the harshness of that rule, while vested rights analysis is used in the states that follow one of the exceptions.

Whether in the form of equitable estoppel or one of the exceptions to the majority rule, the theoretical foundation is the same: fundamental fairness. The Supreme Court of Illinois recognized this and named the injustice resulting from upholding such a retrospectively-applied amended ordinance as their reasoning for the so-called "Illinois Rule."

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4. *See* 4 Rathkopf Sec. 50.03(3); 49 ALR3d 13 Sec. 2(a); 50 ALR3d 596 Sec. 2(a); *American Law of Zoning* (3rd Ed.) Sec. 606.

5. *See* 1988 *Zoning and Planning Law Handbook*, Clark Boardman Company, Ltd., New York, New York, 1988, quoting *Valley View v. Redmond*, 107 Wash.2d 621 (1986), and *West Main Associates v. City of Bellevue*, 106 Wash.2d (1986).

6. 4 Rathkopf Sec. 50.03(2).

7. *See* Witt, *supra* note 1, at 15.

> "Where an individual or corporation expends substantial sums relying on the then existing zoning and zoning ordinance and proceeds to seek a permit in compliance with them, it would be a grave injustice to allow municipal officials to hold up action on issuance of a building permit until an amendatory ordinance could be passed, changing the standards to be met so that a permit formerly lawful would now not be issued due to an abrupt change in the law."[8]

Most courts, in analyzing this fairness, do so by looking at the "good faith" of the parties involved. In order to find good faith on the applicant's part, courts look to many of the following factors:[9]

- purchase of the property in question for the specific use indicated in the application for the building permit.
- relative usefulness of the subject property for other purposes.
- duration or stability of the zoning classification existing when the permit application was filed.
- openness in dealings with municipal officials, including inquiry into the current zoning status of the applicant's property and into the existence of any proposals to change the zoning, and free and full disclosure of the applicant's plans.
- receipt of assurances from municipal officials as to the legality of the proposed construction or as to the issuance of the requested permit.
- payment of filing fees or other costs in applying for a building permit.
- expenses and obligations incident to preparation for construction, such as payment of architectural or engineering fees, performance of preliminary site work not requiring a building permit, entering contracts for construction, supplies, and other building obligations, and similar matters.

Similarly, in an effort to determine just resolutions, courts will also look at factors which relate to the municipality's good faith, such as:[10]

- Inordinate or unexplained delay in processing the subject application, or its flat refusal to issue the requested permit at a time when its issuance was lawful.
- Affirmative efforts to mislead the applicant or lull him into believing that his permit would be issued as a matter of course.
- The fact that the rezoning process was initiated solely because of the applicant's proposed construction, and was aimed at thwarting his plans.

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8. Cos. Corp. v. City of Evanston, 27 Ill.2d 570 (1963).

9. 50 ALR3d 596 Sec. 2(b).

10. *Id.*

Imposition of frivolous, technical, or previously unenforced requirements with respect to the permit application or the applicant's plans and specifications.

In applying rules that also require the landowner to show a substantial change in position, there has been wide variance as to what constitutes fulfillment of that requirement. One theory requires the change in position to be measured in dollars and for that amount to be considered substantial when measured relative to the total development costs. This position has obtained momentum in many of the states applying the majority and Illinois rules.[11]

THE LAW IN VIRGINIA

Currently, the law in Virginia with respect to vested rights is unclear. Section 15.1-492 (Vested rights not impaired; nonconforming uses) of the Virginia Code provides relief to landowners who wish to continue an existing use allowed for under an old ordinance but prohibited under a subsequent one. Of course, this type of relief is in line with most states and does not help in determining the issue at hand. The case law gives far more guidance but leaves undecided the specific issue of whether and when a prospective use, as allowed for under the existing ordinance, can become vested in a landowner, who has not yet actually begun using the property.

The Supreme Court of Virginia has generally settled zoning issues with the underlying premise that a balance between the individual landowner and the society at large must be maintained so as to provide predictability in the law.

> The zoning statutes of Virginia, and those enacted by her political subdivisions, are designed to strike a delicate balance between private property rights and public interest. One who owns land always faces a possibility of its being rezoned. However, our policy, which holds that permissible land use should be reasonably predictable, assures a landowner that such use will not be changed suddenly, arbitrarily or capriciously, but only after a period of investigation and community planning, and only where circumstances substantially affecting the public interest have changed. As we said in *Fairfax County v. Snell Corp.*, 214 Va. 655, 659 (1974): 'Such stability and predictability in the law serve the interest of both the landowner and the public.'[12]

Given this general proposition, there are two cases, decided in 1972, which have universally been viewed as landmark cases in Virginia for this area of the law: *Fairfax County v. Medical Structures*[13] and *Fairfax County v. Cities Service*.[14] The cases are, for the most part, factually identical. They involve

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[11]. *See* Witt, *supra* note 1, at 16.

[12]. Cole v. City Council of Waynesboro, 218 Va. 827, 834 (1977).

[13]. 213 Va. 355 (1972).

[14]. 213 Va. 359 (1972).

property for which special use permits had been obtained prior to the complainant's purchase of the property. The landowner then filed site plans with the appropriate Fairfax County authorities. Subsequent to the filing of these applications but prior to their approval, the County Board of Supervisors amended the pertinent zoning ordinances, so as to void the special use permits upon which the site plans were based. In *Medical Structures*, the court said:

> [T]hat where, as here, a special use permit has been granted under a zoning classification, a bona fide site plan has thereafter been filed and diligently pursued, and substantial expense has been incurred in good faith before a change in zoning, the permittee then has a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation.[15]

The Board of Supervisors in *Medical Structures* relied heavily upon *McClung v. County of Henrico*.[16] McClung was issued a valid building permit based on a normal zoning classification and the zoning ordinance was subsequently amended so as to prevent the use allowed for in the permit, if construction was not begun in ninety days. The subsequent ordinance was allowed to control in that case even though McClung had cleared and graded the land, set up building stakes, hauled building stone to the site and contracted to have the foundation dug and poured. The court, after a detailed analysis of the definition of construction, denied that McClung's activity constituted a construction start.

The court distinguished *McClung* in the latter two cases by saying that although the landowner had acquired a vested right in the use given by the permit, as was the case in *Medical Structures*, such rights expired when McClung failed to start construction within ninety days as was required by the zoning ordinance. Even though the court claimed there were factual differences and did not specifically overrule *McClung*, *McClung* is clearly not in line with the court's reasoning in either *Medical Structures* or *Cities Service*. Practically speaking, it has lost any precedential power it might have had outside of its factual setting.

In *Cities Service*, decided immediately after *Medical Services*, the Court quoted its decisions from *Medical Services* and found that the developer had acquired a vested right in the site plan application based on the use allowed to him by the special use permit.[17]

The line of reasoning used by the court in *Medical Structures* and *Cities Service* is generally thought to put Virginia among those states which follow the "Illinois Rule." Those in opposition to this reading of those cases, however, make the point that special use permits are far different from normal zoning

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[15]. Fairfax County v. Medical Structures, 213 Va. at 358.

[16]. 200 Va. 870 (1959).

[17]. Fairfax County v. Cities Service, 213 Va. 359, 362 (1972).

classifications. Whereas special use permits offer the municipality an opportunity for site specific analysis and give the landowner an objective governmental act upon which to rely, normal zoning classifications give neither. That argument normally concludes by calling for building permit approval to be the point in time at which vesting occurs with regard to such classifications.

Even if this line of reasoning were followed, building permit approval would have to be replaced by site plan approval. If not fully accepting the Illinois rule, the court, in *Medical Structures*, clearly found, at least with regard to urban development, that the site plan had replaced the building permit as an appropriate point in time to mark both the landowner's and government's intent with respect to the property. "Under current planning practice in many urban localities, the site plan has virtually replaced the building permit as the most vital document in the development process."[18]

In addition to *Medical Structures* and *Cities Service, Planning Commission v. Berman*[19] has also been upheld as a key Virginia Supreme Court precedent in this area and furthers the premise that Virginia is following the Illinois Rule. In that case, the landowner applied for site plan approval for a restaurant in an area which was zoned to allow for such a use and which, in fact, had several free-standing restaurants already. The landowner applied for site plan approval after having amended the preliminary plan, per the Planning Staff's recommendations. The site plan was denied by the Planning Commission, at which time the landowner filed for a writ of mandamus. Subsequent to all of these events, the City Council amended its zoning ordinance to prohibit the proposed use.

The trial court awarded the writ, but on appeal to the state supreme court, the City claimed the amended ordinance should have been the law applied by the trial court. The Virginia Supreme Court disagreed and upheld the trial court's ruling, after finding that the ordinance was precipitated by the site plan application of the landowner. In doing so, the court said:

> The trial court has found on credible evidence that at the time their petition was filed, appellees had complied with all provisions of the ordinances of Falls Church and the usual procedures and requirements, or were ready, willing and able to comply. Under such circumstances, approval of the site plan and the issuance of a permit were no longer discretionary but ministerial and mandatory.[20]

This case seems to indicate that the site specific analysis associated with special use permits and site plan approval is not a factor which should be

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[18]. Fairfax County v. Medical Structures, 213 Va. 355, 357 (1972).

[19]. 211 Va. 774 (1971).

[20]. *Id.* at 776-7.

considered by the courts of Virginia in their analysis of this issue. It is also an indication that normal zoning classifications are a sufficient governmental act upon which landowners should be able to rely in making their development plans.

The specific issues of whether a landowner has a vested right in a by-right use[21] allowed for under the zoning classification of his land and outlined in his site plan application and, at what point in time such a right vests, have not been decided by the Court. Two recent cases in Alexandria involve exactly these issues. The facts of each case are virtually identical.

The first case (*FADCO*) was decided against the landowner and remains on appeal before the Virginia Supreme Court.[22] In this case, the developer filed a site plan for construction of a 150-foot office building, which height was allowed under the existing ordinance. Subsequent to the application, the ordinance was amended so as to prohibit heights over 50 feet, with heights of 77 feet allowed for by special use permit. The amended ordinance gave its restrictions retroactive effect to all site plan applications not yet approved. The Planning Commission denied FADCO's application based on the amended ordinance and the City Council affirmed their decision. FADCO sought a declaratory judgment and the city filed a motion for summary judgment. In awarding summary judgment, the circuit court said that, absent a special use permit or another form of governmental approval specific to the applicant's property, the applicant had no vested interest in the site plan application for a proposed use.

The second case was in federal district court but was settled before the court made its decision.[23] In *Potomac Greens*, the developer filed a site plan for a use allowed under the existing ordinance. At the public hearing before the Planning Commission, it was determined that the height of the building applied for exceeded the heights permitted by the existing ordinance and, by agreement, consideration of the site plan was deferred. A revised site plan, with a lower height, was then submitted for the Commission's next public hearing. Prior to the developer's first application, the City Council had initiated the process of amending its ordinance, to prevent the use applied for by the developer without a special use permit. The ordinance became effective between the time the revised site plan was filed and heard by the Planning Commission at its next hearing.

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[21]. Under a given zoning ordinance, a landowner is allowed some uses automatically or "by right", and some uses under a special use permit, if such a permit is approved by the municipality.

[22]. First Ameriland Development and Construction Company (FADCO) v. City of Alexandria, At Law No. 1132d (1987).

[23]. Potomac Greens v. City of Alexandria, Civil Action 831A (E.D. Alex. 1987).

The case was never decided. The memoranda for both sides, however, typify the pro and con arguments of this issue. The developer argued that laws are generally not applied retroactively and that that rule applies in Virginia to "substantive" as well as "vested" rights. As precedent, he cited *Shiflet v. Eller*[24] and *Potomac Hospital Corp. v. Dillon.*[25] Further, he claimed that the decisions in *Medical Structures* and *Cities Service* were distinguished as involving special use permits. Additionally, citing *Sullivan v. Town of Salem*[26] and *Bain v. Boykin,*[27] he made the argument that a case should be determined by the law as it exists at the time of decision by the court. He also argued that laws are routinely given retroactive effect where the legislative branch enacting such a statute has indicated that such was their intent.

In furthering this reasoning, the city makes its most compelling argument by citing *Chesterfield Civic Association v. Board of Zoning Appeals,*[28] a case decided by the Supreme Court of Virginia two years after the court's landmark decisions in *Medical Structures* and *Cities Service.* In *Chesterfield*, the developer applied to the Board of Zoning Appeals (BZA) for a special use permit, which the BZA was allowed to grant under the existing ordinance. Subsequent to the landowner's applications but prior to the BZA's decision, the County Board of Supervisors amended the ordinance withdrawing the power of the BZA to grant special use permits, reserving it to themselves. The amended ordinance was silent as to the retroactivity of the law. The BZA awarded the special use permit and the complainant civic association then filed a writ of certiorari to have the decision overturned. The court overruled the BZA's grant of the special use permit by upholding the retroactive effect of the amended ordinance. The city used this case to press the point that local governments have the unquestioned authority to amend their own zoning ordinances and to apply such an amended ordinance to any pending applications.

While this is admirable advocacy, it is probably not a fair reading of that case. The court, in *Chesterfield*, primarily based its decision on the fact that the authority to grant special use permits ultimately resides in the Board of Supervisors or a like governing body. Further, the court said that that body is able to delegate that authority and, as in *Chesterfield*, to withdraw any such authority so delegated. Since the authority was withdrawn from the BZA before

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[24]. 228 Va. 115 (1984).

[25]. 229 Va. 355, cert. denied, 474 U.S. 971 (1985).

[26]. 805 F.2d 81 (2d Cir. 1986).

[27]. 180 Va. 259 (1942).

[28]. 215 Va. 399 (1974).

they acted upon the application, the application approved subsequently was held to have been invalidly approved and as such, was void.

In a more recent case in Alexandria, this line of reasoning was used by the city to defend itself against another claim involving a retroactive zoning ordinance. *Dominions Lands v. The City of Alexandria.*[29] In that case, the developer submitted a site plan for a development which met the existing height limitations of 50 feet. The planning staff recommended approval. The site plan was scheduled for review by the Planning Commission on September 1, 1987, and the developer claimed it was in conformance with the existing ordinance and that they were "ready, willing and able to comply" with the planning staff's recommendations. The Planning Commission deferred the review until October 6, 1987 and then recommended an amendment to the city ordinance which would have limited the height of development in the area to 30 feet, with 50 feet allowed for by special use permit.

The city council then failed to approve the ordinance before the October 6th review and the Planning Commission was thus forced to recommend approval. These actions may have been prompted by an action in mandamus which was filed by the developer when it heard of the proposed ordinance. The city council subsequently approved the amended ordinance on October 13, 1987. The adjacent property owners appealed the approval of the site plan by the Planning Commission, additionally claiming that the amended ordinance should be applied to the case on appeal. The developer filed for a declaratory judgment and when the matter came before the council, they deferred it until the issue could be settled in Court.

Primarily relying on *Planning Commission v. Berman*[30] and *Shiflet v. Eller*,[31] the developer maintained that site plan approval was a ministerial function, that they were "ready, willing and able" to proceed with construction under the existing zoning and that statutes are presumably prospective and should not be given retroactive effect.

The City argued two points. First, it argued that the case was not ripe, because the use required by Dominion Lands could still be applied for and that it had not been to date. Secondly, citing *Chesterfield Civic Association v. Board of Zoning Appeals*,[32] the city argued that final authority for approval of site plans rested with the city council and so many preliminary administrative approvals

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[29]. At Chancery No. 18106 (1987).

[30]. 211 Va. 774 (1971).

[31]. 228 Va. 115 (1984).

[32]. 215 Va. 399 (1974).

could not be relied on by the developer. Therefore, the city council should be able to apply the law as it exists when they make their final review of a site plan.

The circuit court, however, found in favor of the developer. First, it held that having a by-right use changed to a use available only by permit was injury enough to warrant adjudication. Secondly, the court, citing *Medical Structures*, said that the preliminary site plan had virtually replaced the building permit and that once its approval was given, the building permit was normally given as a matter of course. Therefore, the ordinance passed subsequent to Planning Commission approval of such a site plan should not be given retroactive effect, especially because there was no indication by the council, in approving the ordinance, that they intended to give it such an effect.

CONCLUSION

The case note briefs of the lower court opinions above signify both the complexity of this issue and its unsettled state in the Commonwealth. The issue will hopefully be decided by the holding of the Virginia Supreme Court in the *FADCO* litigation. The following is an attempt to prognosticate the outcome of that case and thus, give a fair reading of the court's precedent in this area.

The two most important cases remain *Medical Structures* and *Cities Service*. These are the *only* cases in which the court specifically recognizes the "vested rights" of a property owner to a use of his property allowed for by local ordinance, while deciding a zoning issue. Although both cases involve uses allowed the landowner by previously awarded special use permits, the opinions of the cases focus on the substantial change in position of the landowner in reliance upon a use so given and not upon the legislative act conferring those rights originally.

First, the Court included the argument of *Medical Structures* in its opinion, that "once a diligently pursued site plan is filed in reliance upon existing zoning or the issuance of a special use permit, fairness dictates that a vested right is acquired in the land use."[33] The court then followed this statement of the respondent with its finding that the site plan has replaced the building permit as the most important document for development, saying, "The filing of such a plan creates a monument to the developer's intention, and when the plan is approved, the building permit, except in rare situations, will be issued."[34]
Immediately following that case, the Court decided *Cities Service*, which they found "factually similar," and said, "[a]ccordingly, we hold that Cities Service's

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[33]. Fairfax County v. Medical Structures, 213 Va. 355, 357 (1972).

[34]. *Id.* at 358.

right to the land use described in the use permit vested upon the filing of the site plan...."[35]

Attempts are often made to distinguish these cases as involving special use permits, as stated above. Normally, this is done by quoting the respondent's argument as outlining the issue to be reliance on the existing zoning *and/or* the special use permit, and then stating how the court specifically refused to decide the broader issue and only decided as to the use given by a special use permit. This is then interpreted as an affirmative act by the court to hold that site plans based on normal zoning classifications do not carry the same vested rights as do plans based on special use permits.

A fairer interpretation, given the dicta in both cases concerning the substantial expense which both developers had incurred in preparation of their site plans, would be that the court simply chose not to settle issues not directly before it. Continuing the reasoning of the court in these cases to its logical conclusion concerning the issue of this memorandum, it would simply not make sense to protect the substantial expense incurred by the landowner prior to a site plan's submission with regard to use given by a special use permit and not grant the same protection to a developer whose plan is predicated upon a by-right use given by a normal zoning classification. Both are legislative acts of the governing body regulating a landowner's property which are subject to change, and, barring such a change, should be grounds upon which a landowner can rely in making plans for the use of his property.

In addition to these case precedents, the court's holding in *Berman* also bolsters the argument that rights should vest at the time a site plan is filed, even when it is based upon normal zoning classifications. In that case, the court's decision found site plan approval by the governing body of a municipality to be "ministerial and mandatory" rather than "discretionary" where the landowner was "ready, willing, and able to comply" with the applicable ordinances or usual procedures and requirements of that locality.[36] Further, the most recent case involving land use issues, *Cole v. City Council of Waynesboro*,[37] upheld land use predictability as being of paramount importance. The court said that land use designations should not be suddenly changed but altered only after careful consideration "and only where circumstances substantially affecting the public interest have changed."[38]

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[35]. Fairfax County v. Cities Service, 213 Va. 359, 362 (1972).

[36]. 211 Va. 774, 776-7 (1971).

[37]. 218 Va. 827 (1977).

[38]. *Id.* at 834.

Clearly, these cases taken in concert place Virginia more in line with the Illinois rule than with either the majority or Washington Rules, as quoted earlier. The rule in Virginia, therefore, would seem to be, that a landowner acquires a vested right in the use applied for in a site plan, at the time in which such a plan is filed in good faith, if such a use is a designated by-right use under the existing zoning classification of the land for which the site plan is filed, or the use is founded upon a previously-issued special use permit.

The only case which may fall outside of this analysis of the Virginia Supreme Court precedent in this area is *Chesterfield Civic Association v. Board of Zoning Appeals.*[39] In that case, the court held that the ultimate police power to make zoning decisions lies with the legislative body of a municipality, as granted by the General Assembly, and that, therefore, such power may be reserved to that body so as to void any applications before lower administrative agencies, or decisions subsequent to such a reservation. The argument could be made for extending this holding to include the further premise that any site plan application before the Planning Commission can be held invalid at the governing body's pleasure, as the Commission's power of approval is delegated to it by the local governing body, and therefore, it cannot be relied on by the developer in making his plans.

This argument was attempted by the city in the *Dominion Lands* case but was rejected by the circuit court of Alexandria. That reading of *Chesterfield* would be in direct conflict with the decisions in *Medical Structures, Cities Service* and *Berman.* There is no precedent for the notion that only the governing body's approval is enough of a governmental act upon which the landowner can state reliance, because only that body has constitutionally delegated police power. Even conceding this case as precedent, a municipality would presumably have to completely withdraw a Planning Commission's power to itself before any pending applications would lose their associated vested rights, as was the case in *Chesterfield.* Local city councils and/or Boards of Supervisors are unlikely to take this drastic step in order to thwart one developer's plans. Further, any repeated use of this mechanism would surely be held as an "arbitrary and capricious" act and therefore illegal as against the "Due Process" clause of the 14th Amendment of the U.S. Constitution.

STATUTORY RELIEF

Even if the above rule is an effective reading of the existing Virginia Common Law in this area, problems remain. The two most obvious are those of (1) what constitutes a "filing" and (2), at what time an ordinance becomes "existing"; or, phrased differently, when is an application made in good faith.

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[39]. 215 Va. 399 (1974).

Although, the prospective supreme court holding in the *FADCO* litigation could conceivably settle these disputes, it is unlikely, given that court's propensity for failing to settle issues not strictly within the facts of the case before it. A more appropriate remedy for this issue, in any event, is legislation by the General Assembly of Virginia.

Walter F. Witt, Jr., in his article "Vested Rights in Land Uses,"[40] gives a solid proposal for such legislation which adequately balances the individual landowner's rights and the interests of the public at large, as well as complying with the pertinent precedents of the Virginia Supreme Court. He proposes three legislative steps.

(1) Legislation which provides for rights in land uses which have become vested by way of existing zoning ordinances and a landowner's reliance upon them.

(2) Legislation which prescribes points in time at which such rights become vested. He maintains that three such points exist:
   - When an application is made for subdivision of a residential property.
   - When an application for site plan approval is made with relation to a multi-family, commercial, or an industrial project.
   - When an application for a building permit is made. He maintains that such legislation should, likewise, require accompanying land use or building plans so as to satisfy the substantial expenditure requirement as a matter of course.

(3) Legislation which defines time limits for such vested rights, so as to invalidate such a right, as acquired above, if the project is not begun within a designated time period.

While, as a whole, these proposals are a good foundation upon which legislation could be based, there are some factors which are not considered and should be.

With respect to the second step, a specific body should be designated as the agency to whom an application must be made for rights to vested. The most appropriate and equitable body would probably change according to the type of application, but should be spelled out nonetheless. Likewise, the type of application to be made should be specifically outlined for each situation (i.e., preliminary versus final site plan).

Additionally, a caveat should be included which defines existing law as a law which has actually been passed by the local governing body, thereby relieving the developer from considering any proposed legislation. Actual adoption by the

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[40]. Witt, *supra* note 1.

governing body is not only a clear point in time upon which to base the legislation, but also prevents proposed statutes from obtaining prospective effect and thus delaying a developer's plans based on laws which may never be passed.