Vested Rights in Virginia:

HB 1250 and HB 1063 Create A New SAGA and A New BZA Appeal

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There have been two significant statutory amendments by the General Assembly which affect local governments, their attorneys and their BZAs. One, HB 1250, is yet another step toward complexity in vested rights issues for all concerned. The other, HB 1063, is a welcome step toward simplifying procedure and should be a relief to local governments, appellants and BZAs.

Both bills have been signed by the Governor and have an effective date of July 1, 2010.

House Bill 1250 – A New SAGA and Its Requirements

House Bill 1250 was a response by the Home Builders Association of Virginia to the decision in *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), in which the Supreme Court held that a zoning administrator determination was not a "significant affirmative governmental act" (hereinafter, "SAGA") under the vested rights statute, Virginia Code § 15.2-2307. The original filed bill would have found a SAGA in nearly every zoning order, requirement, decision or determination, even if not final. The final, much-amended bill added an enumerated "seventh SAGA" to the statute as follows:

> (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of Section 15.2-2311.

HB 1250, 2010 Va Acts, ch. 315. As adopted, the bill drew upon language from Virginia Code § 15.2-2309(A) and contained two very important conditions.

One of the significant conditions under HB 1250 is that the zoning administrator's action must be "no longer subject to reversal under subsection (C) of Virginia Code § 15.2-2311." My last article (VSB Journal of Local Government Law, Winter 2010), discussed some of the requirements of Virginia Code § 15.2-2311(C). Therefore, this article will focus on some of the *other* requirements for vested rights under Virginia Code § 15.2-2307's new "seventh SAGA."

The burden of establishing that all of the requirements of a vested right have been met – whether under the new SAGA in HB 1250 or not – lies with the landowner. The evidence showing compliance with the requirements for vested rights must be "clear, express and unambiguous." *Hale v. Board of Zoning Appeals of Blacksburg*, 277 Va. 250, 274, 673 S.E.2d 170, 182 (2009).

I. Requirement: Meets The Rest of Virginia Code § 15.2-2307

Before getting to the language of HB 1250 itself, the rest of existing Virginia Code § 15.2-2307 must be considered. After all, even if a zoning administrator's action is a SAGA under HB 1250, the other, existing statutory requirements must be met for a vested right to exist. For example, all of the opening paragraph of Virginia Code § 15.2-2307 still applies:

> Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Each of these requirements must still be met, whether a zoning administrator's determination is involved or not. Therefore, reliance in good faith, incurring extensive obligations or expenditure of substantial sums, diligent pursuit and reliance are all significant areas to consider in addressing requests for vested rights determinations, if an issue arises under HB 1250.

II. Requirement: Must Be in Writing

As a threshold requirement, the action by the zoning administrator under HB 1250 must be a "written" one.

Unlike the appeal requirement for landowners in § 15.2-2311(A), *see Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000), a zoning administrator's verbal determination cannot be a SAGA under Virginia Code § 15.2-2307. This requirement for a writing is identical to the requirement found in Virginia Code § 15.2-2311(C).

This express requirement for a writing would also exclude implicit or presumed rulings. A written order, requirement, decision or determination of some sort by the zoning administrator is required. *See Goyonaga v. Board of Zoning App. of Falls Church*, 275 Va. 232, 234, 657 S.E.2d 153 (2008) (Court assumed without deciding that written approval of a building permit constituted a written order, requirement, decision or determination).

III. Requirement: Must Be an "Order, Requirement, Decision or Determination"

The action of the zoning administrator not only must be in writing, but also must qualify as an "order, requirement, decision or determination" under HB 1250. After amendment, both Virginia Code § 15.2-2307 and § 15.2-2311(A) use the identical terms. As a result, it is likely that the terms have the same meaning in both subsections. The Supreme Court has issued several opinions on the meaning of Virginia Code § 15.2-2311(A) which can be used for guidance.

Discussed in my last article (VSB Journal of Local Government Law, Winter 2010), the cases of *Lilly v. Caroline County* and *Vulcan Materials Company v. Board of Supervisors of Chesterfield County* show that not everything written by the zoning administrator may constitute an "order, requirement, decision or determination" of the zoning administrator. In *Lilly*, the Virginia Supreme Court held that the interpretation given by the zoning administrator during the public meeting was an "order, requirement, decision or determination" under Virginia Code § 15.2-2311(A), even though it was verbal. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000). On the other hand, in *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 404, 448 S.E.2d 97 (1994), the Court held that the zoning administrator's interpretation was not an "order, requirement, decision or determination" under Virginia Code § 15.2-2311(A), but rather was merely "advisory."

An official determination must not be based upon abstract hypotheticals, proposals, ideas, concepts, or "what-if" suppositions. *See Lynch v. Spotsylvania County Board of Zoning Appeals,* 42 Va. Cir. 164 (1997). In addition, an official determination must explain the basis for the decision. *Lilly* v. *Caroline County,* 259 Va. 291 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11* v. *City of Norfolk,* 243 Va. 373 (1992); *Gwinn* v. *Alward,* 235 Va. 616 (1988). Of course, as shown in *Lilly*, this requirement does not require substantial detail. Of course, zoning administrators need not wait for a request to make an official determination. *See Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988).

Localities should determine where the line should be drawn between opinions that are merely advisory and ones that trigger the requirement to appeal to the BZA in Virginia Code § 15.2-2311 and therefore could also be a potential SAGA under Virginia Code § 15.2-2307.

Then, localities may wish to adopt a policy describing what determinations are (and are not) an "order, requirement, decision or determination" under Virginia Code § 15.2-2311, determine what process should be used to create and review them, and incorporate appropriate information for the public, including the notice of appeal under § 15.2-2311(A). If they are not official zoning determinations, or there are other caveats or limitations to the written determination, then local governments may wish to notify the recipient in writing.

IV. Requirement: Administrator Must Have Authority

A written determination by just anyone will not meet the requirements of Virginia Code § 15.2-2311(C). Under Virginia Code § 15.2-2286(A)(4), the zoning administrator or other person, when authorized, "shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance." Therefore, to be an *official* "order, requirement, decision or determination" under Virginia Code § 15.2-2311(A) and (C), the determination must be by a person authorized to issue it.

Local governments and their employees have limited authority. Actions beyond a local government employee's authority are not merely voidable, but are void:

> In *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138 (1981), we held that a building permit was void because the zoning ordinance required a conditional use permit for development of the land and the applicant had not initiated that procedure. The county official was "without authority" to issue the permit "unless and until" the county code provisions had been met. Id. at 97-98, 279 S.E.2d at 142. *See also Segaloff v. City of Newport News*, 209 Va. 259, 262, 163 S.E.2d 135, 137 (1968) (city official cannot authorize a violation of zoning ordinance).
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> Here, a special use permit is required for the development of substandard land. Accordingly, that process could not be circumvented simply by adhering to conditions prescribed by the director. The practical result of the director's decision was to alter the provisions of the Ordinance by imposing a new effective date for the special use permit requirement. Neither the BZA nor the director, however, possesses the power to amend or repeal portions of zoning ordinances. *Belle-Haven Citizens Ass'n, Inc. v. Schumann*, 201 Va. 36, 41-42, 109 S.E.2d 139, 143 (1959).

Foster v. Geller, 248 Va. 563, 568, 449 S.E.2d 802, 805-806 (1994). *Accord County of York v. King's Villa*, 226 Va. 447, 450, 309 S.E.2d 332, 333 (1983) (county administrator's action was beyond the scope of his authority and therefore "void and of no effect").

This does not mean a zoning administrator generally authorized by ordinance to interpret and enforce the zoning ordinance as provided in Virginia Code § 15.2-2286(A)(4) requires specific and express authority from the governing body at every step. The case of *Wolfe v. Board of Zoning Appeals*, 260 Va. 7, 532 S.E.2d 621 (2000) has been cited incorrectly for this proposition. However, as the Supreme Court itself stated in *Wolfe*, the case is properly limited to its facts, where the governing body had conceded and a trial court found by order that the governing body had *not* authorized a particular action by the zoning administrator. *Wolfe*, 260 Va. at 21, 532 S.E.2d at 628 ("We hold only that, under the particular circumstances of this case, she did not possess the authority to file the petition for certiorari relating to Lot 15A.").

However, this *does* mean that a written decision by some other employee or officer, such as the local government attorney or other staff member not authorized to issue official zoning determinations is not an official "order, requirement, decision or determination" and cannot become a SAGA under Virginia Code § 15.2-2307, as amended, or the subject of estoppel under Virginia Code § 15.2-2311(C).

Local governments may wish to consider who is authorized to issue official zoning determinations and review their policies and ordinances to be clear on this point.

V. Requirement: Must Regard "the Permissibility of a Specific Use or Density"

HB 1250 expressly requires that the zoning administrator determination in question be "regarding the permissibility of a specific use or density" in order to be a SAGA. Many zoning administrator determinations deal with other aspects of the zoning ordinance, its administration and its application to a certain parcel or development. But to be a SAGA, the determination must deal with "a specific use or density."

Although HB 1250 has just been adopted, it uses similar terminology to previous enumerated SAGAs in Virginia Code § 15.2-2307, second paragraph. In fact, in the *Hale* case, some of the main issues included whether a proffered zoning approval by the Blacksburg Town Council was for (i) a "specific use" or (ii) a "specified use or density," the first two enumerated SAGAs in the statute. *See Hale v. Board of Zoning Appeals of Blacksburg*, 277 Va. 250, 274-276, 673 S.E.2d 170, 182-184 (2009). In that case, there was an approval for a zoning category, the proffers eliminated some (but not most) of the uses in that category and the proffers capped the residential (but not the retail density). Under those facts, the Supreme Court held that the zoning approval did not identify a "specific use" or constitute an approval for the "specific use or density" desired by the developers.

There are two related points to the "specific use and density" requirement of the new SAGA created by HB 1250.

First, by its nature, a claim for vested rights only arises upon a change in zoning affecting the rights claimed. Therefore, there is a corresponding requirement that the governing body's zoning amendment in question must have affected that same "specific use or density" identified in the determination. If not, then there is not a vested right.

Second, as to what rights vest, only those rights specifically approved in SAGA would be vested. *See Hale,* 277 Va. at 274, 673 S.E.2d at 182 ("In short, when vested rights accrue to a landowner as the result of a significant affirmative governmental act, the rights that vest are only those that the government affirmatively acts upon…."). Thus, under HB 1250, assuming all the other requirements of Virginia Code § 15.2-2307 are met, only the specific use or density described in the zoning administrator's determination would be vested and nothing else.

VI. Requirement: Relates to the "Landowner's Property"

On its face, this new SAGA deals with *landowners'* claims of vested rights. This language requiring that the determination relate to a "specific use or density of the landowner's property" was in the original draft of the Home Builders' proposed bill. While it is uncertain how this will be interpreted, the Virginia Supreme Court has been strictly reading the language of Virginia Code § 15.2-2307 according to its plain meaning. *See Hale*, 277 Va. at 273, 673 S.E.2d at ___.

VII. Requirement: "No Longer Subject to Appeal"

In addition to being "no longer subject to reversal under subsection (C) of Section 15.2-2311," one of the two express limitations to forming a SAGA under HB 1250 is that the "order, requirement, decision or determination" must be "no longer subject to appeal" to the BZA. Logically, this means that the determination must have been, at one time, appealable to the BZA.

To be appealable to the BZA under Virginia Code § 15.2-2311(A), the zoning administrator's "order, requirement, decision or determination" must be an official one, as discussed above. In addition, by statute, there must be a person with standing to appeal. Under Virginia Code § 15.2-2311(A):

> An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the locality affected by any decision of the zoning administrator….

Therefore, the presence or absence of a person with standing to appeal, of being "aggrieved," or being no longer "aggrieved," is a likely issue in interpreting HB 1250 under the right set of facts. It is unclear as to how these requirements will be interpreted in the context of a vested rights claim, especially since the claimant is, by definition, NOT aggrieved since he is relying upon the determination for its claim of vested rights.

Presumably, then, the courts will explore what, if any, other persons may have been aggrieved, including whether the local government is "affected." It is unclear how a local government can be "affected" if no one outside of the zoning administrator has knowledge of the decision, and certainly how they can be expected to appeal when they have no way to know the decision has been issued. However, expect those claiming vested rights to point out that there is no requirement that the local government be "aggrieved" but only that it be "affected." This issue is ripe for litigation.

Assuming a determination was once appealable, it must be "no longer appealable" to be a SAGA. The time for appeal to the BZA must have expired. Under Virginia Code § 15.2-2311(A), that time is "within 30 days after the decision appealed from…."

Interestingly, however, the time limit to appeal *written* determinations to the BZA only runs if the writing includes a warning about the 30-day appeal period. Virginia Code § 15.2-2311(A) expressly states, "The appeal period shall not commence until the statement is given." This means that a written determination *without an appeal notice* cannot be a SAGA under HB 1250 because such a determination is always subject to appeal. While not final, which could cause issues down the road for the locality, a written determination without a warning cannot be a SAGA.

House Bill 1063 – The BZA Gets Off the Hook on Appeal

While HB 1250 is yet another substantive complication at the BZA level, HB 1063 is a helpful simplification of the process when BZA decisions are appealed to circuit court.

This bill began as the idea of some of the fine local government attorneys for James City County and Warren County: Leo Rogers, Adam Kinsman and Blair Mitchell. They approached and educated their respective supervisors and legislators and, after many others assisted, HB 1063 resulted. 2010 Va Acts ch. 241.

As discussed in my last article, this bill was much needed. Prior to this bill, a BZA has been held to be a necessary party in an appeal. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 225 Va. 235, 238, 302 S.E.2d 19 (1983) ("[U]ntil return on the writ of certiorari is made by the board of zoning appeals, the only necessary parties to a proceeding under [the predecessor statute to Virginia Code § 15.2-2314] are the aggrieved person and the board."

Being named as a party (and its chair being served with process by the local sheriff) often resulted in angst on the part of the BZAs. Localities and their BZAs argued over whether the BZA is a "real" party on appeal, which needs counsel, or merely named so it can produce its record for consideration by the circuit court. Being named as a party lead many BZAs to ask their localities for counsel, and in some instances, to sue for it. *See Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550, 666 S.E.2d 315 (2008).

HB 1063 largely resolves these problems.

First, service of the petition for writ of certiorari will be served upon the "secretary of the board of zoning appeals or, if no secretary exists, the chair of the board of zoning appeals." This will allow the BZA to designate a person not on the board as secretary, such as a staff member more likely to have the record as a practical matter. This would avoid service on any member of the BZA.

Second, and perhaps most significantly, an appeal from a decision of the BZA no longer will name the BZA. Rather, a petition for writ of certiorari to circuit court will be styled, "In Re: [date] Decision of the Board of Zoning Appeals of [locality name]." The BZA is no longer a necessary or even appropriate party. Rather, the BZA is instructed to "participate in the proceedings to the extent required by this section." The section's only apparent requirement for the BZA, which is unamended by the bill, requires the BZA to provide its record to the circuit court.

Another, arguably unrelated change clarifies who is a "necessary party." The bill expressly lists "governing body, the landowner, and the applicant before the board of zoning appeals." This listing is helpful to the appellant, and eliminates arguments on this issue on appeal. This provision guarantees the governing body a say on appeal, if so desired. However, this amendment requires that the governing body be involved on some level. In the past, a governing body was able to have no involvement in cases in which it had no interest – a variance dispute between two neighbors, for example. Now, the governing body is required to be named. Presumably, the local government attorney representing the governing body can defer to the other parties, or simply default if the governing body has no interest in the case.

Lastly, the bill requires that the written notice of appeal required for a zoning administrator determination to be final under Virginia Code § 15.2-2311(A) to include the cost of appeal and reference to where additional information may be obtained regarding filing an appeal. This is helpful information to prospective appellants and is easily given. By statute, failure to provide this additional information means the zoning administrator's determination is not final.

Conclusion

HB 1250, with its many requirements and reference to the statutory estoppel provision of Virginia Code § 15.2-2311(C), is yet another confusing twist in the law for BZAs, local government attorneys and those that appear before BZAs. This bill raises the stakes for zoning administrators in making determinations, and marks another step down the road toward BZA cases being "quite difficult," as described in my previous article. Local governments should consider how best to respond to this new, potential SAGA.

On the other hand, HB 1063 is a helpful simplification of the procedure for appeals of BZA decisions. While not making cases before BZAs any simpler, this bill clarifies that on appeal – as with a court – it is the BZA's decision that must stand or fall. The BZA is not a party and has no role beyond providing the record. In response, BZAs should ensure that the record is complete and that the reasoning for their decisions are clear in that record.

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