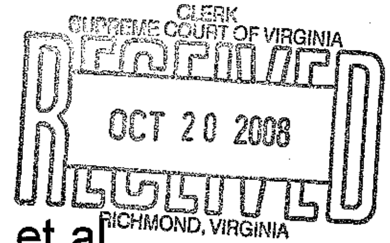
IN THE

Supreme Court of Virginia

RECORD NO. 081001



THE TOWN OF BLACKSBURG, et al.,

Appellants,

v.

THE BOARD OF ZONING APPEALS OF THE TOWN OF BLACKSBURG, et al.,

Appellees.

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE APPELLANTS BY THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., THE VIRGINIA ASSOCIATION OF COUNTIES, AND THE VIRGINIA MUNICIPAL LEAGUE

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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

THE TOWN OF BLACKSBURG, et al.,	:	
Appellants,	:	
v.	:	Record No. 081001
THE BOARD OF ZONING APPEALS OF THE TOWN OF BLACKSBURG, et al.,	:	
Appellees.	:	

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE APPELLANTS BY THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., THE VIRGINIA ASSOCIATION OF COUNTIES, AND THE VIRGINIA MUNICIPAL LEAGUE

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

The Local Government Attorneys of Virginia, Inc. (the "LGA"), the Virginia Association of Counties ("VACo"), and the Virginia Municipal League ("VML"), by counsel, submit this brief *amicus curiae* in support of the Appellants in this matter, the Town of Blacksburg, *et al.* (the "Town" or "Blacksburg").

I. Interest of the Amici Curiae

The LGA is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys, furnish information to local government attorneys and their offices that will enable them to better perform their functions, offer a forum through which LGA members may meet and exchange ideas of import to Virginia local government attorneys, and initiate, support, or oppose legislation and litigation that, in the judgment of the LGA, is significant to Virginia local governments. The LGA was founded in 1975, and its members represent 71 counties, 39 cities, and 55 towns of the Commonwealth. The LGA regularly is asked by the Virginia General Assembly and agencies of the Commonwealth to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions.

VACo was formed in November 1934 as an independent, non-profit instrumentality of Virginia's governments. VACo exists to support county officials and to effectively represent, promote, and protect the interests of counties to better serve the people of Virginia. All 95 counties in the Commonwealth are members of VACo.

VML is an association of political subdivisions of the Commonwealth, currently consisting of 39 cities, 156 towns, and 11 urban counties, formed and maintained pursuant to § 15.2-1303 of the Code of Virginia for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial. VML is an instrumentality of its member political subdivisions.

As an organization of attorneys who are charged with the responsibility of protecting the legal interests of Virginia's local governments, the LGA is well qualified to recognize matters of general importance impacting local government law that may be presented to this Court. Similarly, VACo and VML are uniquely qualified to express the interests of counties, cities and towns throughout Virginia with respect to matters of common concern that come before this Court. The LGA, VACo, and VML therefore are well situated to provide assistance to the Court with respect to local government issues that may impact not only the present litigants but all Virginia local governments and their citizens. The LGA, VACo, and VML previously have filed *amicus curiae* briefs in cases before this Court that implicate issues of special importance to Virginia's local governments.

II. Preliminary Statement

This appeal raises significant issues of law and policy impacting local governments and their citizens, as well as developers, in zoning. Here, the trial court erred by ruling that a zoning map amendment to a general commercial zoning classification, without tying that approval to an identifiable specific use or project, is adequate to vest rights for future development to the developer. In this case, the Court should (i) enforce the plain meaning of the vested rights statute, Virginia Code § 15.2-2307, (ii) follow decades of case authority from this Court which holds that there can be no vested rights in a general zoning classification, and (iii) affirm the wise public policy balance underlying the doctrine of vested rights.

The various developer appellees (collectively, the "Developers") ask this Court to extend the meaning of § 15.2-2307 far beyond any fair reading, effectively reading the words "specific project," "specify use" and "specific use or density" out of the statute. Worse, the Developers seek to reverse well-understood rules – first common law and then statutory – going back more than 36 years which hold that landowners have no property right in anticipated uses of their land since they have no vested property right in the continuation of the

land's existing zoning status. *See Snow v. Amherst County Bd. of Zoning Appeals*, 248 Va. 404, 408, 448 S.E.2d 606, 608-09 (1994); *Town of Vienna Council v. Kohler*, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978); *see generally Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972) *and Fairfax County v. Cities Service,* 213 Va. 359, 193 S.E.2d 1 (1972) (cases in which this Court first recognized a common law "vested right" to develop, not in reliance upon existing zoning, but upon a specific governmental approval of the use described in the use permit or site plan); *see also McClung v. County of Henrico*, 200 Va. 870, 108 S.E.2d 513 (1959) (landowner not protected from zoning amendment).

Even after the adoption of the statutory vested rights test in 1998, reliance on an existing zoning category without affirmative governmental approval of an identifiable *specific use or project* and diligent pursuit of that *specific use or project* has never been adequate to create vested rights. *See City of Suffolk v. Board of Zoning Appeals,* 266 Va. 137, 145, 580 S.E.2d 796, 799 (2003) (citing the rule that "mere reliance on a particular zoning classification, whether created by ordinance or variance, creates no vested right in the property owner," but recognizing that rights vest

through compliance with the statute), *quoting Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994).

The Developers ask this Court to judicially extend the statutory vested rights test to an entirely new and immense group of landowners based on property zoned to a zoning category, without an identifiable specific use or project. This would effectively overrule a long chain of precedents of this Court, and judicially legislate far beyond what the General Assembly was willing to do in 1998 when it adopted the statute.

The Developers accuse the Town of bad faith by amending the zoning ordinance legally and legislatively, but the lack of a vested right here is purely the result of the Developers' own decision not to commit to a specific project. In the underlying rezoning of the property in question, the Developers affirmatively and actively preserved their flexibility in what uses would go on the property, and ultimately what project to develop. It was this flexibility, preserved by the Developers and for their benefit, which prevented the accrual of a vested right. Now, after having enjoyed the benefits of this flexibility,

the Developers want to gain the benefit of the vested rights statute, without any "specific use" or "specific project" being approved.

There is a vital public policy at issue here. The vested rights doctrine, as codified in Virginia Code § 15.2-2307, balances the interests of the taxpayer/citizens as represented by the local government with the interests of the landowner/developer. The vested rights doctrine has policy benefits both ways. If a vested right exists, the landowner/developer has the right to finish the particular identified project. The public gets a reassurance that a known project will be developed with known uses, rather than some other, unknown project or a host of other possible uses. However, if the vested right does not exist, the landowner/developer gets to keep its options open and the public retains the ability to adjust zoning regulations to meet changing situations and public needs.

Here, the Developers chose not to commit to the public on a specific use or project, preserving its ability to react to various market demands for its own economic motives. Likewise, the Town retained the ability to enact changes in the applicable zoning regulations. Now, the Developers propose a rule that would impose restrictions

and obligations on a locality without any corresponding commitment from the Developers.

The LGA, VACo, and VML assert that this is not the law, and violates the very public policy on which the vested rights doctrine is based.

III. Statement of the Case

The LGA, VACo, and VML adopt the Statement of the Case submitted by the Town in its Brief.

IV. Statement of the Facts

The LGA, VACo, and VML adopt the Statement of the Facts submitted by the Town in its Brief.

V. Standard of Review

The LGA, VACo, and VML adopt the statement setting forth the appropriate Standard of Review submitted by the Town in its Brief.

VI. Argument

The LGA, VACo, and VML will address only those issues in this case that we think have the most general applicability in localities across the Commonwealth of Virginia. The absence of argument regarding other matters raised by the Developers does not indicate that we acquiesce in their views concerning those matters, but merely reflects our intention as *amici curiae* to focus on those matters of greatest general significance to our respective memberships.

A. The Developers' proposed reading of Virginia Code § 15.2-2307 ignores the plain meaning of "a specific project" as evidenced by (i) acceptance of "proffers or proffered conditions which specify use" or (ii) approval of "an application for a rezoning for a specific use or density."

The Developers in this case ask the Court to ignore the plain meaning of Virginia Code § 15.2-2307 and effectively legislate from the bench. It is well-settled that the Court must apply the "plain meaning" of statutes. *E.g., McClung v. County of Henrico*, 200 Va. 870, 108 S.E.2d 513 (1959).

Virginia Code § 15.2-2307 states in pertinent part:

> 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.
>
> For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project:
> (i) the governing body has accepted proffers or proffered conditions *which specify use* related to a zoning amendment; [or]
> (ii) the governing body has approved an application for a rezoning for a *specific use or density*; . . . .

Virginia Code § 15.2-2307 (emphasis provided).

1. The General Assembly requires a particular, defined specificity throughout the statute.

Throughout the portions of the statute relied upon by the Developers, the General Assembly has used words of exacting specificity. Most obviously, the word "specific" or "specify" is repeated again and again. The word, "specific" is defined as "[o]f, relating to, or designating <u>a particular or defined thing</u>. . . ." Black's

Law Dictionary, 8th ed. A general zoning classification with dozens of uses and only minor proffered limitations cannot satisfy the statute's specificity requirements as suggested by the Developers.

2. In its first paragraph, the statute plainly requires "a specific project," which has been interpreted as "an identifiable project" by this Court.

Virginia Code 15.2-2307 plainly requires a "specific project." This term is found in the first paragraph of the statute, and had not been used in any of the Court's vested rights cases before 1998. *City of Suffolk v. Board of Zoning Appeals,* 266 Va. 137, 146, 580 S.E.2d 796, 800 (2003). However, this Court has had two occasions to revisit this language since 1998, and each is relied upon by the Developers. Each case holds that where the requirements of Virginia Code § 15.2-2307 have been met, "the developer had established vested rights because it obtained the rezoning for 'an identifiable property and project.'" *Board of Sup. of Culpeper v. Greengael, L.L.C.,* 271 Va. 266, 283, 626 S.E.2d 357, 367 (2006), *quoting City of Suffolk v. Board of Zoning Appeals*, 266 Va. 137, 146, 580 S.E.2d 796, 800 (2003). Both *City of Suffolk* and *Greengael* interpret "specific project" to be an "identifiable property and project." *Id.*

City of Suffolk recognized zoning approval of a "specific project," not because a specific parcel was involved, but because there were sufficient restrictions on the development so it was known to all what specific, "identifiable" project would be developed:

> The record reflects that the BZA and trial court were cognizant that the object of the 1988 rezoning was a specific tract known as King's Landing; it was not a general rezoning. The project was restricted to PD-H zoning and that approval specifically limited the number of residential units. Further, through the 1988 and 1994 master land use plans, the highway entrances, general roadways, and recreation areas were established, as well as designated residential and commercial use sections. The record supports the implied conclusion of the trial court and BZA that the rezoning was directed to a specific project.

City of Suffolk v. Board of Zoning Appeals, 266 Va. 137, 146, 580 S.E.2d 796, 800 (2003) (emphasis provided). In *City of Suffolk*, the City had approved a Master Land Use Plan which designated eleven separate areas, each with a specific use and density. This was adequate to identify a particular "specific project." *Id.* at 154, 580 S.E.2d at 804 (Court's opinion published the Master Land Use Plan for the King's Landing project approved by the City). Referring to the *City of Suffolk* case, *Greengael* spoke not only of the rezoning, but also of the City's approval of Master Land Use Plan as representing an "identifiable property and project" meeting the requirements of the

statute. *Board of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 283, 626 S.E.2d 357, 367 (2006). Neither case supports the proposition suggested by the Developers – that a general proffered rezoning for a specific property is adequate to meet the "specific project" test.

Therefore, affording the term its ordinary, plain meaning, and under the precedents of this Court, the facts do not show that any "specific project" was approved. However, the Developers insist that they have met one of the "deemed" examples in paragraph two of the statute. Here, the Developers rely upon the first and second examples, (i) and (ii). Brief in Opposition, at 10.

3. Under example (i) of the second paragraph, proffers "which specify use" are required.

Here, the Developers argue that since the proffers in question eliminate less than 14% of the dozens of permissible uses, set a lower height limit or additional setback, require a buffer and describe certain roadways, this somehow vests the Developers' rights to construct whatever development they chose according to the former zoning regulations. Brief in Opposition, at 12. This is inconsistent with the plain meaning of the statute.

a. In the statute, "land use" and "use" refers to a specific, permissible use under the zoning district regulations.

The statute opens by declaring that 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...." In the zoning context, a land "use" is a specific listed use in a zoning ordinance. *See Board of Supervisors v. Gaffney,* 244 Va. 545, 550, 422 S.E.2d 760, 763 (1992) ("the operation of a nudist club constitutes a land use and, thus, we must look to the specific language contained in the County's ordinance and ascertain if the use is an articulated use permitted by right.").

Therefore, when the statute talks about "proffered conditions *which specify use* related to a zoning amendment" or "a rezoning for a *specific use or density*," it refers to a specific land "use" listed in the zoning ordinance, or if previously zoned for a specific use, a rezoning for the same use but a specific (typically greater) density. This makes sense, because the purpose of the vested rights statute is to protect the landowner's to finish a project involving specific uses permitted in the zoning ordinance. *See Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972) (use as

160-bed nursing home); *Fairfax County v. Cities Service,* 213 Va. 359, 193 S.E.2d 1 (1972) (service station use).

The Town's reading of the term "use" in 15.2-2307 is consistent with the Court's opinions. In *City of Suffolk v. Board of Zoning Appeals,* 266 Va. 137, 580 S.E.2d 796 (2003), this Court found vested rights because the Master Land Use Plan specified a land use (residential or commercial) and permitted densities for each of eleven designated and mapped areas. *Id.* at 146, 580 S.E.2d at 800. These specific uses and densities are stated on the approved Master Land Use Plan, which the Court deemed so important, that it published the Plan as part of its opinion. *Id.* at 154, 580 S.E.2d at 804.

Here, in contrast, the Developers can identify no specific project with a certain, identifiable specific use or density approved by the Town. Judging by the Court's 4-3 split vote on the decision in *City of Suffolk,* the facts in that case may well represent the barest minimum specificity necessary to vest rights under the statute. If so, the Developers here have fallen far short of the specificity shown there with the rezoning and Master Land Use Plan approved there.

b. Proffering of a buffer, height or setback limitation or transportation improvements do not "specify use"

The mere proffering of a buffer or roadway, or an additional height limitation or setback, which would be appropriate for and consistent with any of dozens of possible land uses listed in the zoning district, is insufficient. These are mere regulations associated with the conditional zoning of the property, not a specific use. *Compare* Virginia Code § 15.2-2280(1) (zoning ordinances may allow specific uses) *with* Virginia Code §§ 15.2-2297, -2298, -2303 ("reasonable conditions" may be proffered "in addition to the regulations provided for the zoning district or zone by the ordinance").

To interpret the statute as the Developers suggest would throw uncertainty into the development process. Local governments and landowners alike would be entirely unsure as to what land use has been vested. For example, can landowners vest a "right" to a buffer when one is not otherwise required by the zoning regulations? Can a landowner vest a "right" to construct a roadway? Isn't that more of an "obligation?" Can a landowner vest a "right" to a lower height limit or a greater setback than otherwise required? Why would the

landowner want to? This is illogical. This is also why vesting must be in a specific permitted known use in a specific project, known to all.

The Developers' commitment to build a road, reserve a buffer, limit the height or extend the setback for whatever use or project they finally decided upon is wholly insufficient to vest rights in a "land use" under the plain meaning of the statute.

c. The Developer's proposed reading of example (i) would not "specify use" at all.

The proffered transportation improvements, buffering and height and setback limitations relied upon by the Developers plainly do not "specify use." As discussed above, these proffered conditions are not specific land "uses" permitted by the zoning district regulations, in which the Developers may be vested. They are not even the subject of the dispute between the parties. The Developers seek to construct a "big box" retail use contrary to existing zoning. Indeed, the proposed large retail use is also contrary to the "illustrative" plans the Developers presented when the Town rezoned the property. This kind of large retail store is the use that the Developers desire to be vested. The proffers do not even remotely mention such a use or project, let alone specify it.

Likewise, restricting a handful of uses out of the dozens of uses available in the zoning classification by proffer does not "specify use." The Developers only eliminated eight named uses under the zoning category. They may proceed with any one or more of 52 different remaining specific uses in the zoning classification in question. This is far from identifying "a specific use."

4. **Under example (ii) of the second paragraph, approval of "an application for rezoning for a specific use or density" is required to identify the "specific project."**

    a. **Example (ii) of the second paragraph does not refer to a proffered rezoning, but rather to "an application for rezoning" to a classification that allows "a specific use or density."**

The second statutory example of "a specific project" relied upon by the Developers plainly requires "an application for rezoning for a specific use or density." It does not refer to a proffered rezoning, which is solely dealt with in example (i). Here, the rezoning approved by the Town in Ordinance 1412 involved a zoning classification, General Commercial, which allows 60 different specific uses with a range of permissible densities. The zoning classification applied for by the Developers and approved by the Town does not identify "a use" or "a density." *See* Town Zoning Ordinance § 3150 (listing

specific uses permitted by right). Therefore, given its plain meaning, the rezoning to the General Commercial classification by Ordinance 1412 cannot meet the requirement of example (ii) for "an application for rezoning for a specific use or density." Virginia Code 15.2-2307.

b. Even considering the proffered restrictions, the rezoning did not result in identification of a "specific use" to be developed on any part of the property.

Moreover, even if the Court considers the proffered conditions submitted by the Developers under example (ii) of the statute's second paragraph, the rezoning application was still was not "for a specific use." Although the proffers eliminate eight specific uses, 52 specific uses which remain available to the Developers. "A specific use" is not identified, but rather fifty-two specific uses are permitted by right. Any part of the property may be developed into any one or more of the 52 listed possible uses. This violates the plain meaning of the words used by the General Assembly, and therefore the rezoning application – even as proffered – was not for "a specific project."

c. Even considering the proffered restrictions, the rezoning did not result in identification of "a specific ... density" to be developed on any part of the property.

Similarly, even if the Court wishes to consider the proffered condition related to density, the rezoning application did not identify "a specific … density" to which the property would be developed. Although the proffers do place a cap on residential density on a small portion of the property, this does not identify "a specific … density" as required in example (ii) of the statute's second paragraph. The ultimate density of the project – let alone the use – remains undetermined, unidentified and unspecified. Most of the property has absolutely no limitation on density. The Developers remain free to develop the remainder of the property without this restriction. Even on the portion with a density restriction, an entire range of density remains available to the Developers, not "a" density. The density proffer named a density cap, but not "a specific … density."

Moreover, the limitation on density proffered here only applies *IF* that part of the property so restricted is developed residentially. The Developers remain free to develop everywhere on the property any of the 52 specific uses, most of which do not involve residential uses at all. As proof of this fact, the Developers want to develop this

very same part of the property with a "Big Box" retail use, not with any residential use.

The Developers' proposed reading of the statute contradicts its plain meaning, makes no sense, and would effectively eliminate the statute's requirement of "a specific project." The proffers here do not identify "a specific project" by reference to "a specific use or density." The Developers do not even intend to develop the property in a manner remotely related to the few use or density limitations that were proffered.

B. Developers' proposed reading of Virginia Code § 15.2-2307 would overturn decades of Court authority, effectively eliminate the statutory requirement for "a specific project," and absurdly result in no real requirements at all.

1. "Mere reliance" on a zoning category has never been held by this Court to be adequate to vest rights.

Since this Court first created the doctrine of vested rights in 1972, the Court has repeated held that "mere reliance on a particular zoning classification ... creates no vested right in the property owner." *E.g., Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 408, 448 S.E.2d 606, 608-09 (1994). This remained true after amendment of the vested rights statute in 1998. Governmental

approval of a specific, identifiable project is still required as evidenced by compliance with one of the six enumerated subsections of Virginia Code § 15.2-2307, or else no vested right exists. *City of Suffolk v. Board of Zoning Appeals,* 266 Va. 137, 150, 580 S.E.2d 796, 802 (2003) (finding the trial court's determination that the rezoning involved "an identifiable property and project" was not "plainly wrong"); *Board of Supervisors v. Greengael, L.L.C.,* 271 Va. 266, 283, 626 S.E.2d 357, 367 (2006) (citing *City of Suffolk*).

The Developer's proposed reading of Virginia Code § 15.2-2307 would reverse decades of authority on this point, when the General Assembly has not chosen to do so. *See Kitchen v. City of Newport News,* 275 Va. 378, 395, 657 S.E.2d 132, 142 (2008) (no General Assembly intent shown in statutory amendment to change the prevailing judicial analysis). The Court may not judicially extend the statute in the manner requested. *Town of Leesburg v. Giordano,* 276 Va. 318, 323, ___ S.E.2d ___, ___ (2008) ("courts cannot add language to the statute the General Assembly has not seen fit to include, and neither are they permitted to accomplish the same result by judicial interpretation").

2. Developers' suggestion that any rezoning of a "specific parcel" vests rights would read the statute's requirement of "a specific project" out of the statute entirely.

The Developers argue that any rezoning of a "specific parcel" to a zoning classification is adequate to vest rights in the landowner. Brief in Opposition, at 18. Their proposed vested rights rule is illogical, and would result in no real standard at all. The Developers suggest that because the proffered rezoning involved a "specific parcel," this should be sufficient to meet the "specific project" requirement of the statute. Brief in Opposition, at 21. This makes no sense.

<u>Every</u> rezoning of property necessarily involves specifically-named parcels. *See* Virginia Code § 15.2-2204 (requiring different levels of notice depending upon how many specific parcels are involved in the proposed amendment of the zoning map). Under the Developers' proposed vested rights rule, each and every rezoning would be an "affirmative governmental act ... allowing the development of a specific project" under Virginia Code § 15.2-2307.

Moreover, neither case the Developers cite in support of their proposition supports this minimalist, general approach to vesting. Both *City of Suffolk* and *Greengael* require more than specific

property, they require evidence to identify the specific project. *Board of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 283, 626 S.E.2d 357, 367 (2006), *quoting City of Suffolk v. Board of Zoning Appeals*, 266 Va. 137, 146, 580 S.E.2d 796, 800 (2003) (vested rights existed under example (ii) because the landowner obtained the rezoning for "an identifiable property and project.").

3. The Developers' argument that any limitation on use or density is adequate to vest rights would absurdly result in no requirements at all for vesting.

The Developers essentially argue that because the proffers in question limit certain aspects of a proposed development, this meets the "specific project" requirement. This turns the "specific project" requirement on its head. Under the Developers proposed rule, even the barest of limitations on a tiny part of a parcel would vest the landowner's right to develop whatever it wished under the former zoning regulations. The Developers ask the Court to effectively morph the statute's requirements of "a specific project" into a rule vesting rights if there is any restriction on use or density whatsoever. Under the Developers' proposed rule, a landowner could vest rights in a former zoning classification by eliminating even a single use or

placing any limitation on density whatsoever in a small corner of its property.

While this sounds absurd, it is quite close to the facts of this case. Under the Developer's proposed vested rights rule, the Developers demand the right to develop a use (big box retail use) completely unrelated to any of the proffered limitations. This use is even different from the "illustrative" concept plan that the Developers submitted with their rezoning application. This is illogical, and flies in the face of the statute's requirement of "a specific project" and other "specific" requirements.

C. The Developers' proposed reading of Virginia Code § 15.2-2307 would eliminate the current public policy balance underlying the vested rights doctrine.

1. The public policy balance between the private and public interests would be upended to benefit developers without any countervailing benefit to the public.

Since the Court's recognition of vested rights in 1972, and continuing in the General Assembly's adoption of the statute in 1998, there has always been an important public policy balance between landowners and local government.

If a vested right does not exist, both the locality and the landowner retain flexibility. The landowner may change his development plans, or alter the proposed uses of the property as zoned, based upon financial, tax, legal, business or any other reason, without further local government approval. Likewise, the locality may amend the zoning regulations to adapt to changes in the comprehensive plan or neighborhood, or any other time the "public necessity, convenience, general welfare or good zoning practice require." See Virginia Code § 15.2-2386(A)(7). Either may change the course of development on the property.

If the landowner does achieve a vested right "in a land use," there is far less flexibility for the landowner and the locality. Insofar as the statute is at issue in this case, the landowner is committed to a "specific project" based upon proffers which "specify use" or a rezoning for a "specific use or density." Virginia Code § 15.2-2307. The landowner cannot change from this specific project without further application, public hearings and legislative approval. *See* Virginia Code §§ 15.2-2204, 15.2-2286(A)(7). Likewise, the locality is committed to allow the project to develop. The locality cannot amend the zoning ordinance to affect the landowner's right to develop

the specific project (i.e., the proffered or rezoned specific use or density).

Thus, if there is a vested right, both the landowner and the locality are legally committed to this project. Both have mutual, legally enforceable and specific expectations. The landowner knows what it can do no matter what the "public necessity, convenience, general welfare or good zoning practice" may require in the future. The landowner can plan and budget, and make decisions in its financial best interests. Similarly, the locality knows what specific project will be developed when considering amendments to the comprehensive plan and capital improvements plan. Virginia Code § 15.2-2229 (comprehensive plan reviewed at least every five years); Virginia Code § 15.2-2239 (annual review of capital improvements plan). This is important to know what transportation improvements, schools, public safety and other public infrastructure and services will be required. The locality can properly plan and budget. Perhaps most importantly, in addition to the landowner and the locality, the public knows that the property will be developed in the manner specifically approved unless given further notice and opportunity to

be heard. Virginia Code §§ 15.2-2204 (notice of public hearing required for zoning amendments).

This important balance is achieved only if the statute is enforced as written, and as interpreted by this Court in the past. Without a specific, identifiable project known to the landowner, locality and the public, there cannot be any level of certainty in their planning. There can be no level of certainty in their budgeting. There can be no level of certainty in their mutual expectations.

Here, the Developers propose a radical departure from the plain meaning of the statute and the past opinions of this Court. But perhaps more troubling is the lack of public policy balance in their proposed rule. The Developers ask the Court to extend the statute to vest rights broadly to allow landowners immense flexibility, but deny localities and citizens any certainty in their planning. If accepted by the Court, the Developers' proposed interpretation would tip the balance of public policy far in the landowners' direction, far more than the General Assembly provided for in its 1998 amendment of Virginia Code § 15.2-2307. The Developers would retain the ability to shift their plans based on changes in the economy, the market or even the whim of a business partner. Yet, the locality would be barred from

amending the zoning ordinance as needed to serve the public necessity, convenience, general welfare or good zoning practice, no matter what changes occur in the neighborhood, comprehensive plan, tax base or budget. The citizens and other nearby landowners would not know what project will develop or what their community may look like.

If adopted by the Court, the Developers' proposed reading of Virginia Code § 15.2-2307 would destroy the public policy balance underlying the doctrine of vested rights. The LGA, VACo and VML believe that this is unwise governance and unfair to the citizens of the Commonwealth.

2. A public policy shift in favor of landowners could force localities to deny rezonings, to the detriment of all.

This proposed shift in the public policy balance of vested rights – vesting rights in a general zoning category without any identifiable project – would have likely consequences harmful to all concerned.

Without a known "specific project" which "specifies use or density," the local government's need to plan and the public demand for more certainty would result in additional scrutiny for rezonings like the one approved by the Town of Blacksburg case. Vesting a

landowner in dozens of possible uses in a zoning classification as suggested here will undoubtedly bring a backlash of public sentiment and dashed public expectations. Denials of such rezonings could certainly follow under such circumstances.

Such denials would not aid landowners who, like the Developers, seek a rezoning in order to advance their prospects of development, sale or lease of their property. The cost and time consumed in a rezoning application would be lost. Landowners would be denied the flexibility afforded the Developers here by the Town of Blacksburg to market and pursue dozens of valuable potential uses. Local governments could be denied opportunities to advance their comprehensive plans and achieve economic development important to their tax base. Homes, goods and services needed by the public could be delayed. Other landowners would lose the gains in fair market value that typically come from nearby growth and development.

While undoubtedly a windfall for certain landowners, the Developers' proposed shift in the public policy underlying vested rights would be harmful to most citizens in the Commonwealth.

Conclusion

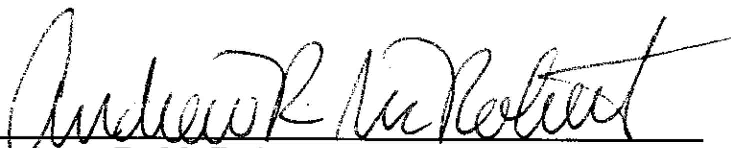
The Developers' radical reading of Virginia Code § 15.2-2307 would violate the plain meaning of the statute, contradict decades of this Court's precedent, and upset the important public policy balance underlying the vested rights doctrine. Accordingly, the LGA, VACo, and VML respectfully urge this Court to reverse the judgment of the trial court, and issue final judgment in favor of the appellants, The Town of Blacksburg, et al.

LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

VIRGINIA ASSOCIATION OF COUNTIES

VIRGINIA MUNICIPAL LEAGUE

By Counsel



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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I certify that twelve copies of the foregoing Brief *Amicus Curiae* were filed with the Clerk of the Supreme Court of Virginia by hand delivery, and that three copies were mailed by first class mail, postage prepaid, to counsel for the Appellants, Lawrence S. Spencer, Town Attorney, Town of Blacksburg, P. O. Box 90003, Blacksburg, Virginia 24062, and Gregory J. Haley, Monica Taylor Monday, and Kathleen L. Wright, Gentry Locke Rakes & Moore, P. O. Box 40013, Roanoke, Virginia 24022; counsel for Edward Hale, et al. Philip Carter Strother, Strother Law Offices, PLC, 15 East Franklin Street, Richmond, Virginia 23219; and to counsel for the Appellees, James K. Cowan, Jr., Esq., LeClairRyan, A Professional Corporation, 2000 Kraft Drive, Suite 1000, Blacksburg, Virginia 24060, Kevin P. Oddo and Joseph M. Rainsbury, LeClairRyan, A Professional Corporation, 1800 Wachovia Tower, Drawer 1200, Roanoke, Virginia 24006, C. Richard Cranwell, Cranwell, Moore & Emick, P.L.C., P. O. Box 11804, Roanoke, Virginia 24022, Joseph L. Anthony, Stott & Anthony, P.C., 101 S. Jefferson St., Suite 700, Roanoke, Virginia 24011, and James E. Cornwell, Jr., Sands, Anderson, Marks & Miller, 205 S. Main Street, Suite 226, Blacksburg, Virginia 24060-4860 on this 20th day of October, 2008.

Andrew R. McRoberts