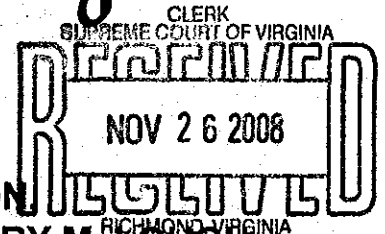


In The
Supreme Court of Virginia

RECORD NO. 081000



EDWARD HALE, JANE ARONSON,
MICHAEL ARONSON, MARY K. GOETTE, MARY M. LOUGH,
KATHLEEN HUSER, EMILY SATTERWHITE, PHIL OLSON,
LISA ONEGA, LUCINDA JENNINGS, ROBERT BEATON,
JEANNE BEATON, JANA DOYLE, MARY ROSS, VAN COBLE,
LAUREN COBLE, THOMAS DILLER, DANIEL BRESLAU,
GREGG LUSTIG AND ANN LINDEN,

Appellants,

v.

BOARD OF ZONING APPEALS FOR THE TOWN OF BLACKSBURG,
VIRGINIA, DIVERSIFIED INVESTORS XIII, LLC,
FAIRMOUNT PROPERTIES, LLC,
FAIRMOUNT UNIVERSITY REALTY TRUST, LLC AND LLAMAS, LLC,

Appellees.

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REPLY BRIEF OF APPELLANTS HALE, ET AL.

The Appellants, Edward Hale, Jane Aronson, Michael Aronson, Mary K. Goette, Mary M. Lough, Kathleen Huser, Emily Satterwhite, Phil Olson, Lisa Onega, Lucinda Jennings, Robert Beaton, Jeanne Beaton, Jana Doyle, Mary Ross, Van Coble, Lauren Coble, Thomas Diller, Daniel Breslau, Gregg Lustig and Ann Linden, by counsel (collectively referred to herein as "Hale" or "the Hale appellants"), submit their reply brief pursuant to Rule 5:29 of the *Rules of the Supreme Court of Virginia*.

The brief of the Appellees (hereinafter the "Developers," whose brief is cited herein by the abbreviation "Dev. Br.") substantially fails to address the central issue of this appeal: the Town had directed no significant affirmative governmental act toward the Developers under the plain language of § 15.2-2307, and the provisions of that statute were accordingly not triggered. The Developers divert focus from the lack of such an act, presenting instead an extensive discussion regarding legislative history, resources expended, plans pursued, and a statute not preserved through cross-error. In so doing, the Developers underscore the very reason that their argument must fail. Vesting protects commitment. Flexibility protects choice. The right to flexibility does not beget the right to claim vesting for a commitment that was not made.

I. **The passage of Ordinance 1412 was not a significant affirmative governmental act under § 15.2-2307.**

The order of the trial court was premised upon the Town's passage of Ordinance 1412 on May 9, 2006, identified by the court as a significant affirmative governmental act under § 15.2-2307. JA 341. While the operation of another statute, § 15.2-2298(B), had been argued by the Developers before the trial court, the court's opinion made no mention of this statute and did not make a finding of vested rights on that basis. *Id.* The Developers neither made any notation on the order regarding the court's failure to so find, nor did they assign any cross-error in their Brief in Opposition to this Court. JA 343-44, Dev. Br. in Opposition.

In their responsive brief, the Developers inaccurately contend that both Appellants focus on the "specific project" portion of § 15.2-2307, and that they do not dispute that a significant affirmative governmental act was represented by the adoption of Ordinance 1412. Dev. Br. at 38. By making this claim, the Developers have evidently opted to not respond to the entirety of Hale's argument, directed precisely toward the nonexistence of a significant affirmative governmental act.¹

¹ The Developers made only one reference to the Hale appellants, ostensibly citing an argument made by those appellants in their opening brief. Dev. Brief at 41, n.16 (citing "Br. at 27"). Interestingly, page 27 of the Hale's opening brief contains no argument, and is actually the certificate

Considerable portions of the Developers' argument pertain to actions taken by the Developers themselves with regard to the Property. It is the action of the Town, however, or the lack thereof, that determines the applicability of the statute. The Developers' argument that § 15.2-2307 was amended to prevent "exactly" the situation at issue in this case² paints this matter with too broad a brush – and over-generalizing the application of this statute *is* what its reenactment was designed to prevent.

Neither the parties nor *amici* allege that Virginia law now requires a full and complete site plan for vested benefits to accrue, or that every detail of a proposed development need be specified and committed to. A bright-line test that fixes vesting at the approval of a site plan, though infinitely simpler to interpret, is no longer correct under the current incarnation of the statute. Quite to the contrary, it was because of the abandonment of the bright-line test that the statute necessarily spelled out specific examples of where those rights might be triggered. In the absence of a clear, one-size-fits-all solution, the General Assembly defined the case-by-case analysis required to determine the accrual of vested rights. The reenactment did not

page. Hale surmises that this citation was actually to the appellants' Petition for Appeal, as this footnote is identical to one appearing in the Developers' Brief in Opposition. Hale can only conclude that the Developers do not respond to Hale's opening brief in their responsive brief.

² Dev. Br. at 2.

“move the vesting point backward in time”³ so much as it clearly defined several individual points that would constitute a significant affirmative governmental act. In this case, analysis of the statutory examples leads to only one conclusion: that *none* of the examples apply. Interpreting the clear and unambiguous language of the General Assembly, and giving credence to the proposition that the legislature meant what it said and said what it meant, permits no other inference.

A. The Proffers Did Not Specify Use

The first example provided in the statute is triggered when the “local government has accepted proffers or proffered conditions that specify use related to a zoning amendment.” Va. Code Ann. § 15.2-2307. The proffers submitted by the Developers did not specify use. The Developers present a grammatical analysis of the Town’s inclusion of an indefinite article to contend that the Town “attempts to rewrite the statute.”⁴ This claim, that the Appellants seek to pin the Developers to a singular use, is irrelevant. Whether the definition of “use” in the statute pertains to a single use or multiple uses makes no difference: *no use or uses are specified by the proffers.* The list of uses set out by the Developers as permitted for

³ Dev. Br. at 14.

⁴ Dev. Br. at 22.

General Commercial property specifically demonstrates why this is the case: the proffers do not commit to *any* of these uses, singular or multiple.⁵

The Developers cite the design features included in the proffers to allege that use can be specified “in the negative.” Dev. Br. at 23. The plain language of the statute, however, does not lead to the conclusion that use can be specified by what is given up. Even if the statute were worded in such a way, the determination of where that line would be drawn – 8 uses out of 60, or one out of 100 – would be undefined, and impossible to determine. Having no legal authority to support the contention that proffers may specify use in the negative, the Developers resort to dictionary definitions to allege that the proffers meet the requirements of the statute.⁶ Even under the Webster’s definitions the Developers provide, a close examination of the proffers makes clear that they do not “mention or name in a specific manner” or “tell or state precisely or in detail” the “act or practice of using” the Property.

What was given up in this case, moreover, was often already independently required by, or consistent with, the Town Zoning Ordinance and other municipal ordinances. For example, the requirement for a buffer yard exists whenever a more intensive zoning classification abuts a less

⁵ Dev. Br. at 25.

⁶ Dev. Br. at 23.

intensive zone. Town Zoning Ordinance § 5305.⁷ Because the Property, zoned General Commercial, abuts a residential zoning classification, the buffer yards proffered by the Developers would have been required in any event; so long as it included an architectural screen, it just would not have been as wide. Town Zoning Ordinance § 5310 (Table Inset). With only vegetative screening, the buffer would have been required to be fifty feet in width, the same width as that proposed in the proffers. *Id.* In addition, the proffers pertaining to screening and landscaping requirements, the grade and drop of the slope, and the requirement that the buffer be free of structures (including the proffered path) were all independently required by the Ordinance. See Town Zoning Ordinance, §§ 5310, 5330–5331. Similarly, two of the eight uses restricted by the proffers were already forbidden by ordinance, as stated by the Zoning Administrator. JA 176.

By defining the “envelope” to be occupied by the proposed development and opting not to pursue a small number of permitted uses, the Developers did not specify the Property’s use or uses. It defined its boundaries, and limited its possible characteristics. The same would have arguably been required of *any* infill development to comply with the Town Zoning Ordinance and the Comprehensive Plan. The relinquishment of

⁷ For ease of reference, the cited portions of the Town Zoning Ordinance are included in an Addendum to this brief.

“sticks” from the Developers’ bundle of property rights is not an act that specifies use.

Proffers can be formulated as design features that serve as inducements to a community that is interested in seeing a parcel put to a more productive purpose, but is understandably concerned regarding how that purpose will be served. Design features and buffer yards crafted to provide assurance to the community, while still retaining broad flexibility regarding the property’s development, are certainly proffers – but they are not proffers that specify use related to a zoning amendment.

The Town approved proffers in order to rezone the Property for a more-intensive zoning classification. It did not approve proffers that specified the use or uses to which the Property would be put – community recreation, educational facilities, restaurant, general office, or otherwise – let alone how those uses would be located. At the time that Ordinance 1412 was passed, the Developers had retained flexibility rather than specifying use. This distinguishes the rezoning from that in the *City of Suffolk* case, where the approved Master Land Use Plans provided the local government with information regarding the uses of a parcel much larger than the one at issue here. *City of Suffolk v. Board of Zoning Appeals*, 266 Va. 137, 138, 580 S.E.2d 796, 798 (2003).

B. Application for a Specific Use or Density

The second statutory mechanism claimed by the Developers is that “the governing body has approved an application for a rezoning for a specific use or density.” Va. Code Ann. § 15.2-2307; Dev. Br. at 33. Because Proffer No. 7 limited density on certain specified parcels of the Property, the Developers claim that this subpart of the statute has been triggered. JA 26, Dev. Br. at 33. In so doing, the Developers contend that vesting for commercial uses can be premised upon a limitation in the number of residences. This interpretation ignores the plain language of the statute and its application to the facts of this case.

The Developers applied for a zoning reclassification, not for a specific use or density. JA 107-111. The application was ultimately approved as part of Ordinance 1412. JA 91-93. The application incorporated proffers, and one of those proffers limited the number of residences that could be constructed on portions of the Property. *Id.*; JA 26. The Town did not approve an application to fix residential density, nor to fix commercial density, for that matter. The Town approved an application to rezone a parcel to a more-intensive zoning classification. The plain language of the statutory prong at issue here focuses attention on the act of the local government, not on the act of the landowner. The approved application for

rezoning the Property did not commit the Developers to any use or uses of the Property.

Even the article cited by the Developers explains that “only rezonings and special exceptions that commit property to a specific use are considered “significant affirmative governmental acts” for the purpose of evaluating vested rights.” E.A. Prichard and Gregory A. Riegle, *Searching for Certainty: Virginia’s Evolutionary Approach to Vested Rights*, 7 GEO. MASON L. REV. 983 (1999) at 1001. The authors go on to state that “[a] developer who assumes the risk of committing property to a specific use receives the reward of having development rights employed under her rezoning vest.” *Id.* For large scale developments, the authors noted that, “to benefit from [§ 15.2-2307], a developer must demonstrate that the property was rezoned *to accommodate a specific use or density*,” and recommend that developers avoid the issue of multi-use defenses to vested rights by invoking § 15.2-2307 in their proffers. *Id.* at 1003 (emphasis added).

The Developers here did not do so. JA 21. The rezoning in this case was to accommodate neither a specific use nor density; it allowed a whole range of uses with unspecified density, and the sole density-oriented portion of the proffers was incidental to, not the purpose of, the application

approved by the Town. The Developers did not “assume the risk of committing” the Property to any use, purpose, or density. Vesting should not apply in such a situation.

C. Public Policy is Served by Ordinance 1450

The Developers cast Ordinance 1450 as an arbitrary “shift in the political winds,” an enactment meant to single out the Property itself passed by an unscrupulous governing body. *E.g.*, Dev. Br. at 48. The focus for this case, however, is the passage of Ordinance 1412 in 2006, as that is the act upon which the trial court premised its ruling. JA 341. If the Developers question the validity of Ordinance 1450 or the motives of the local government in passing it, their remedy was to challenge the ordinance itself, and not to back-end a criticism of the ordinance through a vested rights argument.

The passage of Ordinance 1450 does not deprive the Developers of the ability to develop the Property. It does not require the Developers to “forfeit [their] substantial investment.”⁸ Nor does it “rescind an earlier zoning decision.” Dev. Br. at 15. Ordinance 1412 remains intact, the Property remains zoned General Commercial, and this classification and Ordinance 1450 would still allow a mixed development of the uses

⁸ Dev. Br. at 15.

permitted in the General Commercial zoning classification for which the Developers incurred their cited expenses. The mixed use development originally "illustrated" to the community through the Developers' application remains feasible.

Ordinance 1450 only provides additional protections determined by the Town's governing body to be necessary to ensure the health, safety and general welfare of the community. These protections provide the reason that zoning ordinances exist in the first place. The requirement for a special use permit provides communities with assurance that, if a large format retail use is pursued, it will be consistent with orderly development, the public welfare, and the community's character. This is not an unreasonable curtailing of a developer's rights. It is a reasonable step to permit developers and local governments to meet in the middle.

These requirements are a necessary protection to balance the rights of communities and landowners. It is not unreasonable for a locality to consider and plan accordingly to protect the community, in reasonable ways, from being disparately impacted by the very market realities invoked by the Developers throughout this litigation. It is reasonable for a locality to contemplate, and plan to prevent, the possibility of a large, empty structure in the midst of its downtown when a large-format retail anchor vacates – for

a better location, for lower property taxes, for a yet-more expansive building footprint, or for whatever new “market reality” evolves in the future. Communities throughout the country are dotted with abandoned large-format retail structures, which often defy efforts to convert them to other uses. Urban and suburban “greyfields” evolve when nearby, smaller retailers lured in by the gravitational pull of an “anchor” have no means or incentive to remain when it departs. It is reasonable for localities to exercise zoning in light of these considerations.

II. The operation of § 15.2-2298(B) has not been preserved for appeal.

Rule 5:18(b) of the *Rules of the Supreme Court of Virginia* allows appellees to note assignments of cross-error in their briefs in opposition, noting that “no cross-error not then assigned will be noticed by this Court.” This Rule and Rule 5:25 also limit questions to be decided by this Court to those that were preserved through objection at the time of the ruling.

These rules apply even when a lower court decides a case without ruling on the effect of a substantive argument made before it. In *Horner v. Department of Mental Health*, 268 Va. 187, 597 S.E.2d 202 (2004), the Attorney General of Virginia had made certain arguments in the Court of Appeals regarding a jurisdictional issue, but the Court of Appeals had not addressed that issue nor ruled on it. 268 Va. at 194, 597 S.E.2d at 206.

This Court found that, "in order to preserve that issue for our review, an assignment of cross-error citing the Court of Appeals failure to so rule was necessary." *Id.*

In this matter, the Developers made no objection regarding the trial court's failure to make a ruling on the applicability of § 15.2-2298(B), nor did they assign cross-error on *any* issue in their Brief in Opposition to this Court. JA 343-44, Dev. Br. in Opposition.

In support of their untimely citation of § 15.2-2298(B), the Developers cite *Miller v. Highland County*, 274 Va. 355, 372, 650 S.E.2d 532, 540 (2007) for the premise that a court "can affirm a trial court's decision that reaches the right result, albeit for the wrong reason." Dev. Br. at 42, n. 17. The *Miller* case, however, is inapplicable. That case specifically involved "two issues assigned as cross-error," 274 Va. at 355, 650 S.E.2d at 533, and the cross-error assigned by the appellees in that case pertained specifically to the trial court's failure to grant summary judgment on the basis that declaratory judgment did not provide a third-party right of action to challenge a planning commission. 274 Va. at 370, 650 S.E.2d at 538. This Court agreed that the merits should not have been reached, but as the trial court had ultimately granted summary judgment to the defendants (even on the basis of the merits), the trial court's dismissal was the "right

result" and accordingly affirmed. 274 Va. at 372, 650 S.E.2d at 540. Here, the Developers did not preserve the issue of § 15.2-2298(B) by objection or by cross-error, and the operation of this statute is not an issue before this Court.

III. Conclusion

For the foregoing reasons, the Appellants, Edward Hale, et al., respectfully request that this Court reverse the decision of the trial court that § 15.2-2307 of the Code of Virginia, 1950, as amended, applied to the instant case, and accordingly hold that the Property is subject to Ordinance 1450, and that Fairmount has no vested right to pursue a large format retail use of the Property in nonconformance with Ordinance 1450.

Respectfully submitted,

EDWARD HALE, et al.



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CERTIFICATE PURSUANT TO 5:26(d)

I hereby certify that, on this 26th day of November, 2008:

Twelve copies of this Reply Brief of Appellants have been hand filed in the office of the Clerk of this Court and three copies have been delivered, via U.S. Mail, postage prepaid, to all counsel, listed below, on or before the day on which the brief is filed. An electronic copy of this brief has also been hand filed with the Clerk contemporaneous with the brief.

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ADDENDUM

DIVISION 3. BUFFER YARDS AND SCREENING**Sec. 5300 Buffer yards--Purpose.**

The purpose of buffer yards is to limit the view and reduce the noise between abutting incompatible uses, and to ease the transition from one zoning district to another. Buffer yards are intended to provide a physical integration of uses which promote the public health, welfare and safety by:

- (1) Preventing visual pollution;
- (2) Preventing the overcrowding of land;
- (3) Preventing the undue congregation of people and vehicles; and
- (4) Promoting the peaceful enjoyment of property within the Town of Blacksburg.

Secs. 5301--5304 [Reserved].

Sec. 5305 Buffer yards--When required.

(a) A buffer yard shall be required of any lot in any zoning district when the lot in that district abuts a zoning district of lower intensity.

(b) When a public right-of-way separates zones of different intensities, the following criteria shall apply, regardless of whether the zoning line is on one side or the other or the center of the public right-of-way:

- (1) If the public right-of-way is an alley, a buffer yard with screening shall be provided as per the table below.
- (2) If the public right-of-way is a local or collector street, a buffer yard with screening shall be provided on any side or rear of the higher intensity use which abuts the right-of-way as per the table below; however the buffer yard shall not be required on the front of the higher intensity use where the front abuts the public right-of-way.
- (3) If the public right-of-way is an arterial street or highway, no buffer yard or screening shall be required for the portion of the higher intensity use abutting the public right-of-way.

(c) No buffer yard is required within or adjacent to the University zoning district.

(d) When a site plan is submitted to modify or expand an existing building or site improvements, or accommodate a change in land use, buffer yard and screening requirements shall only be applied to those portions of the site that are directly affected by the proposed improvements, or change in land use, as determined by the Administrator.

Secs. 5306--5309 [Reserved].

Sec. 5310 Buffer yards--General standards.

(a) Buffer yards shall contain vegetative and/or architectural screening that achieves the

purpose of the buffer yard, and which meets the requirements for screening, below. Trees used for screening purposes shall be suitable as defined in section 5331.

(b) The maximum slope of any buffer yard shall be 2H:1V. Additional width shall be added to any portion of any buffer yard which exceeds this slope such that the minimum buffer yard width is met by land less steep than 2H:1V.

(c) The buffer yard shall be located entirely within the higher intensity zoning district and abutting the zoning district line, or adjacent right-of-way if such right-of-way separates the lot from the zoning district line. However, the buffer yard may be placed in the lower intensity zoning district or partially within both zoning districts if both sides of the zoning district line and entire buffer yard width are within common ownership and a permanent easement is provided over any portion of the buffer yard not within the higher intensity zoning district.

(d) A driveway required to serve the principal structure on the site may exist in the buffer yard. This driveway shall run substantially perpendicular to the buffer yard.

(e) Buffer yards shall be maintained in a natural condition free of structures, loading or storage areas, parking, roads, or driveways except as provided for in (d) above.

(f) Buffer yards required by this Section shall be applied equally to all similarly situated properties. Modifications to these standards may be granted in writing by the Administrator if the Administrator finds any of the following circumstances exist on the proposed building site, or surrounding properties:

(1) Natural land characteristics such as topography or existing vegetation on the proposed building site would achieve the same intent of this section.

(2) Innovative landscaping or architectural design is employed on the building site to achieve an equivalent screening or buffering effect.

(3) The required screening and landscaping would be ineffective at maturity due to the proposed topography of the site, and or the location of the improvements on the site.

(4) The topography of adjacent and surrounding sites is such as to render required screening ineffective at maturity.

(g) When the acreage of a site is significantly larger than the area proposed for physical improvements or active usage, buffer yards shall be reserved as required by this section. However, to achieve the intent of this section, the administrator may require an alternative location and design for required screening and plantings.

(h) When property lines abut an adjacent jurisdiction, the Administrator shall determine the specific screening and buffering requirements along that property line after consideration of the zoning designation and or land use of the adjacent property. Requirements shall not exceed those that would be required for similarly situated /zoned property within the Town.

(i) Buffer yard dimensions and screening requirements shall be provided as detailed in the chart below:

Abutted District (lower intensity)

TABLE INSET:

Abutting District	RR1, RR2, R-4, R-5, OTR, PR	RM-27, RM-48, PMH	O	DC, GC, PC, RD	I, PIN
RR1, RR2, R-4, R-5, OTR, PR	N/A	N/A	N/A	N/A	N/A

RM-27, RM-48, PMH	B	N/A	N/A	N/A	N/A
O	B	A	N/A	N/A	N/A
DC, GC, PC, RD	C	B	N/A	N/A	N/A
I, PIN	D	C	C	C	N/A

TABLE INSET:

Buffer Yards	Architectural	Vegetative
A	4' screen 10' buffer yard small evergreen trees	20' buffer yard, Small evergreen trees and one row small evergreen shrubs
B	6' screen 15' buffer yard Small evergreen trees	30' buffer yard, small evergreen trees, and one row evergreen shrub
C	6' screen 25' buffer yard Large and small evergreen trees	50' buffer yard, large evergreen trees, small evergreen trees, and one row of evergreen shrub
D	8' screen 30' buffer yard Large deciduous and large evergreen trees	60' buffer yard, large evergreen trees, small evergreen trees, and one row of evergreen shrubs

(Ord. No. 1215, § 32, 5-11-99)

Secs. 5311--5329 [Reserved].

Sec. 5330 Screening--When required.

(a) Screening shall be provided within a buffer yard to ease the transition of one land use or activity to another, to achieve the purposes of the buffer yard. Screening may be accomplished through architectural or vegetative materials.

(b) Screening shall be provided, in addition to the requirements listed above, for:

(1) All articles or materials being stored, maintained, repaired, processed, erected, fabricated, dismantled, or salvaged, such that the activity is not visible from surrounding properties or roads.

(2) Refuse storage and loading areas such that these activities are not visible from surrounding properties or roads.

(3) Rooftop and ground level mechanical equipment such that it is not visible from surrounding properties or roads.

(4) All trash dumpsters or containers used for recycling shall be screened so that it is not visible from surrounding properties or roads. At minimum, the dumpster or container shall be screened on three sides with architectural screening supplemented by plantings. Screening shall be based upon the standards below and subject to the approval of the Administrator.

a. Four foot tall architectural screening is acceptable when household style

trash containers are used in place of dumpsters;

b. The requirement for supplemental plantings may be waived by the Administrator in cases where dumpsters or containers are added to an existing development. In determining whether to grant a waiver, the Administrator shall be guided by these standards: proximity of the facility to residential structures; efficacy of screening to mitigate any adverse effect of the use; and benefit of the screening relative to its cost.

(c) No screening is required within or adjacent to the University zoning district.

(d) When a site plan is submitted to modify or expand an existing building or site improvements, or accommodate a change in land use, screening requirements shall only be applied to those portions of the site that are directly affected by the proposed improvements, or change in land use, as determined by the Administrator.

(Ord. No. 1308, § 63, 8-13-02)

Sec. 5331 Screening--General standards.

(a) Screening shall be continuous and in place at the time of occupancy. If vehicular or pedestrian access through the screen is necessary, the screening function shall be preserved.

(b) Screening may be architectural or vegetative, per the requirements below:

(1) Acceptable architectural screening materials include stockade fences, decorative masonry walls, brick walls, and earth berms, and other like materials approved by the administrator.

(2) Architectural screening shall be at least four feet in height, shall be supplemented with plantings, and shall be subject to the provisions of Blacksburg Town Code section 21-304, "sight triangles established."

(3) Vegetative material shall be alive and in good health.

(4) Small evergreen trees shall be at least 4 feet in height at planting and allowed to grow to at least 6 feet in height. Large evergreen trees shall be at least 6 feet in height at planting and allowed to grow to at least 10 feet in height. All required evergreen vegetation shall be maintained in good condition. (Ord. No. 1184, adopted 6-9-98)

(5) Deciduous trees shall be at least 1 1/2" caliper or 10' to 12' in height. They shall be supplemental and not deemed to be adequate screening in themselves.

(6) Acceptable vegetative plantings include any tree listing in the "recommended list of trees" for screening purposes; or yew, box honeysuckle or similar dense hedge.

(c) Screening design and development shall be compatible with the existing and proposed land use and the development character of the surrounding land and structures.

(d) Screening shall be of sufficient density and diversity to achieve the intent of this section. However, at the time of planting, the spacing of trees shall not exceed 12' on center, and the planting pattern shall be staggered. Shrubbery shall be more closely-spaced. Specific exceptions to this requirement may be granted by the administrator to encourage quality and creativity of design where the intent of this section is met.

(e) Existing vegetation within buffer yards shall be considered as a substitute for otherwise required landscaping or screening, if in the opinion of the Administrator, the type, size, and density of the existing vegetation complies with the standards and intent of this section.

(f) When a proposed buffer yard has a variation in elevation of greater than 10 vertical feet at

any point, the required screening or landscaping within the yard shall be placed to maximize the effectiveness of the screening or landscaping, as determined by the administrator.

(g) Trees planted to meet any of the screening requirements may also be used to meet any other landscaping requirement within this Article.

(h) Screening required by this Section shall be applied equally to all similarly situated properties. Modifications to these standards may be granted in writing by the Administrator if the Administrator finds any of the following circumstances exist on the proposed building site, or surrounding properties:

- (1) Natural land characteristics such as topography or existing vegetation on the proposed building site would achieve the same intent of this section.
- (2) Innovative landscaping or architectural design is employed on the building site to achieve an equivalent screening or buffering effect.
- (3) The required screening and landscaping would be ineffective at maturity due to the proposed topography of the site, and or the location of the improvements on the site.
- (4) The topography of adjacent and surrounding sites is such as to render required screening ineffective at maturity.

(Ord. No. 1247, § 20, 9-12-00)