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In The  
**Supreme Court of Virginia**

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RECORD NO. 081000

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TOWN OF BLACKSBURG, 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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**BRIEF OF APPELLANTS**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Now come 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, and pursuant to Rule 5:27 of the Rules of the Supreme Court of Virginia, submit their opening brief.

**NATURE OF THE CASE**  
**AND MATERIAL PROCEEDINGS**

Zoning ordinances exist for the benefit and welfare of the public. As such, they are drafted with reasonable consideration of factors for the public good, including “the creation of a convenient, attractive and harmonious community,” protection against overcrowding, obstruction of light and air, and danger and congestion in travel. Va. Code Ann. § 15.2-2283.

This case involves a 39.63-acre parcel of land (the “Property”) centrally situated in the well-defined environment of the Town of Blacksburg (“Town”), and controlled by a group of developers with contracts regarding its development, purchase and ownership, including Llamas, Inc., Diversified Investors XIII, LLC, Fairmount University Realty

Trust, LLC, and Fairmount Properties, LLC (referred to collectively herein as "Fairmount"). JA 77-78. In 2006, the Town received an application to rezone the Property. JA 1049.

The Property, contemplated for "infill" development amidst surroundings with distinct character, highlights the precise purposes for which zoning ordinances are enacted by local governments. The Town's interest in assuring a "convenient, attractive and harmonious community," directed toward the public good, necessitates the enactment of appropriate ordinances. The application of these ordinances must be consistent and uniform in order to accomplish the fundamental purposes of zoning.

All landowners are subject to the application of these enactments. No landowner is entitled to the expectation that a given parcel will continue under an existing zoning classification, or will be exempt from the application of subsequent zoning ordinances. *E.g., Board of Zoning Appeals of Bland County v. Caselin Systems, Inc.*, 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998). This general rule is subject to a single, narrow exception. In limited circumstances, a landowner can establish a vested right to develop a parcel in a nonconforming manner to the subsequent ordinance. *Id.*

In this case, the narrow mechanism of vesting depends on an even narrower issue: whether a single subpart of § 15.2-2307 of the Code of Virginia has been triggered. Unless Fairmount was the beneficiary of a “significant affirmative governmental act which remains in effect allowing development of a specific project,” the parcel is fully subject to subsequent zoning ordinances in the same manner as any other property.<sup>1</sup> The remaining requirements of the statute are not at issue in this appeal and have no bearing on the existence or nonexistence of a significant affirmative governmental act.

The trial court made the legal determination that the Town’s passage of Ordinance 1412, on May 9, 2006, as that act. JA 340-341. Ordinance 1412 rezoned the Property to a Conditional General Commercial classification. JA 91. In finding that the Town had committed a significant affirmative governmental act through this rezoning, the court below vested Fairmount with the right to develop the parcel in a manner prohibited by the new zoning ordinance, Ordinance 1450, passed by the Town Council on May 29, 2007, that required a special use permit for any retail use in

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<sup>1</sup> As stated by the trial court, “The only real issue between the parties in this instance is ‘whether or not a significant affirmative governmental act which remains in affect [*sic*] allowing development of a specific project’ has occurred. The other two elements [of § 15.2-2307] . . . are not in question, as neither party argued them.”

excess of 80,000 square feet in the General Commercial District. The trial court's conclusion meant that Fairmount could thereby proceed with plans for a nonconforming "large format retail use" on the Property. This appeal followed.

The decision of the trial court affirmed an earlier decision of the Board of Zoning Appeals for the Town of Blacksburg ("BZA"), reached July 31, 2007. JA 396-97. The BZA overturned a determination made by the Town Zoning Administrator, who had determined that Fairmount was not vested in the right to develop a nonconforming large format retail use, and that the Property was subject to Ordinance 1450. JA 184. The Administrator issued a well-reasoned determination on June 17, 2007, thoroughly exploring both § 15.2-2307 and § 15.2-2298(b), also alleged by Fairmount to apply to the Property. JA 172-85.

The tenet of vesting exists to protect those landowners who openly commit to using their property in a manner known to the governing body and approved by it, thereby sacrificing flexibility of use in order to protect the right to pursue a specific project. A landowner cannot be vested in the right to flexibility, or in the right to a concept. Vesting protects a reality. If no reality has been revealed, a local government can direct no significant affirmative act toward it.

## **ASSIGNMENT OF ERROR**

- I. THE COURT ERRED IN FINDING THAT FAIRMOUNT WAS VESTED IN ITS RIGHT TO PLACE A LARGE-FORMAT RETAIL FACILITY ON ITS PROPERTY UNDER SECTION 15.2-2307 OF THE CODE OF VIRGINIA, AS AMENDED.

## **STATEMENT OF FACTS**

The 39.63 acre Property at issue in this case was zoned low-density residential and office when the Town received an application in 2006 to rezone the property to General Commercial. JA 189. That application ultimately included proffers, dated May 3, 2006. JA 201. The application provided a conceptual justification for the more intensive classification, painting a “vision” of a mixed-use community that would be well integrated to nestle into the “unique Blacksburg charm.” JA 107-11.

The application also included a “preferred illustrative plan” and “proposed concept layouts” for the Property. JA 197-200. The proffers involved certain design features for the Property and defined certain boundaries, but did not specify any particular use or uses to which the Property would be put. JA 201-207. The proffers also prohibited 8 of the 60 uses – or roughly 13% – otherwise permitted in the General Commercial district. In short, the proffers only defined that the Property’s use – whatever it was – would be subject to certain physical limitations and contain certain features. Any reference to commercial or other applications

for the Property was limited to the “conceptual,” qualified language of the application and “illustrative plan.” JA 187-200.

On May 9, 2006, the Town passed Ordinance 1412, rezoning the Property to Conditional General Commercial, and incorporating Fairmount’s application, proffer statement, and proffer plan. JA 91-93. After the passage of Ordinance 1412, Fairmount submitted certain line drawings and conceptual plans to the Town Zoning Administrator and requested courtesy reviews regarding the information’s compliance with the proffers. JA 33-59, 177-179. The Zoning Administrator found that each of these submissions failed to comply, in numerous ways, with the proffers and did not approve the submissions on the basis of these deficiencies. *Id.*

On May 29, 2007, the Town adopted Ordinance 1450, a zoning ordinance requiring a special use permit for all retail uses over 80,000 square feet in general commercial districts – titled “large format retail uses.” In identifying the need for Ordinance 1450, the Town made specific findings regarding the deleterious impact of unchecked large-format retail uses on communities. JA 60-61.

This ordinance does not forbid the development of large format retail uses in general commercial zones. It does, however, require that owners obtain a special use permit to promote “public necessity, convenience,

general welfare and good zoning practice.” JA 62. The requirement for a special use permit allows the Town to verify the project’s impact on valid community concerns, including neighborhood compatibility, environmental issues, traffic, and scale features. JA 63-64.

Fairmount submitted its full site plan to the Zoning Administrator on May 4, 2007, which was also ultimately not in compliance and denied approval on June 27 and June 29, 2007. JA 81-82, 145-171. The inclusion of a large format retail use on the Property in violation of Ordinance 1450 was only one of dozens of reasons for non-approval presented to Fairmount by numerous Town officials. *Id.*

After the passage of Ordinance 1450, Fairmount, having been informed by the trial court that it must exhaust administrative remedies, sought a determination from the Town Zoning Administrator regarding whether or not the Property was immune from the application of Ordinance 1450 by virtue of vesting. JA 179. The Zoning Administrator, looking at both statutes cited by Fairmount in support of this claim, determined that Fairmount had no vested right to pursue a large-format retail use, and would accordingly need to obtain a special use permit in order to proceed with one. JA 184.

Fairmount appealed the decision of the Zoning Administrator to the BZA, which conducted hearings on July 25 and July 31, 2007, regarding the determination. Numerous citizens from the Town testified before the BZA regarding the significant discrepancies between the "vision" originally presented by Fairmount and the reality of the plans later submitted, and one resident noted the "bait and switch" maneuver that replaced a community-oriented, Blacksburg-appropriate proposal with a large commercial development. JA 357, 362-63, 364. Ultimately, having been provided with evidence and testimony from the developers, the Town, and the citizens, the BZA made no findings of fact, yet reached the conclusion that a significant affirmative governmental act had occurred by virtue of the passage of Ordinance 1412. JA 64. Each member of the BZA then voted to accept Fairmount's petition and reverse the Zoning Administrator's determination. *Id.*

Both the Town and the Appellants who submit this brief appealed the determination of the BZA to the trial court, seeking reversal of the decision regarding the existence of a significant affirmative governmental act. When the trial court affirmed the BZA, these citizens filed an independent petition for appeal to this Court.

## QUESTION PRESENTED

- I. DID THE COURT ERR IN FINDING THAT FAIRMOUNT WAS VESTED IN ITS RIGHT TO PLACE A LARGE-FORMAT RETAIL FACILITY ON ITS PROPERTY UNDER 15.2-2307 OF THE CODE OF VIRGINIA, AS AMENDED? (Assignment of Error #1)

## ARGUMENT

- a. Whether a significant affirmative governmental act has occurred is a question of law, examined de novo.

This Court's standard of review is de novo, premised on the legal determinations of both the trial court and the BZA in concluding that a significant affirmative governmental act had occurred. The determination of a significant affirmative governmental act is a question of law, and this Court, in deciding a case under a previous version of § 15.2-2307, did not impart a presumption of correctness to a trial court's finding that a significant affirmative governmental act had taken place. *Caselin*, 256 Va. at 211, 501 S.E.2d at 400. Under § 15.2-2314, when a trial court hears arguments on questions of law on matters appealed from a BZA regarding a zoning administrator determination, those arguments must be heard de novo. Va. Code Ann. § 15.2-2314. As stated by the trial court and agreed by the parties, there are no facts in dispute in this matter, and the disagreement arises only as to the existence of a significant affirmative

governmental act. JA 339. The trial court accordingly decided the matter through legal reasoning, discussing case law. JA 339-40.

Similarly, the BZA made no findings of fact in this case that would be entitled to a presumption of correctness, instead premising its decision on a vote to reverse the Town Zoning Administrator and finding that Fairmount was entitled to vested rights protection. JA 393-97. The record does not support the BZA's conclusion, nor does it support that of the trial court, that a significant affirmative governmental act under § 15.2-2307 has occurred. The finding of the trial court should accordingly be reversed.

- b. Section § 15.2-2307 of the Code of Virginia does not apply in this case.

Section 15.2-2307 of the Code of Virginia, in relevant part, sets forth a list of events that constitute significant affirmative governmental acts:

*(i) [T]he governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; or (vi) the governing body or its designated agent has approved a final subdivision*

plat, site plan or plan of development for the landowner's property.

Va. Code Ann. § 15.2-2307 (emphasis added). Each entry on the list defines an act by which a Town can significantly and affirmatively trigger a landowner's pursuit of development in reliance on the Town's actions.

It is the act of the local government, and not the status of the landowner's plans, that triggers the application of this statute. As explained in the *Suffolk* case, prior to the passage of the statute's subparts as listed above, the "controlling factor was the issuance of a specific government land use authorization, *beyond zoning*, before vesting of a particular land use could be found." 266 Va. at 144-45; 580 S.E.2d 796, 799 (emphasis added). The *Suffolk* court reiterated the holding of *Snow v. Amherst County Board of Zoning Appeals* that "mere reliance on a particular zoning classification, *whether created by ordinance or variance*, creates no vested right in the property owner." *Id.* (quoting *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994) (emphasis added)). The *Suffolk* case clarified that the new subparts of § 15.2-2307 enumerated the actions "beyond zoning" that entitle a landowner's reliance and diligent pursuit of a specific project.

The facts of *Suffolk* involved a landowner who had committed considerably more to the specifics of a project than is apparent in the facts

here. As later discussed by the Court in *Board of Supervisors of Culpeper County v. Greengael, L.L.C.*, 271 Va. 266, 283, 626 S.E.2d 357, 367 (2006), the developer in *Suffolk* had “received approval for a Master Land Use Plan and submitted to the City, among other things, a preliminary recreation plan, preliminary site plan, and a traffic study, before the City rezoned the property for commercial or office park use.” *Id.* (citations omitted). The *Suffolk* development had been for a project called King’s Landing, the character of which changed little for the numerous years throughout development. The project was identifiable, as was the property, and the developer had been before the local government on two separate occasions over several years to obtain rezoning in furtherance of that project.

Throughout this matter, Fairmount has implicated the three subparts of § 15.2-2307 italicized above, claiming that one of three actions by the Town triggered the statute. The relevant subparts are (i) where the local government has accepted *proffers* that *specify use* related to a zoning amendment, (ii) where the local government has approved an application for a rezoning for a *specific use or density*, and (iii) where the local government has approved a preliminary site plan, plat, or plan of development. Notable in these subparts of § 15.2-2307 are the additional

requirements to *specify use*, or to gain approval of an application for a *specific use or density*, in order to find that a significant affirmative governmental act has taken place. The other subparts of this code section require only approval of some form: the approvals of a variance or of a special use permit, for example.

The additional requirements in the italicized subparts seem consistent with the goal of protecting communities while balancing the rights of landowners. A BZA that has approved a variance must, by definition, know the reason that a variance is required and the use for which it is necessary. A special use permit or special exception necessarily applies to a specific set of circumstances that must be known to the local government. By the same token, a local government that has approved a final plan has necessarily taken a "significant affirmative governmental act which remains in effect allowing development of a specific project," because the approval of a final plan can only occur when the project has become specific enough to be final.

Where events have not progressed this far, however, the additional requirements of subparts (i) and (ii) serve to clarify that in the context of vested rights a local government cannot direct a significant affirmative governmental act toward a mere concept or idea. A landowner cannot

claim vested rights when it has presented a proposal requesting flexibility in determining the form that their property may or may not take, or the use or uses that will best meet their needs. To do so would undermine the fundamental purpose of the locality's zoning ordinance, as provided in § 15.2-2283 of the Code of Virginia, to accomplish a plan for the future development of its community.

Both the trial court and the BZA identified the Town's passage of Ordinance 1412 as the operative action that triggered application of the statute, although neither specified the particular subpart of the statute that applied. JA 340-41, 394. The record, however, reflects uncertainty by both the BZA<sup>2</sup> and the trial court<sup>3</sup>, as acts that occurred *after* the adoption of Ordinance 1412 were identified in support of the legal conclusion that a significant affirmative governmental act had taken place. JA 341, 394.

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<sup>2</sup> The BZA's deliberations on July 31, 2007, reflected several different conclusions regarding how the mechanism of vesting had taken place. Regarding significant affirmative governmental acts, one member concluded "there are several of them . . . Ordinance 1412, which accepted the proffers and rezoned the property[,] . . . negotiations on the traffic circle. And where it's going to be placed, the entrances to Main Street and all those things, I think those are significant affirmative governmental acts. JA 394.

<sup>3</sup> The trial court similarly identified Ordinance 1412 as the operative act by the Town, but in support of its holding found "sufficient evidence that from the date the ordinance was passed up until the passage of Ordinance 1450 . . . the respondents were continually supplying the Town with information about the particular project being developed[.]" JA 341.

On the face of the record, none of the cited subparts of § 15.2-2307 had taken place prior to the passage of Ordinance 1450. Fairmount was not the beneficiary of a significant affirmative governmental act, and is thereby not vested in the right to proceed with a nonconforming use.

i. The Town did not accept proffers that specified use.

In passing Ordinance 1412 on May 9, 2006, the Town conditioned the rezoning of the Property to general commercial on the Developers' application. The final application attached a "Revised Proffer Statement" stating that the property would be developed in accordance with the conditions listed, "if and only if approval of Ordinance 1412 is granted, and the property is zoned General Commercial." JA 21. The proffers did not specify use.

The Revised Proffer Statement begins with a preamble that paints an attractive portrait of "an exciting 'main-street' retail destination." JA 21. This representation was enhanced by language in the rezoning application itself, which incorporated line drawings representing "one *example* of a possible *concept*" for the property. JA 190 (emphasis in original.)

Divorced from the conceptual language and illustrative portrait, the proffers themselves specify little – and fail to elucidate the use or uses to

which the property will be put. Reading the proffers in isolation reveals that *no* use – retail, residential, office, or mixed – is specified.

Whatever the project, all that can be gleaned from the proffers themselves is that it will be partially screened by a perimeter fence and buffer area, that a path will be adjacent to it, that setbacks will be established, that building height will be limited in some instances, that certain “traditional neighborhood” elements will be followed, and that the developer will not pursue eight of the sixty permitted uses in the general commercial district. JA 201-207.

In short, the proffers provide certain design features and define dimensions for an unspecified use, for which the Developers agreed to forego approximately 13% of the permitted uses for the General Commercial district. To conclude that foregoing such a limited percentage of uses constitutes “specifying use in the negative” provides no protection to communities. Pushed to its limit, specifying use in the “negative” begs the question of how small the field of negatives must be to trigger the protection of vesting – 2 uses out of 50? 1 out of 100? To eliminate a small selection of uses from consideration – two of which would not have been permitted by virtue of the Property’s location in any event (JA 176) – is not to specify use.

In its July 31, 2007 proceeding, the BZA demonstrated its own misapprehension of this subpart of § 15.2-2307. The BZA's legal conclusion that the Property was not subject to Ordinance 1450 resulted from discussion that identified acceptance of the proffers themselves – and not what the proffers contained – as sufficient.<sup>4</sup> Because the proffers did not specify use, the Town's acceptance of those proffers as part of Ordinance 1412 was not a significant affirmative governmental act.

- ii. The Town did not approve an application for a specific use or density.

What culminated in the passage of Ordinance 1412 commenced with an application for a change in zoning classification. That application was for neither a specific use nor a specific density. It was an application to permit a greater range of options for the property's development. At its most fundamental level, it was an application to afford the Developers flexibility. By approving the application, the Town did not vest the Developers with a right to pursue a use that was ultimately nonconforming. A landowner cannot be vested in the right to flexibility.

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<sup>4</sup> One BZA member, in concluding that Ordinance 1412 removed the parcel from Ordinance 1450, stated, "I think there's the attorney general's opinion that accepting proffers and rezoning are significant governmental acts." JA 395. The Chairman of the BZA agreed. JA 395-96. This exchange indicates that the BZA itself did not understand the function of § 15.2-2307, or that the proffers accepted must specify use.

1. The application was not for a specific use.

The trial court found that at the time Ordinance 1412 was passed, “the Town was aware of the specific request being made by the respondents and was aware that they intended to develop the property according to the plans that had been presented.” JA 340. The plain error of this statement stems from what the Town actually knew at the time Ordinance 1412 was passed. At that time, the only “plans” that existed were line drawings presenting “one *example* of a possible *concept*” referenced in the application for rezoning. JA 91-93. The proffer statement and the application were incorporated in the rezoning. *Id.*

These plans, moreover, ultimately bore little resemblance to the plans submitted to the Town. Residents testifying before the BZA felt that they had been the victims of a “bait and switch.” JA 364. As discussed in subpart (a), above, the proffers submitted by Fairmount did not specify use for the property; and the “vision” sold to residents was that of the conceptual application and the illustrative plans, not the vague dimension-related requirements of the proffers. Fairmount ultimately indicated that this application, though incorporated into 1412 and used to promote the development to the community, has no effect on the ultimate development

plans for the Property. JA 384-85.<sup>5</sup> The only element Fairmount has preserved from its application is its continued emphasis on the need for flexibility, noted four separate times in the application in support of the rezoning to General Commercial. JA 107-111.

The concepts of flexibility and creativity run completely counter to the concept of vesting. By definition, to be vested is to be “fixed; accrued; settled; absolute; complete.” *Black’s Law Dictionary* 1563 (6th ed. 1990). To be vested is to have abandoned the creative realm of the “flexible” in favor of commitment, and to have traded vague and conceptual for the tangible, for the definite, for the *specific*. Fairmount seeks to retain the elasticity of flexibility while still claiming the protection of the absolute. The clearly defined language of § 15.2-2307 should not be interpreted to encompass such a double standard.

2. The application was not for a specific density.

The most recent decision to discuss the “specific density” provision of § 15.2-2307 was the *Suffolk* case. In noting that the statute now

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<sup>5</sup> In proceedings before the BZA, Fairmount was asked whether it considered its rezoning application, and the application’s vision for a “mixed use town center” with “cohesive development” providing “a distinctive appearance and a true sense of space,” had any bearing on the ultimate project pursued by Fairmount. Fairmount denied that the application was of any effect, responding that the application “is not part of what they adopted in Ordinance 1412. If they wanted to require that as a proffer, then certainly they had every right to turn the zoning down.” JA 384-85.

enumerates types of significant affirmative governmental acts, the Court counted "rezoning for a specific use or density" as applicable to the facts in the *Suffolk* matter. 266 Va. at 145, 580 S.E.2d at 799.

The developer in that case had twice obtained rezoning for his property. 266 Va. at 141, 580 S.E.2d at 797. The most recent rezoning had taken place in 1994, and had fixed residential density for 154 acres of the property at four units per acre. *Id.* The density was fixed for a development that was continually identified as King's Landing, and the portion ultimately fixed for low-density residential was specified as a residential development. *Id.* As of the 1994 rezoning, only 10 acres, distinct from the 154 residential acres, were intended for non-residential uses. Those 10 acres were the only portion of the property that was unaffected by the city's subsequent rezoning of the area from "PD-H" (planned development housing) to "Commerce Park" and "Office-Institutional." The planned residential development was the use at risk by the city's rezoning, and it was the use ultimately found vested by the Court.

Distinguished from the *Suffolk* case, Fairmount did not apply to have its property rezoned to any specific density. The application in this case was to rezone the Property's classification to General Commercial. In stark contrast to the developer in *Suffolk*, this classification change was sought

not to limit the potential uses of the Property, but rather, to *increase* the available options in order to provide greater flexibility for the Property's development. The application Fairmount itself noted that the uses and densities of the property were still fluid, stating that "all available information regarding development densities and uses will be provided to the Town" to permit evaluation of the property's evolving public utility needs. JA 108. In answering the application's query regarding the "relationship of the proposed change to the general planning program," Fairmount provided only a "vision" for the development. This vision, Fairmount again claimed, required flexibility to fulfill. After the myriad changes to the "illustrative plans" pitched to the community, Fairmount's vision became a mirage.

Moreover, the "specific density" fixed in *Suffolk* was residential density, for a residential development. Fairmount's application did not propose, as anything other than concept, *any* particular development – commercial, residential, mixed use, or otherwise. The mechanism of vesting is not intended to protect a concept or a vision. As a narrow exception, it should not and must not apply to a situation where a developer limits density for any use, regardless of whether it is contemplated for the property at some undefined future point. Were vesting to apply to such a

situation, communities would lose the right to use zoning effectively in the public interest.

- iii. The Town did not approve a preliminary site plan, plat, or plan of development.

In *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008), this Court stated the intent of § 15.2-2307 “is to provide a property owner with protection from a subsequent amendment to a zoning ordinance when the *owner has already received approval* for and made substantial efforts to undertake a use of the property permitted under the prior version of the ordinance.” 275 Va. at 237, 657 S.E.2d at 159 (emphasis added).

The trial court identified the passage of Ordinance 1412 on May 9, 2006, as the operative “significant affirmative governmental act” on which the Developers were entitled to rely. JA 340. After reaching that conclusion, however, the court made further findings regarding acts that took place after that enactment, stating that between Ordinance 1412 and Ordinance 1450, the “respondents were continually supplying the Town with information” in pursuit of the project. JA 341. The exchange of information cited by the court appeared to pertain to the courtesy reviews by the Town Zoning Administrator of information submitted by Fairmount. Fairmount cited this same correspondence to support a contention that

subsection (v) of § 15.2-2307, approval of a preliminary site plan, had taken place. This contention is contradicted by the record.

The language in *Goyonaga* supports that it is the approval of the permitted use that is operative to the question of vesting. No such approval had occurred in this case. To the contrary, the courtesy reviews conducted by the Zoning Administrator specifically *denied* approval of the information provided by Fairmount, noting numerous ways that the conceptual drawings submitted to the Administrator failed to conform to the proffers and the Town Zoning Ordinance. Even the site plans ultimately submitted to the Town, as well as the traffic impact study and transportation improvements, were denied approval. JA 81-82, 143-171. By contrast, in the *Suffolk* case, the developer had obtained approval for two separate Master Land Use Plans in addition to other developmental documents by the time the City rezoned the property. 266 Va. at 141, 580 S.E.2d at 797. Here, no preliminary site plan or plan of development had been approved by the Town, and the terms of this sub-test were accordingly not met, even considering the information exchanged between the Town and Fairmount after May 9, 2006.

Any information exchanged after that date, moreover, is irrelevant to the presence or absence of a significant affirmative governmental act at the

time Ordinance 1412 was passed. While this information may be relevant to the second and third prongs of § 15.2-2307 – whether Fairmount relied in good faith on the governmental act, and whether they incurred extensive obligations and expenses in diligent pursuit of the project – those prongs are outside of the scope of this appeal.

The public protections and community interests of zoning ordinances require that these ordinances be strong and consistent. Because of this, vesting is a narrow exception that should apply only when the landowner has been the beneficiary of a significant affirmative governmental act. Fairmount has not been. Ordinance 1450 should apply to its Property.

### **CONCLUSION**

For the foregoing reasons, 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, 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,

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**CERTIFICATE PURSUANT TO 5:26(d)**

I hereby certify that, on this 20<sup>th</sup> day of October, 2008:

Twelve copies of this brief 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. The electronic copy has been provided in disc format to the Clerk.

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