

'Big box' stopped

By Peter Vieth
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Local governments in Virginia won a closely watched battle that pitted a large-scale retail developer against land use regulators and citizens in the Town of Blacksburg. The Supreme Court of Virginia strictly interpreted a law that grants developers "vested rights" to build new projects under certain circumstances.

The decision in *Hale v. Board of Zoning Appeals* (VLW 009-6-028) was met with cheers from opponents of what was widely thought to be a planned Wal-Mart store on Main Street in Blacksburg.

At the instigation of those critics of the expected "big box" store, the town council in 2007 passed a new requirement for large retail land use – the developer would be required to get a special use permit to build a store larger than 80,000 square feet.

But the developers, who planned a store that would cover 176,000 square feet, claimed that Blacksburg was too late to change the rules for the project they had pursued for two years. A circuit court judge agreed, finding that certain prior "proffers" from the developers were specific enough to create vested rights that could not be changed by a later amendment to the zoning ordinance.

Proffers are agreements by a developer to restrict the use of property, negotiated in exchange for a local government's loosening the property's zoning classification. In this case, the developers in 2006 had promised to provide certain setbacks and buffers.

They also agreed to height restrictions and ruled out several possible uses of the land. They did not, however, make any proffers that limited the "footprint" of any particular building, nor did they disclose that they intended for the entire project to be retail use.

The hue and cry arose after the developers submitted a revised site plan in 2007 showing the 176,000-square-foot building. The town council soon amended the zoning ordinance to require a special use permit for such "big boxes." When a circuit court judge determined the negotiated proffers deal was specific enough to withstand later zoning changes, the town and the citizen opponents appealed to the Supreme Court.

The court's Feb. 27 decision turned on interpretation of a state statute, amended in 1998, that lays out the circumstances where a landowner has a vested right in the face of zoning changes. Developers had sought the change 10 years ago in the face of a series of cases viewed as hostile to developers.

Under Virginia Code § 15.2-2307, a developer wins vested rights when he benefits from a "significant affirmative governmental act." One of those significant acts can be a government accepting proffers "which specify use related to a zoning amendment."

The case turned on whether the proffers from the big box developers actually specified the intended use of the property. Writing for the court, Justice Lawrence L. Koontz Jr. said, "There is simply no language in the proffers and nothing in the attendant materials that were submitted with the rezoning application that would 'specify use' so that it could be found the developers clearly intended to reserve ... a vested right for an unrestricted retail sales use of the property."

Guidance on changes

Government lawyers welcomed the guidance on when a developer becomes immune to changes in a local zoning code.

"One of the big things that the case will do is help to clarify proffers as they relate to vested rights, and what's going to be considered a 'significant event' with regard to vested rights," said Blacksburg Town Attorney Lawrence S. Spencer.

Spencer noted that Koontz took pains to describe the interactions over the years between the developers and the town regulators. The recitation of facts covered more than 20 pages of the 43-page opinion.

The message, Spencer said, is that the court will back up local governments when they can demonstrate their attention to detail on zoning regulation.

"It kind of makes the point that the court is going to look at the work the staff does. Our staff did good work," Spencer said.

Local government attorneys saw the case as an opportunity to hold the line against an effort by developers to expand their rights under the law. Goochland County Attorney Andrew R. McRoberts authored an amicus brief on behalf of three local government organizations.

McRoberts said the *Hale* decision provides the support sought. "It confirms that you need a serious commitment from a developer to get vested rights," he said.

"To get vested rights," McRoberts said, "you have to have a very specific project and you have to have proffers specific to that project."

McRoberts complimented the work done by Roanoke attorney Gregory J. Haley, who represented Blacksburg and argued the case before the Supreme Court. "He did a good job," McRoberts said.

▲ [Link to report](#)

Abingdon is next

The decision helps all sides, according to an attorney who represented a group of activist citizens in the case. Philip C. Strother of Richmond said the guidance from the court helps developers as well as local governments, because the rules now are clear.

“It clarifies what triggers the vested rights mechanism,” Strother said. “Going forward, people will know what is required for them to acquire those vested rights.”

The Blacksburg case was being closely followed in Abingdon, where a developer hopes to build a Wal-Mart despite recently enacted zoning restrictions.

The developer, Commonwealth-Abingdon Partners, L.P., had asked Washington County Circuit Judge C. Randall Lowe to declare that it has vested rights to build the large format store without seeking special use permits.

The partnership sought approval for a retail project in the southwest part of Abingdon beginning in 2002. As in Blacksburg, the town later imposed additional requirements for “big box” stores.

“Bottom line: It’s the same type of issue,” said Abingdon town attorney Deborah C. Icenhour.

Icenhour said Lowe appeared to be waiting for the outcome of the pending Blacksburg case as he considered the arguments from a hearing in November. After the hearing, the judge ordered briefs from the parties. “Our pot was on simmer,” said Icenhour.

Briefs in the Abingdon case are due over the next few months, she said.

Now that the high court has spoken, town attorney Spencer had no information on what’s next for the Blacksburg project. The developer could build smaller-scale retail stores, seek the special use permit for a big box, or wait for the economic climate to change.