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## Blacksburg big-box case awaits judge's ruling

Parties presented arguments Tuesday over a company's right to build a the store, widely thought to be a Wal-Mart Supercenter.

By Tonia Moxley



*Matt Gentry | The Roanoke Times*

An aerial photograph shows the Fairmount Properties development along South Main Street in Blacksburg on Nov. 17. The project is near Gables Shopping Center (left), Country Club Drive (bottom) and Margaret Beeks Elementary School (right).

CHRISTIANSBURG -- Officials, activists and developers who have waited for months to get a court ruling on an Ohio firm's right to build a big-box retail store in Blacksburg will have to wait several more weeks for a decision.

After more than three hours of arguments from four attorneys Tuesday, Montgomery County Circuit Judge Bobby Turk wished the parties good health and a happy holiday season, then told them they would have to wait up to four more weeks for his ruling. The judge will decide whether Fairmount Properties of Ohio may build a 186,000-square-foot big-box store along Country Club Drive -- widely thought to be a Wal-Mart Supercenter -- without further review from Blacksburg Town Council.

Rocking back and forth in his chair with glasses dangling from his lips, Turk presided over a courtroom populated by nearly a dozen attorneys and about 40 assorted activists, officials and developers. The judge spent considerable time questioning the town's actions.

In a case where council grants a rezoning that says "you can do basically whatever you want" but then "changes their mind after money's been expended on the plan ... what protects the landowner?" Turk asked town council attorney Greg Haley.

"Something doesn't seem right about that," the judge added later.

Attorneys are quick to point out, however, that it is impossible to predict the outcome of a case based on a judge's questions or comments during a hearing. The ruling will likely come in a letter to the parties in the next three to four weeks, according to Turk.

The big-box store is part of a 40-acre retail revitalization project planned along South Main Street. Grading for the project has started, turning a strip of blighted businesses into a red clay moonscape at the town's southern gateway. Site plans for a part of the project that does not include the big-box store have been approved by town staff. Fairmount will now have to secure building permits for smaller retail structures that will house several stores and restaurants, including a locally owned brew pub. Owners hope to open those businesses sometime in 2008.

The big-box saga began in 2006 when council, on a 5-2 vote, approved a broad "general commercial" rezoning that made way for Fairmount's project. At the time, Fairmount principal Adam Fishman said the development would include retail and residential buildings. But months later, when developers submitted plans that showed a big-box store on part of the property that had been slated for residential development, the council hastily passed Ordinance 1450. That ordinance requires an extra layer of governmental review before any retail building larger than 80,000 square feet can be built in the town limits.

Fairmount then filed suit in Montgomery County Circuit Court naming the town and former zoning chief Steve Hundley as defendants. The suit asked the court to bar the town from applying the ordinance so late in the process. The judge asked Hundley to rule on whether the ordinance could be applied to the project, and Hundley decided that it should apply.

But the Board of Zoning Appeals, a five-member quasi-legal body appointed by the circuit court to hear appeals of the zoning administrator's decisions reversed Hundley's ruling in July, saying Fairmount had a right to continue without further governmental regulation. Council then appealed the zoning board's decision to the circuit court, which resulted in Tuesday's hearing. Town residents affiliated with anti-big-box group Blacksburg United for Responsible Growth, or BURG, petitioned to join the appeal and was recently granted standing to do so by Judge Turk.

BURG's attorney, Robert Allen, argued Tuesday that the court should discard the zoning board's decision because it was not based on findings of fact or a careful consideration of the law. Allen argued that Hundley's ruling, which is based on detailed factual and legal arguments, should bear more weight.

Haley, the attorney for the town, took a different tack, arguing that concept plans submitted by Fairmount during the rezoning process were too vague to qualify for what the state code calls "vested rights."

Under state law, Fairmount does not have vested rights to build the big-box store because the project it introduced for the approved rezoning was not specific to qualify that rezoning as a "significant affirmative governmental act."

Simply put, the rezoning was based on a concept plan that changed between the rezoning and the submission of site plans, Haley said. He also argued that voluntary conditions, or proffers, placed on the property by Fairmount did not commit the company to "substantial expenses," which can be used to lock-in vested rights.

Fairmount attorney Jim Cowan countered that council's approval of the rezoning and the voluntary conditions have already vested Fairmount's right to build the project without further regulation. Those proffers include \$25,000-worth of road improvements to mitigate traffic impacts from the project and a promise to build a public-access walking and biking trail that will connect to the town's public trail system. In accepting the proffers town council committed a "significant affirmative governmental act" that Fairmount relied upon when spending more than \$1 million in design and other work related to the project, Cowan said.

Turk's ruling, whenever it's made, may not be the last word in the case. Any of the parties involved could appeal the circuit court decision to the Virginia Supreme Court.

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