Commonwealth of Virginia

FIFTEENTH JUDICIAL CIRCUIT

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June 1, 2005

Barbara G. Decatur, Clerk
Stafford County Circuit Court
1300 Courthouse Road
Stafford, Virginia 22554

Re: Stafford Lakes Limited Partnership, et al. vs. Board of Zoning Appeals of Stafford County, Virginia – CH04-240

Dear Ms. Decatur:

Enclosed you will find the undersigned's Opinion with regard to the above styled case. A copy of the Opinion is being, this day, forwarded by mail to counsel of record and I would appreciate your filing the original Opinion in the Court file upon its receipt.

If you have any questions in this matter, please do not hesitate to contact me through my legal assistant in Montross, Virginia.

Thanking you for your kind attention to this matter, I remain

Cordially yours,

George Mason, III

GMIII/snw
Enclosure
c: H. Clark Leming, Esquire
Carl F. Bowmer, Esquire

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

STAFFORD LAKES LIMITED PARTNERSHIP, and
DIVERSIFIED MORTGAGE INVESTORS, INC.,
Petitioners

vs.

CASE NO. CH04-240

BOARD OF ZONING APPEALS OF
STAFFORD COUNTY,
Respondent

OPINION

This matter came before the Court on May 11, 2005, pursuant to a Writ of Certiorari requested by Petitioners, Stafford Lakes Limited Partnership and Diversified Mortgage Investors, Inc., (Toll Bros., Inc. having previously been dismissed as a party herein by order of this Court dated September 17, 2004) appealing a decision of the Respondent, Board of Zoning Appeals of Stafford County (BZA), that the subject property referred to in the pleadings herein was not vested for (R-1) zoning purposes; upon the issuance of such Writ of Certiorari by the Circuit Court of Stafford County on May 27, 2004; the record of the proceedings filed with the Court by the BZA; and the Opening Brief of the Petitioners, the Reply Brief of Respondent, and the Reply Brief of the Petitioners. The Court having reviewed the record of the BZA and the briefs by the parties determined that no additional evidence would be necessary nor required, and was argued by counsel.

A. Demurrer

The Respondent in its responsive pleadings filed a demurrer to the petition for Writ of Certiorari. The Court, after hearing argument on the demurrer, overruled and dismissed the same based upon the Court's opinion that a demurrer was not a proper vehicle for a determination of the issues set forth in the Writ of Certiorari pursuant to Virginia Code §15.2-2314.

B. Standard of Review

In a review of proceedings before the BZA, where the BZA had exercised its authority to review an administrative decision of the Zoning Administrator, such decision of a BZA is presumed to be correct on appeal to a Circuit Court; the appealing party bears the burden of showing that the board applied erroneous principles of law or that its decision was plainly wrong and in violation of the purpose and intent of the Zoning Ordinance. *City of Suffolk, et al., v. Board of Zoning Appeals for the City of Suffolk, et al.*, 266 Va. 137 at 142 (2003).

C. Findings of Fact

The pertinent facts as disclosed by the BZA record and the pleadings filed by the parties and established through representations in oral argument are as follows:

10-28-71 Crow's Nest Harbour Limited Partnership (CNHLP) purchased the subject Property in Stafford County, Virginia, containing 4,725 acres. A new town community for 20,000 residents was planned.

11-10-71 Board of Supervisors of Stafford County rezoned 2,766 acres of the property from A-1 to R-1 for residential use.

12-08-71 Board of Supervisors rezoned the remaining 1,959 acres from A-2 and R-1 to R-2, B-1, M-1, and A-1 for 1,000 single family houses, 7,000 apartments/townhouses, 2 golf courses, 4 marinas, an airpark, an airport, commercial centers, convention center, and schools.

04-02-73 Diversified Mortgage Investors (DMI) issued its commitment letter for financing of the project.

04-30-73 CNHLP restructured the limited partnership including withdrawal of Woodrow Marriott leaving FVM as general partner, and Research Homes as limited partner. On withdrawal, Marriott received $154,000 in cash, and $366,000 in notes.

10-02-73 Safeco Insurance Company issued four subdivision bonds in the total amount of $1,287,492 to guarantee construction of streets, water and sewer facilities for Sections A, B, C, and D of Crow's Nest Harbour. The bond premium was $19,313. The bonds provided:

> A condition of the approval and recordation of said plat is construction of the streets and water and sewer lines therein in accordance with the specifications shown on said plat, and whereas Crow's Nest Harbour has undertaken to complete said water and sewer lines and streets in a workman like manner in accordance with said specifications within twenty-four months from the date hereof....

10-17-73 Tri-Party Agreement between CNHLP, DMI, and Guaranty Bank & Trust Company regarding $14,600,000 loan secured by mortgage on the property.

10-19-73 Final subdivision plats for Sections A, B, C, and D of Crow's Nest Harbour recorded in the Clerk's Office of the Circuit Court of Stafford County. Streets and school site dedicated per plats. Plat approval conditioned upon posting of bonds requiring completion of construction of streets and water and sewer facilities by October 2, 1975.

11-20-73 CNHLP and County entered into separate Water and Sewer Agreements. Under Water Agreement, CNHLP to construct water interceptor line from the property to the County lines at Poole School, a pre-condition to performance by County.

12-14-73 Final subdivision plat for Section E of Crow's Nest Harbour signed by Planning Commission Chairman, but plat never recorded.

05-02-74 Research Homes wrote a letter to the agent for the bonding Company stating that no construction contracts had been let for the bonded improvements, and that the contractor that partially cleared and burned some of the roads failed to complete the work, leaving it in bad shape.

07-25-74 County Planning Director executed Subdivision Improvement Bond Status Inquiry Forms for Sections A, B, C, and D, indicating 5% of work completed and "stake out and some clearing and grading of roads has been done."

09-14-74 Research Homes wrote a letter to DMI regarding refusal to fund Loan Draw Request which stated in part:

> As a consequence of your default, you have created or exacerbated the following adverse conditions:
> 1. Because of our inability to obtain loan funds, it will be impossible for us to complete the water, sewer, road, and underground utility systems in time to meet the completion date (October 1, 1975) specified in the Safeco Subdivision Improvements Bonds.
> 2. Failure to complete construction of improvements in a timely fashion may certainly result in a loss of the zoning of the property.

12-21-74 Research Homes wrote a letter to its creditors regarding inability to pay bills. It proposed a Creditors Committee as an alternative to bankruptcy.

12-31-74 "The proposed roads, waterlines, and sewage facilities were not installed by December 31, 1974, the dated indicated in the HUD property report, or at any other time. Indeed, by December 31, 1974, the partnership had abandoned the project and it later filed for bankruptcy..." *Marriott, et al., vs. Harris, et al.,* 235 Va. 199 at 206 (1988).

07-17-75	Board of Supervisors approved a revision to the Comprehensive Plan providing for low density development of Crow's Nest.
10-02-75	Required completion date for roads, water lines and sewage facilities under bonds for Sections A, B, C, and D of Crow's Nest Harbour not met.
11-07-75	CNHLP filed for Chapter 11 bankruptcy which was later converted to a liquidation proceeding.
09-77	County filed suit against Safeco to collect on the performance bonds for Sections A, B, C, and D of Crow's Nest Harbour.
02-17-78	Trustee's Deed in Foreclosure to DMI conveying 4552.83 acres of the property for $2,270,000.
06-20-78	Board of Supervisors rezoned the whole of the property to A-2 Rural Residential over the objection of DMI. The Supreme Court in *Marriott, et al., vs. Harris, et al.,* 235 Va. 199 at 215 (1988) stated, "that the down zoning of the Crow's Nest tract did not occur until 1978, long after the partnership had abandoned the project. We said that the development plan was only a guideline, not a zoning ordinance, and the 1975 approval of the plan by the County 'did not frustrate performance by [the partnership] of the bonded obligations.'"
08-78	DMI filed suit against the County challenging the 6-20-78 A-2 Rural rezoning. (NOTE: Neither counsel for the parties mentioned the suit in oral argument nor did it advise the Court of any outcome therefrom.)

At the request of Petitioners' counsel, a letter dated December 19, 2003 related to the issue of vested rights, a copy of which is attached to the pleadings herein, was drafted by the Director of Code Administration of Stafford County (herein, also referred to as the Zoning Administrator) which concluded that "for the reasons stated above, landowners have acquired no vested rights under the 1971 rezonings on Crow's Nest Harbour or Crow's Nest." (For purposes of this opinion, no distinction is made between Crow's Nest Harbour or Crow's Nest.)

Petitioners filed a timely appeal of the Zoning Administrator's determination noted above to the BZA. This appeal was heard by the BZA at its April 27, 2004 meeting whereupon the BZA upheld the decision of the Zoning Administrator by a 6-0 margin with one abstention. The Writ of Certiorari was then entered upon petition of the Petitioners, and was entered May 27, 2004.

The Petitioners provided with their opening brief a 1972 tax return which details expenses of Crow's Nest Harbour. No other specific expenses were documented by the Petitioner, and it is appears that some of the expenses shown on the 1972 tax return are anticipated expenses. The owners of the land in 2004 were different from the owners in 1972 due to an intervening foreclosure.

D. Issues Presented

The issues presented to the Court relate to the status of the 1971 Zoning (R-1) (or rezoning) and the effect thereupon by the 1978 Rezoning (R-2). Specifically, the issue is whether or not the Petitioners may claim that the 1971 rezoning causes the project or land to be "vested" under common law or through the application of Virginia Code §15.2-2307.

The parties do not agree on which standard to apply, with the Petitioners urging the Court to apply the provisions of Virginia Code §15.2-2307, while the Respondent urges the Court to apply common law principles of vesting which were in effect prior to the adoption of Virginia Code §15.2-2307 in 1998. In the *City of Suffolk, et al., v. Board of Zoning Appeals for the City of Suffolk, et al.*, 266 Va. 137 (2003), the parties stipulated that the "law of the case" would follow

the provisions of Virginia Code §15.2-2307. No such agreement was entered into by the parties in this case, and there has been no such stipulation.

E. Conclusions of Law

The Court makes the following conclusions of law:

1. That Virginia Code §15.2-2307 was amended by the General Assembly and approved on April 22, 1998 as a re-enactment pursuant to the following language contained in Senate Bill 570: "1. That Section 15.2-2307 of the Code of Virginia is amended and re-enacted as follows:" (see Exhibit "E" of Reply Brief of Respondent).

2. Virginia Code §1-13.39:3 provides as follows:

"Whenever the word *'re-enacted'* is used in the title or enactment of a bill or Act of Assembly, it shall mean that the changes enacted to a section of the Code of Virginia or an Act of Assembly are in addition to the existing substantive provisions in that section or act, and are effective prospectively unless the bill expressly provides that such changes are effective retroactively on a specified date.

The provisions of this section are declaratory of existing public policy and law."

3. "That prior to 1998, cases which considered the issue of vested rights involved determining whether a significant governmental act had occurred with respect to the properties at issue which accorded vested land use rights to the landowners despite later zoning changes. In these cases, a controlling factor

was the issuance of a specific government land use authorization, beyond zoning, before vesting of a particular land use could be found." *City of Suffolk, et al., v. Board of Zoning Appeals for the City of Suffolk, et al.*, 266 Va. 137 at 144-145 (2003). The pre-1998 test for vested property rights in a land use classification is set forth in *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404 at 407 (1994) which provides: "a landowner must identify a significant official governmental act that is manifested by the issuance of a permit or other approval authorizing the landowner to conduct a use on his property that otherwise would not have been allowed. Additionally, and equally important, our test requires that the landowner establish that he has diligently pursued the use authorized by the government permit or approval and incurred substantial expense in good faith prior to the change in zoning. A landowner, who seeks to assert a vested property right, must establish all these elements."

After 1998, the standard for establishing a vested property right after the re-enactment of Virginia Code §15.2-2307, the provisions of which are not fully set out herein, are more specific as to what are "significant affirmative governmental acts allowing development of a specific project." The initial rezoning on the subject property was obtained by the owners thereof in 1971. While final subdivision plats were recorded for Sections A, B, C, and D of Crow's Nest Harbour (a portion of the property), for all practical purposes, little, if any, work was carried out on any of the property up to the present time, other than some lot sales in Crow's Nest Harbour. Additionally, after the rezoning in 1978 to downzone the property to an A-2 rural residential classification, the landowners

did not seek clarification from the County of Stafford through its Zoning Administrator until 2003. These facts evidence the failure of the Petitioners to diligently pursue the project.

4. That given the extraordinary passage of time wherein more than twenty (20) years had elapsed from the 1978 rezoning to the passage of Virginia Code §15.2-2307 and 5 (five) additional years elapsed before an opinion letter was requested from the Stafford County Zoning Administrator, that under the pre-1998 test set forth in *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404 at 407 (1994), the opinion of this Court is that the project was never "diligently pursued" by any of the owners of the property and the failure of the owners to continue to diligently pursue the project has caused a loss of any vested rights in the initial (R-1) rezoning which took place in 1971.

5. Moreover, even if the Court used the criteria established post-1998 as set forth in Virginia Code §15.2-2307, the same result would be reached in view of the fact that one of the hurdles that the landowners must demonstrate is that it "(iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act." Thus, §15.2-2307 also requires "diligent pursuit" of a project in order to maintain a vested right, which was not the case herein.

6. This Court concludes that the landowners of the subject properties failed to diligently pursue the intended project, given the extensive period of time that had elapsed after the 1978 rezoning during which no such diligent pursuit of the project was undertaken. This Court further opines that the (R-2) rezoning,

which took place in 1978, was a valid rezoning of the whole of the property which was affected thereby and that the continued inactivity on the land and the passage of §15.2-2307 in 1998 had no effect on the 1978 (R-2) rezoning.

7. That as used in this Opinion, the term "diligent pursuit" has been defined in *City of Suffolk, et al., v. Board of Zoning Appeals for the City of Suffolk, et al.*, 266 Va. 137 at 153 (2003) to mean "steady, earnest, attentive and energetic application and effort." As set forth, no such definition could apply to the land and/or project in question.

8. Having concluded that the landowners (the Petitioners or their predecessors), did not diligently pursue the project as required under pre-1998 law or pursuant to §15.2-2307, the Court therefore concludes that the BZA was not plainly wrong and that it did not apply erroneous principles of law in its determination that the subject property is not vested for zoning purposes pursuant to the (R-1) rezoning which was obtained in 1971. The determination of the BZA is therefore affirmed. Mr. Bowmer shall prepare a sketch order for counsels' endorsement making specific reference to this Opinion.

6/1/05
Date

George Mason, III, Judge

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