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Virginia Supreme Court Narrowly Interprets Landowner's Vested Rights Under § 15.2-2307(D)

Virginia Code § 15.2-2307 (A) and (B) provide that where a landowner obtains or is the beneficiary of (i) a "significant affirmative governmental act" allowing development of a specific project, (ii) relies in good faith on the approval and (iii) incurs extensive obligations and/or substantial expenses in the diligent pursuit of the approved project, then the landowner is deemed to be "vested" and subsequent changes in local land use ordinances cannot be applied to the property owner's detriment. "Significant affirmative governmental acts" under the statute include (but are not limited to) zoning approval where proffers specify use or density, subdivision or site plan approval and obtaining a variance and/or special exception.

Subsection (C) codifies a different form of vesting in existing uses. Where an existing building or use has become "nonconforming" due to a change in the locality's zoning or subdivision ordinances, it may nonetheless be continued as a legal non-conforming use. This is subject to the caveat that if the building or structure is substantially demolished, then it must be reconstructed in accordance with current ordinance requirements. Case law under § 15.2-2307 almost entirely consists of interpretations of subsections (A), (B) or (C) summarized above.

However, in a case handed down just prior to year-end, Board of Supervisors of Fairfax County v. Cohn, No. 171483 (December 13, 2018), the Virginia Supreme Court narrowly interpreted the rarely litigated subsection (D). This form of vesting applies where a local government has issued a building permit, the building or structure is thereafter constructed in accordance with the building permit and the landowner has paid taxes on the improvements for a period of fifteen (15) years. Assuming these requirements are met, the locality is barred from thereafter declaring the improvements illegal by reason of a subsequently discovered nonconformity and requiring removal of same.

In this case, the Cohns owned property zoned R-1 which at all times allowed one (1) single family residence. On their property was a main house built in 1962, a garage built in 1963 and a "garden house" constructed in 1972. All three of these structures were improved with kitchens and bathrooms and rented as separate dwelling units. In August of 2016, Fairfax County issued a Notice of Violation requiring the Cohns to remove the kitchens, plumbing, gas connections, etc., to the garage and garden house. The Cohns argued that they had paid taxes on these improvements for more than fifteen (15) years, so the County could not legally require them to remove them. The BZA sided with the property owners and vacated the Notice of Violation.

On appeal, the Virginia Supreme Court was called upon to interpret and apply § 15.2-2307(D). Particularly key to the Court's decision was the fact that subsection (C) is addressed to "land, buildings, and structures *and the uses thereof*" whereas subsection (D) only explicitly refers to a "building or structure." Based upon this, the Court ruled that only the physical structures are protected by subsection (D) and the Cohns had no vested right in the continued use of those

structures as additional dwellings or in the interior improvements associated with such use. Accordingly, the original Notice of Violation by the Zoning Administrator was reinstated.

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