

Chapter 19

Vested Rights

19-100 Introduction

Under Virginia zoning and subdivision law, there are four general statutes that protect certain vested rights:

- *Virginia Code § 15.2-2307*: This statute protects certain rights to use property arising from a proposed lawful use allowed by a prior approval by the locality when the zoning regulations change before the proposed use is established. *See section 19-300, below.*
- *Virginia Code § 15.2-2311(C)*: This statute protects certain rights to use property in a manner that otherwise would not have been allowed under the applicable zoning regulations when the landowner relies on an erroneous written order, requirement, decision or determination by the zoning administrator or other administrative officer. *See section 19-400, below.*
- *Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303*: These statutes protect certain rights to use property arising from a proposed lawful use where the landowner has proffered as part of a rezoning a specific use or density, to dedicate land, or to make a substantial cash contribution when the zoning regulations change before the proposed use is established. *See section 19-500, below.*
- *Virginia Code § 15.2-2261(C)*: This statute protects certain rights to develop property under previously approved subdivision plats and site plans for a specified period of time when the applicable regulations are later changed. *See section 19-600, below.*

Each of these statutes has prerequisites that must be satisfied in order for the vested rights to be established. This chapter focuses primarily on vested rights that apply to zoning.

As noted in chapter 18, the principles of nonconforming uses and vested rights are closely related to one another (the principle of nonconforming uses is one type of vested rights), and they are intended to protect certain existing private property interests when zoning regulations are changed.

Vested rights	Nonconforming Uses
Determines whether a <i>previously approved</i> use has ripened to the point that it should be allowed to exist, even though it would not conform to the new zoning regulations.	Determines whether a <i>pre-existing</i> use may continue even though it no longer conforms to new zoning regulations.

For vested rights determinations under a locality's zoning regulations, Virginia Code § 15.2-2286(A)(4) specifically gives the zoning administrator the authority to make conclusions of law and findings of fact regarding vested rights with the concurrence of the attorney for the governing body under Virginia Code §§ 15.2-2307 and 15.2-2311(C). The zoning administrator's authority to make vested rights determinations is not exclusive. A landowner may seek a vested rights determination in a declaratory relief action filed in circuit court without first obtaining a determination from the zoning administrator. *Board of Supervisors Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009) (holding that when what is now Virginia Code § 15.2-2286 was amended to confer authority on zoning administrators to make vested rights determinations, the pre-existing remedy available from the circuit courts was not abolished).

19-200 The nature of vested rights generally

Generally, landowners have no property right in the anticipated uses of their land since they have no vested property right in the continuation of the land's existing zoning status. *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009); *Board of Zoning Appeals of Bland County v. Caselin Systems, Inc.*, 256 Va.

206, 501 S.E.2d 397 (1998); *see also* *Town of Leesburg v. Long Lane Associates*, 284 Va. 127, 726 S.E.2d 27 (2012) (owner of neighboring property had no vested right in its expectation that the neighboring property would continue to develop in accordance with the prior proffered zoning, which existed at the time the owner purchased its property and developed it in accordance with the prior proffers); *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006) (prior R-4 zoning designation, which was part of a general rezoning, not enacted at the landowner's request, and not directed specifically to the landowner's project, could not create vested rights). However, in limited circumstances, private landowners may acquire a vested right in planned uses of their land that may not be prohibited or reduced by subsequent zoning legislation. *See* *Holland v. Board of Supervisors of Franklin County*, 247 Va. 286, 441 S.E.2d 20 (1994).

The doctrine of vested rights arises from the principle that certain property rights are constitutionally protected. The determination of whether one has a constitutionally protected property right is a question of state law. *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702, 130 S. Ct. 2592 (2010) (The Takings Clause protects property rights as they are established under state law); *Garraghty v. Commonwealth of Virginia, Department of Corrections*, 52 F.3d 1274 (4th Cir. 1995), citing *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074 (1976); *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993). To have a property interest in a certain benefit, a person or entity must have more than an abstract need or desire for it. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). Rather, there must be a legitimate claim of entitlement to the benefit in order for a property right to be involved. *Roth, supra*; *Biser, supra*. This *legitimate claim* must arise under Virginia law.

Prior to July 1, 1998, the requirements to establish vested rights in zoning were developed through Virginia case law, *i.e.*, the common law. In 1998, the General Assembly amended Virginia Code § 15.2-2307 and codified those requirements and expanded the scope of vested rights by adding various actions that are significant governmental acts.

19-300 Vested rights under Virginia Code § 15.2-2307

The intent of Virginia Code § 15.2-2307 is to provide a landowner with protection from a subsequent amendment to a zoning ordinance when the landowner has already received approval for and made substantial efforts to undertake a use of the property permitted under the prior version of the ordinance. *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008). In other words, vested rights under Virginia Code § 15.2-2307 only protect a landowner's right to develop a specific project under existing zoning regulations and allow the continuation of what has become, in essence, a nonconforming use when the zoning regulations are amended. *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009); *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006). The vested rights provisions in Virginia Code § 15.2-2307 are not merely *enabling legislation* having force only if a locality has adopted an implementing ordinance, but are self-executing. *The Lamar Company, LLC v. City of Richmond*, 287 Va. 348, 756 S.E.2d 444 (2014) (reversing the circuit court's grant of the city's demurrers on the ground that the two complaints failed to state a cause of action because they did not allege that the city had adopted an ordinance implementing Virginia Code § 15.2-2307, and holding that the statutory provisions in issue were *restrictive legislation*, not *enabling legislation*).

The mere reliance on a particular zoning classification creates no vested right in the landowner. *Hale, supra*. The doctrine of vested rights does not preclude a governing body from rezoning property to a zoning designation that would otherwise prohibit the vested use. *Greengael, supra*. It merely vests a right to a permissible use of the property against any future attempt to make the use impermissible by amending the zoning ordinance. Virginia Code § 15.2-2307 is not intended to permit, nor does it provide for, the vesting of a right to an impermissible use. *Goyonaga, supra* (no vested right arose under Virginia Code § 15.2-2307 from the zoning administrator's approval of building plans showing the reinforcement of existing walls, where the reconstruction of the house resulted in the complete demolition of the existing house which, in turn, caused the house to lose its nonconforming status).

A vested right may be established under Virginia Code § 15.2-2307 if:

- *Significant affirmative governmental act*: The locality has taken a significant affirmative governmental act that remains in effect allowing development of a specific project.

- *Good faith reliance*: The landowner relies in good faith on the significant affirmative governmental act.
- *Extensive obligations/ substantial expenses and diligent pursuit*: The landowner incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

A locality is not enabled to do anything that would impair vested rights acknowledged by state law. *Virginia Code § 15.2-2307* (“[n]othing in this article shall be construed to authorize the impairment of any vested right”).

Questions To Address When Considering a Vested Rights Claim

- Was the government approval a significant affirmative governmental act that is still valid?
- Has the claimant provided documentation such as bills and contracts to show it has incurred extensive obligations or substantial expenses?
- To what extent has physical construction occurred?
- Do the various activities show diligent pursuit of the project?

19-310 Significant affirmative governmental acts

Virginia Code § 15.2-2307 lists seven actions by a locality that are deemed to be significant affirmative governmental acts:

- *Certain proffered rezonings which specify the use*: The governing body has accepted proffered conditions related to a rezoning which specify the use. *Virginia Code § 15.2-2307(i)*. In order for one to rely on Virginia Code § 15.2-2307(i), the proffer must clearly, expressly and unambiguously specify the use to which the developer agrees to be bound, and the mere exclusion of uses or the imposition of design and development standards that could apply to any permissible use, does not *specify use* within the meaning of Virginia Code § 15.2-2307(i). *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009) (developers did not have vested right to construct a single 176,000 square foot retail use building in one section of a planned development and, therefore, the building was subject to town zoning regulations adopted after the parcel’s 2006 rezoning requiring a special use permit for retail sales uses located in one structure in excess of 80,000 square feet gross floor area); *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009). Proffers that prohibit various uses and regulate building height, setbacks and the placement of various improvements do not *specify use* within the meaning of Virginia Code § 15.2-2307(i). *Hale, supra*.
- *Rezonings to a specific use or density*: The governing body has approved an application for a rezoning to a specific use or density. *Virginia Code § 15.2-2307(ii)*. The only vested right that accrues to the landowner is the right to use the property for the specific use and up to the density that the particular proffer specified. *Hale, supra*. In *Hale*, the developers unsuccessfully contended that a proffer limiting the maximum *residential* density in the project satisfied the type of significant governmental act described in Virginia Code § 15.2-2307(ii) and, therefore, their rights vested to develop part of their project in accord with their desired *commercial* use of a single 176,000 square foot retail use building. Vesting need not wait until site plans have been filed for the entire property. *City of Suffolk v. Board of Zoning Appeals for the City of Suffolk*, 266 Va. 137, 580 S.E.2d 796 (2003). Rezonings to a planned development zoning district may likely fall into this category.
- *Special use permits*: The governing body or board of zoning appeals has granted a special use permit with conditions. *Virginia Code § 15.2-2307(iii)*.
- *Variances*: The board of zoning appeals has granted a variance. *Virginia Code § 15.2-2307(iv)*.
- *Preliminary subdivision plats and site plans*: 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. *Virginia*

Code § 15.2-2307(v). The question is open as to whether a court-ordered approval of a preliminary plat is a significant affirmative governmental act. *Greengael, LLC, supra* (declining to decide the question since the court reversed the trial court's approval of the plat); see *Purcellville West LLC v. Board of Supervisors of Loudoun County*, 75 Va. Cir. 284 (2008) (rejecting plaintiff's argument that there is a point in time prior to acceptance of the preliminary plat when the actions of the approving body rise to the level of a significant affirmative governmental act).

- *Final subdivision plats and site plans*: The governing body or its designated agent has approved a final subdivision plat, site plan, or plan of development for the landowner's property. *Virginia Code § 15.2-2307(vi)*. See *Commonwealth-Abingdon Partners, LP v. Town of Abingdon*, 79 Va. Cir. 226 (2009) (even though town ordinance provided that a final site plan was deemed approved if it was not acted on within 60 days, and the planning commission did not act on the site plan within 60 days, there was no significant governmental act because the town's approval of the pending final subdivision plat was a necessary prerequisite to consideration of the site plan, the subdivision plat was not approved and, therefore, the site plan could not be approved or even acted upon).
- *Administrative action pertaining to the permissibility of a specific use or density*: The zoning administrator or other administrative officer has issued a written order, requirement, decision, or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal, and is no longer subject to change, modification or reversal under Virginia Code § 15.2-2311(C) because it contained nonclerical errors. *Virginia Code § 15.2-2307(vii)*. See section 19-400 for a discussion of vested rights that may arise from an erroneous decision.

In order to make a vested rights claim, Virginia Code § 15.2-2307 requires that these acts remain in effect allowing development of a specific project. This issue most often arises with preliminary and final subdivision plats and site plans, which by law have limited periods of validity unless certain rights are perfected. When making a vested rights determination pertaining to a subdivision plat or site plan, see also Virginia Code § 15.2-2261(C), discussed in section 19-600. The requirement of a significant affirmative governmental act creates a bright line test that enables landowners to know precisely when they may have acquired a vested right in a land use. See *Holland v. Board of Supervisors of Franklin County*, 247 Va. 86, 441 S.E.2d 20 (1994) (decided under prior common law).

The seven enumerated actions discussed above are not exhaustive because Virginia Code § 15.2-2307 states that the list is "without limitation" as to other actions that may be determined to be significant governmental acts. When an act does not fall within one of the seven enumerated above, the decisions of the Virginia Supreme Court determine whether a particular act constitutes a significant governmental act. *Crucible, Inc., supra*. The evidence to support the claim must be clear, express, and unambiguous. *Crucible, Inc., supra*.

Certain actions have been determined *to not be* significant affirmative governmental acts:

- *General rezonings*: General rezonings, not initiated at the landowner's request and not directed at the landowner's project, are not significant affirmative governmental acts. *Board of Supervisors of Culpeper County v. Greengael, L.L.C.*, 271 Va. 266, 626 S.E.2d 357 (2006).
- *Compliance letters*: A letter from the zoning administrator that an applicant's proposed cluster development would comply, as proposed, with the relevant cluster overlay district standards then in effect so as to entitle the applicant to proceed with a by-right development, was not a significant governmental act. *Board of Supervisors of Prince George County v. McQueen*, 287 Va. 122, 752 S.E.2d 851 (2014). Relying on *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), the Virginia Supreme Court concluded in *McQueen* that the zoning administrator's compliance letter did not affirmatively approve McQueen's proposed development nor make any commitment to McQueen regarding the proposed project; instead, the compliance letter merely confirmed that McQueen's proposed development met the general standards for a cluster subdivision. The Court agreed with the county that McQueen's right to pursue his project by-right did not derive from the compliance letter, but from the legislative action of the board of supervisors in adopting the cluster regulations themselves.

- *Filing applications:* The mere act by a landowner to file an application for approval, such as an applications for a preliminary site plan, is not a significant affirmative governmental act. *2006 Va. Op. Atty. Gen. LEXIS 38, 2006 WL 4286462* (filing application for preliminary site plan is not a significant affirmative governmental act because Virginia Code § 15.2-2307 specifically requires the approval of the preliminary site plan; also noting that Senate Bill 570 as originally presented merely required filing a preliminary or final subdivision plat or site plan; because the version of the bill as passed required approval, the change in the bill “indicates that the General Assembly intended to exclude earlier reviews and approvals in the category of unspecified significant governmental acts that may establish a vested property right in a particular land use”).
- *Denied application; pending appeal:* A landowner’s mere application for a permit, which is thereafter denied, cannot create a vested right because there is no significant affirmative governmental act. *Moore v. Zoning Appeals Board of Spotsylvania County*, 49 Va. Cir. 428 (1999). In *Moore*, the applicants applied for a permit to operate a tattoo parlor, which was denied because the zoning administrator determined that a tattoo parlor was not a “personal service establishment,” which would have been a by-right use in the applicable zoning district. The BZA upheld the zoning administrator, and while the applicants’ appeal was pending in circuit court, the board of supervisors amended its zoning ordinance to define “tattoo parlor” and allow tattoo parlors only by special use permit.
- *Statement of zoning classification:* A statement of zoning classification is not a significant governmental act where the zoning administrator “verified” that a proposed use would be classified as a school under the zoning regulations then in effect, especially where the zoning administrator stated that the classification was subject to change, and did not affirmatively approve any proposed project. *Crucible, Inc.*, 278 Va. at 160, 677 S.E.2d at 287 (“There was no commitment contained within the zoning verification. The zoning administrator simply answered the question concerning the classification of Crucible’s project according to the [regulations] in place on the date the request was made”). The General Assembly attempted to address the Virginia Supreme Court’s holding in *Crucible* by adding Virginia Code § 15.2-2307(vii), discussed above.

Virginia Code § 15.2-2307 requires *specificity* in the significant governmental act for a landowner to obtain vested rights. *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009). “[W]hen vested rights accrue to a landowner as the result of a significant affirmative governmental act, the rights that vest are only those that the government affirmatively acts upon, and the evidence to support the claim to those rights must be clear, express, and unambiguous.” *Hale*, 277 Va. at 274, 673 S.E.2d at 182. The governmental act must have a sense of *finality* as well. In *Crucible*, the Virginia Supreme Court held that the zoning administrator’s letter as to whether a proposed use was a by-right use under the district regulations in effect at the time (and later amended to be allowed only by special use permit) was not a significant governmental act because “the zoning administrator did not affirmatively approve the project. There was no commitment contained within the zoning verification. . . . The zoning administrator specifically stated that the verification was subject to change.” *Crucible, Inc.*, 278 Va. at 160, 677 S.E.2d at 287.

19-320 Reliance in good faith

Having benefited from a significant affirmative governmental act, a landowner must *rely in good faith* on that act, *i.e.*, the landowner must take actions designed to move the project forward after the approval of the significant governmental act. Examples of actions that may show good faith reliance include hiring consultants and engineers to develop site plans, stormwater plans, marketing plans, environmental information or other actions designed to advance the completion of the project if those actions result in the landowner incurring extensive obligation or expense. *See, e.g., Board of Supervisors of Fairfax County v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972) (obtained engineering and architectural plans, made a bond deposit, and obtained site plan approval; decided under prior common law); *Salem Fields, LLC v. Spotsylvania County Zoning Appeals Board*, 40 Va. Cir. 289 (1996) (hired an engineering firm to develop construction plans and the final plat; hired another firm to delineate wetlands, to locate drainfields on the lots, and to coordinate review of the project by the appropriate agencies; acquired a construction bond; decided under prior common law). Whether reliance on a significant affirmative governmental act is in good faith is a factual determination that is made on a case-by-case basis.

Good faith reliance will not necessarily be found where the present actions by the landowner create a need to claim vested rights under prior zoning regulations in order to use the property. For example, in *Robertson v. City of Alexandria*, 46 Va. Cir. 6 (1998) (decided under prior common law), the landowners' undeveloped lot ("Lot 7") was created in 1946, but in 1951 the city amended its zoning regulations, and Lot 7 no longer met the minimum lot size and street frontage requirements. From 1960 until 1987, Lot 7 was owned by the same person as the owner of the adjoining developed lot ("Lot 6") and was used as a yard for the house on Lot 6. When the current owners bought both lots, they sold developed Lot 6 and then asserted a vested right to develop Lot 7 under the zoning regulations in effect in 1946. On the issue of good faith reliance, the circuit court stated that "where, as in the case at bar, the property has been owned and used in conjunction with an adjacent house and lot for a period of twenty-seven years, the incaution of the current owners in separating title to Lot 7 from title to the adjacent Lot 6 can hardly be described as a type of good faith reliance meriting vested rights protection." *Robertson*, 46 Va. Cir. at 9-10.

19-330 Extensive obligations or substantial expenses

A party claiming vested rights also must demonstrate that it incurred "extensive obligations or substantial expenses" in diligent pursuit of the project. *Virginia Code* § 15.2-2307. *Virginia Code* § 15.2-2307 does not define *extensive obligations* or *substantial expenses*, and so the meaning of those terms is defined by the limited number of cases that have considered the issue. Whether extensive obligations or substantial expenses have been incurred is a factual determination that is made on a case-by-case basis. The following cases illustrate how this principle has been applied.

In *City of Suffolk v. Board of Zoning Appeals of the City of Suffolk*, 266 Va. 137, 580 S.E.2d 796 (2003), the Virginia Supreme Court concluded that a landowner had incurred substantial expenses between 1993 and 1998 where he spent \$158,000 on services to review development options, to rezone a portion of the property and have the master plan amended to reduce the density of the remainder, to prepare and submit a preliminary recreation plan and traffic impact analysis, to have a survey prepared, and to prepare and submit preliminary and final subdivision plats. The landowner also conveyed 1.1 acres to VDOT for road improvements.

In *Board of Supervisors of Fairfax County v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972) (decided under prior common law), the landowner had purchased a tract of land for which a special use permit had been issued, and then spent \$59,000 for engineering and architectural plans, made a bond deposit, and obtained site plan approval, before the county amended its zoning ordinance to prohibit the use contemplated by the landowner. The Virginia Supreme Court held that the landowner had acquired a vested right because, in addition to satisfying the other prerequisites, it had incurred substantial expenses.

In *Salem Fields, LLC v. Spotsylvania County Zoning Appeals Board*, 40 Va. Cir. 289 (1996) (decided under prior common law), the circuit court found that vested rights had been established by a landowner that hired an engineering firm to develop construction plans and a final subdivision plat at a cost of \$38,080, obtained the services of another firm to delineate wetlands, to locate drainfields on the lots, and to coordinate review of the project by the appropriate agencies, at a cost of \$16,800, and obtained a construction bond from a local bank for a fee of \$2,190.

19-340 Diligent pursuit

Finally, the party claiming vested rights must establish that the extensive obligations or substantial expenses were incurred in *diligent pursuit* of the project. *Virginia Code* § 15.2-2307. Although the term is not defined in *Virginia Code* § 15.2-2307, the usual and common meaning of *diligent* is "steady, earnest, attentive, and energetic application and effort." *Webster's Third New International Dictionary* (1993), cited in Justice Keenan's dissenting opinion in *City of Suffolk v. Board of Zoning Appeals of the City of Suffolk*, 266 Va. 137, 580 S.E.2d 796 (2003). Whether pursuit is diligent is a factual determination that is made on a case-by-case basis. The following cases illustrate how this principle has been applied.

In *Suffolk*, the landowner had obtained the rezoning for his property in 1988 but did not take any action in pursuit of its approval until 1993, and his actions continued until 1998 when the city amended its zoning regulations. The four-justice majority focused on the extensive obligations and substantial expenses incurred by the landowner

between 1993 and 1998 (discussed in section 19-330 above), concluding that the “record shows a train of regular, although not constant, events occurring in the period of some [14] years between the purchase of the property and the adoption of the [new zoning regulations].” *Suffolk*, 266 Va. at 147, 580 S.E.2d at 800-801. In its majority opinion, the Court speculated that economic conditions may have been a factor in the landowner’s inaction from 1988 until 1993. The developer of an adjoining tract that was part of the 1988 rezoning dropped out because of financial difficulties. The three-justice dissent found no diligent pursuit because of the landowner’s inaction from 1988 until 1993.

A California case picks up on the relevance of economic conditions the Virginia Supreme Court considered in *Suffolk*, though in a different context. In *Foothill Properties v. Lyon/Copely Corona Associates, L.P.*, 46 Cal.App.4th 1542 (1996), Lyon was obligated under an option agreement with Foothill to diligently pursue the preparation of a final subdivision plat for a portion of the property at issue. There was a dispute as to whether Lyon had diligently pursued the subdivision, and the court concluded that what is diligent must be considered in light of what is commercially reasonable, *i.e.*, by considering what a reasonably prudent developer would do, given the economic and logistical circumstances.

In *Robertson v. City of Alexandria*, 46 Va. Cir. 6 (1998) (decided under prior common law; discussed in section 19-320 above), the landowners’ undeveloped lot (“Lot 7”) was created in 1946 but in 1951 the city amended its zoning regulations and the lot no longer met the minimum lot size and street frontage requirements. From 1960 until 1987, Lot 7 was owned by the same owner as the owner of the adjoining developed lot (“Lot 6”) and was used as a yard for the house on Lot 6. When the current owners bought both lots, they sold developed Lot 6 and then asserted a vested right to develop Lot 7 under the zoning regulations in effect in 1946. In rejecting the vested rights claim, the circuit court stated on the issue of diligent pursuit:

Nothing in the vested rights doctrine suggests or requires that a half-century old approval might give rise to a vested right to use and develop land contrary to the current zoning regulations. The absurdity and chaos that would result from such a rule is self-evident. . . . It is clear that the present owners and their predecessors in interest have failed to diligently pursue development of Lot 7 within a reasonable time and are now precluded from exercising that option.

Robertson, 46 Va. Cir. at 9-10.

In *Salem Fields, LLC v. Spotsylvania County Zoning Appeals Board*, 40 Va. Cir. 289 (1996) (decided under prior common law; discussed in section 19-330 above), the circuit court found that a vested right had been established by a landowner that incurred extensive obligations or substantial expenses within one year after obtaining preliminary subdivision plat approval.

19-400 Vested rights under Virginia Code § 15.2-2311(C) arising from an erroneous determination

Virginia Code § 15.2-2311(C) provides “for the potential vesting of a right to use property in a manner that otherwise would not have been allowed.” *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008). When a zoning administrator makes an erroneous written determination that works to the benefit of a landowner (*e.g.*, by allowing the landowner to do something not otherwise allowed by the zoning ordinance) and that error is discovered, the zoning administrator presumably will seek to correct the erroneous determination. Virginia Code § 15.2-2311(C) creates a limited exception to the general rule that estoppel does not apply to localities, and vests rights in the landowner if the zoning administrator does not correct an erroneous written determination within 60 days after the date of the decision.

Virginia Code § 15.2-2311(C) provides:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially

changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical errors.

The burden of establishing the vesting of a right to an otherwise impermissible use of the property under Virginia Code § 15.2-2311(C) is on the landowner. *Norfolk 102, LLC v. City of Norfolk*, 285 Va.340, 738 S.E.2d 895 (2013); *Goyonaga, supra* (landowners failed to meet their burden and could not reasonably rely on the zoning administrator’s approval of the building plans as permission to completely demolish an existing nonconforming house and replace it with a new nonconforming house; the only conclusion upon review of the plans was that the front and principal portions of both side walls of the existing structure were to be retained).

19-410 Factors that define the scope of the rights that may vest

There are five important factors that define the scope of the vested rights created by Virginia Code § 15.2-2311(C).

Five Factors
<ul style="list-style-type: none"> • The action to which Virginia Code § 15.2-2311(C) is being applied must have been made by the “zoning administrator or other administrative officer.” • Vested rights may attach only to a “written order, requirement, decision or determination.” • Virginia Code § 15.2-2311(C) only prevents the zoning administrator or other administrative officer from changing, modifying or reversing an <i>erroneous</i> written order, requirement, decision or determination; it does not prohibit others from doing so. • The vested rights protections created by Virginia Code § 15.2-2311(C) serve a different purpose than those created by Virginia Code § 15.2-2307 because Virginia Code § 15.2-2311(C) provides for the potential vesting of a right to use property in a manner that otherwise would <i>not have been allowed</i>. • The party asserting vested rights must demonstrate that they relied to their detriment on the erroneous action.

First, the action to which Virginia Code § 15.2-2311(C) is being applied must have been made by “the zoning administrator or other administrative officer.”

Second, vested rights may attach only to a “written order, requirement, decision or determination.” *Virginia Code § 15.2-2311(C)*. The courts will carefully consider whether the action actually falls within one of these four categories. In *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010), the city’s zoning administrator was asked to interpret the zoning ordinance to decide whether church parcels within a historic district could be consolidated, and the zoning administrator concluded that they could be consolidated. Based on the zoning administrator’s interpretation, the church filed a plat to consolidate the parcels. When the plat reached the city’s planning commission, the commission disagreed with the zoning administrator’s interpretation and disapproved the plat. In concluding that the zoning administrator’s interpretation did not rise to the level of an official determination to which vested rights might accrue under Virginia Code § 15.2-2311(C), the Virginia Supreme Court said:

[T]he zoning administrator merely provided an interpretation of City Code § 48-800(a). In its letter to the zoning administrator, Columbia Baptist requested a “zoning interpretation.” And in his reply letter, the zoning administrator made clear that he was responding to a “request for an interpretation.” He further stated: “while the actual consolidation process is a Planning Commission function [,] it is my *interpretation*” [emphasis in original] that the ordinances permit the consolidation . . . That “interpretation” lacked the finality of an “order, requirement, decision or determination under Code § 15.2-2311(C).

James, 280 Va. at 44, 694 S.E.2d at 575. The Court went on to hold that the planning commission had the authority to interpret the zoning ordinance when it considered the plat, and it was not obliged to adopt the zoning administrator's interpretation. *See also Greene v. Board of Zoning Appeals of Fairfax County*, 34 Va. Cir. 227 (1994) (erroneous written determination as to whether property was to be used only for open space was advisory to county only, not one triggering rights and obligations under what is now Virginia Code § 15.2-2311).

In *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), Crucible operated a security training facility and wanted to expand its facility. It sought and obtained from the zoning administrator an "interpretation" that the proposed facility would be classified as a "school," a by-right use in the applicable zoning district at the time. The zoning administrator's interpretation was contained in a letter entitled "Zoning Verification," and the interpretation was conditioned that the verification was valid as of the date of the letter and was subject to change. Relying on that letter, Crucible bought the property. When the county changed its zoning regulations to make schools a special use, Crucible sought to claim vested rights based on the zoning administrator's "Zoning Verification" letter. The Virginia Supreme Court held that the letter was not a determination within the meaning of Virginia Code § 15.2-2311(C) so as to allow rights to vest, stating:

The zoning verification letter merely stated that Crucible's facility fell within the definition of "school" according to the then-current zoning laws and that those laws were subject to change. The zoning verification letter did not permit Crucible to use its property in a way that was otherwise not allowed under then-current zoning laws, and Crucible cannot establish a right to proceed based upon Code § 15.2-2311(C).

Crucible, 278 Va. at 161, 677 S.E.2d at 288.

In *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013), two establishments that served alcoholic beverages claimed that they had vested rights to do so under Virginia Code § 15.2-2311(C) because each received a "cash receipt" which was signed by the zoning administrator, bore the description of being a zoning clearance for a business license, and listed the license category as "eating place." In addition, there was apparent acquiescence by city officials for those establishments to serve alcoholic beverages, even though the underlying zoning did not allow them to serve alcoholic beverages. The Virginia Supreme Court held that the cash receipts were insufficient to establish vested rights under Virginia Code § 15.2-2311(C), stating:

The "Cash Receipt" was not a specific determination by the zoning administrator or any other City official that either of these businesses could use their respective premises in a manner not otherwise allowed under the zoning ordinances in effect at that time. . . . In other words, those documents did not reflect a determination that either Bar Norfolk or the Cafe could operate as an "Entertainment Establishment" and provide alcoholic beverages for on-premises consumption contrary to the terms of either the 1983 or the 1997 Ordinances. Furthermore, the apparent acquiescence of the City officials in the business operations of Bar Norfolk and the Cafe does not satisfy the specific requirements of Code § 15.2-2311(C).

Norfolk 102, LLC, 285 Va. at 355, 738 S.E.2d at 903.

Third, Virginia Code § 15.2-2311(C) only prevents the zoning administrator or other administrative officer from changing, modifying or reversing an erroneous written order, requirement, decision or determination after 60 days have passed. It does not prevent, for example, a planning commission from effectively changing, modifying or reversing the decision of the zoning administrator or other administrative officer. *James, supra* (holding that the planning commission was not constrained by Virginia Code § 15.2-2311(C) because it was not an "administrative officer" within the meaning of that statute and it could, therefore, interpret the zoning ordinance differently than the zoning administrator, even though more than 60 days had passed).

Fourth, the vested rights protections created by Virginia Code § 15.2-2311(C) serve a different purpose than those created by Virginia Code § 15.2-2307, as explained in the table below:

Vested rights under Virginia Code § 15.2-2307	Vested rights under Virginia Code § 15.2-2311(C)
Provides for the vesting of a right to a <i>permissible</i> use of property against any future attempt to make the use impermissible by amendment of the zoning ordinance; it is not intended to permit, nor does it provide for, the vesting of a right to an impermissible use under the existing ordinance.	Provides for the vesting of a right to use property in a manner that <i>otherwise would not have been allowed</i> .

Fifth, the party asserting vested rights must demonstrate that they relied to their detriment on the erroneous action. In *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008), the landowners sought approval to do renovations to a nonconforming structure on a nonconforming lot. The landowners obtained a variance to enlarge and extend their home by adding a second story to the existing structure and an addition to the rear of the structure. No representation was made in the variance application that the renovations would require the demolition of the front and side exterior walls of the home. Construction commenced, and the work involved some demolition of the house. As work proceeded, the building inspector determined that the structural integrity of the portion of the exterior walls that was to have been retained was inadequate to support the new construction, and required additional demolition of the exterior walls. This work was done, but it resulted in the house being demolished to an extent that exceeded 75% of the assessed value of the house which, under the Falls Church Zoning Ordinance, caused the house to lose its nonconforming status. When the zoning administrator inspected the site, he determined that the “original structure has been totally demolished,” that the work was outside the scope of the building permit, and that the house now violated the zoning regulation pertaining to the replacement of nonconforming structures. The zoning administrator issued a stop work order.

With respect to Virginia Code § 15.2-2311(C), the landowners contended that the zoning administrator’s approval of the building plans ripened into a vested right after 60 days because they had materially changed their position in good faith reliance on the zoning administrator. The Virginia Supreme Court rejected that argument. The Court said that under Virginia Code § 15.2-2311(C), the issue was whether the zoning administrator’s approval of the building plans constituted a waiver, although an improper one, of the requirements of the zoning ordinance’s prohibition against removing, demolishing, or damaging a nonconforming structure to an extent equal to 75% of its assessed value. Because the building plans did not reflect even the potential that the house would have to be demolished to its foundation and a new structure erected in its place, the Court concluded that the landowners had failed to meet their burden of proof that they could have reasonably relied on the zoning administrator’s approval of the building plans as authorizing them to completely demolish the house.

19-420 The 60-day rule

Virginia Code § 15.2-2311(C) provides that the zoning administrator or other administrative officer has 60 days to correct an erroneous written order, requirement, decision, or determination. The 60-day rule applies to any error other than a clerical error where there is no malfeasance or fraud. *Virginia Code § 15.2-2311(C)*.

The circuit courts have not agreed whether Virginia Code § 15.2-2311(C) applies to determinations made before July 1, 1995 when the subsection became effective. Virginia Code § 15.2-2311(C) begins “*In no event* shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator . . .” (italics added) Some circuit courts have held that the 60-day rule applies only to determinations made after July 1, 1995. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 69 Va. Cir. 129 (2005) (note that the court’s decision mistakenly states that Virginia Code § 15.2-2311(C) was enacted in 1997; subsection (C) was added to former Virginia Code § 15.1-496.1 in 1995; the mistaken reference in the court’s decision is likely because title 15.1 was recodified as title 15.2 in 1997); *Hughey v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 138 (1996).

Other circuit courts have held that the prospective application of Virginia Code § 15.2-2311(C) means that the protections of that section also apply to determinations made before July 1, 1995 where the locality seeks to reverse the erroneous determination after July 1, 1995. *Board of Supervisors of Henrico County v. Board of Zoning Appeals of Henrico County*, Case No. CL03-1024, opinion letter dated December 13, 2004. The conclusion that Virginia Code § 15.2-2311(C)’s “In no event” introductory clause extends to determinations made before July 1, 1995 may find support in

the analysis of the Virginia Supreme Court in *Board of Supervisors of James City County v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014), where the Court held that Virginia Code § 15.2-2303.1:1's reference to "any cash proffer" applied to proffers accepted before July 10, 2010 when that statute became effective.

19-430 Clerical errors

In considering whether an erroneous tax assessment more than one year old was a *clerical error*, the court in *Commonwealth v. Richmond-Petersburg Bus Lines, Inc.*, 204 Va. 606, 611, 132 S.E.2d 728, 732 (1963) (upholding tax commission's refund to carrier where the erroneous assessment and overpayment by carrier was the result of an error by a subordinate who provided the carrier with the wrong tax form) explained as follows:

It is true, as the Attorney General argues, that a "clerical error" often denotes "an error made in copying or writing." But the term frequently has a broader meaning according to the context in which it is used and the purpose for which it is employed. Construing the words literally, a "clerical error" means an error committed by a clerk or some subordinate agent in the performance of clerical work. [citations omitted] It usually denotes negligence or carelessness which is not attributable to the exercise of judicial consideration or discretion. [citations omitted]

A clerical error is different from a *nondiscretionary* error. The latter class of errors was removed from Virginia Code § 15.2-2311(C) effective July 1, 2012 as one that could be corrected by the zoning administrator after 60 days had passed since the erroneous determination.

19-500 Vested rights under Virginia Code §§ 15.2-2297, 15.2-2298, and 15.2-2303 (proffered rezonings)

For proffered rezonings, the enabling authority for conditional zoning found in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 establishes alternative standards for vested rights. Under these sections, a locality may neither rezone the property, amend the proffers, nor amend the applicable zoning district regulations, in a manner that eliminates, or materially restricts, reduces or modifies the uses, floor area ratio, or the density applicable to the property. The scope of rights vested under Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 is narrower than the rights that may vest under Virginia Code § 15.2-2307.

19-510 Elements to establish vested rights under Virginia Code §§ 15.2-2297, 15.2-2298, and 15.2-2303

Vested rights arise in a proffered rezoning if a proffer requires:

- The dedication of real property of substantial value; substantial cash payments for the construction of substantial public improvements; or construction of the substantial public improvements themselves.

and

- The need for the dedication or the substantial public improvements is not generated solely by the rezoning; and there has been no mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

19-520 Dedications of real property must have substantial value, cash payments must be substantial, or the developer must construct substantial public improvements

Substantial is not defined in the applicable statutes. Of the several definitions available, the one that appears to most appropriate in this context is "adequately or generously nourishing; ABUNDANT, PLENTIFUL." *Webster's Third New International Dictionary (2002)* (definition of *substantial*). Whether a dedication of real property, cash payment, or the construction of public improvements is substantial is a factual determination that is made on a case-by-case basis.

In *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009), the developers contended that their proffer to create a multi-use path through their project, which would be owned, controlled and maintained by the developers, was a “requirement for the dedication of land having substantial value” within the meaning of Virginia Code § 15.2-2298(B). With little discussion, the Virginia Supreme Court rejected the developers’ argument because, however the developers chose to characterize the path, the proffers did not require any land to be dedicated as required by Virginia Code § 15.2-2298(B).

19-530 The need for the dedication, cash payment, or public improvements must not be generated solely by the rezoning

A proffered rezoning may vest only if the need for the dedication, cash payment, or the substantial public improvements is *not* generated solely by the rezoning. This means that the landowner must proffer land, cash, or public improvements above and beyond those that are merely addressing the impacts substantially created by the proposed development itself.

The *substantially generated* standard has its origins in the holdings of the Virginia Supreme Court in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) and *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). In *Rowe*, the Court held that a county may not require a landowner to dedicate land and make off-site road improvements through the zoning regulations applicable to the zoning district where the need for the improvements was not substantially generated by the development itself. *Cupp* extended the holding of *Rowe* to special use permit conditions.

In *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 673 S.E.2d 170 (2009), the developers contended that a proffer requiring that they contribute \$25,000 to the cost of off-site street intersection improvements was a *substantial cash payment* within the meaning of Virginia Code § 15.2-2298(B). The Virginia Supreme Court did not directly address the question of whether a \$25,000 cash payment in the context of a \$45,000,000 project was *substantial*. Instead, the Court rejected the developers’ argument because the need for the transportation improvements to which the cash payment would be applied was generated solely by the rezoning itself. Virginia Code § 15.2-2298(B) requires that for vested rights to arise, the need for the land dedication or the cash payment must not be “generated solely by the rezoning itself.”

19-540 There must have been no mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare

There is no case law addressing the *mistake, fraud or change in circumstances* standards under Virginia Code §§ 15.2-2297, 15.2-2298 or 15.2-2303. The discussion in the following three paragraphs is borrowed from the similar analysis that occurs when determining the validity of a piecemeal downzoning.

A *mistake* is demonstrated when there is probative evidence to show that material facts or assumptions relied upon by the governing body at the time of the prior rezoning were erroneous. *Board of Supervisors of Henrico County v. Fralin and Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981) (no evidence of mistake or changed circumstances). A mistake does not include judgmental errors. *Fralin and Waldron, supra*. Moreover, a difference of opinion or a change of heart is not a mistake. *Conner v. Board of Supervisors of Prince William County*, 7 Va. Cir. 62 (1981).

Fraud means a false representation of a material fact, made intentionally and knowingly, with the intent to mislead, upon which the defrauded person relies to his detriment. *Winn v. Aleda Construction Company, Inc.*, 227 Va. 304, 315 S.E.2d 193 (1984); *Peet v. Peet*, 16 Va. App. 323, 429 S.E.2d 487 (1993).

Changed circumstances mean a changed condition since the prior ordinance, as shown by objectively verifiable evidence that substantially affects the character of the neighborhood insofar as the public health, safety or welfare is concerned. *Turner v. Board of County Supervisors of Prince William County*, 263 Va. 283, 559 S.E.2d 683 (2002) (holding that the “prior ordinance” is the last ordinance adopted by the locality before it enacted the ordinance that downzoned the land); *Fralin and Waldron, supra*. In *Seabrook Partners v. City of Chesapeake*, 240 Va. 102, 393 S.E.2d 191 (1990), the Virginia Supreme Court held that the city’s downzoning of 9.88 acres of a neighborhood from multi-

family to single family housing was valid where the city presented sufficient evidence of changed circumstances. The Court found that the neighborhood defined by the city had changed since 1969 when the multi-family zoning was established because the surrounding area had developed, or was planned to be developed, as single-family housing. If developed as multi-family housing as desired by the plaintiffs, the Court concluded that it was fairly debatable that the island of multi-family housing would substantially affect the public health, safety, or welfare.

19-600 Vested rights under Virginia Code § 15.2-2261(C)

Virginia Code § 15.2-2261(C) establishes certain rights in approved subdivision final plats and site plans. Approved and recorded final subdivision plats and approved final site plans are valid for 5 years from the date of approval or for a longer period as the planning commission or the agent may determine to be reasonable. *Virginia Code § 15.2-2261(A)*. However, Virginia Code § 15.2-2209.1 extends to July 1, 2017 the expiration date for any subdivision plat, recorded plat, or final site plan that was valid and outstanding as of January 1, 2011. All of these extensions require that any performance bonds or other financial guarantees of completion of public improvements be continued for the time of the extension.

For five years after a subdivision plat is approved, or as extended under Virginia Code § 15.2-2209.1, and during the period that an approved final site plan remains valid, “no change or amendment to any local ordinance, map, resolution, rule, regulation, policy or plan adopted subsequent to the date of approval of the recorded plat or final site plan shall adversely affect the right of the subdivider or developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the recorded plat or site plan unless the change or amendment is required to comply with state law or there has been a mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare.” *Virginia Code § 15.2-2261(C)*.

Note that although Virginia Code § 15.2-2261(A) provides that an approved and recorded subdivision plat and approved site plans may be valid for 5 years from the date of approval *or for a longer period as the planning commission or the agent may determine to be reasonable*, Virginia Code § 15.2-2261(C) vests rights “[f]or so long as the final site plan remains valid in accordance with the provisions of [section 15.2-2261], or in the case of a recorded plat for five years after approval.”

While an approved and recorded subdivision plat and an approved final site plan remains valid, Virginia Code § 15.2-2261(C) provides much broader protections to the landowner beyond amendments to the zoning ordinance (which is the scope of Virginia Code § 15.2-2307), and extends those protections from amendments to *any* local ordinance and other policies and rules. This broader protection makes sense because a subdivision plat or site plan requires the landowner to develop the property in the very specific manner shown on the plat or site plan.