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The Journal of the
Virginia State Bar
Real Property Section

http://www.vsb.org/site/sections/realproperty

Vol. XLI, No. 1 Spring 2020

A Tribute to Professor Lynda Butler upon her retirement

As this issue went to press, the Virginia State Bar announced the cancellation of the 2020 Annual Meeting due to concerns regarding COVID-19. We do not know how the annual election of board members and officers of the Real Property Section and other section business normally conducted at the VSB Annual Meeting may be done. An announcement will be forthcoming.

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HOW BEING QUARANTINED WITH A THREE YEAR-OLD IS MAKING ME A BETTER LAND USE ATTORNEY

By David I. Schneider

David I. Schneider is a land use and zoning attorney in the Tysons office of Holland & Knight LLP.

As attorneys we wear several hats for our clients. We are advocates, fiduciaries, confidants, and counselors. At home, I also wear numerous hats; I am a husband, father of two boys, friend, etc. As I strived to find that ever elusive work-life balance, I would *try* to maintain a psychological firewall between all my work hats and all my family hats (try being the operative word).

Here we are in the midst of a global health pandemic. While my office is closed, I am fortunate to be able to work from home – a collision of my two worlds. I now find myself wearing so many hats at the same time that I feel like a character straight out of a Dr. Seuss book. (See e.g. *The 500 Hats of Bartholomew Cubbins* (September 1, 1938))

Our oldest son is 3 years old and our youngest son is 8 months old. We also have two beagles (who could be the subject of their own piece). I'll be honest, the first few weeks at home were a mental struggle navigating between the different worlds under the same roof. I pride myself in the strong bond I have with my boys, but it took some time to teach my toddler that just because daddy is home does not mean daddy can play all day.

I am trying to find a silver lining in this situation and am trying to lean in to how fortunate I am to spend so much extra time with my family. As I transition back and forth between thinking about proffers, special exceptions, vested rights, and ordinances and then thinking about fun activities to keep a homebound three year-old entertained day after day, I started to notice some overlap between my two worlds.

The rules of parenting are at best ambiguous. Great weight is given to consistent and longstanding application of the house rules.

My wife stays home with our two children. With my office closed, I am crashing into their world and their daily routines. I help whenever I can. Just the other day, I was making lunch for my son and I did the unthinkable. I cut my toddler's sandwich the wrong way. I tried to explain that there is no rule on how a sandwich has to be cut, and it can be done many different ways. Nope. "But mommy always cuts it this way."

This is the way it has always been done in the Town of Mommy. While the house rules may be ambiguous, my wife is clearly charged with enforcing the rules – our very own Zoning Administrator. "A consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight." *Trustees of Christ & St. Luke's Episcopal Church v. Bd. of Zoning Appeals of City of Norfolk*, 273 Va. 375, 381–82, 641 S.E.2d 104, 107 (2007) (quoting *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 44, 353 S.E.2d 727, 733 (1987)). As I was the interloper in their home routine, I realized that I needed to abide by the unwritten ordinance and, when unsure, give "great weight" to the consistent and longstanding application of the rules. Parenting after all is a bunch of judgment calls and as the Supreme Court of Virginia has said, a "decision, or 'judgment call,' is 'best accomplished by those charged with enforcing': the ordinance. *Id at 381.* (quoting *Lamar Co., LLC v. Bd. of Zoning Appeals*, 270 Va. 540, 547, 620 S.E.2d 753, 757 (2005)).

Conditions Must have Reasonable Relation to the Impacts

For a three-year old, my son is quite adept on a scooter – he must get that level of coordination from his mother. He zips down big hills and turns corners faster than I can run. Our house is in an older subdivision with no sidewalks, so we scooter in the road and down driveways. Luckily, our neighborhood is not a through street and has minimal traffic, especially now with our "stay-at-home" order in effect. That being said, it *is* still a road. One day he zipped down the road and turned into a cul-de-sac. Sprinting and panicking because I lost sight of him for a few seconds, I was flustered. After seeing he was OK and the worry subsided, the anger boiled. Wanting to reinforce the message, I took away his screen time for two days. Right away, I could see that devastating look in his eyes that screamed – "but Dad – TV has nothing to do with my scooter AND two days an eternity."

This moment was an instant reminder that local jurisdictions cannot impose unconstitutional conditions on developments. The Supreme Court of the United States held that requiring landowners to "internalize the negative externalities of their conduct is a hallmark of responsible land use policy…so long as there is a "nexus' and 'rough proportionality' between the property that the government demands and the social costs [i.e., impacts] of the applicant's proposal". *Koontz v. St. Johns River Water Management District, 570 U.S. 595, 605, 133 S. Ct. 2586, 2595 (2013).* The *Koontz* decision was supported by two seminal cases. First, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), the Court held that there was no "essential nexus" between demanding owners dedicate a public easement across the beach front of the owners property in exchange for a building permit to build a larger house." Second, in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) the Court held that while there may be a nexus between conditioning the expansion of a commercial office building on the dedication of land for a bike path and dedication of land in a floodplain for a greenway, such conditions must have a "rough proportionality" with the impacts of the proposed development.

In Virginia, the concept of requiring a condition imposed on a development to be substantially generated by the proposed development originates in common law. The Supreme Court of Virginia held that a local jurisdiction does not have the have the authority to require a property owner to dedicate a portion of its land for the purpose of providing a road, "the need for which is substantially generated by public traffic demands rather than by the proposed development." *Bd. of Sup'rs of James City Cty. v. Rowe,* 216 Va. 128, 138, 216 S.E.2d 199, 208 (1975). This concept was later applied to conditions imposed through a special exception/special use permit in *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). The General Assembly also applied a similar standard for proffers in §§15.2-2297 and 15.2-2298 which both require that the rezoning give rise for the need for the conditions and that the proffers have a reasonable relation to the rezoning.

After my son made a passionate appeal that would make any attorney proud, my wife and I held the line on no screen time…for a few hours and then gave in to the TV demands. Before you apply your parenting judgment – it was raining and our options were severely limited in a global health pandemic!

Re-thinking Screen-time

There are about a million parenting blogs out there providing opinions on children and screen time. Should you allow screen time? How much is too much? What content is appropriate? We have decided to allow a limited amount of screen time and only to watch things with an educational focus – Daniel Tiger[1] has become a member of our family.

Screen time has now been a huge discussion point in entitlements as our Commonwealth ventures into virtual public hearings. The Freedom of Information Act has many public meeting and public

[1] "Daniel Tiger's Neighborhood" aired by PBS. –Ed.

hearing requirements with respect to land use cases, and specific instructions for emergency situations. With the stay-at-home order in place, there was a lot of debate and opinions about how and if land use cases can continue virtually. Should virtual meetings be allowed? How much public access must be given? What type of public comment is required?

On March 20, 2020, Attorney General Mark Herring issued an opinion stating that local jurisdictions could "meet electronically to make decisions that must be made immediately and where failure to do so could result in irrevocable public harm." On April 22, 2020, the General Assembly authorized public bodies, boards and commissions to meet electronically if certain factors are met. In addition, the General Assembly specifically authorized boards and commissions to consider land use cases in its electronic meeting.

By luck of draw on the agenda, I had the honor of presenting Fairfax County's first virtual land use case during the pandemic. Fairfax County worked diligently to ensure the virtual platform worked and that all participants understood the technology and protocols. The public could participate by writing a letter, calling into the hearing, or even by submitting video testimony. Perhaps this public hearing screen time, when used correctly, could enhance the process and is not something completely taboo. Furthermore, shoes are now optional for a public hearing.

But Dad – I Have a Vested Right to a Cookie

One day my son asked my wife for a cookie. She told him that he could not have one until the playroom was cleaned. I was in the home office and did not hear this arrangement made. Later in the day, my son asked me for a cookie and I said – no. He immediately responded that I was being unfair and that he cleaned the playroom, so it was it was *his* cookie. He told me that his mom said he could have it. Once denied, he took his appeal to the proper authorities and his vested rights determination was issued in his favor.

There are several ways to establish vested rights in Virginia, but this experience made me think of §15.2-2307(A). The Supreme Court of Virginia explained that "[t]he clear intent of the statute is to provide a property owner with protection from a subsequent amendment to a zoning ordinance when the owner 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. Bd. of Zoning Appeals*, 275 Va. 232, 243, 657 S.E.2d 153, 159 (2008).

A vested right can be established under §15.2-2307(A) if the landowner satisfies a three part test:

1. Obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project,

2. Relies in good faith on the significant affirmative governmental act, and

3. Incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act

Section 15.2307(B) provides a non-exclusive list of what constitutes a significant affirmative governmental act: (1) proffered rezonings with a specified use; (2) rezonings for a specific use or density; (3) special use permits or special exceptions; (4) variances; (5) preliminary subdivision plats and site plans; (6) final subdivision plats and site plans; and (7) a written order, requirement, decision or determination regarding permissibility of a specific use or density that is no longer subject to appeal.

My son received a conditioned approval of a cookie from my wife. He relied in good faith on that approval and, as he would argue, incurred the extensive obligation of having to clean the playroom. He was being deprived a vested right and sought a vested rights determination to uphold his right to the cookie.

In Virginia there are two avenues to obtain a vested rights determination for rights established under 15.2-2307(A). First, Section 15.2-2286(A)(4) gives the Zoning Administrator the authority to make such a determination with the concurrence of the attorney for the that local jurisdiction. Second, 15.2-2286 allows a landowner to seek the determination directly from the Circuit Court. Selecting which venue to seek a vested rights determination is an important decision and can have significant procedural ramifications. If a landowner seeks an administrative determination from the Zoning Administrator, the landowner cannot then make a direct judicial appeal of the zoning decision without first exhausting administrative remedies. See *Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 831 S.E.2d 483 (2019); See also *Lilly v. Caroline Cty*., 259 Va. 291, 296, 526 S.E.2d 743 (2000). If the landowner is unhappy with the Zoning Administrator's determination the landowner may appeal that determination to the Board of Zoning Appeals within 30 days of the Zoning Administrator's decision, or the determination becomes a thing decided and not subject to judicial attack. *Bragg Hill*, 297 Va. at 583, 831 S.E.2d at 492 (2019). Section 15.2-2314 then allows a landowner aggrieved by a decision of the Board of Zoning Appeals to appeal the decision to the Circuit Court. Lesson: Do not lose your cookie by dropping the ball on a vested rights determination.

No Matter How Old You Are, People Just Want To Be Heard

Just this past week we changed our son's bed from a toddler bed to a twin mattress. My wife and I thought it was a clear upgrade: a new and bigger bed – a symbol that he is growing up. After we put him down for bed that first night in his big-boy bed, he came out of his room to find us and proclaim "everything is different." Change is scary. We tried to comfort him and put him back in bed. This process repeated several times. Eventually I went into his room and sat with him on his bed and let him explain to me what was different and why it made him nervous. I wanted to give him an opportunity to share his feelings, while guiding him to my desired outcome – bedtime. After a nice discussion, I tucked him back in and he went to sleep.

No matter what age, all people want to be heard. One facet of being a land use attorney is working with the community to introduce and socialize a proposed development. I can explain until I am blue in the face why the new and bigger bed or a new and bigger development is a good thing. This interaction with my son was a good reminder that no matter what change I am proposing, change to one's surroundings is scary. While not everyone may be supportive of a proposed development, it is human nature to desire an opportunity to be heard. Providing an opportunity to let people be heard while still trying to drive your agenda is more art than science. Practicing with the intense emotions of a three-year old is great training.