

IN THE SUPREME COURT OF VIRGINIA

Record No. 081000

EDWARD HALE, ET AL.

Appellants,

v.

**BOARD OF ZONING APPEALS OF THE TOWN OF BLACKSBURG,
VIRGINIA, ET AL.,**

Appellees.

Record No. 081001

THE TOWN OF BLACKSBURG, ET AL.

Appellant,

v.

**BOARD OF ZONING APPEALS OF THE TOWN OF BLACKSBURG,
VIRGINIA, ET AL.,**

Appellees.

BRIEF OF APPELLEES

(counsel information listed on inside cover)

CONTENTS

TABLE OF AUTHORITIES.....	III
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	3
STATEMENT OF FACTS	3
ARGUMENT	8
I. The General Assembly Enacted Virginia Code § 15.2-2307 and § 15.2-2298 to Protect the Legitimate Investment-Backed Expectations of Landowners.	8
The “Significant Governmental Act” Rule.....	8
Proffers and the “Significant Governmental Act” Rule	11
The Vested-Rights Statutes	12
City of Suffolk v. Board of Zoning Appeals	17
II. The Conditional Rezoning of the Property Vested the Developers’ Land-Use Rights Under Virginia Code § 15.2-2307 Because the Developers’ Myriad Proffers Specified Use and Limited the Density of Development on the Property.....	19
A. The Town of Blacksburg accepted proffers that specified use of the Property.	20
1. The Proffer Statement “specifies use” of the Property.	20
2. A proffer can “specify use” by restricting the uses to which the land can be put.	21
3. The developer in City of Suffolk did not “specify use” in the manner suggested by Appellants.	27
4. Allowing use restrictions to vest land-use rights is consistent with public policy.....	31
B. In adopting the conditional rezoning, the Town approved a rezoning for a “specific density.”	33

C. The conditional rezoning was a “significant governmental act allowing the development of a specific project.” 38

III. Developers Made Significant Proffers of Real Property and Cash That Vested Their Rights Under Va. Code § 15.2-2298. 42

CONCLUSION 47

CERTIFICATE OF COMPLIANCE WITH RULE 5:26(D) 51

TABLE OF AUTHORITIES

Cases

<u>Board of Supervisors v. Cities Service Oil Co.</u> , 213 Va. 359, 193 S.E.2d 1 (1972)	9
<u>Board of Supervisors v. Greengael, L.L.C.</u> , 271 Va. 266, 626 S.E.2d 357 (2006)	39
<u>Board of Supervisors v. Medical Structures, Inc.</u> , 213 Va. 355, 192 S.E.2d 799 (1972)	9
<u>Buntin v. City of Danville</u> , 93 Va. 200, 204, 24 S.E. 830 (1896)	46
<u>City of Hopewell v. County of Prince George</u> , 239 Va. 287, 389 S.E.2d 685 (1990)	23
<u>City of Suffolk ex rel. Herbert v. Board of Zoning Appeals</u> , 266 Va. 137, 580 S.E.2d 796 (2003).....	passim
<u>McClung v. County of Henrico</u> , 200 Va. 870, 108 S.E.2d 513 (1959)	8
<u>Miller v. Highland County</u> , 274 Va. 355, 650 S.E.2d 532 (2007)	42
<u>Norfolk v. Meredith</u> , 204 Va. 485, 132 S.E.2d 431 (1963).....	46
<u>Notestein v. Board of Supervisors</u> , 240 Va. 146, 393 S.E.2d 205 (1990)	9, 10
<u>Town of Rocky Mount v. Southside Investors, Inc.</u> , 254 Va. 130, 487 S.E.2d 855 (1997).....	2, 10, 12, 16

Statutes

Va. Code § 15.2-2298.....	passim
Va. Code § 15.2-2307	passim

Ordinances

Blacksburg Zoning Ordinance § 3151	22, 25
Blacksburg Zoning Ordinance § 3152	34
City of Suffolk Code § 98-441	29
City of Suffolk Code § 98-462.....	28

City of Suffolk Code § 98-603 28, 29

Other Authorities

E.A. Prichard and Gregory A. Riegle, Searching for Certainty: Virginia’s Evolutionary Approach to Vested Rights, 7 GEO. MASON L. REV. 983 (1999) 9, 11, 15, 16

Note, Breaking the Exclusionary Land Use Regulation Barrier, 82 GEO. L.J. 2039 (1994)..... 11

WEBSTER’S THIRD NEW INT’L DICTIONARY 2187 (2002) 23

COME NOW Diversified Investors XIII, LLC, Fairmount Properties, LLC, and LLAMAS, LLC (collectively “Developers”), by counsel, and submit this Brief of Appellees in response to the briefs filed by the Town of Blacksburg (“Town”) (Record No. 081001) and by Edward Hale and the other private appellants (“Private Appellants”) (Record No. 081000).¹

PRELIMINARY STATEMENT

In their briefs, Appellants seek to judicially repeal the 1998 amendments to Va. Code § 15.2-2307, which extended vested rights to landowners who had conditionally rezoned their property. They do so by arguing that the 1998 amendments did not represent a substantial expansion of vested rights but were merely a “codification” and “clarification” of pre-existing law. They also argue that a landowner in a conditional-rezoning case must proffer the exact future use in order for his rights to become vested.

These arguments should be rejected. As this Court has recognized, the General Assembly enacted the 1998 amendments in response to Town of Rocky Mount v. Southside Investors, Inc., 254 Va. 130, 487 S.E.2d 855

¹ The Developers have various ownership and development rights in the subject Property, but the particular allocation of those rights is not relevant to the issues raised in this appeal. This brief therefore will refer to them generically as “Developers” and treat them as if they jointly own the subject Property.

(1997). The statute now explicitly recognizes conditional rezoning as a significant affirmative governmental act giving rise to vested rights. It protects landowners who pursue conditional rezoning and who, in anticipation of developing that property, make proffers that restrict its use.

In this case, the Developers sought and received conditional rezoning on the subject property. In the process, they agreed to a litany of proffered restrictions—restrictions that significantly constrained the multi-use commercial project that they intended to build. Relying on this conditional rezoning, Developers immediately undertook costly engineering and architectural work—expending almost a million dollars—and submitted preliminary plans and a site plan to the Town’s planning department. But because the new Town Council did not like one of Developers’ larger tenants, it tried to downzone the property and divest the Developers of their right to include that retail use on the Property.

Developers respectfully submit that such local-government action is exactly the type of abuse the 1998 amendments were designed to prevent, and the Developers are precisely the type of landowner the amendments are intended to protect. Accordingly, it asks that this Court affirm the decisions of the Circuit Court and the Board of Zoning Appeals, which held

that Developers had vested land-use rights that could not be diminished by the Town's subsequent downzoning efforts.

QUESTIONS PRESENTED

Does Virginia Code § 15.2-2307 vest a landowner's land-use rights where the landowner rezones the property, significantly restricts use of the property with proffers that run with the land, relies in good faith on the conditional rezoning, proceeds diligently with the project, and incurs nearly \$1 million in expenses in performing the engineering and other work needed for a site-plan application?

Does Virginia Code § 15.2-2298 preclude a locality from downzoning property where—as part of an earlier rezoning of that property—the locality accepts a proffer that creates a link in the Town's pre-existing public multi-use trail, valued at hundreds of thousands of dollars, and also accepts a cash proffer of \$25,000 to improve pre-existing problems at an off-site intersection?

STATEMENT OF FACTS

On May 9, 2006, the Blacksburg Town Council—at Developers' request—adopted Ordinance 1412, which rezoned a 26.53-acre tract (the "Property") from Low Density Residential and Conditional Office, to Conditional General Commercial, with extensive proffered restrictions. (JA 91). Developers applied for the rezoning because they intended to develop a large, multi-building retail, dining, and entertainment center on the

Property.² (JA 108). The Property lies in Blacksburg’s “South Main Street” area, which is characterized by “a concentration of neglected or declining properties.” (JA 119-20). It is the Town’s “primary redevelopment corridor.” (JA 119). The proposed rezoning to General Commercial was consistent with the Town’s land-use plans for that area. (Id.).

Developers attached an “illustrative plan” to their Rezoning Application. (JA 106). The plan depicted a configuration for the project, which incorporated the proffered conditions. But the application stated that the final layout would depend, in part, on the particular retailers they attracted. (JA 108). Developers needed the rezoning to attract tenants, but needed to retain some flexibility in the final layout in order to accommodate the needs of prospective tenants.

The parties negotiated proffers to address the concerns of the Town and its citizens about the project’s effect on neighboring properties. As adopted, Ordinance 1412 incorporates several pages of proffers. (JA 94-105). Those proffered restrictions specify use of the Property in great detail. They impose height and setback requirements that far exceed those imposed by Blacksburg’s zoning ordinance. (JA 97-98). They impose

² Part of the land on which Developers intended to build their project—the part fronting on Main Street—already was zoned General Commercial.

architectural and design standards on all buildings in the project. (JA 99-100). They prohibit certain uses that otherwise are permitted by right. (JA 99). They require Developers to pay \$25,000 for improvements to an intersection a block away. (JA 100-01). And they require Developers to construct a “multi-use” path across the Property’s entire length . (JA 98-99). In exchange for surrendering numerous rights and incurring extensive obligations via the proffered restrictions, Developers obtained the General Commercial zoning they needed for their project.³

Developers relied in good faith on the Town’s May 9, 2006 approval of their rezoning application and acceptance of the proffered restrictions. They incurred extensive obligations and devoted substantial resources in diligent pursuit of the development of their mixed-use project. Their engineering fees, soils studies, surveying fees, architect fees, and land deposits together amounted to nearly \$1 million. (JA 279-80). In addition, the Developers themselves have expended countless hours of work on the project.

³ *Amici* dismissively refer to these restrictions as “minor proffered limitations.” But Developers presented evidence that the proffered use restrictions reduced the value of the property by several million dollars from what it would have been worth under an unrestricted General Commercial zoning. (JA 286).

Within months of the rezoning, Developers submitted a preliminary “proffer plan” and other engineering and architectural diagrams to Steve Hundley, the Town’s Zoning Administrator. (JA 48-59). Those diagrams depict, among other things, a proposed retail-use structure that exceeds 80,000 square feet of total gross floor area. (JA 48, 53, 56-57). On March 6, 2007 the Zoning Administrator issued a zoning-determination letter stating that—with certain limited exceptions not relevant here—the plan “appears to comply with all proffer[ed] site development requirements” related to the Property. (JA 58-59). No mention was made of the proposed large retail structure.

Shortly after the Zoning Administrator issued this letter, however, the Town Council referred a proposed downzoning amendment to the Town’s Planning Commission for fast-track consideration.⁴ That amendment, Ordinance 1450, did three things. First, it established an entirely new use classification, “Retail Sales, Large Format,” encompassing retail structures with more than 80,000 square feet of gross floor area. (JA 138). Second, it required that a landowner who wanted to build such a structure first obtain a special-use permit from the Town Council. (JA 138-39). Third, it

⁴ The composition of the Town Council had changed since the time it had granted the Developers’ conditional-rezoning request.

established “general standards” for large-format retail sales uses, including provisions regulating architecture, parking, and lighting. (JA 139-40).

The clear purpose of this downzoning amendment was to preclude Developers from erecting a large retail-use structure on their Property. Indeed, the Council Member who proposed Ordinance 1450, Don Langrehr, admitted that the Developers were the intended target. In an April 10, 2007 e-mail, he stated that “Ordinance 1450 would not have been needed” if Developers had not included a “big box store” in their proposed development. (JA 287).

On May 4, 2007—prior to the passage of Ordinance 1450—Developers submitted a final site plan for approval by the Town. (JA 70). Although the Town requires that its staff complete site-plan review within fifteen working days from site-plan submission, (JA 70), review of Developers’ site plan dragged on for weeks.⁵ Meanwhile, on May 29, 2007, the Town Council passed Ordinance 1450. (JA 138-40).

Three weeks later, the Zoning Administrator issued a “Determination of Vested Rights,” which found that Developers did *not* have a vested right to develop a retail structure in excess of 80,000 square feet gross floor

⁵ A final decision, rejecting the application, was not made until June 29, 2007. (JA 165).

area. (JA 172-85). He opined that the downzoning amendment, Ordinance 1450, applied to Developers and that they now needed to obtain a special-use permit from the Town Council in order to build such a structure. (JA 184). Developers appealed this determination to the Board of Zoning Appeals. (JA 1). After a public hearing, the Board of Zoning Appeals unanimously reversed the Zoning Administrator's decision and found that Developers *did* have a vested right to use the Property for a large-scale retail use. (JA 392-97). The Circuit Court affirmed the BZA's decision. (JA 337-42). This appeal followed.

ARGUMENT

I. The General Assembly Enacted Virginia Code § 15.2-2307 and § 15.2-2298 to Protect the Legitimate Investment-Backed Expectations of Landowners.

This case ultimately turns on questions of statutory interpretation. But to understand the meaning of Virginia's vested-rights statutes, it is necessary to understand the context in which those statutes arose.

The "Significant Governmental Act" Rule

Beginning with McClung v. County of Henrico, 200 Va. 870, 108 S.E.2d 513 (1959), this Court generated an extensive body of case law

defining when a property owner's land-use rights vest, and what the owner had to show in order to establish vested rights.⁶

A pair of cases in 1972 established that the site-plan-approval process was the key point from which to measure vested rights. See Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972) (nursing-home developer's land-use rights vested after it had submitted an application for site-plan approval, making subsequent downzoning inapplicable); Board of Supervisors v. Cities Service Oil Co., 213 Va. 359, 193 S.E.2d 1 (1972) (holding that a service-station developer's land-use rights "vested upon the filing of the site plan" and nullifying locality's subsequent attempts to eliminate service stations as a permitted use).

In both Medical Services, Inc. and Cities Service Oil, the owners had obtained a special-use permit prior to applying for site-plan approval. In Notestein v. Board of Supervisors, 240 Va. 146, 393 S.E.2d 205 (1990), by contrast, the property owners proposed a by-right use—i.e., one that did *not* require a special-use permit. Narrowly construing its earlier cases, the

⁶ For a detailed history of the development of vested-rights law in Virginia leading up to the 1998 amendments to Va. Code § 15.2-2298 and -2307, see E.A. Prichard and Gregory A. Riegle, Searching for Certainty: Virginia's Evolutionary Approach to Vested Rights, 7 GEO. MASON L. REV. 983 (1999).

Court held that the owners' rights had *not* vested upon submission of a site-plan request because they could not point to a prior "significant official governmental act to support their claim of a vested property right." Id. at 152, 393 S.E.2d at 208.

This Court applied its "significant governmental act" rule in several subsequent cases, which culminated in Town of Rocky Mount v. Southside Investors, Inc., 254 Va. 130, 487 S.E.2d 855 (1997). In that case, a townhouse developer rezoned his parcel from R-1 to R-2, a residential classification that allowed townhouses as a by-right use. The developer then constructed townhouses on one part of the property, building the infrastructure so as to accommodate similar townhouse development on the remaining, undeveloped, property. The developer did *not*, however, obtain site-plan approval for the undeveloped part of the property. The locality then amended the R-2 classification, eliminating townhouses as a by-right use. The developer claimed it had a vested right to construct townhouses on the property, arguing that the earlier rezoning was a "significant governmental act." This Court disagreed, holding that the rezoning did not vest the landowner's rights because it "did not authorize any specific plan for development of the property." Id. at 133, 487 S.E.2d at 857.

Proffers and the “Significant Governmental Act” Rule

The bright-line site-plan-approval rule created by this Court’s vested-rights precedents did not keep pace with emerging economic and political realities. In recent decades, local governments have greatly increased the requirements for obtaining project approval. Localities often will not approve a rezoning request unless the owner makes “proffers”: nominally voluntary undertakings by the owner either to dedicate money or property for public use or to impose additional use restrictions on the property.

Proffers cede valuable property rights and run with the land. Note, Breaking the Exclusionary Land Use Regulation Barrier, 82 GEO. L.J. 2039, 2067, n.154 (1994) (“Proffers are a form of conditional zoning used in Virginia. . . . Unlike impact fees, the conditions run with the land.”). They are made in order to persuade the locality to approve the rezoning request.

In addition, the site-plan-approval process has become increasingly complex. Localities now require detailed traffic studies, surface-water studies, land-use analyses, architectural drawings, etc.⁷ Even before submitting a site-plan, a developer already may have invested hundreds of

⁷ See Prichard & Riegle, 7 GEO. MASON L. REV. at 999 (“Obtaining land-use approvals has become more difficult and more expensive. . . . [T]he need for more intensive and expensive preliminary engineering, land-use planning and architectural work and longer development made the issue of vested rights more critical.”).

thousands of dollars in a project. Id. Exacerbating this issue is the increased demand for complex, mixed-use, multi-phased projects. By their very nature, these projects impose enormous up-front costs on developers. Furthermore, where construction is done in phases, the initial stages often are engineered so that the infrastructure complements later phases (e.g., with interconnecting utilities, roads, etc.). But if those later phases do not yet have site-plan approval, and if site-plan approval is a precondition for vesting, then developers of multi-phase projects run the risk that the infrastructure investments they make on initial phases—made in anticipation of subsequent phases—will be lost if the locality downzones the parcels on which later phases are to be built. See, e.g., Rocky Mount, 254 Va. at 133, 487 S.E.2d at 857.

The Vested-Rights Statutes

The General Assembly responded to this changing zoning landscape with two vested-rights statutes.

In 1998—during the legislative session immediately following Rocky Mount—the General Assembly enacted Senate Bill 570, which extensively modified Va. Code § 15.2-2307. Whereas this Court’s precedents, including Rocky Mount, had fixed the site-plan-approval stage as the critical point in determining vested rights, the 1998 amendments allowed rights to vest

much earlier than that. In some circumstances, rights could vest as early as the conditional-rezoning stage.

The statute accomplishes this in two steps. The first paragraph of § 15.2-2307 establishes a three-pronged test for vested rights, which requires, *inter alia*, a showing of a “significant affirmative governmental act”:

a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Id. The major change, however, occurred in the second paragraph of § 15.2-2307. It provides specific examples of local-government actions that are deemed, as a matter of law, to satisfy the “significant affirmative governmental act” requirement:

For purposes of this section and without limitation, *the following are deemed to be significant affirmative governmental acts allowing development of a specific project*: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) 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; or (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property.

Id. (emphasis added). If a project developer satisfies one or more of these six categories, the court *must* find that the developer was the beneficiary of a “significant affirmative governmental act[] allowing development of a specific project.”

These six examples, which are not exhaustive,⁸ significantly altered Virginia’s law of vested rights. They eliminated the bright-line site-plan-approval requirement and replaced it with a more flexible calculus for determining when a property owner’s land-use rights vest. In addition to site-plan approval (subdivision vi), rights can become vested as of the time of zoning amendments with proffers (subdivision i), rezonings to a specific use or density (subdivision ii), special-use permit approval (subdivision iii), granting of a variance (subdivision iv), or approval of a preliminary plan of development (subdivision v). The practical effect is to move the vesting point backward in time.

⁸ The statute says “without limitation.” Va. Code § 15.2-2307.

The 1998 amendments reflect the legislature’s recognition that—even before site-plan approval—a landowner may incur hundreds of thousands of dollars of expenses in reliance upon an earlier governmental action, such as a conditional rezoning, that seemingly had green-lighted the project. The statute now protects developers from shifting political winds that otherwise might rescind an earlier zoning decision and stop a project—causing the developer to forfeit its substantial investment.

Contrary to the Town’s argument, the 1998 amendments were *not* a mere “codification and clarification” of existing law. (Town Br. at 17). Rather, they made the general vesting rules more consistent with Medical Services, Inc. and Cities Service Oil, before those cases were pruned back by more recent cases, and they also moved the specific vesting point backward in time:

Senate Bill 570 amended section 15.2-2307 of the Virginia code to clearly memorialize a three part test for vested rights that had evolved from the pro-property rights decisions of the 1970s while providing an earlier vesting point than that reached in any previous judicial decision.

. . .

[T]his new law goes further than any approach found in earlier common law. Under common law, the earliest a right could vest was upon site-plan approval. The practical effect of Senate Bill 570 is to allow rights to vest even earlier.

Prichard & Riegle, 7 GEO. MASON L. REV. at 999-1000.

The 1998 amendments were vigorously, but unsuccessfully, opposed by local governments:

The introduction of Senate Bill 570 was met with a storm of protest from local government officials. It was received as a direct affront to those in the front lines of representing the public interest in consideration of land-use changes.

Id. In short, Senate Bill 570 abrogated Rocky Mount and replaced the bright-line site-plan-approval rule with a more expansive vesting test.

To protect property owners further, the General Assembly amended Code Section 15.2-2298 in 1990.⁹ These amendments curtailed abuses of the proffer system by local governments. 1990 Va. Ch. 868. The amendments prevent localities from extracting proffers—either of cash or property—as part of the rezoning process, and then downzoning the property to deprive the landowner of the land-use rights that had induced the owner to proffer the money or property.

Under Section 15.2-2298, if (1) a locality accepts cash or property proffers as part of a rezoning, and (2) the need for those proffers is not created by the rezoning itself, then the locality cannot later downzone the property:

In the event proffered conditions include a requirement for the dedication of real property of substantial value, or substantial

⁹ Then codified as § 15.1-491.

cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to the property, shall be effective with respect to the property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

Va. Code § 15.2-2298 (emphasis added).

City of Suffolk v. Board of Zoning Appeals

City of Suffolk ex rel. Herbert v. Board of Zoning Appeals, 266 Va.

137, 580 S.E.2d 796 (2003), was the first case to apply the 1998 Amendments to § 15.2-2307. The Court acknowledged that the amendments significantly changed Virginia’s law of vested rights. And it held that rights could vest—even at the rezoning stage—without site-plan approval.

In 1988, the City of Suffolk granted a developer’s request to rezone its parcel from “Rural Residential” to “Planned Development Housing” (“PD-H”). Although the City simultaneously approved a “Conceptual Land Use & Circulation Plan” for the project, the developer did *not* seek any site-plan approval at that time. The developer later submitted a preliminary site-plan

for part of the project, “Planter’s Station,” which the city approved. But it did not obtain any site-plan approval for the remainder of the property.

The city then adopted an ordinance that rezoned most of the property from PD-H to “Commerce Park” and “Office Industrial.” The developer claimed that his rights for the entire property had vested under the 1988 rezoning. This Court agreed. In so doing, it noted that under pre-1998 case law, rezoning was insufficient to vest land-use rights:

[P]re-1998 cases 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.

Id. at 144-45, 580 S.E.2d at 799 (emphasis added). The Court observed that the 1998 amendments fundamentally changed applicable law, making rezoning an event that could vest land-use rights:

However, the plain language of current Code § 15.2-2307 now makes clear that vested rights accrue when one of the six types of actions listed in the second paragraph of that Code section occurs. Such acts are deemed to constitute “significant affirmative governmental acts allowing development of a specific project,” *including “rezoning for a specific use or density”* as in the case at bar.

Id. at 145, 580 S.E.2d at 799 (emphasis added). Thus, this Court affirmed the lower court, which had held that the landowner “had vested rights in the PD-H zoning for the 154 acres.” Id. at 142, 580 S.E.2d at 798.

II. The Conditional Rezoning of the Property Vested the Developers’ Land-Use Rights Under Virginia Code § 15.2-2307 Because the Developers’ Myriad Proffers Specified Use and Limited the Density of Development on the Property.

In the present case, the Developers’ land-use rights vested under § 15.2-2307. There is no dispute that the Developers relied in good faith on the May 2006 conditional rezoning. And there is no dispute that they incurred substantial expenses—approximately \$1 million—in diligent pursuit of their project. The sole issue is whether the May 2006 conditional rezoning was a “significant affirmative governmental act allowing development of a specific project.” That question in large part turns on whether the May 2006 conditional rezoning satisfied one or more of the “deemed” substantial governmental actions enumerated in the second paragraph of § 15.2-2307.

The Developers qualified under at least two of these six enumerated governmental actions—specifically, subdivisions (i) and (ii). They also qualified under the more general standard stated in the first paragraph of

§ 15.2-2307. Accordingly, the Developers' land-use rights vested and the Town of Blacksburg could not unilaterally eliminate those rights.

A. The Town of Blacksburg accepted proffers that specified use of the Property.

1. *The Proffer Statement “specifies use” of the Property.*

Under subparagraph (i) of the second paragraph of § 15.2-2307, a local government's acceptance of “proffers or proffered conditions which specify use related to a zoning amendment” is deemed, as a matter of law, to be a “significant affirmative governmental act allowing development of a specific project.” In rezoning the Property, the Town Council accepted proffered conditions that “shall govern the development *and use* of this land.” (JA 92) (emphasis added).

Those proffers “specify use” in great detail.

To begin, the proffers *prohibit* certain activities on the Property. They bar eight classes of uses that otherwise would be permitted, by right, in a General Commercial District. (JA 25, ¶ 5). They restrict the height of buildings. (JA 23, ¶ 1(g); JA 24, ¶ 2(b)). They require additional building setbacks. (JA 23, ¶ 1(f); JA 242, ¶ 2(a)). And they specify the locations of roads and parking areas within the development. (JA 22-23, ¶ 1(d)-(e); JA 25-26 ¶ 6(d)-(f)).

The proffered conditions also *mandate* certain uses of the Property. They require enhanced “buffer areas” with landscaped vegetation. (JA 22, ¶ 1(b); JA 24, ¶¶ 2(c) & 3(b)). They require that a portion of the Property be set aside for a “multi-use path.” (JA 24-25, ¶ 4). And they require that all buildings be erected in conformity with the elements of “Traditional Neighborhood Design” with a “discernible center” (e.g., a plaza, a landscaped square, green or promenade, a landscaped traffic circle, or a corner with public seating areas). (JA 25-26, ¶ 6).

Because the proffered conditions “specify use related to a zoning amendment,” Ordinance 1412 is deemed, as a matter of law, to be “significant affirmative governmental act allowing development of a specific project.” Thus, the trial court correctly held that—by accepting the Proffer Statement and adopting the rezoning ordinance—the Town committed a significant governmental act allowing development of the Property. Accordingly, Developers’ land-use rights were vested as of May 2006.

2. *A proffer can “specify use” by restricting the uses to which the land can be put.*

Appellants, however, argue that these detailed restrictions “govern[ing] the development and use” of the Property, (JA 92), do not actually “specify use.” The Town, for example, asserts that “the elimination of eight of sixty uses is not the specification of *a* use.” (Town Br. at 25-26)

(emphasis added). Its point, apparently, is that usage is not “specified” unless a single use is mandated. To vest under subdivision (i), the Town argues, the developer must commit to one—and only one—of the 60 permitted uses for General Commercial property, as set out in Blacksburg Zoning Ordinance § 3151. (JA 125-27).

There are four problems with this argument. First, it does not comport with the actual language of subparagraph (i). The phrase “specify use” does not mean the same thing as identify “a specific use.” To circumvent this fact, the Town attempts to re-write the statute. At various points in its argument, it inserts an indefinite article into its analysis of “specify use,” asserting that the Proffer Statement was not a “specification of **a** use” and did not require that the Property be developed for “**a** retail use.” (Town Br. at 26, 29) (emphasis added). Elsewhere, it inserts a definite article, talking about “**the** required future use” and “**the** required use.” (*Id.* at 28) (emphasis added). But subparagraph (i) does *not* say “specify **a** use” or “specify **the** use.” It says “specify use.” And although the proffers do not require a single particular use, they do “specify use” of the Property inasmuch as they significantly constrain how Developers may use the Property. If the General Assembly had intended for subparagraph (i) to refer to a single particular use, it would have used the phrase “a specific

use”—as, indeed, it did in subparagraph (ii), which refers to “rezoning for a specific use.” The fact that the General Assembly used the phrase “specify use” in subparagraph (i) but used the different phrase “a specific use” in subparagraph (ii) shows that the two locutions do not mean the same thing. See, e.g., City of Hopewell v. County of Prince George, 239 Va. 287, 294, 389 S.E.2d 685, 689 (1990) (“When the legislature uses two different terms in the same act, it is presumed to mean two different things.”).

Second, the dictionary definitions of “specify” and “use” show that the clause “specify use” simply refers to proffers that restrict how a landowner may develop and use its property. The verb “specify” means “to mention or name in a specific or explicit manner: tell or state precisely or in detail.” WEBSTER’S THIRD NEW INT’L DICTIONARY 2187 (2002). And the noun “use” means “the act or practice of using something.” Id. at 2523. The proffers in this case “specifically” and “explicitly” state “in detail” what “acts” or “practices” are required—and forbidden—in using the Property. Thus, they “specify use.”

Third, “use” can be “specified” in the affirmative (e.g., detached single family residence) or in the negative (e.g., no restaurants, no cell towers, no gas stations, no buildings on the back half of the site, etc.). Indeed, from a zoning perspective, it often is more important to specify what a property

owner *cannot* do with a parcel than it is to specify what the owner *will* do with it. More to the point, by surrendering otherwise permissible uses, a landowner relinquishes valuable “sticks” from its bundle of property rights. Whether a proffer is phrased in the affirmative or the negative is irrelevant. The point of subparagraph (i) is to protect landowners who—by making proffers that constrain use of a parcel—cede valuable property rights during the rezoning process. It prevents a locality that accepts such proffers from later renegeing on its implicit promise to permit the landowner to develop the property pursuant a particular set of zoning rules.

Fourth, and most importantly, the Town’s construction of “specify use”—an interpretation that would require landowners to proffer a single narrow use—places an impossibly high standard on vesting. It is important to distinguish between a *proffer* and a *permit*. A proffer imposes mandatory conditions on the property that run with the land and bind future owners. A permit simply allows a particular project to proceed, but does not restrict other potential future uses of the property. The difference between a proffer and a permit is the difference between “must” and “may.” The Town is arguing that, to be vested under subdivision (i), the developer must *proffer* a single use; i.e., it must commit itself—and all future owners of the

property—to one, and only one, of the uses enumerated in Blacksburg Zoning Ordinance § 3151. (JA 125-27).

To appreciate what an extreme position this is, consider the list of permitted uses under Blacksburg Zoning Ordinance § 3151 for General Commercial property. (Id.). It includes such items as:

- Day care center,
- Open space,
- Cultural services (e.g., museums),
- Financial institutions (e.g., banks),
- General office,
- Medical office,
- Business support services (e.g., an office-supply store),
- Garden center,
- Commercial indoor entertainment (e.g., a movie theater),
- Grocery store,
- Neighborhood convenience store,
- Personal improvement services (e.g., fitness clubs or dance studios),
- Personal services (e.g., florists and beauty shops),
- Restaurant, fast food,
- Restaurant, general,
- Restaurant, small,
- Retail sales,
- Specialty shop (i.e., small retail stores dedicated to a single theme),
- Residential (on upper floors and in basements).

The Town maintains that, to vest under subdivision (i) of the second paragraph of § 15.2-2307, the developer must commit to one, and only one, of these uses.

No rational landowner would accept such a severe constraint on commercial development. It would be reckless for an owner of a commercially zoned parcel to proffer that—from now until the end of time—the property will *only* be used, say, as a bank. Times change and the desirability of particular commercial uses changes with them. Locking property into a single, narrow, allowed use may render the property completely useless. A change in the business climate may make the proffered single use—say, a bank—uneconomical. This would leave the owner with worthless property and the Town with a boarded up bank.

The point applies with even greater force where, as here, the rezoned parcel comprises tens of acres and the project is a multi-use commercial-center development. Such projects contemplate dozens of different “uses.” It would be impossible for the developer of a large commercial center to commit to a single use or identify all its tenants prior to rezoning.

Because proffering a single use is neither prudent nor practical, no landowner would do it. So if the Town’s “single-use” interpretation is correct, virtually nobody ever would be vested under subparagraph (i). It would become a dead letter. The Town and its supporting *amici* understand this. They urge such a construction in order to judicially repeal the 1998 amendments to Va. Code § 15.2-2307.

3. *The developer in City of Suffolk did not “specify use” in the manner suggested by Appellants.*

Appellants may respond that proffering multiple uses is permitted under subdivision (i), so long as the proffers state exactly what those uses are and where they will be located on the subject property. Indeed, the Town claims that this is what happened in City of Suffolk. (Town Br. at 20-21, 24).

But that is *not* what happened in the City of Suffolk. To begin, the developer in that case did not make any proffers at all. Rather, it merely submitted a “Conceptual Land Use & Circulation Plan.” The conceptual plan was *not* binding on the developer or its successors-in-interest: “development . . . may not ever occur in any manner now being evaluated by Etheridge.” Id. at 153, 580 S.E.2d at 804. (Keenan, J., dissenting).

Furthermore, the Conceptual Land Use & Circulation Plan in City of Suffolk did not designate particular uses for particular parts of the rezoned property. All it did was assign general *types* of development to general locations:

[T]he rezoning did not mandate any particular use of the property and did not limit development to any specific density. Instead, the 1988 rezoning permitted a wide variety of densities Further, the 1988 plan showed only general locations for various basic types of development

Id. at 151, 580 S.E.2d at 803 (Keenan, J., dissenting) (emphasis added).

For example, a significant portion of the property was set aside for “COMMERCIAL/OFFICE” uses. This corresponded to the B-1 “neighborhood commercial” and O-I “office institutional” zoning classifications, whose use the City of Suffolk authorized on a certain percentage of parcels zoned PD-H.¹⁰ But the City of Suffolk’s B-1 and O-I districts—like the General Commercial District at issue in the present case—authorized several different kinds of uses. Among other uses, “B-1” permitted:

- Barbershops and beauty shops,
- Coin-operated laundry and dry cleaning establishments,
- Drugstores,
- Dry cleaning and laundry pickup stations,
- Florists,
- Gift shops or stationery stores;
- General and speciality food and beverage stores;
- Restaurants;
- Retail hardware stores;
- Churches;
- Bank branches.

City of Suffolk Code § 98-462. Likewise, property zoned “O-I” permitted a multitude of different uses, including:

¹⁰ Under the City of Suffolk’s “PD-H” zoning classification, owners could use up to 10% of the planned development for uses that were authorized under “B-1 neighborhood commercial districts or O-I office institutional districts.” City of Suffolk Code § 98-603(c). A copy of the relevant portions of the City of Suffolk’s zoning ordinance is included in the Addendum to this brief.

- Business offices of various sorts;
- Finance agency offices;
- Banks;
- Medical, optical, and dental offices;
- Legal, engineering, architectural, accounting, auditing, and bookkeeping offices.
- Offices of miscellaneous business services;
- Offices of charitable and political organizations;
- Day care centers;
- Funeral homes;
- Governmental services and offices;
- Museums, art galleries, auditoriums, arenas, civic centers, parks, and recreational facilities.
- Nursing homes;
- Public utilities.

City of Suffolk Code § 98-441. Even the residential areas of the plan permitted a variety of different kinds of residential uses, including “one-family detached, semidetached and attached dwellings,” “two-family detached, semidetached and attached dwellings,” and “multifamily dwellings.” City of Suffolk Code § 98-603.

Thus, contrary to the Town’s arguments, the “Conceptual Land Use & Circulation Plan” in City of Suffolk did not commit the landowners to any particular uses at any particular locations. Indeed, unlike the proffers in the present case, the plan in City of Suffolk did not exclude *any* of the uses permitted under the relevant residential, commercial, or office districts. It allowed *all* of them. If anything, the plan in City of Suffolk was *less* specific

about “uses” than was the Proffer Statement in the present case. The developer had more flexibility than the Developers in the present case.

Finally, the Town’s interpretation ignores reality. The precise tenant mix of large multi-use developments is difficult to know in advance.

Moreover, the tenant mix will change over time to adapt to evolving market conditions. An owner that attempted to establish, for all time, the precise nature and location of all conceivable commercial uses on a large property would quickly find itself unable to adapt when necessary. A commercial developer would not agree to proffers that forced it to do this. Nor would the General Assembly intend such singular commitment. The legislature was trying to promote economic development, not straightjacket it.

Developers of multi-use projects can, however, “specify use” with proffers without taking the command-and-control approach urged by the Town (i.e., forever fixing single narrow uses at specific locations). Such proffers may (1) eliminate the otherwise-permitted uses that the locality does not want on the property, and (2) establish detailed restrictions/requirements that govern the look and feel of the project, such as architectural requirements, open-space commitments, and overall design features. This approach—utilized in by the Town when it rezoned the Property in the present case—“specifies use” of the property sufficiently

to address the locality's concerns about future development, but still gives the specific project the ability to evolve over time.

4. *Allowing use restrictions to vest land-use rights is consistent with public policy.*

Appellants and *amici* argue, however, that allowing proffers to “specify use” in this way would “throw uncertainty into the development process” and would impede localities’ ability to guide development according to their comprehensive plans. They claim that “communities would lose the right to use zoning effectively in the public’s interest.”

These protestations ignore that localities hold the trump card in the rezoning game: they decide whether or not to approve a rezoning request. If the submitted proffers do not sufficiently protect neighboring landowners, the local governing body can reject the rezoning request. If proffers do not “specify use” narrowly enough, it can reject the rezoning request. If proffers do not ensure that the rezoned parcel will be developed in a manner consistent with the locality’s comprehensive plan, it can reject the rezoning request. And if the locality does not want land-use rights to vest, it can reject the rezoning request. Nothing forces localities to accept rezoning requests or the proffers that accompany them. If, in the present case, the Blacksburg Town Council did not think that the pages and pages of proffers

that Developers submitted were sufficient to protect the interests of its citizens, it could have denied the request for conditional rezoning.

But once a locality accepts proffers that “specify use” for the property—thereby binding the current owner and all future owners to those conditions, and inducing the owner to undertake costly site-plan preparation efforts—Code § 15.2-2307 prevents the locality from reneging on the deal, downzoning the property, and changing the rules that led the landowner to agree to the proffers in the first place. This prohibition on *ex post facto* changes represents sound public policy. By creating stability in land-use rights, the statute encourages owners to invest the front-end time and expense needed for well-planned development.

Indeed, the Town’s interpretation of § 15.2-2307 would have the unintended effect of blunting one of the most effective tools in localities’ land-use toolbox: conditional rezoning with proffers. Suppose, for example, a locality wished to redevelop a dilapidated part of town and encourage the development of a large, upscale, multi-use town-center. Section 15.2-2307, the vesting statute, enables the locality to credibly assure developers that after a conditional rezoning they will be able to proceed with their project without being subject to the caprice of local politics. Without such assurances, it would be difficult for a locality to induce landowners to enter

into conditional-rezoning proffers. Landowners justifiably would fear that the locality would accept the valuable proffers and later downzone the property—as happened in this case.

Of course, a locality that does *not* want to encourage such projects could simply refuse to accept proffers and could deny the conditional-rezoning requests. But § 15.2-2307 gives localities the option, if they wish to exercise it, to encourage multi-use town-center developments—like the one at issue in the present case. Without any assurance of vested rights, however, localities effectively lose that option. Developers would be reluctant to risk the up-front costs of development. Like an enforceable contract, the binding nature of conditional rezonings with proffers actually expands the locality’s economic freedom.

B. In adopting the conditional rezoning, the Town approved a rezoning for a “specific density.”

The May 2006 rezoning also vested Developers’ rights under subparagraph (ii) of the second paragraph of Code § 15.2-2307 because the Town “approved an application for a rezoning for a specific . . . density.” Id. In the present case, item seven in the Proffer Statement imposes specific limits on the density of residential development. Properties in the General Commercial District are allowed, by right, 48 bedrooms per acre.

Blacksburg Zoning Ordinance § 3152.¹¹ But item seven in the Proffer Statement limits residential development on several parcels of the Property to 27 bedrooms per acre. (JA 206). On the remaining parcel, encompassing 14.8 acres, the Developers could place “no more than four hundred (400) bedrooms”—an average of approximately 28 bedrooms per acre. (Id.).¹² Item seven thus cuts the permitted residential density nearly in half. Because the Town approved Developers’ rezoning application, and because the rezoning prescribes a specific density for the various parcels on the Property, the Town “approved an application for a rezoning for a specific . . . density,” thereby vesting Developers’ rights under subsection (ii). Va. Code § 15.2-2307.

The Town, however, claims that subsection (ii) does not apply because the proffers relating to residential density do not actually *require* the Property to be developed for residential uses; they instead place an upper limit on residential development *if* the Property is developed as residential. (Town Br. at 33). The Town asserts that residential-density

¹¹ A copy of § 3152 is included in the Addendum.

¹² *Amici* claim that the cap on residential density only affected a “small portion of the property.” (*Amici* Br. at 20). This is false. Item seven includes specific residential-density restrictions for *all* of the rezoned property, though different parcels have different density restrictions. (JA 26, 30).

limitations cannot vest rights unless the property is actually developed for residential uses. But the Town fails to cite any authority to support this sweeping proposition, relying instead on “logic.” (Town Br. at 33).

Contrary to the Town’s argument, however, it is not “illogical” for residential-density restrictions to vest land-use rights, even if the ultimate use is not residential. The Town fails to recognize that residential-density limitations can influence the actual course of development even if the property ultimately is developed only for commercial uses. Density restrictions may, in fact, change the “highest and best use of the property” from residential to commercial.

Suppose, for example, that both residential and commercial uses are permitted as a matter of right on a parcel zoned general commercial. And suppose the locality does not want the owner to use the property for potentially lucrative high-density residential (e.g., student housing).¹³ It wants the owner to use the property for commercial uses. To influence the owner’s development plans, the locality might agree to general commercial

¹³ This was a real concern in the present case. At a neighborhood meeting “Concern was expressed that residential units will mean a student population with accompanying noise and life style conflicts with adjacent single family residences.” (JA 118). By reducing residential density, the proffers made that use less likely.

rezoning but forbid high-density residential uses. The density limitations would simultaneously discourage residential use and encourage commercial use. Thus, the residential-density limitation would influence development even if—indeed, precisely because—the property is developed commercially. In such a circumstance, to say that the residential-density restriction is irrelevant because the restriction induced the owner to develop the property commercially is to miss the entire point of the residential-density restriction.

Thus, there is nothing “illogical” about having a residential density limitation vest a landowner’s rights to use land for commercial purposes. Indeed, it would be unfair for the locality to accept the diminished residential-density proffers but then downzone the remaining commercial uses that had induced the owner to agree to the residential-density reduction.

The Town, however, claims that if any density restriction is sufficient to vest rights, then “[e]very developer would simply place a density limitation somewhere in the proffers and later claim a vested right to build whatever they wanted to build.” (Town Br. at 33). The response is twofold. First, the residential-density caps in the present case were an important consideration and fulfilled the Town’s stated goal of emphasizing the

commercial development in the area. (JA 119-20). Second, a locality does not have to accept every proffered density restriction. It can refuse that particular proffer or it can deny the rezoning request altogether. While landowners can propose specific density limitations, they cannot force local governing bodies to accept them. Thus, the Town's nightmare scenario of landowners manufacturing vested rights out of trivial density limitations is unfounded. Localities themselves have the power to prevent it from occurring.

Finally, *amici* argue that a density cap is not a rezoning to a "specific . . . density." (Amicus Br. at 20). Evidently, they would refuse to allow any vesting of rights under this subsection unless the rezoning mandated that the owner develop the property with a density that is exactly the same as—no more or no less than—the density specified in the rezoning request. But under *amici's* construction, the landowner would be immediately out of compliance upon the adoption of the ordinance because the landowner had not yet built out the residential units to the required density. This is absurd. When the General Assembly referred to a "specific density" in subparagraph (ii), it meant a density that was specific to the parcel, as opposed to a density limit contained in a general rezoning ordinance.

C. The conditional rezoning was a “significant governmental act allowing the development of a specific project.”

The governmental acts enumerated in the second paragraph of Va. Code § 15.2-2307 are “deemed” to be “significant governmental acts allowing development of a specific project.” But as the “without limitation” language makes clear, this list is not exhaustive. If a governmental act otherwise qualifies under the general standard in the first paragraph, then it meets § 15.2-2307’s governmental-acts requirement. In the present case, this provides yet another way for Developers to meet § 15.2-2307’s vesting standard. In addition to qualifying under the two “deemed” provisions discussed above, the Town’s actions in the present case meet the general standard set out in the first paragraph.

It does not appear that Appellants dispute that the May 2006 rezoning was a “significant affirmative governmental act.” They instead focus their argument on the “specific project” part of this prong. They claim that Ordinance 1412 was not a rezoning for a “specific project” because the conditional rezoning allowed the Developers some flexibility in how exactly they would build out their commercial project.

But in City of Suffolk this Court considered—and rejected—that exact argument. In particular, it rejected the city’s claim that the 1988 rezoning

was not for the “development of a specific project” because the owner had not submitted a site plan for the property. The Court based its finding of a “specific project” on the fact that “the 1988 rezoning was [for] a specific tract . . .; it was not a general rezoning.” Id. at 146, 580 S.E.2d at 800.

In Board of Supervisors v. Greengael, L.L.C., this Court reiterated the basis for its decision in City of Suffolk:

[In City of Suffolk, w]e held that under Code § 15.2-2307, which lists as a specific governmental act approval by a governing body of “an application for rezoning for a specific use or density,” the developer had established vested rights because it obtained the rezoning for “an identifiable property and project.”

271 Va. 266, 283, 626 S.E.2d 357, 367 (2006) (quoting City of Suffolk, 266 Va. at 146, 580 S.E. 2d at 800). In 2004, the Attorney General likewise opined that “[r]ezoning ‘specifically directed to an identifiable property and project,’ as opposed to general rezoning, constitutes ‘a significant affirmative governmental act creating a deemed vesting of land use rights.’” 2004 Va. AG LEXIS 26, at *11 n.12 (quoting City of Suffolk, 266 Va. at 146, 580 S.E.2d at 800).¹⁴ And the General Assembly, too, concurs in this interpretation. It has amended § 15.2-2307 *four* times since 2003: once in 2004 (c. 538), once in 2006 (c. 244), and twice in 2008 (cc. 377 and 411).

¹⁴ Although Attorney General opinions are not binding on this Court, they are entitled to “due consideration.” Beck v. Shelton, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004).

Yet none of these amendments changed the provision at issue in City of Suffolk. The General Assembly’s failure to take action to change this part of § 15.2-2307—despite repeated opportunities to do so—evidences its acquiescence in the construction that the Attorney General and this Court have placed on the statute.¹⁵

Appellants insist that this Court based its decision in City of Suffolk on the land-use plans that the owner submitted in connection with its rezoning requests. But as noted above, the “Conceptual Land Use & Circulation Plan” at issue in City of Suffolk did *not* commit the landowner to any particular development plan. And it did not require any particular uses. As with the application in the present case, it simply outlined a general proposal for how the property *might* be developed, allowing a broad class of permitted uses. Had this Court required, in City of Suffolk, the kind of detail that the Town now claims is necessary in a rezoning application, it would not have concluded that the developer’s rights had vested.

¹⁵ See, e.g., Beck, 267 Va. at 492, 593 S.E.2d at 200 (“The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.”); Kitchen v. City of Newport News, 275 Va. 378, 395, 657 S.E.2d 142 (2008) (noting that the General Assembly is aware of state court precedents bearing on legislative matters).

Indeed, the City of Suffolk court expressly *rejected* the argument that “development plans in great detail are required before a property owner can obtain vested rights in a land-use classification.”¹⁶ City of Suffolk, 266 Va. at 144, 580 S.E. 2d at 799. And it rejected the city’s claim that the landowner’s plans were “too vague to be deemed a ‘specific project’ under Code § 15.2-2307.” Id. The Court noted that after the 1998 amendments to § 15.2-2307 it no longer was necessary to have a “specific land use authorization, beyond zoning, before vesting of a particular land use could be found.” Id. at 144, 580 S.E.2d at 799. Rather, a rezoning directed at a specific parcel *was* sufficient to vest land-use rights:

Code § 15.2-2307 now specifically recognizes the type of zoning act taken by the City in 1988 as a significant affirmative governmental act creating a deemed vesting of land use rights. The record reflects that the zoning was specifically directed to an identifiable property and project. Thus, there was credible evidence in the record to support the trial court and BZA conclusions that the statutory requisite of “a significant affirmative governmental act . . . allowing development of a specific project” occurred.

Id. at 146, 580 S.E.2d at 798 (emphasis added). The level of detail in the “master use plan” was irrelevant. Id. at 146, 580 S.E.2d at 800 (“Any

¹⁶ The Private Appellants incorrectly state that the Master Use Plans in City of Suffolk “provided extensive detail as to the manner in which the property would be developed.” (Br. at 27). As pointed out above, this simply is not so.

distinction due to the general versus the specific nature of a landowner's development plans is unrelated to whether a significant governmental act, such as approval of a site plan, had occurred.”).

In the present case, as in City of Suffolk, the Town Council approved the rezoning for a specific project—the development of a commercial center on the Property. As in City of Suffolk, the rezoning was directed to a specific, identifiable tract and parcel. And as in City of Suffolk, the rezoning restricted use of the Property in myriad ways. It governed such issues as roadway entrances, recreational areas, and the intensity of residential development. Thus, the Circuit Court correctly held that Developers' rights became vested when the Town conditionally rezoned the Property.

III. Developers Made Significant Proffers of Real Property and Cash That Vested Their Rights Under Va. Code § 15.2-2298.

Virginia Code § 15.2-2298(B) provides an alternate basis for finding vested rights and for affirming the Circuit Court's decision.¹⁷ This statute

¹⁷ Although Developers presented its § 15.2-2298(B) argument below, the trial court did not reach the issue because it found that Developers had vested rights under Va. Code § 15.2-2307. Nevertheless, this Court can affirm on this ground in the event it disagrees with the lower court's § 15.2-2307 analysis. See, e.g., Miller v. Highland County, 274 Va. 355, 372, 650 S.E.2d 532, 540 (2007) (court can affirm a trial court's decision that reaches the right result, albeit for the wrong reason).

preserves existing land-use rights if, as part of a rezoning, the Town accepts “proffered conditions” where:

- (1) The “proffered conditions include a requirement for the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements.” Va. Code § 15.2-2298(B); and
- (2) “[T]he need for [such proffers] is not generated solely by the rezoning itself.” Id.

If those two conditions are met, then—absent fraud, mistake, or a threat to public welfare—“any subsequent amendment to the zoning ordinance which eliminates or materially reduces or modifies the permitted uses in the zoning district is not applicable to the property.” Id. In other words, if a locality uses the proffer system as a back-door way to fund unrelated projects, then it must honor the zoning that generated the proffer.

As set forth below, the Proffer Statement qualifies under this statute because it compels Developers to make donations of real property and cash to the Town. These donations primarily take the form of mandated improvements to the Town’s “greenway” network.¹⁸ In recent years,

¹⁸ The Proffer Statement also requires Developers to pay \$25,000 for upgrades to an intersection that is not on, or adjacent to, the Property. (JA 26-27). The rezoning did not create the need for the upgrades. Instead, the Town needed to improve the intersection to address a long-standing traffic issue in the nearby neighborhood. This payment provides an additional
(note continued on following page . . .)

Blacksburg has developed a path for pedestrian, bicycle, and other public uses, known as the “Huckleberry Trail.” Proffer four requires Developers to build a connecting link to the Huckleberry trail.

Developer proffers to provide a continuous multi-use path from Hubbard Street to Country Club Drive so as to provide pedestrian and bikeway interconnectivity throughout the neighborhood and access from the development to the Huckleberry Trail

(JA 24). This connection will run north-south along the entire west side of the Property, linking Country Club Drive (which abuts the north side of the development) with Hubbard Street (which is near the south side). (JA 30).

The value of this trail is “substantial” for purposes of § 15.2-2298(B). The land needed for this path—including the additional buffer area set forth in the proffers—is valued from \$600,000 to \$1,000,000. (JA 286). In addition, constructing the path will cost more than \$165,000. (Id.). These are not trivial financial commitments. They qualify as “substantial” under anyone’s definition of the term.

Turning to the second element of the § 15.2-2298(B) test, the need for the Huckleberry Trail extension was *not* created by the rezoning or by the Developer’s specific project. Rather, it implemented the Town’s pre-

(. . . note continued from previous page)

basis for finding that, under Va. Code § 15.2-2298(B), Ordinance 1450 cannot be enforced against the Property.

existing desire to improve citizen access to the Huckleberry Trail. In his report on the proposed conditional rezoning, the Zoning Administrator, Steve Hundley, stated that the proffered trail would provide “interconnectivity throughout the neighborhood and access from the development to the Huckleberry Trail.” (JA 116). He noted that the Town had wanted this multi-use trail even before the property was rezoned: “This proffer addresses a long term goal for a multi-use trail between Hubbard and Country Club Drive.” (Id.). And he pointed out that “this is a trail section that has high priority in the Comprehensive Plan’s Greenway Priority List and partially fills a trail gap that is listed as one of the action Strategies to be completed within 5 years.” (JA 121). Plainly, the “need for [the Huckleberry trail] [wa]s not generated solely by the rezoning itself.” Va. Code § 15.2-2298(B).

Because proffer number four required the Developers to dedicate valuable land for a public purpose, because it required Developers to build a public trail at great expense, and because the need for these improvements was not generated by the project itself, the Developers satisfy the requirements of § 15.2-2298. Accordingly, any amendment to Blacksburg’s Zoning Ordinance that “eliminates or materially reduces or modifies the permitted uses” of the Property—e.g., Ordinance 1450, which

created the new “Retail-Sales, Large-Format” use—is “not applicable to the property.” Thus, the trial court correctly held that Ordinance 1450’s restriction on large retail stores did not apply to the Property at issue in this case.

The Developers anticipate that Appellants will argue that the multi-use path proffer did not involve a “dedication” because Developers were not ordered to formally deed the property to the Town. And they anticipate that Appellants will argue that construction of the trail was not a “public improvement.” Both of these arguments fail.

To begin, long-settled Virginia law holds that real property can be “dedicated” without formally being deeded to the government:

Dedication is an appropriation of land by its owner for the public use. It may be express or implied. It may be implied from long use by the public of the land claimed to have been dedicated. *Dedication is not required to be made by a deed or other writing, but may be effectually and validly done by verbal declarations. The intent is its vital principle, and the dedication may be made in every conceivable way that such intention may be manifested.*

Buntin v. City of Danville, 93 Va. 200, 204, 24 S.E. 830 (1896) (emphasis added). See also Norfolk v. Meredith, 204 Va. 485, 489, 132 S.E.2d 431, 434 (1963) (“Dedication may be accomplished by the owner of land by deed or other writing, or by his oral declarations. Or it may be implied from his actions and the long use of his land by the public.”).

In the present case, the language of the Proffer Statement shows that the multi-use trail was proffered for public use—it was intended to link the nearby neighborhood with the Huckleberry Trail, and was designed to fill a long-felt public need for a bike and pedestrian connection between Hubbard Street and Country Club Drive. (JA 24-25). Constructing the multi-use path therefore qualifies as a public improvement.

Although the proffer statement does not require Developers to formally deed the property, the May 2006 rezoning amendment—which incorporated the Proffer Statement—is itself an “other writing” that creates a dedication. It evinces the Developers’ intent to devote a part of their property to a public use. Norfolk, 204 Va. at 489, 132 S.E.2d at 434. And it demonstrates the Town’s intent to accept that offer of land for public use. Under Virginia law, that is all that is required for a “dedication.” Accordingly, Developers’ land-use rights were vested under Va. Code § 15.2-2298(B).

CONCLUSION

This present litigation is, in reality, a case of “buyer’s remorse.” In approving the rezoning with its accompanying proffers, the Town addressed its land-use concerns associated with Developers’ project. It extracted valuable concessions from Developers—proffers that significantly

restrict use and that run with the land. Relying upon this conditional rezoning, Developers promptly undertook efforts to bring the project to fruition, incurring nearly \$1 million in engineering, architecture, and other expenses.

After a shift in the political winds, however, the Town decided it wanted to impose still further restrictions on the project. Specifically targeting the Developers in this case, it amended its Zoning Ordinance to eliminate large retail stores as a by-right use. But Virginia law prevents the Town from making these kinds of after-the-fact changes to land-use rights. Because the Developers made extensive proffers that specified how they could develop their project, because they diligently pursued their project, because they invested approximately \$1 million in site-plan preparations in reliance on the conditional rezoning, and because they dedicated cash and property to the Town, Developers' rights were vested and the Town could not renege on the bargain. The Town's mercurial behavior in the present case is exactly the sort of local-government action that the General Assembly intended its vesting statutes to protect against.

WHEREFORE, Appellees respectfully request that this Court affirm the decision of the Circuit Court and the Board of Zoning Appeals, find that

Developers' land-use rights had vested, and hold that the downzoning ordinance, Ordinance 1450, cannot be applied against Developers.

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

Pursuant to Rule 5:26(d), the undersigned hereby certifies that twelve copies of this brief have been hand-filed with the Clerk on November 12, 2008, along with an electronic copy in .pdf format e-mailed to scvbriefs@courts.state.va.us, and that three copies of this brief have been mailed to each of the following counsel:

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