



WEINBERG LAND USE FORUM

NEWS

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WINTER 2008

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This publication may describe some of the legal matters that the attorneys of Hirschler Fleischer have worked on in the past. Of course, case results depend upon a variety of factors unique to each case and case results do not guarantee or predict a similar result in any future case undertaken by a Hirschler Fleischer attorney.

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Chapter 527: Timing and VDOT's Control

BY: JEFFREY GEIGER, ESQ.

In an effort to link transportation decisions and local land use decisions, the Virginia General Assembly and the Governor have given the Virginia Department of Transportation ("VDOT") a more prominent role in the local planning approval process. Developments in the Richmond area which consist of over 100 detached homes, 20,000 square feet of shopping center space, 150,000 square feet of general office space or other equivalent densities are now subject to review and comment by VDOT pursuant to recently-adopted legislation and new regulations promulgated by VDOT. The new legislation and regulations are commonly referred to as the "Chapter 527 regulations" and are being phased in across the Commonwealth ending July 1, 2009. The Chapter 527 regulations were implemented in the metro Richmond area on July 1, 2007.

The Chapter 527 regulations create a process by which VDOT provides local land use decision makers with comments regarding a proposed development's impact on Virginia's transportation infrastructure. Initial experience with this process revealed a new layer of unpredictability in an already unpredictable local planning approval process. This new layer of unpredictability stems from the control VDOT has over the commencement of the time frame by which VDOT must submit comments to localities.

Summary of Process

The process begins with the applicant's submittal to a locality of an application for approval of a rezoning request (a "Rezoning Approval Request") or an application for approval of a subdivision plat, site plan, or other plan of development (a "Plan Approval Request") which will have a substantial impact on state-controlled roads (collectively, a "Proposed Development"). Within ten days of the locality's receipt of a complete application for a Proposed Development, the locality must submit it to VDOT for review. The complete application must include, among other things, a traffic impact study ("TIS") prepared in accordance with the Chapter 527 regulations.

Once a complete application, including a properly-prepared TIS, is received by VDOT, the timeframe for VDOT's review commences. The specified timeframe for VDOT's review of a Rezoning Approval Request is forty-five days (thirty days for a Plan Approval Request), unless VDOT requests a meeting with the applicant. If VDOT requests a meeting, then the timeframe for VDOT's review of a Rezoning Approval Request is extended to one hundred and twenty days (ninety days for a Plan Approval Request). This timeframe for VDOT's review of a Rezoning Approval Request or a Plan Approval Request will be collectively referred to herein as the "Timeframe."

VDOT is, however, able to reset the "clock" if it determines during the Timeframe that the application is incomplete and/or the TIS was not prepared in accordance with the Chapter 527 regulations. Once VDOT is satisfied with the completeness of the application and the preparation of the TIS, it is to send written comments regarding the Proposed Development's transportation impact to the locality before the expiration of the Timeframe.

After receiving VDOT's comments, localities are to include them in the locality's official public record for the Rezoning Approval Request or the Plan Approval Request. If localities do not receive VDOT's comments regarding the Proposed Development's transportation impact within the Timeframe, then the locality may choose to proceed in the absence of VDOT's comments. There is no obligation, however, for a locality to do so and political considerations may weigh in favor of inaction by the locality.

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The Next CHAPTER:

Proposed Access Management Regulations

BY: JEFFREY GEIGER, ESQ.

New access management regulations and guidelines have been proposed by the Virginia Department of Transportation ("VDOT"). VDOT's initial proposal for both can be viewed at <http://www.virginiadot.org/PROJECTS/accessmgmt/default.asp>. Initial public comments are being considered by VDOT, and VDOT is currently revising the regulations and guidelines.

The normal public review and comment procedure is being fast-tracked to permit approval of these new regulations and guidelines by July 1, 2008 with phased implementation beginning July 1, 2008 and ending July 1, 2009. However, Senator John Watkins has introduced legislation (S.B. 370) to end this fast-tracked public review and comment. Readers are urged to contact their legislator to support this legislation, which will permit the normal and appropriate amount of public scrutiny before the new regulations and guidelines are finalized.

Here is a summary of some of the proposals being considered by VDOT:

- Applications for VDOT's approval of an entrance would be reviewed with an eye toward restricting commercial entrance locations, requiring shared entrances with adjacent properties, use of frontage or reverse frontage roads to maximize use of signalized intersections, and coordinating entrance spacing, among other considerations.
- Permitted spacing that is now 50 feet apart on state highways, could be changed to as much as a quarter of a mile between full-access entrances on principal urban highways with speed limits between 35 mph and 45 mph or no closer than 200 feet for highways with lower speeds.
- If two or more state roads provide alternative entrance locations, VDOT determines on which road the entrance will be located. VDOT does not have to consider the most convenient or applicant preferred location.
- If a road is in VDOT's six year plan or in a locality's funded roadway project, VDOT may require entrances on that road to be compatible with the roadway's ultimate design.
- VDOT would seek to require entrance owners to redesign entrances if the entrance's operational characteristic changes significantly in the future. Reconstruction, relocation, commercial entrance consolidation, or upgrading may also be required by VDOT if future characteristics of the entrance require such action.
- Funds, real property, or improvements committed as part of local planning approval would not release an applicant from fees and improvements separately required by VDOT. If a locality requires road improvements in accordance with the locality's road improvement plan, VDOT may require additional improvements. Further, proffering a road improvement does not guarantee approval of an entrance which may be necessary to justify the cost of constructing the road.
- VDOT may require submission of a traffic impact study as part of the application for approval of a new entrance. If the traffic impact study shows that a road with a rural functional classification is degraded from a level-of-service "C" to a "D" or a road with an urban functional classification is degraded from a level-of-service "D" to a "E," then the applicant would be required to submit a plan to mitigate the entrance's impacts on the road's level-of-service. If the applicant chooses not to make the improvements set out in the approved mitigation plan, then VDOT would allow only a right-in and right-out entrance or similarly restricted entrance.

While it is not clear whether all or just some of these proposals will be a part of the final access management regulations and guidelines, developers and other interested parties need to consider the possible impact these new regulations and guidelines could have on currently planned development and future development plans.

Pending ZONING CASES

THE COUNTY OF Chesterfield

Penny Koch obtained a Conditional Use to permit Centex Homes to develop recreational facilities as part of its Cambria community.

Jim Theobald represents Boyd Homes in its request to rezone approximately 40 acres from I-1 and R-7 to R-MF with CUPD to develop 273 townhomes. The request is located off Jefferson Davis Highway just south of Route 288.

Jeff Geiger successfully amended the zoning on property at Chippenham Parkway and Route 10. The Richmond Kickers Youth Soccer Club intends to develop a soccer facility on the site, including a potential future stadium.

THE TOWN OF Fredericksburg

Groundbreaking for a Courtyard by Marriott Hotel in downtown historic Fredericksburg recently occurred. **Charlie Payne** has handled all of the zoning issues for the Inns of Historic Fredericksburg, LLC, which have included a special use permit to construct a hotel in the historic district, a special use permit for parking and constructing a hotel within a flood plain, a special exception to exceed floor area ratio requirements, and a certificate of appropriateness from the architectural review board for architectural design within a historic district. This is the first hotel constructed within the historic district in over 50 years.

Charlie Payne has requested rezoning for Tower Ministries Bragg Hill Family Life Center to rezone property in the city from R-1 to Plan Development Residential (PDR) for purposes of developing a low-income housing and social services campus. The proposed development will consist of approximately 120 low-income apartment units, 168 affordable single-family housing units (work force and low income mix), 120 senior apartment units, approximately 30,000-50,000 square feet in commercial/retail office space, and a 40,000 square foot worship/educational center on 32 acres of land.

THE COUNTY OF Hanover

Chuck Rothenberg and **Jeff Geiger** rezoned the Bon Secours - Memorial Regional Medical Center to add 13 acres to the campus, to amend traffic density caps to permit an additional 300,000 square feet of medical office building space, and to amend a special exception regarding height restrictions. They also obtained an extension of an existing conditional use permit for constructing an emergency helipad.

Glenn Moore and **Caroline Nadal** have requested a Conditional Use Permit on behalf of the Diocesan Missionary Society of Virginia to allow for the development of an Episcopal Church serving the All Souls congregation along Chamberlayne Road.

THE COUNTY OF Henrico

Glenn Moore has filed to amend the zoning for the Beth Shalom Lifecare Community at John Rolfe Parkway. A new assisted living building is planned, as well as an update to the architecture on The Home. A cultural arts center is proposed and additional access to the site is being requested.

Glenn Moore is representing an automobile dealer on West Broad Street in rezoning and a street vacation of property adjacent to the existing dealership.

Chuck Rothenberg received a positive recommendation from the Planning Commission for a Provisional Use Permit at the site of the former Ukrop's grocery store on Patterson Avenue near Gaskins Road. Bon Secours has leased the property from Ukrop's and intends to improve the building and site and locate medical offices on the property.

Jim Theobald and **Caroline Nadal** are representing Pavillion Development in amending the zoning in the area of Bowl America in Downtown Short Pump in order to permit the development of a Merchant Tire and Automotive Center.

Jim Theobald and **Penny Koch** are seeking zoning for Katherman Investments Inc. at the corner of Gaskins and Three Chopt Road to rezone the remainder of the property at the intersection to an office designation as a continuation of the recently-developed office condominiums known as Gaskins Professional Offices.

Jim Theobald will represent Partners Financial Federal Credit Union located at Route 1 and New York Avenue in amending their current zoning to obtain an ATM and drive through teller, as well as rezoning the property immediately west of the site as a continuation of its offices.

THE COUNTY OF King George

Section 30, LLC has asked **Charlie Payne** to assist with a rezoning in King George County from R-2 to C-2 to address some potential nonconforming set back issues. This will assist the client with any future sale of the property.

Caroline Nadal is representing 7-11 in its request for a Provisional Use Permit to permit 24 hour operation at the proposed Shops at White Oak Village on East Laburnum Avenue near its interchange with I-64.

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Jurisdictional UPDATES

THE TOWN OF Ashland

The Town's Comprehensive Plan update process is under way. The current update is anticipated to result in a major overhaul of the Town's Comprehensive Plan and contain more in the nature of specific recommendations for land uses within the Town, followed by policy

statements. The Town will also be taking another look at the mapping under the Land Use Plan. Consequently, if you have an interest in land in the Town of Ashland, you should be aware of how the mapping could affect the future development potential of your property.

THE COUNTY OF Chesterfield

With four new members elected to the Board, changes may be on the horizon in Chesterfield County. The recently adopted Upper Swift Creek Plan may be re-examined by the new Board. Changes to this plan are likely to center around slowing growth perceived to have an impact on water quality in the Swift Creek Reservoir. "Level of Service" standards are also being proposed for this area to be taken into consideration for rezonings. The Board may also consider adopting a single, county-wide comprehensive plan for the county, as opposed to the current area-specific land use plans.

Also in the area of transportation funding, the new Board may be asked to consider dedicating part of the real estate tax rate to fund road improvements in the County. Doing so could raise as much as \$220 million over ten years. The County may also consider diverting tax money saved by the cap on business, professional and occupation licensing taxes, a move that could provide another \$110 million.

The Board is also likely to consider a change in the cash proffer amount. An increase from the current maximum of \$15,600 to \$21,709 has been proposed by the County administration. In addition, the new Board indicated a willingness to adopt long discussed impact fees on non-cash proffer residential lots at its organizational meeting on January 9th. It is not clear whether the Board will adopt the impact fees as a component to a comprehensive transportation funding plan or alone as a new revenue source. To consider its options, the Board deferred action on impact fees for thirty days.

Chesterfield is also proposing "low impact design" standards in the upper Swift Creek area relating to water quality which will likely result in increased development costs and a reduction in density in certain instances – consult your engineer early!!

A new R-5 zoning classification to permit cluster development as a matter of right is being considered.

Also, a new mixed-use ordinance for Traditional Neighborhood Development is before the Board for approval

THE COUNTY OF Henrico

The Independent Commission Examining Land Purchases will likely issue its findings by the end of the month. The Board of Supervisors is expected to hold a worksession on the report sometime in February or early March.

Randy Silber has been promoted to Deputy County Manager replacing retiring Harvey Hinson, who will be sorely missed for his many contributions. Able real estate lawyer George Elmore, Assistant County Attorney, recently retired after years of capable and loyal service to the County.

Contracts for the construction of Gayton Road Extended and the next phase of the John Rolfe Parkway are about to be let.

THE CITY OF Richmond

Roy Benbow of the Planning Department reports that the City is working on amendments to the RF-1 and RF-2 zoning districts. Some of the changes are in the nature of cleanup matters which have come to the attention of the Planning Department as a result of dealing with a zoning request for one of the districts. The Planning Department is seeking to insert base requirements in the districts relating to planning matters such as parking, window requirements, building heights, etc. The Ordinance amendment language has been drafted and will be submitted to the Planning Commission for further processing prior to the end of January, 2008. Additionally, the City is in the process of enacting an amendment to the Zoning Ordinance

establishing a UB-2 zoning district. The UB-2 district will allow some more intense uses than the UB-1 district and provide more flexibility with respect to height requirements.

As has been recently publicized, the downtown portion of the City's Comprehensive Plan is now under review.

Finally, the City is considering the adoption of an amendment to the Zoning Ordinance to broaden the powers of the Board of Zoning Appeals to grant special exceptions for reduced parking requirements in certain circumstances.



Jim Theobald is representing Gumenick Properties in obtaining a Special Use Permit to construct two additional apartment buildings and other site amenities at Malvern Manor.

Glenn Moore and **Jenn Rosen** were successful in representing JJH Corporation in connection with an R-4 Conditional rezoning case to allow development of an upscale residential community on Duryea Drive, off Old Gun Road in South Richmond.



Charlie Payne represents Jefferson Contracting Corporation in a proffer amendment application to allow them to construct a 40,000 square foot professional office building. The current proffers restrict development to only a convenience store.



Jenn Rosen, Jeff Geiger, and Chuck Rothenberg represent Verizon in a number of requests for communication tower locations in the Cities of Richmond and Colonial Heights, and in Chesterfield, Henrico and Caroline Counties.



John McManus and **Charlie Payne** represent Smith Packett in a rezoning application to provide an assisted living campus and nursing home in Stafford County. John has already successfully assisted the client with a text amendment change to the zoning ordinance and comprehensive plan to allow this type of development and Charlie is now helping with the actual rezoning from M-1 (light industrial) and A-1(Agricultural) to Urban Residential. Two hundred thirty-four residential units, plus the nursing home, are proposed.

Charlie Payne is assisting Stacy Custom Homes with new county ordinance language to allow for a waiver to urban service rule requirements (e.g. requirement to connect to public water and sewer) and a request for same to allow them to construct 13 single family homes.

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VDOT's Control and its Effect

The Timeframe appears to provide a specific number of days in which VDOT must comment on a Proposed Development's transportation impacts, after which localities may choose to proceed if VDOT's comments have not been received. The specified number of days, however, is not a reliable measure of the actual number of days which will be required to reach the point where a locality may act.

The commencement of the Timeframe rests solely in the discretion of VDOT. Commencement occurs upon VDOT's receipt of a complete application, which must include a TIS prepared in accordance with the Chapter 527 regulations. Whether a TIS is prepared in accordance with the Chapter 527 regulations is a determination made by VDOT in its sole discretion. Thus, VDOT's approval of the preparation of the TIS determines whether the Timeframe commenced upon VDOT's receipt of the TIS.

VDOT has provided some guidance as to what is required for a TIS to be deemed prepared in accordance with the Chapter 527 regulations. However, this guidance provides only the minimum elements to be included in a TIS. The necessary additional elements are to be determined by VDOT, in its sole discretion, based "upon the scale and potential impact of the specific development proposal being addressed by the TIS." Furthermore, VDOT is the ultimate arbiter in determining whether a TIS uses approved methodologies and assumptions. As a result, the requirements for a properly-prepared TIS can be unpredictable and applicants cannot assume their initial TIS submission will be sufficient to commence the Timeframe. If VDOT determines that a TIS was not prepared in accordance with the Chapter 527 regulations, then VDOT will inform the applicant of its determination by returning the TIS to the applicant with suggested changes. Any time VDOT used for its review of the TIS is erased.

After receiving VDOT's comments, the applicant will need to revise the TIS and resubmit it to the locality. The locality will then resubmit the revised TIS to VDOT. Upon receipt of the applicant's revised TIS, VDOT has the full length of time provided by the Timeframe to review the revised TIS. Once VDOT determines that the TIS was prepared in accordance with the Chapter 527 regulations, then the Timeframe will have commenced upon the date VDOT received the properly prepared TIS and VDOT's comments regarding transportation impacts will be due to the locality prior to the expiration of the Timeframe.

Initial Experience

Our initial experience with VDOT reveals that there are at least two areas of unpredictability that can stem from the control given to VDOT.

The first is that VDOT may wait until the end of the Timeframe before alerting an

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applicant that a TIS is not properly prepared. There is no requirement in the Chapter 527 regulations that VDOT alert the applicant any earlier. As a result, valuable time can be lost while VDOT determines whether a TIS is properly prepared.

The second effect is that incorporating all of VDOT's suggested changes does not guarantee that the revised TIS will be deemed properly prepared. VDOT may suggest additional changes to a revised TIS, even if the additional changes are unrelated to the initial suggested changes. If VDOT does so, the "clock" is reset again.

Based on this experience, developers and other interested parties cannot assume that a TIS or a revised TIS submitted to VDOT will be sufficient to commence the Timeframe. Without a firm commencement, forecasting when a locality may be able to act will be difficult and draw out the process longer than originally anticipated.

Recommendations

As a result, developers and other interested parties must plan for and contend with the possibility of delays and added expense in this new VDOT review and comment process.

The primary way developers and other interested parties can minimize these effects is to request a scope of work meeting with VDOT. Holding the scope of work meeting will facilitate communication and an understanding about the scope, elements, methodologies, and assumptions to be used in preparing the TIS. However, holding the scope of work meeting does not guarantee that VDOT will deem the applicant's initial TIS properly prepared. VDOT may still request changes to a TIS even though it was prepared pursuant to VDOT's comments from the scope of work meeting. In spite of this, applicants should request a scope of work meeting to reduce the cost of producing a properly-prepared TIS, to

minimize any future changes VDOT may require, and to shorten delays which may be caused by VDOT's review of the TIS.

Developers should also endeavor to obtain greater flexibility in real estate purchase contracts to contend with this new process. Such flexibility could be achieved by insisting on longer contingency periods and/or providing a mechanism for automatic extension of contingency periods should VDOT's review and comment process take longer than initially anticipated. Contingency provisions could also specifically provide the purchaser with the right to withdraw requests for local approval if the developer cannot agree to approval conditions imposed by the locality as a result of VDOT's comments..

Given the control VDOT has over the review and comment process imposed by the Chapter 527 regulations, developers and other interested parties must prepare for and contend with a local planning approval process that is now even more unpredictable.