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Virginia Local Government Law

HB 1250, Vested Rights and a New Private SAGA

By: Andrew McRoberts. ***This was posted Tuesday, March 2nd, 2010***

Did you feel it? HB 1250 has been approved by the Virginia General Assembly. And with it, a major shift has occurred in the law of vested rights.

Vested rights is a legal principle arising from common law under which a developer can acquire the property right to develop a specific project despite a change in zoning which would no longer allow the project.

In 1998, when codifying the common law of vested rights in Virginia Code § 15.2-2307, the General Assembly listed certain governmental approvals that were "deemed" to be "significant affirmative governmental acts allowing development of a specific project." It codified the various acts that the Virginia Supreme Court had held were "significant affirmative governmental acts" — or SAGAs — that, together with good faith reliance and substantial sums spent in diligent pursuit, could lead to vested rights in a specific project despite a subsequent change in zoning. The codification added two more acts that the Supreme Court had never held were sufficient to be a SAGA — approval of a variance, and approval of a site plan (also called a plan of development).

Question: What did all of these governmental acts that were "deemed" to be a SAGA have in common?

Answer: A public process with public notice and a chance for public review. Granted, some localities approve site plans administratively, but many do not, or at least, the locality has the option for a public process before the planning commission or even the governing body.

But, with HB 1250, the General Assembly has added another act that is "deemed" to be a SAGA, but the act is *not* done in public. By its nature, it happens in private. A zoning administrator issues a "written order, requirement, decision or determination regarding the permissibility of a specific use or density" to a developer that meets the other requirements of HB 1250, and it is a SAGA.

No public review. No public notice. No other agencies reviewing it. Perhaps no one else in the local government or even the planning or zoning office even knowing.

Little chance of elected officials learning. The administrative, non-public aspect of this has received criticism, such as in the Roanoke Times editorial, "A Letter isn't Enough," and Beth Wellington's blog article, "Virginia General Assembly's Gift to Stealth Development," and deservedly so.

Despite calls for increased transparency in government, and the General Assembly's requirement that local governments do nearly everything in the sunshine under the Freedom of Information Act, HB 1250 is a step in the opposite direction. With HB 1250, developers could start acquiring property rights from a government employee's letter, and perhaps in some cases, even if the employee gets the law wrong. In such a case, this could potentially result in vested rights even if the zoning ordinance does not and has never allowed the development.

Time will tell if HB 1250 is a large expansion of vested rights or not. It does have limitations and requirements. To be a SAGA, the zoning administrator's act must "no longer be subject to appeal" and it must be "no longer subject to change, modification, or reversal under" Virginia Code § 15.2-2311(C).

However, whether HB 1250 benefits many or just a few, this step is a big change by its very nature. It is a step toward government in the dark to the detriment of the public will as expressed by its elected officials. A major shift, indeed.