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2300 Wilson Blvd., 7th Floor
Arlington, VA 22201
703.525.4000
www.beankinney.com

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Lorton Landfill Dispute Nearing Board of Supervisors' Review

By Zachary Williams

A multiyear land use battle over the future of the EnviroSolutions, Inc. (ESI) landfill in Lorton, Virginia is set to culminate in the Fairfax Board of Supervisors' consideration of the proposed extended operation of the landfill until 2040. In May 2013, ESI submitted an application for a special exception amendment, along with other related land use requests, to the Fairfax County Board of Supervisors. In this application, ESI set forth its proposals for the future operation of the landfill site. ESI's application has created controversy in the Lorton community as residential, business and public advocacy groups have voiced strong and differing opinions as to the best course of action at the landfill site.

History of the Landfill

At issue is ESI's proposal to extend the operation of the 30-year-old construction debris landfill until 2040. The landfill sits on property totaling approximately 250 acres and borders Interstate 95 to the west, just north of the Occoquan River. The current land use approvals for the site allow landfill disposal activities to continue until January 1, 2019. The 2019 closure date was a result of a development condition that ESI negotiated with the Lorton community as part of its application for a 2007 special exception amendment for the site. At the time ESI submitted its 2007 application, the Lorton community agreed to support the application given that a development condition required the landfill to be closed when the final elevation reached 412 feet above sea level, or by January 1, 2019, whichever came first. Another development condition required ESI to work with the Fairfax County Park Authority to develop the entire site into a public park following the closure of the landfill.

The New Plan for the Landfill

ESI now seeks to operate the landfill until 2040 and submitted a new special exception amendment in 2013 requesting the board's approval to do so. Instead of developing a public park, ESI now proposes to develop the landfill into a Green Energy Park to include wind turbines, solar panels and geothermal piping. The ESI application states that the Green Energy Park will be developed over several phases, each phase lasting 4 to6 years. In addition to special exception approval,

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the Green Energy Park proposals require a "15.2-2232 review" by the Planning Commission. Section 15.2-2232 of the Virginia Code requires the Planning Commission to determine if the location, character and extent of the proposal is substantially in accord with the adopted comprehensive plan. ESI also proposes to develop portions of the closed landfill site into a baseball hitting field, golf driving range and radio controlled aircraft field, each requiring its own special exception approval.

The Dispute

While many are touting the Green Energy Park proposals as a unique and important renewable energy project for Fairfax County, Lorton community groups, led by the South County Federation, remain fiercely opposed to ESI's application. The dispute highlights the benefits and risks of negotiating development conditions as part of land use applications. The 2007 development conditions played an important role in fostering community support for ESI's prior application. Now, those same community groups feel that ESI has reneged on its promises. ESI's 2013 application has led to distrust in the community as to whether ESI will follow through on the Green Energy Park proposals. ESI's proposed stormwater management at the landfill site and traffic concerns have also played a role in the ongoing debate on the application.

What's Next?

Fairfax County released a staff report on February 13, 2014 recommending approval of the ESI application, including the special exception amendment and required 2232 reviews. The application next heads to the Planning Commission for review and then to the Board of Supervisors for a public hearing.

Zachary Williams is an associate attorney practicing in the areas of land use law and litigation. He can be reached at 703.525.4000 or zwilliams@beankinney.com.

I Know My (Vested) Rights! Developing a Project in a Changing Climate

By Matthew Roberts

More than one landowner has been disappointed to find out they cannot develop their property how they would like. This disappointment can be compounded if the landowner bought a property based on its zoning potential, but the locality then rezoned the property to remove the use, essentially pulling the rug out from under them. Luckily, if the right circumstances exist, there are rules protecting landowners' development expectations. This article will focus on the first element of those rules - obtaining a significant, affirmative governmental act.

Rule #1 – You are not entitled to your current zoning status.

Generally speaking, you do not have a right to your current zoning status. This means that even if you bought a property with an expectation of using it a certain way, a locality may always change the property's zoning to another category. This can cause dramatic swings in property value for landowners and can defeat development expectations.

Rule #2 – Sometimes you are entitled to your zoning status.

Yet, Virginia recognizes that certain steps are important enough that landowners should receive the benefit of using their property a certain way. Under Virginia's vested rights statute, Va. Code sec. 15.2-2307, a landowner has vested their rights in a land use if three things have occurred:

1. the landowner obtained a significant affirmative governmental act (SAGA),
2. the landowner relies on the SAGA in good faith, and
3. in reliance on the SAGA, the landowner incurs extensive obligations or substantial expenses in diligent pursuit of their project.

What Qualifies as a SAGA?

Clearing the first hurdle by obtaining a SAGA can be one of the more challenging elements in the vested rights analysis. By statute, there are at least seven governmental actions that qualify as a SAGA, although the statutory list is not exclusive. These include:

1. the locality approves proffers during a rezoning that specify a use for the property;

2. the locality approves a rezoning application for a certain use or density;

3. the locality or local board of zoning appeals grants a special exception or special use permit;

4. the board of zoning appeals approves a variance;

5. the locality approves a preliminary subdivision plat or site plan and the applicant diligently pursues final approval of the plat or site plan;

6. the locality approves the final subdivision plat or site plan; or

7. the local zoning administrator issues a written order, requirement, decision or determination regarding the permissibility of a specific use or density on the property and this decision is no longer subject to change or appeal.

The Virginia Supreme Court has also held that a SAGA exists if a locality expressly and unambiguously approves or commits to a project. But it is often unclear which government actions count under this standard. The Supreme Court has found that letters of support and certifications of legal compliance from a board of supervisors were sufficient, as were certain supportive statements by local officials about a project's chances for approval.

Board of Supervisors v. McQueen

On the other hand, the Virginia Supreme Court has now held on multiple occasions that letters confirming the ability to use property a certain way, without more, do not count as SAGAs. Most recently, the Virginia Supreme Court held in *Board of Supervisors v. McQueen* that a "zoning compliance letter" did not constitute a SAGA. In *McQueen*, a landowner asked the court to find he had obtained a SAGA to build a cluster subdivision when the local zoning administrator issued a letter stating the property complied with the zoning regulations to build such a subdivision. The court held the letter was not a SAGA, because it did not affirmatively approve the cluster subdivision project or commit the county to allowing the project. The court compared the zoning compliance letter to "zoning verification" letters, which the court previously held did not count as SAGAs. Like the zoning verification letter, a zoning compliance letter fell short of the necessary approval – it simply confirmed the property complied with the appropriate regulations.

Conclusion

In the end, obtaining a SAGA depends on how close the locality comes to unambiguously supporting or committing to a particular use of property. Under the vested rights statute, clear approval is necessary, either because the locality approved a zoning permit or approved the relevant plats and plans. Outside of the statute, landowners must get positive, clear affirmances from their localities that the use will be approved. If a landowner can nudge their locality that far, they have likely cleared a significant hurdle in obtaining their vested rights.

Matthew Roberts is an associate attorney practicing in the areas of land use law and real estate. He can be reached at 703.525.4000 or mroberts@beankinney.com.

Contact Us

2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com