REPORT OF THE

SUBCOMMITTEE STUDYING THE

IMPACT OF JUDICIAL DECISIONS

ON ZONING POWERS

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 45

COMMONWEALTH OF VIRGINIA
RICHMOND
1983

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Administrative and Clerical

Office of Clerk, House of Delegates

* Floyd C. Bagley, Bernard S. Cohen, and Clinton Miller also were initial members of the Subcommittee.

Report of the
Subcommittee Studying the

Impact of Judicial Decisions

on Zoning Powers
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January, 1983

To: Honorable Charles S. Robb, Governor of Virginia
and
The General Assembly of Virginia

SUMMARY

This study was occasioned by the allegation of many local officials that Virginia's courts no longer observe the presumption of legislative validity and the fairly debatable rule in zoning cases. The Subcommittee found that the courts continue to recognize and apply these principles. While local governments in the past frequently have failed to have their zoning actions upheld, the Subcommittee is reassured by recent decisions upholding local governing bodies in their actions and reiterating specifically the principles in questions. Thus there is no need for additional statutory language in this regard.

The Subcommittee does recommend the amendment of two sections of the Code of Virginia, as follows:

1. Amend § 15.1-489 to clarify that zoning ordinances should be designed to give reasonable consideration to each [emphasis added] of the purposes of zoning, as applicable to a particular case,

2. Amend § 15.1-490 to delete obsolete language no longer needed in view of the § 15.1-446.1 requirement that all localities adopt a comprehensive plan by July 1, 1980.

DISCUSSION

1. The Supreme Court of Virginia several decades ago succinctly summarized the traditional understanding of the law with regard to the exercise of the zoning power by local governments as follows:

> The general principles applicable to a judicial review of the validity of zoning ordinances are well settled. The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained. . . The exercise of the police power is subject to the constitutional guarantee that no property shall be taken without due process of law and where the police power conflicts with the Constitution the latter is supreme, but courts will not restrain the exercise of such power except when the conflict is clear.[1]

This study was created in response to a perception by many local officials that the courts in Virginia have departed from the presumption of legislative validity and that the "fairly debatable" rule no longer applies.

This perception was reinforced by a study conducted by two law professors for the Joint Land Use Task Force of the Virginia Association of Counties and the Virginia Municipal League. The study

was commissioned in 1979 and the Report, entitled Judicial Review of Local Land Use Decisions in Virginia , was issued in July, 1981. Among the major conclusions of the Report were the following:

1. " [The] preeminent criterion of the validity of a local zoning action is whether the action is consistent with the land use preferences of the individual developer. . . As a result, the Virginia Supreme Court has decided these zoning cases as if only one of the eight purposes of zoning set out in the enabling act is valid—'to encourage economic development activities'." (p. 135)

2. The Court [has] significantly modified the process of review. Rather than examining only whether the local legislature had a rational basis for concluding that its decision would serve the general welfare, "the court treated the general welfare inquiry as a de novo question on review. This standard of review no longer limited the reviewing court to examining the basis for the legislative action. Instead, the reviewing court now asked whether and to what extent the challenged zoning decision would serve the general welfare. . . [This] subjects the local legislative decision to an unusually high level of scrutiny . . . [and] eliminates much of the substantial deference accorded to local zoning decisions [in early cases] . . ." (pp. 138-139)

3. " [The Court has] severely constrained the legislature's 'wide' discretion as to both the ends and the means of land use regulation. It puts the burden of proof on the legislature to demonstrate the reasonableness of its actions while presuming. . . that 'him who assails' the local action is the representative of the public interest." (p. 151)

These and other conclusions in the Task Force Report are by no means accepted by all as accurately interpreting the position of the Court. They are cited simply to indicate the context within which this Subcommittee came to examine the question of whether additional statutory guidance was needed.

2. The Subcommittee afforded concerned local government officials and interested private citizens in all parts of the State an extensive opportunity to express their views. Hearings were held in Manassas (December 15, 1980), Virginia Beach (January 6, 1981), Harrisonburg (August 25, 1981), Roanoke (September 24 1981), Richmond (October 22, 1981), Fairfax (December 16, 1981), and Leesburg (July 14, 1982). In addition, the Subcommittee held a two-day work session with the VACO-VML Joint Land Use Task Force on May 26, and 27 1982, at Wintergreen.

Much of the public hearing testimony echoed the Task Force Report. Local officials generally claimed that the courts were not following the presumption of legislative validity. They saw a need for legislation which would emphasize that all the purposes of zoning should be considered in zoning decisions. Much of the testimony went to the point that the localities needed tools to control the rate of growth so as to match their ability to provide public services. A variant of this theme from some localities, Prince William County in particular, was that the localities needed more power to require land developers to bear the cost of public services occasioned by development.

Others, principally those interested in development, presented an opposing view. Their position was that the existing law was sufficient and that the problem primarily rested with the local governments themselves. Local governments need to have a defendable rationale behind their decisions and to have a reasonable basis for their actions. Even if it were conceded that the Court had been somewhat "pro-development" in the past decade, according to this view, the trend of decisions in the last couple of years was to reassert traditional presumptions of legislative validity and to uphold local decisions.

3. The Subcommittee understands the law and the intent of the General Assembly to be the traditional "fairly debatable" rule which gives a presumption of validity to the zoning decisions of the local legislature. The Subcommittee has listened to the testimony, considered the Task Force Report, and examined the major decisions of the Court. It is obvious that from the mid-1950's to the end of the 1970's the Court frequently did hold against the local governing body in zoning cases. It is less clear that in so doing the Court took a position that could be characterized as a rejection of the fairly debatable rule.

However one interprets the past era, a reading of the most recent opinions of the Court assures the Subcommittee that the fairly debatable rule is being followed. The Joint Land Use Task Force Report itself took cognizance of three recent cases under the heading "A New Era?" In Board of Supervisors of Loudoun County v. Lerner , 221 Va. 30 (1980), the Supreme Court upheld the local governing body's denial of a request to rezone a tract for a regional shopping center. It found with regard to the comprehensive plan's definition of the minimum standard for such a shopping center, "that the Board, acting in its own discretion, was entitled to interpret the term in the manner it

thought would best implement the Comprehensive Plan, provided the interpretation was reasonable within the context of the language employed in the Plan." (221 Va., at 36)

Board of Supervisors of Fairfax County v. Jackson , 221 Va. 328 (1980), upheld the denial of the rezoning of a 1.5 acre residential lot to a higher density. The Court found both the existing and proposed zoning classifications to be reasonable and stated: "When, as here, the underlying zoning and the new zoning are both appropriate for the lot in question, a classic case of a 'fairly debatable' issue is presented. Under such circumstances, it is not the property owner, or the courts, but the legislative body which has the prerogative to choose the applicable classification." (221 Va., at 335) In Board of Supervisors of Roanoke County v. International Funeral Services, Inc. , 221 Va. 840 (1981) the Court upheld the denial of rezoning of a tract lying in primarily a city residential area from residential to business use as a funeral home.

While the Court has not uniformly upheld the decisions of local governing bodies, it has done so in all recent cases where the actions of the governing body were found to be reasonable. We believe that the Court was stating the controlling view of the law in Lerner:

Legislative action is reasonable if the matter in issue is fairly debatable. County of Fairfax v. Parker , 186 Va 675, 680, 44 S.E.2d 9, 12 (1947). An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. Fairfax County v. Williams , 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975).

In Fairfax County v. Snell Corp. , 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974), we established this test for determining whether the presumption of reasonableness of zoning action should prevail or has been overcome:

"Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance 'must be sustained'. If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained."

Upon review of a trial court's finding that the denial of a rezoning request is unreasonable, we accord the court's finding, as with the usual case, a presumption of correctness, but we also give full credit to the presumption of validity of the legislative action involved in the denial and then, assimilating the two presumptions, we examine the record to determine whether the evidence sustains the court's finding. See Fairfax County v. Williams , 216 Va. at 52, 58, 216 S.E.2d at 36, 40. In other words, the presumption of validity of legislative actions does not disappear when a trial court finds that the action is unreasonable; the presumption accompanies the legislative action when the latter is brought to this court for review, and it is viable until this Court holds with the trial court that the legislative action is unreasonable. (221 Va, at 34-35)

The Subcommittee believes the recent trend of cases upholds local zoning authority and applauds the Court's clear statement above. Consequently, the Subcommittee finds no need for substantial additional statutory amendments.

4. Section 15.1-489 of the Code of Virginia provides eight specific purposes of zoning. As noted above, the Joint Task Force Report concluded that the courts were focusing almost exclusively on only one, "to encourage economic development." The Subcommittee recommends that the section be amended to provide that zoning ordinances shall be designed "to give reasonable consideration to each of the following purposes, where applicable." The Subcommittee believes the amendment to be more in the way of clarifying or reiterating the present intent of the statute rather than making a major change. The new language, however, should reassure local governments that all of the purposes may be considered. At the same time, it recognizes that not all purposes will be of equal weight in each case.

5. The amendments proposed to § 15.1-490 are housekeeping ones which delete unnecessary language. Each locality by § 15.1-446.1 of the Code was required to have adopted a comprehensive plan by April 1, 1980. While the Subcommittee discussed but took no final action on the matter, there was substantial support on the Subcommittee for a suggestion that zoning ordinances should be both drawn "and applied" with reasonable consideration to the various elements enumerated in § 15.1-490.

6. In summary, the intent of the General Assembly has been, and is, that the zoning decisions of local governments carry a presumption of legislative validity and that the fairly debatable rule

should be applied to their actions. Our review leads to the conclusion the courts do continue to recognize and apply these principles.

Respectfully submitted,

C. Richard Cranwell, Chairman
Gladys B. Keating
S. Wallace Stieffen
Warren E. Barry
Carl S. Bowmer
W. E. Cundiff
John G. Kines, Jr.
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Elbert Waldron

DISSENTING STATEMENT OF

KATHLEEN SEEFELDT

I find that I cannot concur with the general conclusions reached in this report. Specifically, I disagree with the conclusions that a reading of recent Supreme Court decisions provides assurance that the fairly debatable rule is being followed and that there is no need for additional statutory language. A few recent decisions in favor of localities does not completely overcome a reverse trend-line extending back almost 25 years. It would be preferable in my view to enact certain statutory amendments, such as specifically making comprehensive plan implementation a ninth purpose of zoning in § 15.1-489 of the Code of Virginia.

HOUSE RESOLUTION NO. 24

House Resolution Requesting the Counties, Cities and Towns Committee of the House of Delegates to study the planning procedures of local governments and the relationship of zoning ordinances, subdivision ordinances and court decisions bearing thereon.

WHEREAS, a subdivision ordinance is a device to implement the orderly development of land within certain zones; and

WHEREAS, some court decisions have cast doubt upon the effectiveness of the preparation and adoption of comprehensive plans, zoning ordinances and subdivision ordances by local governments; and

WHEREAS, it is deemed advisable to review the statutes pertaining to the adoption of comprehensive plans, zoning ordinances and subdivision ordinances in view of such court decisions to determine if the intent of the General Assembly in such matters is being implemented; now, therefore, be it

RESOLVED by the House of Delegates, That its Committee on Counties, Cities and Towns is hereby requested to study the implementation and effectiveness of the comprehensive plan, zoning ordinances and subdivision ordinances in the various local governments of the Commonwealth.

Agencies and officials of the Commonwealth and its political subdicisions are requested to cooperate with the Committee in this study. ordinances and court decisions bearing thereon.

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Agencies and officials of the Commonwealth and its political subdivisions are requested to cooperate with the Committee in this study.