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The Virginia Supreme Court Has Made it Easier for Neighbors to Challenge Land Use Approvals - Here's Why it Matters

By: T. Preston Lloyd, Jr.

The concept of legal standing made headlines in high-profile U.S. Supreme Court cases this summer; but it is just as critical for cases in Virginia state courts. In the land use and real estate development context, the Supreme Court of Virginia has issued a series of decisions in recent years making it easier for neighboring landowners to challenge a locality's land use approvals. This increased litigation risk should be considered by applicants seeking special use permits, rezonings, and other local government approvals for their projects.

What is standing?

To bring a lawsuit in any court, a plaintiff must have proper standing to move forward with their case. In short, a plaintiff must allege that they have suffered or will likely suffer an injury from the defendant's conduct and that a court can provide a remedy to address the harm.

Standing must be established for a court to address the substantive merits of a lawsuit. Judges do not want to decide hypothetical cases, and standing helps ensure that courts review actual controversies with real stakes for the parties involved.

How does a neighboring landowner establish standing in land use cases?

In the land use context, neighboring landowners may contest a proposed development, and, in some cases, threaten litigation against the local government and applicant.

A decade ago, the Virginia Supreme Court articulated a two-part test to determine whether a party who does not own the property that is the subject of a locality's land use permit approval can challenge the decision in court. In *Friends of the Rappahannock v. Caroline County Board of*

Supervisors, the Court held that a plaintiff can only establish standing by meeting two criteria:

1. The party owns or occupies real property within or in close proximity to the property that is the subject of the land use determination (the "proximity" requirement); and
2. The party must allege facts that show "particularized harm" to a personal or proprietary right that is distinct from that suffered by the public in general (the "particularized harm" requirement).[1]

Virginia courts have since relied on this test to determine third-party standing in challenges to land use decisions.

The *Friends of the Rappahannock* case involved an appeal of the Caroline County Board of Supervisors' approval of a special exception permit for the development of a sand and gravel mining operation near the Rappahannock River. The Board approved the permit, subject to requirements that the operator comply with pollution and noise regulations. Neighbors challenged the decision on a variety of grounds, such as that the industrial activity might interfere with hunting activities, deter potential tenants from renting a farmhouse on adjacent land, disrupt their quiet enjoyment of the area with increased commercial boat traffic, and generate particulate pollution harmful to their health, including that of a child with asthma.[2]

The Court held that even if the landowner plaintiffs were located in geographic proximity to the mining site, they failed to allege facts required to demonstrate the *particularized harm* prong of the two-part test. Instead, these were "conclusory allegations" about possible harms, meaning that the plaintiffs failed to point to specific facts that would demonstrate how the particular mining operation would cause off-site harms to these landowners distinct from harms to the general public.[3] In other words, these were speculative, somewhat generic claims about possible effects of industrial activity – they lacked sufficient specificity to establish standing. The Court also placed significant weight on how the site's zoning allowed for mining with a special exception permit because the County could impose conditions to limit the operation's negative effects. The landowners failed to allege any facts to establish that the permit's conditions would fail to protect their property rights.[4]

Recent Virginia Supreme Court decisions have expanded what kinds of alleged harms can form the basis for neighbors to challenge land use approvals.

Some cases involve a straightforward application of the *Friends of the Rappahannock* two-part standing test. For example, in 2021, the Virginia Supreme Court held that while the City of Alexandria's approval of an application to renovate a historic property may result in the loss of a historic residence and open space, such an alleged harm is shared by the public and did not constitute a particularized injury to a historic preservation group which challenged the decision.[5] Thus, the group lacked standing.[6]

But since 2022, the Court has handed down a trio of decisions which expand the Court's prior concept of standing, opening the courthouse doors to plaintiffs alleging somewhat speculative or general harms from nearby development. These cases have focused on the second prong of the *Friends of the Rappahannock* test by broadening the kinds of alleged impacts of a land use permit that qualify as "particularized" harms.

In *Anders Larsen Trust v. Board of Supervisors of Fairfax County* (2022), the Virginia Supreme Court found that neighboring landowners' concerns about a residential treatment center's impact on traffic and property values could establish a particularized harm, distinct from that to the wider public.[7]

The lawsuit arose from a County Zoning Administrator's determination that a treatment center could be operated "by right" in a residential neighborhood, so it did not require a special use permit. The Board of Zoning Appeals later affirmed this decision and the neighbors appealed to the local circuit court. While the circuit court held that the neighbors lacked standing, the Virginia Supreme Court saw things differently. The Court concluded that the neighbors alleged particularized harm to establish standing when they contended the center would generate increased traffic in their neighborhood and diminish their property values. Given the circumstances of a commercial use entering what had been an entirely residential neighborhood and the fact that the neighbors' properties were immediately adjacent to the center site, the Court found that "[t]heir allegations of diminished property values and increased traffic to and from the residence rise beyond mere speculation and suffice to allege standing."[8]

The following month, the Virginia Supreme Court reached a similar conclusion in *Seymour v. Roanoke County Board of Supervisors*, holding that traffic impacts can form the basis of standing.[9] The *Seymour* case involved a challenge to Roanoke County's issuance of a special use permit for a raptor building and other structures at the Southwest Virginia Wildlife Center of Roanoke. Neighbors who shared a private road easement with the Center argued that increased traffic associated with the project would impose new maintenance costs, endanger those who use the easement, generate dust,

noise, and light pollution, and negatively affect property values.[10] Despite the similarities to *Friends of the Rappahannock* – where the Court held that nearby landowners lacked standing – the Court concluded that these alleged harms could form the required showing of particularized harm.[11]

Most recently, in *Morgan v. Board of Supervisors of Hanover County*, the Virginia Supreme Court endorsed a broad view of standing in a challenge to the permitting of a Wegmans distribution and warehousing facility.[12] The Court allowed alleged traffic impacts and light pollution, among other purported harms, to form the basis for standing.

Morgan arose from Hanover County's approval of a rezoning and a special exception for the Wegmans project. In 1995, the Hanover Board of Supervisors rezoned the 217-acre property to allow for light industrial land uses with various proffered conditions. However, the property sat vacant until 2019, when Wegmans sought to purchase the property for its facility. In 2020, the Supervisors approved an application to amend the rezoning case, remove conditions associated with the 1995 rezoning, and add new conditions to the property. They also approved a special exception to increase the maximum height of buildings.

Neighboring homeowners objected to the approvals and brought a suit challenging their legal validity on various grounds. To establish standing, the neighbors alleged that a number of anticipated impacts constituted particularized harms beyond those to the public. They alleged the development would create congestion on local roads, cause flooding on nearby property, and generate night sky light pollution and excessive noise.[13] Once again, the concerns seemed similar to those at issue in *Friends of the Rappahannock* because they could be construed as speculations about harms to the public at large. But the Court concluded these alleged harms were sufficiently specific to Wegmans's intended use of the land and distinct enough from impacts on the public that the neighbors could move forward with their case.[14]

Although Wegmans petitioned for a rehearing, the Court declined to reconsider its decision. Members of the public and private sectors have expressed concern that the *Morgan* decision failed to distinguish the case from *Friends of the Rappahannock* and created an overly expansive standing rule. "Now, virtually any landowner who is proximate to a development need only allege purported harms no different from those suffered by the public generally – such as potential night sky light pollution on a yet-to-be-completed building project – to possess standing to challenge the project," read a March 2023 amicus brief in support of Wegmans.[15]

In sum, the Supreme Court of Virginia has lowered the bar that neighbor landowners need to clear when asserting that they have standing to challenge a land use approval. While the Court has not formally eliminated the *Friends of the Rappahannock* two-part standing test, its broad reading of what

constitutes a "particularized harm" to a nearby landowner will allow for standing that previously seemed barred.

The bottom line: loosened impediment to challenges means more risk to developers.

Moving forward, land use applicants and local governments should be aware that a broad range of conceivable impacts from a project could form the basis of standing for neighboring landowners to initiate litigation. In a variety of circumstances, allegations about a project's potential effects on traffic, noise, the night sky, and property values may be enough of a particularized harm for a nearby landowner to proceed with having a court consider their legal challenge to a land use entitlement. For project applicants, this may further extend development timelines beyond when an approval is issued. For local governments, expansive standing may interfere with implementing a locality's comprehensive planning objectives, like approving residential projects and commercial sites as part of larger housing and economic development strategies.

To be sure, these decisions do not address the merits of a plaintiff's claim. It is possible for a neighboring landowner to establish standing and ultimately lose their case. Still, even a meritless claim has the potential to result in poisonous effects on the ability to obtain financing for a project and its economic viability. These recent judicial decisions have raised the potential for neighboring landowners to litigate their challenges, which, in turn, creates uncertainty in the development permitting process. In a state recognized as among the best to do business,[16] the cloud of litigation may have a deterrent effect on economic growth. Time will tell how these decisions shape future land use litigation.

This article contains general, condensed summaries of actual legal matters, regulations, and opinions for informational purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel. For more information, please contact Preston Lloyd at 804.420.6615 or via email at plloyd@williamsmullen.com

[1] Friends of the Rappahannock v. Caroline County Board of Supervisors, 286 Va. 38, 48-49 (2013).

[2] *Id.* at 42-43.

[3] *Id.* at 49.

[4] *Id.* at 49-50.

[5] Historic Alexandria Foundation v. City of Alexandria, 299 Va. 694 (2021).

[6] *Id.* at 700.

[7] Anders Larsen Trust v. Board of Supervisors of Fairfax County, 301 Va. 116 (2022)

[8] *Id.* at 123.

[9] Seymour v. Roanoke County Board of Supervisors, 301 Va. 156 (2022)

[10] *Id.* at 167.

[11] The Court attempted to distinguish its *Seymour* decision from *Friends of the Rappahannock* by focusing on the private nature of the shared easement, the fact that the neighbors alleged that traffic on the easement had already created harms, and the lack of conditions on the special use permit to address traffic. *Seymour*, 301 Va. at 167-69. Still, the alleged harms – particularly the impacts of dust, noise, and traffic – are strikingly similar to those that the *Friends of the Rappahannock* decision deemed inadequate for nearby landowners to establish standing.

[12] Morgan v. Board of Supervisors of Hanover County, 883 S.E.2d 131 (2023).

[13] *Id.* at 138.

[14] *Id.* at 139.

[15] Brief Amici Curiae in Support of Petition for Rehearing by Appellee Wegmans Food Markets, Inc., at 2 (March 13, 2023).

[16] Richard Foster, *Virginia rises to No. 2 in CNBC's Top States for Business*, Virginia Business (July 11, 2023), https://www.virginiabusiness.com/article/virginia-rises-to-no-2-in-cnbcs-top-states-for-business/?oly_enc_id=1138C4780801F2U.

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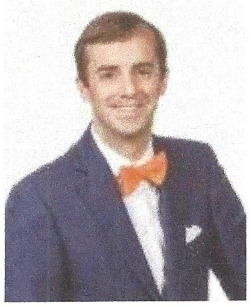

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