
In the
Supreme Court of Virginia

At Richmond

211143

DAVID BERRY, ET AL.,

Appellants,

– v. –

BOARD OF SUPERVISORS OF FAIRFAX COUNTY,

Appellee.

**BRIEF OF AMICUS CURIAE THE VIRGINIA
LAND TITLE ASSOCIATION IN SUPPORT OF
PETITION FOR REHEARING**

JOHN E. RINALDI, VSB #31580
WALSH, COLUCCI,
LUBELEY & WALSH, P.C.
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192
T: (703) 680-4664
F: (703) 680-2161
jrinaldi@thelandlawyers.com

Counsel for Amicus Curiae



TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTEREST OF THE <i>AMICI</i>	2
I. VLTA is a professional organization that represents the interests of land title professionals in the Commonwealth of Virginia.....	2
II. VLTA’s members issue title insurance policies that insure, among other things, the zoning of specific properties	3
III. Contrary to the representations Appellants made to the Court, the Court’s decision has had significant implications throughout the Commonwealth.....	5
AUTHORITIES AND ARGUMENT.....	6
I. The Court’s decision has already caused great uncertainty as to the current validity of decisions, particularly in land use matters, that were approved before the July 1, 2021	6
II. VLTA requests that the Court clarify its ruling as the Appellants themselves asked this Court to do consistently with this Court’s decision in <i>Perkins v. Cnty. of Albemarle</i>	7
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>City Council of Alexandria v. Potomac Greens Assocs. P’ship</i> , 245 Va. 371 (1993)	8
<i>Kelley v. Stamos</i> , 285 Va. 68 (2013)	9
<i>Perkins v. Cnty. of Albemarle</i> , 214 Va. 416 (1973)	7

INTRODUCTION

The Court's March 23, 2023, decision in this case has caused significant confusion and uncertainty throughout many industries, including the title insurance industry. Although the Court's decision was focused on the Fairfax County Board of Supervisor's adoption of Z-Mod, its reasoning has cast a cloud over thousands of land use approvals and permits throughout the Commonwealth since the Fairfax County Board of Supervisors was not alone in conducting business at electronic meetings during the COVID-19 pandemic, including prior to July 1, 2021.

The Court's decision is of particular importance to the Amicus, The Virginia Land Title Association ("VLTA") and its members who have issued countless title insurance policies on properties throughout the Commonwealth that, among other things, insured certain things related to the zoning of the insured property. Because the zonings of some of those properties and the permits issued in good faith in reliance thereon are now subject to potential challenge as a result of the Court's decision, VLTA requests that the Court clarify its decision and specifically state that it applies prospectively only to all bodies other than the Fairfax County Board of Supervisors and even with respect to Fairfax, to limit its impact to the invalidity of zMOD alone. **This is what the Appellants themselves asked the Court to do.** Failure to do so could create havoc that could materially disrupt the title insurance industry and other industries in Virginia.

INTEREST OF THE AMICI

I. VLTA is a professional organization that represents the interests of land title professionals in the Commonwealth of Virginia.

The VLTA's primary mission is to promote and advocate for the land title industry in Virginia by providing its members with resources, educational opportunities, and networking events. VLTA seeks to maintain high professional standards and promote ethical practices among its members. Membership in the VLTA is open to professionals and businesses involved in the land title industry, and includes title agents, title insurance underwriters, real estate attorneys, and other related service providers.

Some of the key objectives and activities of the VLTA include:

Advocacy: The VLTA represents its members' interests by engaging with lawmakers, regulators, and other stakeholders to ensure that the land title industry's concerns are heard and addressed.

Education and Professional Development: The association offers various educational opportunities, including workshops, seminars, and webinars, to help members stay informed about industry trends, best practices, and legal and regulatory changes. The VLTA also provides continuing education credits required for maintaining professional licenses and certifications.

Networking: The VLTA organizes events and conferences to facilitate networking and collaboration among its members, enabling them to share knowledge, exchange

ideas, and build relationships within the industry.

Resources: The association provides members with access to various resources, including industry news, best practice guidelines, and publications, to support their professional growth and help them stay informed about the latest developments in the land title industry.

Community Involvement: The VLTA encourages its members to engage with their local communities and participate in activities that support charitable causes and promote the land title industry's positive image.

II. VLTA’s members issue title insurance policies that insure, among other things, the zoning of specific properties.

In 2013, the ALTA (American Land Title Association) Homeowner's Policy of Title Insurance, often referred to as the “enhanced” title insurance policy was first introduced. It provides extended coverage to homeowners in comparison to the standard owner's policy. Since its introduction, the enhanced policy has become the standard policy issued to individual homeowners.

One of the key differences between the ALTA enhanced policy and the standard owner's policy is the coverage it provides for zoning violations and related zoning issues. While the standard policy does not typically cover such issues, the enhanced policy does offer some protection in this area. Under the ALTA enhanced policy, an insured is covered against loss or damage resulting from zoning issues including:

- Forced removal or alteration of any structure on the land due to a violation of the zoning laws or regulations that existed at the time the policy was issued. This coverage applies when the violation occurred before the policy's effective date, and the homeowner was not aware of the violation when they purchased the property.
- The inability to use the land for a single-family residence due to a zoning violation that existed at the time the policy was issued. This coverage applies if the homeowner was not aware of the violation when they purchased the property.
- The inability to obtain a building permit or to complete a structure due to a violation of an existing zoning law or regulation, provided the homeowner was not aware of the violation when they purchased the property.

It would be almost impossible to determine how many enhanced policies have been issued to individual homeowners throughout the Commonwealth since the issuance of the Governor's Declaration of Emergency with respect to Covid 19 in March of 2020. It similarly would be almost impossible to determine how many such policies were issued in Fairfax County alone. The number is significant.

In addition, owners of commercial property and their lenders can, and often do, obtain an endorsement to their commercial title insurance policies that covers the zoning status of commercial property. Prior to issuing such an endorsement, title

insurance agents generally: (1) secure and review a written certification or building permit from the applicable zoning department or agency, or certification from a surveyor, as to the zoning classification and authorized use, (2) secure and review a copy of the applicable zoning ordinance, (3) confirm the zoning classification by review of the zoning maps or by requiring that the survey state the applicable zoning classification. In all cases, the agent issuing the policy must rely in good faith on the legitimacy of the underlying zoning and resulting land use actions of the local government in issuing the endorsement.

Because the title insurer is not a party to, nor does it have any control over, the zoning process, the insurer must be able to rely heavily on the legitimacy of any action taken by a local government. If the title insurer cannot rely on the legitimacy of the actions taken by the local government, it cannot insure the zoning status of any property. Without such protections, purchasers will not be willing to assume the additional risks themselves. Not only will property values be negatively impacted across the Commonwealth, it could significantly disrupt development.

III. Contrary to the representations Appellants made to the Court, the Court's decision has had significant implications throughout the Commonwealth.

Although the Court's decision was focused on the adoption of Z-Mod, its reasoning has cast a shadow over thousands of land use approvals and permits, not just in Fairfax County but throughout the Commonwealth. These approvals include

all decisions on land use cases that were filed and processed by land use applicants in good faith under Z-Mod made by the Fairfax County Board of Supervisors under that Ordinance prior to this Court’s decision declaring it void *ab initio*. This would be true as well for all land use actions taken by other public bodies in Virginia at electronic meetings prior to July 1, 2021. The number of cases potentially impacted by the Court’s decision is substantial.

The Court’s decision has specific potential consequences on VTLA’s members who have issued enhanced policies or zoning endorsements on properties whose zoning is now potentially challengeable.

VTLA respectfully asks the Court to clarify its decision in this case and specifically state that its ruling applies only prospectively and to limit its impact to the invalidity of Z-Mod alone, as the Appellants themselves asked.¹

AUTHORITIES AND ARGUMENT

I. The Court’s decision has already caused great uncertainty as to the current validity of decisions, particularly in land use matters, that were approved before the July 1, 2021.

VLTA submits that the decision in this case has already had far greater impact than the Appellants represented to the Court that it would. In their Reply Brief they said, “Residents do not believe that there is likely to be a substantial adverse

¹ See, Reply Brief of Appellants in Response to Brief of *Amici Curiae* pp. 11-12 (“**Reply Brief**”).

precedential impact upon other local government actions in the event that the Court should decide in their favor.” Reply Br., p. 11. That representation ignored the fact that actions were taken by many localities under conditions that this Court has suggested were potentially illegal meetings. This has created legitimate confusion as to the sweep of the Court’s reasoning, an uncertainty already being seized upon by opponents of development projects.

The potential consequences of the Court’s decision on VLTA’s members cannot be understated since title insurance agents and underwriters now regularly insure the validity of the zoning status of those properties. Property owners might not be able to sell their properties without being able to convey with assurances that the zoning is valid. Property purchasers may not be able or willing to purchase property without assurances that the most significant purchase in many of their lives is properly zoned for their use as a home. In the commercial context, occupancy and other operating permits may be significantly delayed.

As a result, good cause exists to grant the County’s Petition for Rehearing and, in the event the Court does not fully reconsider its decision, at least limit or clarify the scope of the Court’s ruling, which is desperately needed. Rule 5:37(e).

II. VLTA requests that the Court clarify its ruling as the Appellants themselves asked this Court to do consistently with this Court’s decision in *Perkins v. Cnty. of Albemarle*.

In *Perkins v. Cnty. of Albemarle*, 214 Va. 416 (1973), this Court granted

reconsideration of its earlier decision in order to clarify that its sweeping decision in that case applied prospectively to all localities other than Albemarle County only. See also *City Council of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 378 (1993). VLTA requests that the Court fashion a similar remedy here. VLTA submits this should not be controversial since the Appellants themselves sought such a ruling from this Court. In their Reply Brief Appellants volunteered that Perkins could serve as a roadmap for the appropriate relief and said, “[i]n the event that the Court believes that its ruling here raises similar concerns about an adverse statewide impact (which Residents believe is extremely unlikely), it could fashion its relief in a similar manner in this case.” *Reply Brief* pp. 11-12.

This is precisely what VLTA seeks. Specifically, VLTA asks the Court to clarify its ruling as follows:

1. As to all public bodies except the Fairfax County Board of Supervisors, the Court’s ruling applies prospectively only, and that the decision cannot be used to challenge decisions already made by other public bodies that occurred prior to the date of the Court’s decision;

2. With respect to the Fairfax County Board of Supervisors, clarify that the decision only applies to the adoption of Z-Mod itself, and does not apply to any other decision that was made by the Board at an electronic meeting prior to July 1, 2021, and most particularly land use decisions;

3. In addition, because Z-Mod was the governing ordinance in Fairfax County from March 23, 2021, until this Court’s decision two years later, more than one hundred land use applications were filed, processed, heard, and approved by the Board pursuant to that Ordinance and the Court declared that Ordinance to be void *ab initio* and therefore never existed,² legitimate confusion now exists regarding the approvals derived from that Ordinance, and

4. that the Court clarify that nothing in its decision may be used to challenge the approval of any rezoning, special use permit, special exception, variance, proffer condition amendment, site or subdivision plans, waivers, or similar approvals, or any permits that were issued pursuant to Z-Mod during that time.

This would eliminate the cloud that now lies over the validity of these actions. As the Court’s opinion reads today, VLTA’s membership simply does not possess that certainty, and respectfully submits that neither can any public body similarly situated. Failure to remove that cloud has potentially serious consequences for the economic interests of VLTA’s members, the operation of local government during the period in question, and other related industries.

² This Court has said multiple times that something that is void *ab initio* means “it was without effect from the moment it came into existence.” Kelley v. Stamos, 285 Va. 68, 75 (2013). Such a decision “is a nullity without force or effect and may be collaterally challenged.” Id.

CONCLUSION

The breadth of the Court's ruling in this case has potential impacts that go far beyond those that may have been contemplated by the parties in this case and, by extension, the Court. VLTA respectfully requests that the Court reconsider its decision and rule that the holding in this case shall be applied prospectively only and shall not affect other zoning actions other than the Z-Mod as set forth herein.

Respectfully submitted,
Virginia Land Title Association
By Counsel

WALSH, COLUCCI, LUBELEY & WALSH, P.C.

John E. Rinaldi

John E. Rinaldi, VSB #31580
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192
Telephone: (703) 680-4664
Facsimile: (703) 680-2161
jrinaldi@thelandlawyers.com

CERTIFICATE PURSUANT TO RULE 5:26

I hereby certify that Rule 5:26(e) of the Virginia Supreme court has been complied with and pursuant to that Rule on April 25, 2023, an electronic version, in Portable Document Format (PDF), was filed with the Clerk of the Supreme Court of Virginia and served on counsel for all parties via e-mail. In addition, 3 printed copies were filed with the Clerk of the Supreme Court of Virginia. Copies of this brief were served on counsel of record, via e-mail as follows:

Craig J. Blakeley, Esq. (VSB No. 43855)
Alliance Law Group LLC
1751 Pinnacle Dr., Suite 1000
Tysons, VA 22102-4008
703-848-8336 (phone), 703-848-8265 (fax)
cblakeley@alliancelawgroup.com

Counsel for Appellees

Elizabeth D. Teare, Esq.
T. David Stoner, Esq.
Cynthia A. Bailey, Esq.
Laura S. Gori, Esq.
Fairfax County Attorney's Office
12000 Government Center Pkwy., Suite 549
Fairfax, VA 22035
(703) 324-2421(phone), (703) 324-2665 (fax)
Elizabeth.Teare@fairfaxcounty.gov
Thomas.Stoner@fairfaxcounty.gov
Cynthia.Bailer@fairfaxcounty.gov
Laura.Gori@fairfaxcounty.gov

Counsel for Appellee

By: *John E. Rinaldi*
Counsel