Guest Column

New zoning cases 'reconcilable,' land use lawyer says

By John W. Farrell

The Supreme Court of Virginia's recent resolution of a zoning case by unpublished order has caused confusion both on the high court and among observers, where none is warranted.

In its unpublished order in *Town of Occoquan v. Elm Street Development, Inc.* (VLW 012-6-062), the high court upheld a decision in favor of a developer who sought a special use permit for a townhouse development whose site in the historic town included a steep slope. A majority of the court upheld at Prince William County Circuit Court's Judge Mary Grace O'Brien's decision that a state statute precluded the town from requiring an SUP under the circumstances of this case.


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Chief Justice Cynthia Kinser and Justice S. Bernard Goodwyn dissented from the *Elm Street* order, with no comment.

Justice Elizabeth McClanahan, however, filed a concurring opinion that suggested the outcome in *Elm Street* is inconsistent with the recent Supreme Court decision in *Sinclair v. New CingularWireless PCs* LLC, 283 Va. 198 (Jan. 13, 2012, amended March 30, 2012), an opinion authored by Justice William C. Mims. While both cases dealt with the regulation by localities of the disturbance of steep slopes, the dissimilarities between the cases far exceed that single shared fact.

What these two cases do reveal is divisions within the Virginia Supreme Court that have been historically hidden by unanimous opinions issued without dissents or concurrences.

In thinking about both cases, it is essential to remember that, as the court said in *Lynchburg v. Amherst*, 115 Va. 600 (1913), every Virginia locality is a "mere administrative subdivision" of the commonwealth. All power to regulate land use resides with the General Assembly, which delegates parts of that power to localities under narrow conditions. If those pre-conditions to the exercise of that power are not observed, the locality's attempt to exercise that element of police power is void ab initio, as the court ruled in *Glazebrook v. Board of Supervisors of Spotsylvania County*, 266 Va. 550 (2003), and *Gas Mart v. Board of Supervisors*, 269 Va. 334 (2005)

At bottom, *Sinclair* is about improper delegation of police power by Albemarle County to its planning commission. Mims wrote that Albemarle's steep slope modification was a legislative act, functionally analogous to a special exception. The Virginia Zoning Act, Virginia Code § 15.2-2280 et seq., does not authorize localities to give their planning commissions the power to grant special exceptions. The General Assembly has directed in Code § 15.2 2286(A)(3) that those powers be given only to the governing body or to the board of zoning appeal, under Code § 15.2-2309. Thus, the General Assembly does not allow any planning commission to grant any zoning modification, whether for steep slopes or any other issue under a zoning ordinance.

McClanahan wrote an extended dissent in *Sinclair* that was joined by Justice Cleo Powell and focused on a belief that the court majority had based its holding on a theory that *Sinclair* had not raised below. The dissent also took the view that the Albemarle Planning Commission was not exercising legislative power but rather engaging in an administrative review comparable to the building inspector in *Ours Props. v. Ley*, 198 Va. 848 (1957).

It is worth noting that the General Assembly has given planning commissions "original jurisdiction" over subdivision plats and site plans, in Code §15.2-2258, and authorized them to grant variations or exceptions to local subdivision and site plan regulations in that process, in Code § 15.2-2242. If Albemarle's steep slope regulations had been part of its Subdivision Ordinance, or the design manual adopted as a part thereof, its planning commission could have been given the power to issue modifications regarding steep slopes. Given the highly technical nature of the engineering methods used when developing on steep slopes, there are solid public policy justifications for such construction regulation to be ministerial acts, much like the analysis of the adequacy of stormwater management facilities during a subdivision review or roof trusses during a building permit review, and not a political exercise such as a rezoning or special permit.

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In *Elm Street*, the court held the steep slope special permit provisions of the Occoquan Zoning Ordinance are contrary to the limitations on local police power adopted by the General Assembly in Code § 15.2-2288.1. This section of the Virginia Code is one of several provisions enacted by the General Assembly in recent years to throttle back on the legislative discretion localities have sought (and abused in the opinion of some) through the use of the special exception to regulate a number of specific land uses. Examples of regulated areas include § 15.2-2286.1 (cluster development); § 15.2-2288 (agricultural activities); § 15.2-2288.2 (temporary structures); § 15.2-2288.3 (wineries); and § 15.2-2291 (group homes).

Virginia Code § 15.2-2288.1 applies only to residential dwellings. Thus, it was not available to save the cell tower in the *Sinclair* case.

While not creating inconsistencies in Virginia land use law, these two cases may reveal a fracturing in the approach of the justices of the Virginia Supreme Court to land use jurisprudence. The two newest justices, McClanahan and Powell, were supportive of the applicant/landowner in both cases. Kinser and Goodwyn opposed the interests of the applicant/landowner in both cases, while Lemons, Millette and Mims split on the two cases. It will be interesting to see how these three voting blocks approach the *Long Lane v. Town of Leesburg* case argued last week and other land use cases in the coming months.

It is curious to this observer why our Supreme Court chose not to publish the *Elm Street* decision. As *Sinclair* and *Elm Street* are easily reconciled, the failure to publish *Elm Street* puts the advocate of the landowner and their counterpart for the locality in an awkward position. We know the Supreme Court's view on the matter but are not supposed to cite it to a circuit court. The Supreme Court should reconsider and publish the *Elm Street* decision.

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