

# Using Zoning Tools to Adapt to Sea Level Rise

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SPRING 2013

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Barb Marmet, J.D. is a graduate of William & Mary Law School, class of 2013 (summa cum laude, Order of the Coif). She served as a member of the William & Mary Environmental Law and Policy Review and a member of the Moot Court team. She has worked for the Piedmont Environmental Council, both before and during law school. She also served as a student research assistant during law school. In the fall, she will begin a post-graduate fellowship for the Virginia Environmental Endowment. She graduated from Carleton College in 2008 with a Bachelor of Arts in American Studies.

## About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

VCPC is especially grateful to the Virginia Environmental Endowment for providing generous funding to establish the clinic in fall 2012.

## A Note from the VCPC Director

VCPC received funding from the Virginia Environmental Endowment to produce a series of white papers analyzing legal issues Virginia localities may face as they respond and adapt to increased flooding caused by sea level rise. To focus the students' analysis, we selected two Virginia jurisdictions—Norfolk and Poquoson—to analyze. The students utilized facts from published reports and press accounts to inform their work. Although we focused on these two jurisdictions, the issues raised are broadly applicable to similarly situated cities in Virginia. The reader should be aware, however, that the legal issues that county governments may face might be different from those in the city government context.

Future work is likely to involve interviews, additional analysis, and engagement with the broader policy community about some of the issues raised. Adapting to flooding and sea level rise is a complex area. We have not identified all of the possible legal issues that may arise. Nor have we necessarily answered every possible legal question as part of the analysis that was conducted. We hope, however, that our white papers begin to answer some of the threshold questions facing Virginia localities at this time. We also anticipate that they lay the groundwork for in-depth work and identify areas of needed discussion and additional research. We therefore welcome any feedback on our work.

Finally, a special thanks goes to Erica Penn, a rising third-year law student and Virginia Sea Grant Summer Fellow, for source-checking and editing this white paper. VCPC is also grateful to Virginia Sea Grant for funding the VCPC Summer Fellow program at William & Mary Law School.

## Introduction

The authority to zone is among the most basic and broadest powers of a locality in Virginia. The general purpose of zoning is to direct different types of development to locations where they best fit a community's needs.<sup>1</sup> However, even when a locality is empowered to act, there are important reasons it might choose not to exercise its authority, such as constitutional concerns (not addressed in this section) or insufficient political will.

However, as the effects of sea level rise grow, it may be necessary for Poquoson to take steps to protect human life and property that may be unpopular among affected landowners. 90% of the city is located in an area historically estimated to have a 1/100 chance of flooding each year.<sup>2</sup> As sea levels rise, the landmass of Hampton Roads is also gradually sinking.<sup>3</sup> Based on moderate estimates of accelerated sea level rise, 69% of Poquoson is at risk for frequent flooding over the next 30-50 years.<sup>4</sup> Poquoson may need to consider relocating development as a significant adaptation strategy. What if Poquoson passed an ordinance that changed some commercial properties to residential? What if Poquoson's future flood plain ordinance requires buildings to be 200 feet from the coast, and many coastal residences are already built with a smaller setback? This section will consider the challenges Poquoson may face if it attempts to use strategies like downzoning and restrictive flood plain regulations to affect retreat from flood-prone areas.

### Key Points

- A comprehensive “downzoning” limiting the density or types of development on properties at risk from sea level rise would likely be permissible.
- Downzoning affecting a small area can only be justified by fraud, mistake, or a change in circumstances
- Virginia's protections for existing nonconforming uses would significantly limit the effect of a comprehensive downzoning, as many at-risk properties in Poquoson are already developed.
- Where retreat is not possible through zoning ordinances, Poquoson can still use its flood plain regulations to implement adaptive building standards on structures damaged by floods.

## Downzoning: Zoning Changes Limiting Future Development

One zoning tool that Poquoson may use in order to adapt to sea level rise is downzoning. Downzoning is a general term that refers to a decrease in the intensity of use or development permitted on land.<sup>5</sup> A downzoning could occur, for example, if Poquoson decided to reassign commercially zoned properties within the 100-year flood plain to a low-density residential designation. It could also occur if the city increased the required lot size for residential development from two acres to three acres. Because a downzoning can have negative economic consequences for landowners, legal challenges may arise.

## Comprehensive versus Piecemeal Zoning

To determine whether a downzoning is lawful, a court will look to determine whether it was done in a comprehensive or piecemeal manner.<sup>6</sup> A comprehensive zoning change will be easier to sustain than one that affects relatively few parcels.<sup>7</sup>

The Virginia Supreme Court has articulated several factors that help determine whether zoning is comprehensive or piecemeal. A piecemeal zoning is often one initiated by the zoning authority on its own motion; one selectively addressed to landowners' single parcel and an adjacent parcel; and one that reduces the permissible residential density below that recommended by a duly-adopted Master Plan.<sup>8</sup> Conversely, a downzoning is likely comprehensive when "1) it affects all or a substantial part of the land within the community; (2) it is the product of a long study and careful consideration; (3) it is initiated by the locality's governing body or planning commission, rather than a citizen; and (4) it regulates all uses within the zoned area."<sup>9</sup> While inconsistency with a comprehensive plan will weigh against an ordinance in this analysis, consistency with a plan will not necessarily be enough to save it if a court determined the downzoning is piecemeal.<sup>10</sup>

In order to avoid having downzoning characterized as piecemeal, Poquoson should attempt to make a potential zoning change as comprehensive as is reasonable under the circumstances. If, for example, Poquoson were to pass zoning regulations pertaining to those properties identified as vulnerable to inundation over the next century, it would potentially include a significant portion of the land in the city. Low estimates suggest that out of approximately 5,500 parcels in Poquoson, more than 2,000 are at risk from one meter of sea level rise.<sup>11</sup> An ordinance that restricted the use of those properties would likely be found to affect a substantial part of the land within Poquoson.<sup>12</sup> If the city determined that a more targeted downzoning was necessary, it could protect itself to some degree through study and debate to satisfy the "product of long study and careful consideration" element.<sup>13</sup>

## Justifications for Piecemeal Downzoning

Even if a downzoning is piecemeal, that does not make it invalid automatically. A piecemeal downzoning is still valid if the governing body can demonstrate fraud, mistake, or a change in circumstances justifying the zoning modification.<sup>14</sup> The change in circumstances must have occurred in the time since the last ordinance prior to the proposed downzoning.<sup>15</sup> So, for example, if Poquoson adopted changes to its Floodplain Management Area Overlay District that appeared to target certain parcels, the city would have to present evidence that conditions have changed since 1999, when the overlay was last revised.<sup>16</sup>

A recent Virginia Supreme Court case, *Turner v. Board of County Supervisors of Prince William County* signals some additional hurdles for piecemeal downzoning based on projections of sea level rise. In that case, the Virginia Supreme Court rejected a zoning ordinance due to a lack of changed circumstances.<sup>17</sup> The county government presented evidence that development at the previously permitted intensity would (1) increase traffic concerns, and (2) increase environmental degradation.<sup>18</sup> Even though governments have a relatively low evidentiary burden in proving changed

circumstances, the Supreme Court held that in piecemeal downzoning cases, concerns about future impacts of development on traffic conditions could not be sufficient evidence of a change in conditions.<sup>19</sup> The court also looked for evidence of quantitative environmental changes and found none.<sup>20</sup> The refusal to consider likely future impacts as changed circumstances may frustrate future zoning changes.

If Poquoson faced a downzoning challenge that could be considered piecemeal, Turner would raise substantial concerns. First, it puts a fairly high burden on localities to be comprehensive in their changes to zoning ordinances, as the “change in circumstances” will be measured based on the time before the downzoning, but after the most recent zoning ordinance update.<sup>21</sup> Second, concerns about future sea level rise might not be sufficient justification to uphold a piecemeal downzoning. Poquoson would likely have to demonstrate a measured increase in flooding during the time between the prior ordinance and the proposed downzoning, in order to provide evidence of changed circumstances. Because sea level rise happens gradually, that may present a difficult hurdle.

### When Considering Downzoning:

- Be as comprehensive as possible. Even if downzoning is not necessary in all areas of the locality, a record that demonstrates that the City Council considered it everywhere will look more comprehensive than if the downzoning is targeted from the very beginning. This should be feasible in Poquoson, as a significant portion of the town is vulnerable to sea level rise, and downzoning may be necessary in many locations.
- When targeting areas, do so based on recognized zones and after careful consideration. What conditions have changed since the last revision of the zoning ordinance? If downzoning is found to be piecemeal, the city will need evidence of changed circumstances arising since the last revision of a zoning ordinance impacting that property. *If the affected property has always flooded, and flooding is no worse today than it was when the zoning ordinance was last considered, Poquoson may be stuck.*

### The “fairly debatable” standard

All legislative zoning actions can also be challenged as “arbitrary and capricious,” which requires all laws be for a proper purpose and meet a reasonableness standard.<sup>22</sup> Localities have relatively broad authority to act in the public interest,<sup>23</sup> so few situations arise where a zoning ordinance is rejected for having an improper purpose. When the reasonableness of an ordinance is challenged, it is presumed to be reasonable.<sup>24</sup> Somebody challenging a zoning ordinance aimed at implementing adaptation measures would have the burden of providing evidence of the ordinance’s unreasonableness.<sup>25</sup> Then, even if there is some evidence of unreasonableness, the locality has the opportunity to present counter-evidence of the ordinance’s reasonableness.<sup>26</sup> Ultimately, the evidence in favor of the ordinance is weighed against the evidence against the ordinance according to a “fairly debatable” standard. “Fairly debatable” means that if the evidence weighs in favor of the ordinance, or is even sufficiently close so that objective and reasonable people could reach different conclusions, the ordinance will be upheld.<sup>27</sup>

## Vested Rights: Zoning changes impacting existing or anticipated use

While the arbitrary and capricious challenge above is available to any citizen whose land is affected by a zoning action, there are additional causes of action that protect landowners who might experience even greater hardship while bringing their land into conformity with new zoning ordinances. “Vested rights” is a doctrine that protects a landowner from a change in zoning, even when the preferred use or development has not been fully implemented.<sup>28</sup> A nonconforming use is a current land use that was legal at some point, but a change in the zoning ordinance resulted in it becoming nonconforming.<sup>29</sup> Both could happen in situations where a locality enacts a comprehensive downzoning, creates new zones for preserving coastal buffers, or increases setbacks.

The Virginia Code sets out a number of stages in the pre-development approval process that will result in vested rights for a landowner. Vested rights are conceptually similar to a regulatory taking in that they deprive a landowner of some right of use of their land. However, the right that is “taken” in a vested rights case is more specific, because it depends on some affirmative act by the locality leading the landowner to expect their land can be used in a particular way. This could present problems for a locality looking to downzone coastal land if they have already issued approval for certain phases of the development.

A right to use land under its current zoning is said to vest when “the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.”<sup>30</sup> Some examples of affirmative acts that give rise to a vested right are: accepting proffers, approving a special permit or special exception, and granting approval to a preliminary or final plat.<sup>31</sup>

However, there are often time limits on the preservation of a vested right. If the landowner delays action excessively after the significant governmental act, it could prevent him from demonstrating “diligent pursuit.”<sup>32</sup> Therefore, Poquoson need not worry about every special use permit it has ever issued or preliminary plat it has approved. However, where the city has issued approval recently, and landowners have taken some regular steps in pursuit of the approved use, the city will likely not be able to enjoin the use as a violation of a subsequent zoning ordinance.

When a property or use has legal nonconforming status, it is similarly insulated against a future injunction based on its violation of subsequent zoning ordinances.<sup>33</sup> The Code of Virginia provides that a legal use may be continued, notwithstanding its violation of subsequent zoning ordinances, so long as (i) the use remains the same, or less intense than it was at the time of the subsequent ordinance, (ii) the use is not discontinued for more than two years, and (iii) nonconforming buildings and structures are not substantially altered from their existing condition.<sup>34</sup>

The impact of nonconforming uses in Poquoson is significant, and many of the properties that are most at risk from sea level rise are already developed.<sup>35</sup> Under the doctrine of a nonconforming use, even if Poquoson were to impose additional coastal

setback requirements or limit the uses permitted in particular areas that are at great risk from sea level rise, those structures and uses already in place would have a protected status. Under state law, localities must allow landowners to rebuild nonconforming structures that are destroyed by “acts of God”, such as floods, hurricanes, high water, and wind-driven water, to their original nonconforming status, if the “building is damaged greater than 50 percent and cannot be repaired, rebuilt or replaced except to restore it to its original nonconforming condition.”<sup>36</sup> That requirement poses a problem for implementing a retreat plan in Poquoson.

While some states allow localities to set a period after which nonconforming uses must be discontinued, it is not clear that Virginia’s localities have the authority to do so. “Amortization” is the technique designed to give property owners a reasonable amount of time to recoup their investment while also guaranteeing that the property will be brought into compliance with the new ordinance.<sup>37</sup> The Virginia Code does not mention any potential for amortization. Instead, it simply states that localities must allow legal nonconforming uses to continue.<sup>38</sup> Although several states have allowed amortization periods, even in the absence of explicit state authorization,<sup>39</sup> Virginia is more likely to require clear authorization because of its adherence to the Dillon Rule.<sup>40</sup>

While Poquoson’s ability to use downzoning in flood-prone areas to affect retreat is limited, the city does have some options to address sea level rise. The Code of Virginia provides that a locality may require the removal or repair of buildings that might endanger the public health or safety.<sup>41</sup> Additionally, if a commercial or residential building is significantly damaged by a natural disaster, localities can require that any repairs comply with the local flood plain regulations.<sup>42</sup> The first power permits Poquoson to react to dangers on private property after they occur. The second power allows Poquoson to proactively impose some restrictions on rebuilding at-risk properties. A flood plain ordinance that went so far as to prohibit rebuilding in certain areas would be susceptible to challenge based on the statutory requirement that nonconforming uses be allowed to continue. There are possibly other adaptation measures that would limit protected nonconforming uses too greatly to withstand challenge. But there are other adaptation measures that Poquoson has implemented through its flood plain regulations, such as requiring buildings to be anchored and raised above base flood levels.<sup>43</sup> Those measures can be enhanced as additional techniques are developed for building more resilient structures.

## Conclusion

While zoning is a localities most powerful and broad-reaching power, Poquoson’s zoning power is limited in ways that may hinder its use in adapting to sea level rise. There appears to be little that Poquoson can do as a matter of zoning to gradually encourage retreat, since nonconforming uses and vested rights are protected from subsequent zoning ordinances by state law. Poquoson has much greater authority to limit future development on properties that are not currently in use, but there are minimal properties that fall within that category. Still, when buildings on developed land are significantly damaged, Poquoson does have the authority to use its flood plain ordinance to set standards for their repair.

## Acknowledgement

Funding for this project came from the Virginia Environmental Endowment

## Notes

- 1 See VA. CODE ANN. § 15.2-2283 (West).
- 2 CITY OF POQUOSON, MULTI-HAZARD MITIGATION PLAN 40 (2009).
- 3 VIRGINIA INSTITUTE OF MARINE SCIENCE, RECURRENT FLOODING STUDY FOR TIDEWATER VIRGINIA 110 (2013) [hereinafter VIMS RECURRENT FLOODING].
- 4 *Id.* at 9 (2013).
- 5 See *Bd. of Supervisors of Culpeper Cnty. v. Greengael, L.L.C.*, 271 Va. 266, 285, 626 S.E.2d 357, 368 (2006); GREG KAMPTNER & LARRY DAVIS, THE ALBEMARLE COUNTY LAND USE LAW HANDBOOK 10-1 (Mar. 2012) [hereinafter ALBEMARLE HANDBOOK].
- 6 ALBEMARLE HANDBOOK, *supra* note v, at 10-12.
- 7 *Id.*
- 8 *Bd. of Supervisors of Culpeper Cnty. v. Greengael, L.L.C.*, 271 Va. 266, 284, 626 S.E.2d 357, 367 (2006) (citing *Bd. of Supervisors of Fairfax County v. Snell Const. Corp.*, 214 Va. 655, 658, 202 S.E.2d 889, 893 (1974)).
- 9 ALBEMARLE HANDBOOK, *supra* note v, at 10-12.
- 10 See *Bd. of Supervisors of Fairfax Cnty. v. Snell Const. Corp.*, 214 Va. 655, 659-60, 202 S.E.2d 889, 893-94 (1974) (rejecting the proposition that a prior ordinance that was inconsistent with the comprehensive plan was a “mistake” justifying piecemeal downzoning).
- 11 BENJAMIN J. MCFARLANE, HAMPTON ROADS PLANNING DISTRICT COMMISSION, CLIMATE CHANGE IN HAMPTON ROADS: PHASE III: SEA LEVEL RISE IN HAMPTON ROADS, VIRGINIA 62 (July 2012).
- 12 See *Turner v. Bd. of County Sup<sup>rs</sup> of Prince William County*, 263 Va. 283, 289-90, 559 S.E.2d 683, 686 (2002) (describing some of the divisions that could support a change in zoning, such as magisterial districts, county regions, or recognized zones). Changing zoning in areas recognized by Poquoson as flood risk areas would likely support a finding of comprehensive review rather than targeting particular parcels.
- 13 See *Hennage Creative Printers, Inc. v. City of Alexandria*, 37 Va. Cir. 63 (1995) (distinguishing between zoning affecting a small area as part of a broader, city-wide plan and zoning targeting a small area alone).
- 14 ALBEMARLE HANDBOOK, *supra* note v, at 10-12; See *Bd. of Supervisors of Fairfax Cnty. v. Snell Const. Corp.*, 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974) (holding that the type of change that could validate a piecemeal zoning is a “change in circumstances substantially affecting the public health, safety, or welfare.”).
- 15 See *Turner v. Board of County Supervisors of Prince William County*, 263 Va. 283, 559 S.E.2d 683 (2002).
- 16 POQUOSON, VA., CODE OF ORDINANCES § 11.5-1 to 11.5-8 (1999).
- 17 *Turner v. Bd. of County Sup<sup>rs</sup> of Prince William County*, 263 Va. 283, 297, 559 S.E.2d 683, 690 (2002).
- 18 *Id.* at 295-96, 559 S.E.2d at 689-690.
- 19 *Id.* at 295, 559 S.E.2d at 689.
- 20 *Id.* at 296, 559 S.E.2d at 690.
- 21 *Id.* at 293, 559 S.E.2d at 688.
- 22 See *Bd. of Supervisors of Fairfax Cnty. v. Snell Const. Corp.*, 214 Va. 655, 658, 202 S.E.2d 889, 892 (1974).
- 23 See VA. CODE ANN. § 15.2-2283 (West).
- 24 *Bd. of Supervisors of Fairfax Cnty. v. Snell Const. Corp.*, 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).
- 25 *Id.*
- 26 *Id.*
- 27 See *Clark v. Town of Middleburg*, 26 Va. Cir. 472 (1990) (“An issue is 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”).
- 28 ALBEMARLE HANDBOOK, *supra* note v, at 19-1 to 19-2.
- 29 *Id.* at 18-1.
- 30 VA. CODE ANN. § 15.2-2307 (West).
- 31 *Id.*
- 32 See *City of Suffolk v. Board of Zoning Appeals of the City of Suffolk*, 266 Va. 137, 580 S.E.2d 796 (2003) (dissent finding a failure of diligent pursuit where a landowner took no action until 1993 after receiving a rezoning in 1988, while the majority found the lack of action explained by economic difficulties).
- 33 See *Patton v. City of Galax*, 269 Va. 219, 225, 609 S.E.2d 41, 44 (2005).
- 34 VA. CODE ANN. § 15.2-2307 (West).
- 35 See VIMS RECURRENT FLOODING, *supra* note 3, at 9.
- 36 VA. CODE ANN. § 15.2-2307 (West).
- 37 *Am. Jur. Proof of Facts* 3d 531 (Originally published in 1997).
- 38 VA. CODE ANN. § 15.2-2307 (West).
- 39 *44 Am. Jur. Proof of Facts* 3d 531 (Originally published in 1997).
- 40 *City of Richmond v. Confrere Club of Richmond, Virginia, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) (“The Dillon Rule provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”).
- 41 VA. CODE ANN. § 15.2-906 (West).

- 42 VA. CODE ANN. § 15.2-2307 (West) (describing significant damage as more than 50 percent). Poquoson's flood plain ordinance takes advantage of this authority, providing that all repairs to structures damaged by 50 percent or more of their fair market value must comply with the flood plain ordinance as well as Virginia's Uniform Statewide Building Code. POQUOSON, VA., CODE OF ORDINANCES § 42-33 (2012).
- 43 POQUOSON, VA., CODE OF ORDINANCES § 42-33 (2012).

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VSG-13-16