

# PUBLICATION

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## Virginia Supreme Court's Ruling in Wegmans Case Could Endanger Future Commercial Real Estate Development in the State

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**On February 2, in *Morgan v. Board of Supervisors of Hanover County*, the Supreme Court of Virginia ruled against the county zoning board's approval of the Wegmans grocery chain's construction of a distribution center. This decision may give future developers pause about building facilities in Virginia.**

Wegmans sought to build a 1.7 million square foot distribution center on 217 vacant, mostly wooded acres in Hanover County, Virginia. The county's zoning board eagerly greenlit the project. It granted Wegmans a special exception, promising millions in incentives and tax credits, and made slight modifications to the zoning designation of the property. This process occurred during the spring and summer of 2020 when then-Governor Ralph Northam had imposed significant restrictions on in-person government gatherings.

While the state and local governments celebrated the new Wegmans facility and the hundreds of new jobs it would bring to the area, some neighboring property owners brought suit in the Hanover County Circuit Court to enjoin the construction, arguing that they would be harmed by the facility's light and noise pollution, added traffic from distribution vehicles on the local roads, and an increased risk of flooding on their properties. Most of these plaintiffs, including the lead plaintiff, lived within a few miles of the proposed development site, which they contended put them at risk of suffering "particularized harm," as would be necessary for them to have standing to challenge the facility's construction.

The court held that, in aggrieved resident zoning approval cases where standing was granted, the particularized harm occurred due to developers' use of "private roads" and other circumstances where owners' individual property rights were burdened. In *Morgan*, the plaintiffs complained of the proposed use of public roads, as well as light and noise pollution that would have affected a large radius of locals to some extent (just more significantly at closer proximity to the facility). This distinction led the court to determine that the plaintiffs' harms were not particularized enough to create standing. The court also posited that "particularized harm" could only occur if the harm was present (i.e. justiciable and ripe) and not merely speculative. Because the plaintiffs' alleged harms in this dispute fell in the latter category, they did not have standing.

On appeal, the Supreme Court of Virginia took a different perspective, holding that the harms were sufficiently particular to the plaintiff property owners to merit standing. The court distinguished between this case and those cited by the trial court in the sense that these plaintiffs' arguments were less conclusory:

"[T]he homeowners assert harms specific to Wegmans's intended expansion including tractor-trailer traffic on specific feeder roads surrounding the facility, the increased level of noise caused by back-up alarms from these trucks (allegedly in violation of the local noise ordinance after a sound study by county staff), anticipated flooding caused by the topography of the project, and the night-sky light pollution from taller lighting poles in the parking areas."

Moreover, the Virginia Supreme Court did not bless the trial court's analysis of the ripeness issue. It found that the plaintiffs asserted "a direct cause-and-effect relationship between the Board's 2020 decision and specific,

detailed harm to the homeowners" and that this prognostication was appropriate for parties seeking declaratory judgment.

The Hanover County Circuit Court will now decide whether the county zoning board's procedures appropriately invited public debate – a decision that will no doubt be affected by the changes in work and social practices experienced in the early months of COVID in the United States.

The Virginia Supreme Court's decision in *Morgan* poses significant harm for developers seeking to build in Virginia because *Morgan* creates a new class of plaintiffs. Any neighboring property owner who will face increased traffic and decreased vision of the night sky now meets the "particularized harm" component of Virginia's standing test for zoning cases. This change has two significant implications. First, the larger plaintiff class will require zoning boards and developers to become even more scrupulous in their procedures, as an increased number of plausible plaintiffs will be watching to ensure that everything is done precisely by the book. Second, even if zoning boards and developers follow every rule, guideline, and ordinance with absolute precision – such that any claim against them would not be meritorious – the larger group of potential plaintiffs means heightened litigation risk, and thus higher litigation expenses for both counties and developers.