In The

# Supreme Court of Virginia

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RECORD NO. 091502

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AROGAS, INC., and PAT MANNING,

Appellants,

v.

FREDERICK COUNTY BOARD OF ZONING APPEALS and
FREDERICK COUNTY BOARD OF SUPERVISORS,

Appellees.

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# APPELLANTS' BRIEF

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From the Circuit Court of the County of Frederick
Case No. CL06-580
Final Order April 27, 2009

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Mark E. Stivers, Esquire
Va. State Bar No. 32662
Post Office Box 1737
Winchester, VA 22604
Telephone: (540) 722-6168
Facsimile: (540) 722-6169
E-Mail: markestivers@comcast.net

Counsel for Appellants

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## ASSIGNMENTS OF ERROR

1. The court erred in sustaining the demurrer to the declaratory judgment count against the Board for failure to state a cause of action to declare the proffer void ab initio and for failure to appeal within 30 days.[1]

2. The court erred in sustaining the demurrer to the declaratory judgment count, based on lack of standing.

3. The court erred in refusing to interpret and determine the invalidity of the rezoning proffer in the appeal from the Board and in directing the Zoning Administrator to accept and process the site plan application.

## NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This is an appeal from the trial court's decision to sustain a demurrer to Appellants' declaratory judgment challenge to a rezoning proffer as void ab initio, because it was adopted contrary to the county zoning code (A. 85-86, 115-17), as well as its decision in their appeal from the Board of Zoning Appeals (BZA) to simply direct the county Zoning Administrator to accept Appellants' site plan application, without resolving the meaning and applicability of the proffer. (A. 314-16.)

On April 13, 2006, Appellants submitted a site plan to build a fueling

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[1]Appellants have included failure to state a cause of action and failure to appeal within 30 days in a single assignment of error since the court articulated no basis other than failure to appeal within 30 days for finding a failure to state a cause of action.

service station on a portion of a tract rezoned from an RA to a B-2 District. (A. 324-25.) Although the sale of diesel fuel, service stations, and truck stops are specifically authorized in that zoning district, the rezoning included a proffer which excepted "[a]ny use involving the retail and wholesale of diesel fuel for over-the-road truck carriers." (A. 328.) "Over the road truck carriers" is not defined anywhere in the county zoning ordinance. (A. 89, 248, 259-88.) While the zoning hearing and approval occurred on April 27, 2004, the proffer at issue was changed after the close of the public hearing and was not reduced to writing, signed, or dated until May 3, 2004. (A. 88, 324-29.)

By letter dated April 19, 2006, the Zoning Administrator rejected the site plan application, stating that it could not be processed due to a discrepancy between the proposed use and the rezoning proffer. (A. 64-65.) Contending, inter alia, that the rejection of the site plan was an invalid and unwarranted exercise of authority (A. 24), Appellants appealed to the BZA (A. 50-58, 14-21, 24-31).

The BZA concluded that "the proffer speaks for itself" and upheld the Zoning Administrator's decision. (A. 11, 21.) Appellants then filed a Petition for Writ of Certiorari and Declaratory Judgment in the Circuit Court of the Frederick County. (A. 1-6.)

The circuit court bifurcated the Petition, first hearing arguments on a

demurrer by the BZA and Frederick County Board of Supervisors to the request for declaratory judgment, which asked the court to find the proffer void ab initio and otherwise unenforceable. Appellants argued that the proffer was not part of the original rezoning application, that it stemmed from discussions that occurred after the close of the public hearing, but before the vote to approve the rezoning, and was signed by the applicant well after the hearing, and that it was void ab initio because it violated the county zoning code requirement that final proffers be received in writing and be signed by the applicant five days prior to the advertised hearing. (A. 1-4, 28-29, 87-93, 94-105.)

By Order entered July 6, 2007, the court ruled that the Petition for Declaratory Judgment failed to state a cause of action and that the action was barred for failure to file suit within 30 days of the rezoning decision. (A. 85-86.) The Order granted Appellants leave to file, and Appellants did file, an amended petition, to which the BZA and the Frederick County Board of Supervisors again demurred. (A. 110-14.) Again, by Order entered June 2, 2008, the court held that the Amended Petition failed to state a cause of action and was barred for failure to file within 30 days of the rezoning. (A. 115-16.) In addition, the court concluded that Appellants did not have standing to contest the proffer. (A. 115-16.)

Appellants ask this Honorable Court to overrule the trial court decision sustaining the demurrer by the Frederick County Board of Supervisors and the BZA to the Amended Petition. They challenge the decision that they failed to state a claim, noting that the proffer was void ab initio because the county zoning code requires, inter alia, that final proffers be received in writing and be signed by the applicant at least five days prior to the advertised hearing, and that the 30-day requirement does not apply to validity challenges. (A. 115-17.)

In the alternative, Appellants ask this Court to overrule the Final Order of the trial court entered April 27, 2009 (A. 314-16), which directs the Zoning Administrator to accept and process Appellants' application, but which fails to resolve the meaning and applicability of the proffer and fails to determine whether the Zoning Administrator's interpretation was warranted or whether the proffer is void for vagueness, unconstitutionally interferes with interstate commerce, or otherwise improperly invites arbitrary and capricious enforcement, noting that it is a court's duty to interpret any provision, the meaning of which is not clear. (A. 115-17, 314-16.)

## QUESTIONS PRESENTED

1. Did the court err in sustaining the demurrer to the declaratory judgment count against the Board for failure to state a cause of action to

declare the proffer void ab initio and for failure to appeal within 30 days? (Assignment of Error I)

2. Did the court err in sustaining the demurrer to the declaratory judgment count, based on lack of standing? (Assignment of Error II)

3. Did the court err in refusing to interpret and determine the invalidity of the rezoning proffer in the appeal from the Board and in directing the Zoning Administrator to accept and process the site plan application? (Assignment of Error III)

## STATEMENT OF FACTS

On April 27, 2004, the Frederick County Board of Supervisors voted to rezone approximately 112 acres owned by Carol and George Sempeles. (A. 88, 107, 324-29.) The rezoning included 10.3 acres rezoned from Rural Agricultural (RA) to Business General (B-2) and 101.92 acres from RA to M-1 Industrial. Pursuant to the application to rezone the property, Mr. and Mrs. Sempeles filed written proffers prior to the rezoning hearing. All proffers, except the one at the heart of this appeal, were unchanged before the Board of Supervisors. An original proffer eliminating the sale of all diesel fuel was changed after the close of the public hearing and before the vote as a result of discussion by the Board of Supervisors. (A. 28, 88; see also A. 125.) While the zoning hearing and rezoning approval occurred on April 27, 2004,

the proffer at issue was not reduced to writing in its final version, signed, or dated until May 3, 2004. (A. 324-29.) As changed, the proffer provides: "Any use involving the retail or wholesale of diesel fuel for over the road truck carriers shall not be conducted or performed on this site either in the commercial or industrial zones." (A. 28, 88, 328.)

The proffer in question permits more intense use than the advertised proffer, which would have banned all diesel fuel sales. It was neither signed nor submitted in writing prior to hearing, nor reviewed by county counsel, nor advertised, nor submitted for relevant agency review, nor subject to public comment. (A. 2, 28, 87-93, 112; see also A. 125, 249-314.)

On April 13, 2006, Appellants submitted a site plan to build a 5,625-square-foot service station with a convenience market on a 3.45-acre portion of a 10.3-acre tract of land unanimously rezoned by the Frederick County Board of Supervisors from an RA to B-2 District. This use is specifically authorized in B-2 Districts under the Frederick County Zoning Code as part of SIC 55, specifically SIC 5541, which authorizes sale of diesel, service stations, truck stops, and other SIC 55 uses. (A. 32-34, 58, 59-63, 87-93, 204, 248.) Notwithstanding, Appellants' site plan was rejected by the Frederick Zoning Administrator based on his interpretation of the challenged proffer's exclusion of "[a]ny use involving the retail and wholesale of diesel

fuel for over the road truck carriers." (A. 39-40, 64-67.)

Despite the fact that Appellants had specifically acknowledged the proffer's exclusion, and despite the fact that "over-the-road truck carriers" is not defined by the code, the Zoning Administrator interpreted the single exception proffer to mean that Appellants could not build a service station that could conceivably sell diesel for over-the-road truck carriers, and rejected the site plan. (A. 32-38, 39-41, 59-61, 64-65, 70.) By letter dated April 19, 2006, explaining the rejection of the site plan, the Zoning Administrator stated:

> Our department is unable to process this application due to a discrepancy between the proposed use of this property and the property's current zoning designation and associated proffers. . . . [I]t is clear [Petitioners' proposed use] . . . is a gasoline service station . . . with fuel islands and parking spaces appropriately sized to accommodate over-the-road trucks. . . . [D]evelopment of this parcel as proposed would necessitate a proffer amendment to enable the sale of diesel fuel for over-the-road truck carriers.

(A. 39-40, 64-65.) Contending, inter alia, that the Zoning Administrator's rejection of the site plan was an invalid and unwarranted exercise of authority, Appellants appealed to the BZA. (A. 14-21, 24-31, 50-58.)

In response to the notice of BZA appeal, the Zoning Administrator filed two different replies with the Board to support his rationale. The first reply, dated May 2, 2005 [sic] and served on Appellants, argued, inter alia, that (1) "[t]he applicant should have read and understood the proffers prior to

submitting the site plan for review" (A. 61); and (2) "the sale of diesel fuel retail or wholesale to be used by over the road trucks is taxed only by those carriers that ply the roadways with freight" and that, by implication, Petitioners' proposed use should be denied (A. 61).

The second reply, not served on Appellants until during the BZA hearing, omits the tax-based differentiation argument. (A. 34.) In this report to the BZA, the Zoning Administrator restated his other contentions and argued that the proffer renders gasoline stations and truck stops "moot." (A. 32-34, 61.)

Appellants argued that the proposed use is lawful, that the Zoning Administrator's decision to permit the exception to swallow the whole was unfounded, and that the proffer was void ab initio and is otherwise unenforceable. The BZA concluded that "the proffer speaks for itself" and upheld the Zoning Administrator's decision. (A. 14-21.) Appellants then filed a Petition for Writ of Certiorari and Declaratory Judgment in the Circuit Court of Frederick County. (A. 1-6.)

By Order entered July 6, 2007, the court ruled that the Petition for Declaratory Judgment

> fails to state a cause of action to declare void ab initio the subject rezoning proffer which was one of the proffers in the conditional rezoning . . . by the Board of Supervisors on April 27, 2004, and . . . that the Petitioners contesting of the zoning action taken by

> the Board of Supervisors on April 27, 2004, is barred for failure to file suit within thirty (30) days of said decision.

(A. 85-86.) The Order granted Appellants leave to file, and Appellants did file, an amended petition, to which the BZA and the Frederick County Board of Supervisors again demurred. Again, by Order entered June 2, 2008, the court held that the Amended Petition

> fails to state a cause of action to declare void ab initio the subject rezoning proffer which was one of the proffers in the conditional rezoning . . . by the Board of Supervisors on April 27, 2004, and . . . that the Petitioners' contesting of the zoning action taken by the Board of Supervisors on April 27, 2004, is barred for failure to file suit within thirty (30) days of said decision, and that the Petitioners do not have standing to contest the proffer . . . approved April 27, 2004.

(A. 115-16.)

Appellants petitioned to this Court, requesting review of both of the circuit court's decisions, and their Petition has now been granted.

## PRINCIPLES OF LAW AND ARGUMENT

There are two matters at issue in this Appeal: the demurrer to the declaratory judgment action and the reversal of the BZA decision on appeal. As to the first matter, Appellants assert that the circuit court's grant of the Appellees' demurrer in the declaratory judgment action was improper. As to the second, they assert that, although reversal of the BZA's determination would otherwise have been proper, the basis for the court's decision was not,

and the remand to the Zoning Administrator improperly requires Appellants to engage in an entirely futile, very expensive, and duplicative course of action.

As an initial matter, the demurrer was improperly upheld because it was not the proper mechanism for the Appellees' challenge under Va. Code Ann. § 15.2-2285(F). It is well established that a demurrer tests only the legal sufficiency of facts alleged in pleadings, not the strength of proof. Eagle Harbor, L.L.C. v. Isle of Wight County, 271 Va. 603, 611, 628 S.E.2d 298, 302 (2006) (citing Glazebrook v. Spotsylvania County Bd. of Suprv'rs, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003)). In order to survive a challenge by demurrer, therefore, all that is required is that the pleading allege sufficient facts to enable the court to determine whether there is a legal basis for the claim. Id. (citing Moore v. Jefferson Hosp., Inc., 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967); Hubbard v. Dresser, Inc., 271 Va. 117, 119, 624 S.E.2d 1, 2 (2006)).

Importantly, since a demurrer admits the truth of all material facts that have been properly pleaded—including those that are expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts expressly alleged—the court is not permitted to determine, or even evaluate, the merits of the allegations, but must determine only whether the pleading is sufficient to state a cause of action. Glazebrook,

266 Va. at 554, 587 S.E.2d at 591 (citing Elliott v. Shore Stop, Inc., 238 Va. 237, 240, 384 S.E.2d 752, 753 (1989); Riverview Farm Assocs. Va. Gen. P'ship v. Bd. of Suprv'rs, 259 Va. 419, 427, 528 S.E.2d 99, 103 (2000)). A demurrer which is not responsive to the allegations in the complaint must, therefore, be overruled. Chippenham Manor, Inc. v. Dervishian, 214 Va. 448, 450-51, 201 S.E.2d 794, 796-97 (1974) (reversing grant of demurrer which was not responsive to plaintiff's allegations).

The proper mechanism for claiming defenses to an action, as opposed to the sufficiency of the facts alleged, is accordingly not a demurrer, but a plea in bar. As this Court has explained:

> In our view, a plea, whether at law or in equity, is a discrete form of defensive pleading. As distinguished from an answer or grounds of defense, it does not address the merits of the issues raised by the bill of complaint or the motion for judgment. Yet, a plea is a pleading which alleges a single state of facts or circumstances (usually not disclosed or disclosed only in part by the record) which, if proven, constitutes an absolute defense to the claim.
>
> Familiar illustrations of the use of a plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); res judicata; usury; a release; an award; infancy; bankruptcy; denial of partnership; bona fide purchaser; denial of an essential jurisdictional fact alleged in the bill, etc.

Nelms v. Nelms, 236 Va. 281, 289, 374 S.E.2d 4, 9 (1988).

Thus, where the facts relied upon in a demurrer do not appear on the

face of the pleading, the demurrer must be overruled. See, e.g., Burton v. Richmond, 1991 WL 834932, at *1-3 (City of Richmond, Va., Cir. Ct. 1991) (overruling defendant's demurrer on ground that district had been formed without authority and was void where manner in which ordinance was adopted was not alleged in complaint). Nowhere on the face of Appellants' pleading in the present case does the matter of the appeal period from a rezoning appear. The Appellees' challenge, which was based on that period, should, therefore, have been brought by plea in bar, rather than by demurrer, and the court should have overruled the demurrer.

More importantly, when the grant of a demurrer was based on an incorrect interpretation of the law, the decision must be reversed. Caine v. NationsBank, N.A., 262 Va. 312, 316-17, 551 S.E.2d 653, 654-55 (2001). As explained more fully infra, because the court's conclusion that Appellants' declaratory judgment action was barred by the 30-day appeal period for zoning, or rezoning, decisions was clearly erroneous, the court's grant of the Respondents' demurrer was improper, even had the demurrer itself been procedurally proper.

## I. SINCE THE PROVISION FOR A 30-DAY APPEAL PERIOD FROM ZONING DECISIONS APPLIES ONLY TO REASONABLENESS CHALLENGES, AND NOT TO VALIDITY CHALLENGES, THE COURT ERRED IN SUSTAINING THE DEMURRER TO APPELLANTS' VALIDITY CHALLENGE TO THE PROFFER AS VOID AB INITIO, BASED ON THE 30-DAY PROVISION.

The circuit court concluded that Appellants' request for a declaration that the challenged proffer was void ab initio was barred by the 30-day period established under Va. Code Ann. § 15.2-2285(F) for appeals from zoning decisions.[2] (A. 85-86.) That conclusion was erroneous, as a matter of law.

It is now clear under Virginia law that the appeal period under § 15.2-2285(F) applies only to appeals challenging the reasonableness of a zoning decision—not to challenges to a decision's essential legality.[3] In one case which involved the predecessor to § 15.2-2285(F), after noting that a controversy existed about what, if any, rezoning had actually occurred on a

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[2]The circuit court, therefore, did not reach Appellants' challenges on the merits—that the ordinance was void for vagueness, it was arbitrary and capricious, or it was otherwise unlawful. It is noted, for example, that the use of proffers to exclude otherwise permissible uses in a district, as was done in this case, necessarily violates the statutory uniformity requirement. See Va. Code Ann. § 15.2-2282; Andrews v. Loudoun County Bd. of Suprv'rs, 200 Va. 637, 640-41, 107 S.E.2d 445, 447-48 (1959) (disapproving zoning scheme which would allow officials to pick and choose who may or may not enjoy a particular use in a certain district).

[3]Of course, it is beyond debate that an action which is void ab initio because it is in direct violation of an existing law is also, by definition, arbitrary and capricious. See Renkey v. County Bd. of Arlington County, 272 Va. 369, 375-76, 634 S.E.2d 352, 356-57 (2006).

particular date and remanding on that issue, this Court explained:

> Assuming some rezoning became final 30 days after City Council's February 19, 1991 action, the time period in Code § 15.1-493(G) would bar only a judicial review of the reasonableness of the rezoning enactment. Fairfax County v. Miller & Smith, Inc., 242 Va. 382, 384, 410 S.E.2d 648, 650 (1991). The 30-day period would not bar the Landowners' claims that the rezoning ordinance is void ab initio upon the several grounds alleged, see, e.g., City of Alexandria v. Potomac Greens Assoc., 245 Va. 371, 429 S.E.2d 225 (1993).

Kole v. City of Chesapeake, 247 Va. 51, 57, 439 S.E.2d 405, 408-09 (1994) (emphasis added) (footnote omitted). In the present case, as in Kole, in their petition for declaratory relief, the Appellants asked the circuit court to find that the challenged rezoning proffer was void ab initio.

By way of background, there are a number of bases upon which a party may challenge a zoning or other governmental action, including that the action was not in accordance with the law, that it was based on a procedural error which was not harmless, or that the action was not supported by the evidence. See, e.g., Crutchfield v. State Water Control Bd., 45 Va. App. 546, 553, 612 S.E.2d 249, 253 (2005) (discussing challenges to agency action). Although when a party challenges a discretionary action[4] the action will be upheld

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[4]Thus, although when discretion is reserved to the body or person taking a particular action, as it is with a legislative zoning action, there is a presumption of validity and reasonableness, that presumption can be rebutted by evidence of clear unreasonableness. Bd. of Suprv'rs v. McDonald's Corp., 261 Va. 583, 590, 544 S.E.2d 334, 338-39 (2001).

unless arbitrary and unreasonable, when an action is not discretionary, it must be reviewed for conformance with governing standards.

If the formal requisites for taking the zoning action have not been complied with, the question is not one of reasonableness, but of power. This distinction is particularly important with regard to zoning actions since Virginia adheres to the rule that municipalities can exercise only those powers expressly or impliedly granted to them and only in the manner prescribed. Town of Jonesville v. Powell Valley Vill. Ltd. P'ship, 254 Va. 70, 73-75, 487 S.E.2d 207, 209-10 (1997) (and cases cited).

Although the Appellees have argued that the statute does not state that proffers must be included in the notices that it requires (Br. in Opp. to Pet. for Appeal at 12), it is not only the requirements of the statute that apply, but those imposed by governing local legislative acts as well. See, e.g. Dick Kelly Enters., Va. P'ship, No. 11 v. City of Norfolk, 243 Va. 373, 382, 416 S.E.2d 680, 685 (1992). Moreover, while the Appellees attempt to characterize the proffer requirements are merely directory, stating that the "ordinance permits the written proffers to be filed in as little as 5 days before the public hearing" (Br. in Opp. at 12 (emphasis added)), the language of the ordinance is, in fact, mandatory, providing that final proffers "shall be received . . . at least five days

before" the hearing.[5] (A. 252.)

It is well established in Virginia, in any case, that notice provisions concerning zoning or rezoning actions are mandatory—not discretionary—and that any failure to strictly comply with such provisions therefore renders the action void ab initio. E.g., Gas Mart Corp. v. Loudoun County Bd. of Suprv'rs, 269 Va. 334, 344-48, 611 S.E.2d 340, 345-47 (2005) (board's failure to provide required descriptive summary in notice of proposed amendment rendered amendment void ab initio); Glazebrook, 266 Va. at 554-57, 587 S.E.2d at 591-93 (where board passed zoning amendments by notice which failed to meet requirements of code, amendments were void ab initio); cf. City Council of Alexandria v. Potomac Greens Assocs. P'ship, 245 Va. 371, 378, 429 S.E.2d 225, 228-29 (1993) (holding that council's failure to provide two notices, as required by statute, rendered the amendment void ab initio, but making the scope of its decision prospective).

As the cases also make clear, all mandatory provisions of a zoning or other ordinance, since they are legislatively enacted, must be strictly complied with until legislatively changed. Dick Kelly Enters., 243 Va. at 382, 416 S.E.2d

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[5]When the word "shall" is used in a legislative provision, it is generally used in an imperative or mandatory sense and does not allow for discretion. State Health Dep't Sewage Handling & Disposal Appeal Review Bd. v. Britton, 15 Va. App. 68, 70, 421 S.E.2d 37, 39 (1992); Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965).

at 685 (citing Commonwealth v. Wash. Gas Light Co., 221 Va. 315, 323, 269 S.E.2d 820, 825 (1980)). Even the legislative body itself may not waive such provisions, except by explicit legislative action. Id. Accordingly, although a county may have the authority to change its own regulations by proper legislative action, it has no more authority to violate its own existing regulations than to violate statutory or constitutional provisions. Id. As this Court explained in a recent case:

> Although the board of supervisors might have amended the zoning ordinance after following the proper procedure, it was not at liberty to disregard it. Acts of a local governing body that are in conflict with its own ordinances exceed its authority and are void and of no effect.

Northampton County Bd. of Zoning Appeals v. E. Shore Dev. Corp., 277 Va. 198, 202-03, 671 S.E.2d 160, 162-63 (2009) (emphasis added).

In a closely analogous case to the present one, in rejecting the argument that the state code was mandatory but that the county ordinance was merely directory, the circuit court first noted that the county ordinance requirement for notice went beyond the statutory requirement; that the county was not obliged to enact more stringent notice requirements but had the power to do so; and that, although the county was not obligated to make the additional notice requirements mandatory, it also had the power to do that. Chang v. Bd. of Suprv'rs of Fairfax County, 1988 WL 619146, at *1 (Va. Cir.

Ct. 1988). The court then explained:

> The County chose to make its notice requirements mandatory in language so plain and direct that no person could misconstrue the intent of the Board. . . . To adopt counsel's argument that only the State Code is mandatory and the County ordinance is merely directory, would require that this Court find that the Board is incapable of binding itself to a mandatory procedure. The Board clearly had that power; chose to enact this legislation as a mandatory process; expressed its intent in clear, unmistakable language and is bound by its own limiting ordinance.

Id. (concluding that the notice provision in the county ordinance was a jurisdictional limitation imposed by the board upon itself and that it was bound thereby).

The attempt by the Appellees to limit some of the cases that the Appellants have relied upon based on the fact that they involved statutory or constitutional notice provisions, is, accordingly, not supported by the case law, nor, as discussed more fully infra, is their attempt to evade the notice requirement by arguing that the revision was too "minor" to render the proffer void for lack of proper notice. (See Br. in Opp. at 12-14.) The five-day notice requirement was mandatory, and, as conceded by the County (Br. in Opp. at 11), it is clear that it was not complied with. Despite acknowledging that the "timing of the zoning amendment was not in conformity with (the) procedural provision of the county zoning ordinance" (Br. in Opp. at 11), the Appellees argue that the Board of Supervisors did not actually violate § 165-13 of the

County Ordinance since the "purpose" of the ordinance was not to preclude amendments (Br. in Opp. at 15). This argument is flawed, however, because the Appellees' assertion cannot justify nor can it excuse the violation of the ordinance itself.

It is further clear that the failure to comply with prescribed procedures can be challenged at any time, even after a matter of years, where the challenge is to the legality of the zoning provision, not to its reasonableness. In a case in which, as in the present one, the challenge to the zoning ordinance arose out of a later attempt to enforce it,[6] rather than on appeal within 30 days of its enactment, the court agreed with the landowner's claim that the ordinance was void because the prescribed procedures for adopting it had not been complied with. Town of Madison, Inc. v. Ford, 255 Va. 429, 431, 435-36, 498 S.E.2d 235, 235, 238 (1998). The town provided a copy of the minutes of the meeting at which the ordinance had been adopted way back on October 25, 1972, more than 20 years before. Id. at 431, 498 S.E.2d at 236. In that case, the requirement was that, for each ordinance, the name

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[6]Since the original enforcement action was based on the mere possibility of a violation of the proffer, the court erred in sustaining the demurrer to Appellants' declaratory judgment action, even assuming the validity of the proffer, because by doing so it essentially affirmed the denial of a permitted use based on speculation about the mere possibility of proffer violations. At the very least, the court should have allowed Appellants to put on their evidence.

of each council member and how he voted was to be recorded. The court explained:

> Because we cannot tell from the minutes which of the members actually voted for the adoption of the zoning ordinance, whether any member abstained, or if any member was absent when the vote was taken, we conclude that the minutes simply do not comply with the constitutional requirement of art. VII, § 7. Accordingly, we hold that the alleged zoning ordinance is null and void.

Id. at 435-36, 498 S.E.2d at 238. Clearly, where a zoning ordinance or a part thereof is void ab initio—whether the procedural noncompliance is with a constitutional provision, a statutory provision, or an ordinance provision—the 30-day requirement is not a bar. To hold otherwise would be to allow the courts to legislate by validating otherwise invalid measures.

As the court has noted, these kinds of procedural notice requirements for zoning actions are designed precisely to prevent zoning changes from being made "'suddenly, arbitrarily, or capriciously'" and, to that end, suggest an intent to

> generate informed public participation by providing citizens with information about the content of the proposed amendments and the forum for debate concerning those amendments.

Glazebrook, 266 Va. at 555-56, 587 S.E.2d at 592 (emphasis added) (quoting Fairfax County Bd. of Suprv'rs v. Snell Constr. Corp., 214 Va. 655, 658, 202 S.E.2d 889, 892 (1974)). It should be quite clear that if what is actually voted

on is different from what was noticed and from what was actually discussed, the legislative intent has not been served.[7]

In the present case, the County Code specifically requires that proffers must be presented at the advertised public hearing and that final proffers must be received in writing, signed by the owner and applicant, at least five days before the advertised hearing of the Board of Supervisors. (A. 107, 252.) In February 2004, written proffers were submitted by the former owners for consideration by the Planning Commission, which included a provision that "there would be no wholesale or retail sales of diesel fuel." (A. 25; see also A. 125.) However, after the close of the rezoning hearing in April, the proffer was verbally changed to preclude retail and wholesale sale of diesel fuel only for over-the-road truck carriers, thereby allowing a more intensive use than under the original proffer. (A. 112.) Not until May 2004 was the modified proffer signed, providing that

> [a]ny use involving the retail or wholesale sale of diesel fuel for over the road truck carriers shall not be conducted or performed on this site.

(A. 328-29.)

The Appellees also assert that the proffer revision was "minor" and that

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[7]As acknowledged by the Appellees, the purpose of the notice requirement is to make it available for review before the public hearing. (See Br. in Opp. at 15-16.)

Va. Code Ann. § 15.2-2298 was amended in 2006 to allow minor revisions during the public hearing.[8] (Br. in Opp. at 14, 16.) From this, they argue that Appellants' challenge is not to the validity of the proffer, but to the Board's decision to approve the proffer. (Br. in Opp. at 14-15.) This argument cannot save the proffer, however, because the assertion that the proffer revision was minor is inaccurate, and because the fact that the statute was amended, while true, is not determinative of actions taken, well before its enactment, in violation of county law.

The final proffer, however interpreted, clearly allows retail and wholesale sale of diesel fuel—except to "over the road truck carriers." (A. 328.) The initial proffer would have banned all diesel fuel sales. (A. 25, 88; see also A. 125.) Since the revised proffer admittedly allows a more intensive use than the original one, the revision was not "minor" but, in fact, materially affected the commercially rezoned tract and was, therefore, one to which notice would have applied, even under the 2006 amendment. More importantly, however, the 2006 amendment of § 15.2-2298 cannot save a violation of the County ordinance or Code requirements in 2004.

The general rule is that an amendment is intended to impose a

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[8]The amended statute, in fact, states that "[t]he governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal." (Emphasis added.)

substantive change to an existing law and may not be given retroactive effect. E.g., Dale v. City of Newport News, 243 Va. 48, 50-51, 412 S.E.2d 701, 702 (1992). It must be presumed that the enacting body was aware of existing law and that any change was purposeful, rather than unnecessary. Britt Constr., Inc. v. Magazzine Clean, LLC, 271 Va. 58, 63, 623 S.E.2d 886, 888 (2006). These principles govern the court's interpretation of ordinances and bylaws, as well as statutes. W. Lewinsville Heights Citizens Ass'n v. Bd. of Sup'rs of Fairfax County, 270 Va. 259, 264-65, 618 S.E.2d 311, 313-14 (2005).

W. Lewinsville, like the present case, involved a statutory amendment involving time requirements. In holding that the bylaws were inconsistent with the amended statute, the court explained:

> The former statute identified the date of a specific action, the filing of the BZA's decision in the office of its board, as the date from which the 30-day appeal period to the circuit court began to run. The BZA by-law, in turn, served to specify when a decision was "officially filed" in the office of the board, namely, at least eight days following the BZA's decision. Therefore, under those former provisions, the crucial date from which an appeal period was measured was not the actual date of the BZA's vote but the date that the recorded decision was filed in the office of the board.
>
> In amending Code § 15.2-2314, the General Assembly changed the focal point for the commencement of the appeal period from the date the BZA's final decision was filed to the date of the final decision itself. This change was a "substantive one."

Id. at 267, 618 S.E.2d at 315.

As in W. Lewinsville, the 2006 amendment of the zoning statute in the present case changed the focal point of the notice requirements for proffers from all changes in proffers to substantive changes. Because the amendment effected a substantive change in requirements, it may not be applied retroactively to save a violation of the mandatory notice requirements that existed in 2004. Clearly, therefore, the May proffer was void ab initio, as it was neither received in writing nor signed before the advertised hearing of the Board of Supervisors, let alone five days before, and was not presented to the planning board at all. Rather, the May proffer was only signed on May 3, 2004, almost a week after the hearing. The May proffer, accordingly, should have no legal effect on the uses permitted under the B-2 zoning designation. The February proffer, on the other hand, because it was not voted on and was simply not even a part of the rezoning, since the vote on the rezoning was on a substituted proffer, cannot, as a matter of law, have any legal effect.

The Appellees argue that holding that the proffer is void would result in voiding the entire rezoning. (Br. in Opp. at 8-9 n.3.) Quite to the contrary, the law in Virginia is that invalid provisions of legislative acts are severable unless the act specifically provides to the contrary or it is apparent that another provision's operative effect is dependant on that of the invalid portion.[9] The

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[9]Prior to 1986, there was a presumption of nonseverability. See Elliott v. Commonwealth, 267 Va. 464, 471-72, 593 S.E.2d 263, 267-68 (2004). In

rezoning ordinance at issue in the present case does not specifically provide that its provisions are not severable. (A. 252-54, 324-29.) The question is, therefore, whether the other provisions of the rezoning can be given effect without the invalid proffer. See Appalachian Voices v. State Corp. Comm'n, 277 Va. 509, 520, 675 S.E.2d 458, 463 (2009) (other provisions of rate-adjustment statute could be given effect without portion referencing utilization of Virgina coal, even if that portion was invalid); Elliott, 267 Va. at 471-72, 593 S.E.2d at 267-68 (other provisions of cross-burning statute could be given effect without the prima facie evidence provision, which was invalid).

In a pre-1986 case, in which the language of the county ordinance itself created a presumption of severability, after reciting the general principles governing severability, the court explained:

> We agree with the trial court that an examination of section 7, in the light of these principles, shows that the last sentence is severable and does not vitiate the whole section. The first sentence of the section prohibits the act, and the second fixes the punishment by the imposition of a fine upon conviction of its violation. The third sentence merely fixes an additional penalty for the violation of this section by requiring that upon conviction of the offense the dog shall be destroyed in the manner therein provided. The elimination of the last sentence in no manner affects the operation and effect of the first two. Without it the ordinance is complete and effective. The prohibition against the unlawful act remains and a complete punishment by way of a fine for conviction likewise remains.

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1986, the legislature changed the law, establishing the current presumption of severability. Va. Code Ann. § 1-17.1 (now § 1-243).

King v. Arlington County, 195 Va. 1084, 1093, 81 S.E.2d 587, 592-93 (1954) (emphasis added).

In another case, after rejecting the parties' arguments and concluding that Virginia's statutory presumption of severability applied, the federal court explained:

> We see no reason why the second sentence of § 46.2-746.22 must operate in accord with the first . . . . The first sentence is not rendered meaningless or nonsensical by the elimination of the second. Indeed, the operation of the first sentence is in a sense not affected at all by the elimination of the second—it continues to authorize special plates for the SCV, as it did before the second sentence was determined to be unconstitutional. The only change in the statute's operation is the excision of the unconstitutional logo restriction, a restriction that was imposed entirely by the second sentence.

Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 628 (4th Cir. 2002). The court went on to explain:

> Even assuming, as the parties apparently do, that the "intent of the legislature" inquiry remains a valid consideration in determining severability under Virginia law, we find that it is overcome here by the presumption of severability which applies to statutes enacted by the General Assembly. The logo restriction may well have been the result of a political compromise within the legislature that aided the passage of section 46.2-746.22. Some legislators may have agreed to support the authorizing statute only on condition of the addition of the logo restriction. Under the current legal framework in Virginia, however, the General Assembly enacts laws against the backdrop of section 1-17.1's severability presumption. Without a clear indication that the legislature's intent was to enact section 46.2-746.22 only with the

> logo restriction in place, and without any expression of the statute's purpose, we cannot presume that the legislature would not be "satisfied" with what remains after the second sentence is severed.

Id. at 628-29. In the present case, similarly, even if it could be determined that the challenged proffer was the result of a political compromise that aided the passage of the rezoning, and even if some board members may have agreed to support the ordinance only on condition of the addition of the proffer,[10] those factors would not override the presumption of severability.

Importantly, a Virginia court has specifically addressed the effect of the invalidity of an individual proffer and has determined that such invalidity does not necessarily undermine the overall reasonableness of the rezoning. Clark v. Town of Middleburg, 1990 WL 751299, at *5 (Loudoun County, Va., Cir. Ct. 1990). As the court explained in Clark:

> While the Town may have made an error in accepting a proffer as to agricultural use of the northern tract or may have exceeded its authority in doing so, I do not believe that this invalidates the entire ordinance. Invalidity of one proffer should not defeat an entire rezoning ordinance. Therefore, for purposes of the Pettibone Demurer, the Bill of Complaint states facts among which the Court could declare the following provisions:
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> Proffer (5): "and this land shall be used only for

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[10]If that were the case, it would, of course, raise additional questions about whether the proffer was, in fact, voluntary, or whether it actually constituted an unconstitutional condition on obtaining a government benefit. See Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

> agricultural purpose."
>
> Proffer (7): "and the Applicant retains the Right to use this acreage for agricultural purposes."

> to be null and void, but that the balance of the proffers and the ordinance are valid, unless otherwise invalid.

Id. While the court did not specifically invoke the severability presumption in Clark, its decision is entirely consistent with it.

As in Clark, King, and Griffin, while the proffer related to diesel fuel in the present case is clearly null and void for failure to give the required notice, the rest of the proffers and the rezoning itself are valid. The rest of the rezoning ordinance is not rendered meaningless or nonsensical by the elimination of the invalid proffer. Indeed, the operation of the rest of the ordinance is in a sense not affected at all by the elimination of the proffer—it continues to authorize the district change from rural to business, as it did before a determination that the proffer is invalid. The only change in the rezoning's operation is the excision of the invalid proffer.

Because the issue before it was the validity of the proffer, not the discretion of the Administrator or the Board, the circuit court clearly erred in finding that Appellants' request for a declaration was barred for failure to appeal the rezoning within 30 days and in failing to declare the challenged proffer invalid for failure to comply with the notice requirements. This Court

should, therefore, itself declare the proffer invalid or, in the alternative, remand to the circuit court with instructions to do so.

## II. SINCE THE APPELLANTS HAVE A CLEAR LEGAL INTEREST IN THE OUTCOME OF THE CASE, THE COURT ERRED IN CONCLUDING THAT THEY LACKED STANDING.

It is by now well established in Virginia that all that is required for a party to have standing to bring an action is that it have a sufficient interest in the subject matter of the action to insure that the parties will be actual adversaries and that the issues will be fully and faithfully developed. Weichert Co. of Va. v. First Comm'l Bank, 246 Va. 108, 108, 431 S.E.2d 308, 309 (1993) (citing Cupp v. Bd. of Suprv'rs, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984)); Grisso v. Nolen, 262 Va. 688, 693, 554 S.E.2d 91, 94 (2001) (same). The very concept of standing is to ensure that a party who asserts a position in the litigation has a substantial legal right to do so and that the disposition of the case will, in fact, affect the party's right. Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc., 273 Va. 107, 120-21, 639 S.E.2d 257, 265 (2007); Grisso, 262 Va. at 693, 554 S.E.2d at 94.

The Declaratory Judgment Act specifically gives the courts authority to make binding adjudications of rights where there is an actual controversy and specifically enumerates the controversies that may be so determined as including "the interpretation of . . . statutes, municipal ordinances and other

governmental regulations." Va. Code Ann. § 8.01-184. While the courts are not authorized to render advisory opinions, an opinion which makes a binding adjudication of rights to resolve an actual controversy is not an advisory opinion. See, e.g., Appalachian Voices, 277 Va. at 515, 675 S.E.2d at 460 (record clearly presented real controversy concerning whether challenged provisions of Code violated federal Constitution, resolution of which did not constitute advisory opinion).

While the courts, similarly, are not generally authorized to grant declaratory relief where rights have already accrued or where other relief is available, where the controversy would not be resolved upon a dispositive factual question without an interpretation of the governing provisions, declaratory relief is appropriate–even if the defendant has already taken action affecting the plaintiff's rights. See, e.g., Bd. of Suprv'rs of Loudoun County v. Town of Purcellville, 276 Va. 419, 666 S.E.2d 512 (2008) (both declaratory judgment action and appeal from county BZA before court on appeal from lower court's decisions); Hoffman Family, L.L.C. v. Mill Two Assocs. P'ship, 259 Va. 685, 692-94, 529 S.E.2d 318, 323-24 (2000) (without judicial resolution of effect of restrictive covenant at issue, parties would be left without meaningful relief); cf. USAA Cas. Ins. Co. v. Randolph, 255 Va. 342, 348, 497 S.E.2d 744, 747 (1998) (where plaintiff had sought only

determination of a disputed fact, court not authorized to make a declaration of rights).

In Town of Purcellville, in rejecting the county's argument that declaratory relief would not be proper because the town's rights had already accrued given that the county had already acted, and finding the case to be a classic controversy for which declaratory relief was appropriate, this Court stated:

> We disagree. The Town sought a declaration of its rights under its written agreements with the County and the dispute presented would not be resolved upon a dispositive factual question. Therefore, declaratory judgment was a proper vehicle for relief.

276 Va. at 435, 666 S.E.2d at 520. This Court further stated that the trial court's error in the declaratory judgment action meant that its decision in the BZA appeal was also erroneous. Id. at 440, 666 S.E.2d at 522. In the present case, similarly, the court below erred in its decisions in both the declaratory judgment action and the appeal from the BZA.

As this Court explained in another case, in rejecting a similar argument:

> The case at bar differs from Shanklin in two respects. First, Southland is actually engaged in the business of obtaining suitable sites in Fairfax County and developing them as "7-Eleven" stores. This is a major component of its business operations. . . . Its position vis-a-vis the County constitutes an actual controversy, whereas Shanklin's hypothetical and abstract disapproval of the city's zoning ordinance did not. Second, the County essentially admitted Southland's position in its pleadings. The County's answer states: "Defendant admits that Complainant

> has attempted and may be attempting to construct and operate quick-service food stores in Fairfax County . . ." In subsequent parts of its answer, the County admits that "quick-service food stores" are so defined by its zoning ordinance as to bring them within the special exception requirement. Southland asserts that it has the actual, present right to construct and operate quick-service food stores in commercial districts in Fairfax County, without submitting to the special exception requirements, because the zoning ordinance is unconstitutional and void as applied. The County denies this assertion. Having conceded that Southland was directly and immediately affected by the ordinance, the County will not now be heard to contend that no actual controversy exists between the parties.

Bd. of Suprv'rs of Fairfax County v. Southland Corp., 224 Va. 514, 520, 297 S.E.2d 718, 721 (1982). This Court went on to explain:

> Southland had, for the reasons stated above, a "justiciable interest" in the subject matter which was ripe for judicial determination, rather than one which was merely "hypothetical or abstract." This gave it standing to invoke the court's declaratory judgment jurisdiction.

Id. at 520-21, 297 S.E.2d at 721.

In the present case, the Appellants have a right to develop, even with the proffer and, certainly, unfettered by the invalid proffer. They have sought an interpretation of the proffer used by the Zoning Administrator to deny their development application, first from the BZA and then from the circuit court. (A. 207-20, 228.) It could not be clearer that there is an actual and live controversy that involves, not the determination of a disputed factual issue, but an interpretation of the proffer provision in the rezoning ordinance, and

that this is, like Randolph, and like Southland Corp., a classic case for declaratory relief.

The Appellees initially challenged the Appellants' standing on the basis that the Appellants were not involved in the rezoning and had not asserted that they had standing to file suit within the statutory 30-day period for contesting zoning decisions. (Br. in Opp. at 17-19.) The Appellees further have now made a convoluted argument that the Appellants were, therefore, not aggrieved. (Br. in Opp. at 17-18.) As already explained, the 30-day period does not apply to validity challenges, and the present challenge is clearly a validity challenge.

Since the Appellants have raised a validity challenge, the question is not whether the Appellants were aggrieved at the time of the rezoning in 2004 but, rather, whether they were aggrieved at the time they brought the actions now being reviewed. As explained infra, they clearly were. Furthermore, the very case that the Appellees rely upon makes it clear that the Appellants had standing to bring their validity challenge.

In that case, following the language quoted by the Appellees, which fully supports the Appellants' standing as aggrieved persons with a direct and immediate pecuniary and substantial interest in the subject matter of this litigation, this Court further explained:

> Thus, it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated. The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally. Insurance Ass'n v. Commonwealth, 201 Va. 249, 253, 110 S.E.2d 223, 226 (1959).
>
> In the present case, the Commission, for example, neither owns nor occupies real property within or in close proximity to the property that is the subject of the variance application. Indeed, the Commission owns no property at all. And it has not otherwise demonstrated a direct, immediate, pecuniary, and substantial interest in the decision to grant the variance to the height and setback requirements.

Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals of Va. Beach, 231 Va. 415, 419-20, 344 S.E.2d 899, 902-03 (1986). Unlike the commission, the Appellants in this case had an immediate and pecuniary interest in the affected property and made an application for development, which was denied, incorrectly, based on the challenged proffer in the rezoning ordinance. They were clearly aggrieved by the adverse decision on the development application and, therefore, clearly had standing to seek a declaration of their rights under the ordinance.

In Cupp, after reciting the governing principles on standing, this Court, in rejecting the argument that there was a problem with standing, explained:

> The United States Supreme Court has described standing

in the following terms:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978) (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)) (emphasis added).

227 Va. at 589, 318 S.E.2d at 411.

This Court went on to discuss two of its recent decisions that had involved the issue of standing in the context of declaratory judgment actions—first, Southland Corp., discussed supra, and then:

> We likewise found standing in Henrico County v. F. & W., Inc., 222 Va. 218, 278 S.E.2d 859 (1981). There, an option holder regarding certain land sales contracts sued to have declared unlawful the down-zoning of the property on which it held options. The county contended that as a mere option holder, F. & W. did not have standing to pursue its declaratory judgment action. We said this about standing: "A plaintiff has standing to bring a declaratory judgment proceeding if he has 'a justiciable interest' in the subject matter of the litigation, either in his own right or in a representative capacity." 222 Va. at 223, 278 S.E.2d at 862 (citing Lynchburg Traffic Bureau v. Norfolk & Western Railway, 207 Va. 107, 108, 147 S.E.2d 744, 745 (1966). We explained that F. & W.'s interest in the viability of its options was sufficient to give it standing.
>
> Here, the Cupps owned Wolf Trap Nursery and the land on which that business operated. They had a direct stake in any

> ordinance that would curtail or control what they could sell in their business. They were directly affected by any condition that would require them to turn over a portion of their land to the County. In terms of a personal stake, it is plain that if any party were in a position to challenge governmental activity affecting Wolf Trap Nursery and the Cupp property on Route 7, it would be the Cupps.

Id. at 590, 318 S.E.2d at 412 (emphasis added).

In the present case, as in Cupp, it is clear that Appellants have a direct stake in any ordinance that curtails or controls what they can sell in their business and/or what they can do on the property. Because of the illegally adopted and erroneously interpreted proffer in the rezoning of the property, they have been denied the ability to pursue certain business interests which are clearly allowed within SIC 55 and B-2 Districts. The very purpose of their action has been to resolve the issues of validity and interpretation of the rezoning proffer—issues which clearly affect their legal interests in the use of the property. The fact that the property was purchased after the proffer was adopted as part of the rezoning of the affected property in no way negates Appellants' legal interest in the subject matter or their resulting interest in resolving the issues of whether the proffer was void ab initio, as Appellants have argued supra, and whether it was incorrectly interpreted, as they argue infra. The circuit court's determination that Appellants lacked standing is clearly erroneous.

## III. SINCE THE ZONING ADMINISTRATOR HAD MADE HIS INTERPRETATION OF THE PROFFER CLEAR AND MADE IT CLEAR THAT HE WILL NOT CHANGE HIS POSITION, THE COURT ERRED IN REFUSING TO INTERPRET AND DETERMINE THE INVALIDITY OF THE REZONING PROFFER ITSELF AND IN DIRECTING THE ZONING ADMINISTRATOR TO ACCEPT AND PROCESS THE SITE PLAN APPLICATION.

As an initial matter, it is clear from the record that the Zoning Administrator, in deciding not to allow Appellants' application to proceed through the process, had actually made a determination as to what he thought the challenged proffer meant and determined that, under his interpretation, Appellants' project would have to be rejected. (See A. 10, 14-16, 33, 39-40, 60, 64-65, 70.) While zoning boards may not have the authority to rule on the validity of zoning ordinances, a determination which is within the sole province of the courts, they "must necessarily interpret zoning ordinances to execute their responsibilities." Town of Jonesville, 254 Va. at 74, 487 S.E.2d at 210 (emphasis added). Thus, even if the Zoning Administrator had authority to interpret the proffer, the BZA certainly should have, at the very least, interpreted the proffer itself in order to determine whether the Zoning Administrator's action was correct under a proper interpretation of the rezoning.

It is, furthermore, the court's well-established duty to interpret statutes and ordinances enacted by legislative bodies when the meaning of provisions

is at issue in cases before them. E.g., Lawrence v. City of Norfolk, 205 Va. 209, 213, 135 S.E.2d 792, 794-95 (1964) (interpreting meaning of term in ordinance and concluding its requirements were not met). Thus, the circuit court erred in refusing to make a determination as to what the rezoning proffer actually meant, even if a remand would still have been proper.

The Appellees, in another convoluted argument, assert that the Appellants were given the only relief the lower court could have granted them, that this Court cannot make a declaratory judgment that the proffer was void because the Board of Supervisors has not had an opportunity to present evidence on the issue and that interpretation of the proffer would have been beyond the court's statutory review authority. (Br. in Opp. at 20-22.) The Appellees are wrong on each of these assertions.

As an initial matter, the Appellees have referred to the exchange between the circuit court and Mr. Stivers to support their assertion that the Appellants got all the relief they could get when the court reversed the BZA decision. (Br. in Opp. at 21.) That exchange, however, addressed relief very different from what the court actually granted. In that exchange, the court specifically asked about a remand after a ruling that the Zoning Administrator's interpretation was incorrect. (A. 206-20, 228.) The relief that the court actually granted, however, was to remand without ruling on the

interpretation of the proffer. (A. 314-15.)

The circuit court could have, and should have, interpreted the proffer, particularly given the definitions already contained in the County Zoning Code. The court below was authorized, on review, to "reverse or affirm, wholly or partly," or to "modify" the BZA's decision. Va. Code Ann. § 15.2-2314. Accordingly, the circuit court could have modified the BZA's decision, as appropriate, once it had interpreted the proffer. In any case, as explained supra, under the Declaratory Judgment Act, the circuit court was not only authorized to interpret the proffer but was required to do so in order to made a declaration of the rights of the parties.

Furthermore, the statutory provision for review makes it quite clear that a remand to the BZA is not required where additional evidence is required. The statute provides, in pertinent part:

> If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. . . .
>
> Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo.

Id. (emphasis added). The circuit court could, therefore, have taken evidence,

had evidence been required in order to decide the meaning of the proffer. More importantly, however, there was no need for additional evidence, either before the court or the BZA, because the validity issue does not involve a factual matter but, rather, a matter of law.

It is well established that the interpretation of governing provisions, whether by law or by agreement, is a question of law. See, e.g., Alexandria City Council v. Mirant Potomac River, LLC, 273 Va. 448, 455-57, 643 S.E.2d 203, 207-08 (2007); Holston Salt & Plaster Co. v. Campbell, 89 Va. 396, 16 S.E. 274, 274-75 (1892) (construction of all written instruments is question of law for court). In fact, the issue of whether a provision is ambiguous is, itself, a question of law. E.g., Va. Elec. & Power Co. v. N. Va. Reg'l Park Auth., 270 Va. 309, 315, 618 S.E.2d 323, 326 (2005); Pollard & Bagby, Inc. v. Pierce Arrow, L.L.C., III, 258 Va. 524, 528, 521 S.E.2d 761, 763 (1999). When the question before the court is the proper interpretation of an ordinance, therefore, the appealing party must show only that the BZA applied erroneous principles of law, or otherwise committed legal error. Bd. of Suprv'rs of Fairfax County v. Bd. of Zoning Appeals of Fairfax County, 271 Va. 336, 348-50, 626 S.E.2d 374, 381-83 (2006) (stating that preponderance-of-evidence standard applies only to factual findings and concluding that BZA's interpretation of ordinance terms in case involving nonconforming use was plainly wrong).

Importantly, as provided by statute, review of a lower court's interpretation—or failure to make an interpretation—as with any other question of law, is de novo. Va. Code Ann. § 15.2-2314; see also, e.g., Renkey, 272 Va. at 373-76, 634 S.E.2d at 355-57 (concluding that circuit court had erred in its interpretation of provision at issue). The rational for de novo review of things that are in writing, whether contracts, deeds, ordinances, or otherwise, is that the reviewing court's opportunity to consider the words and to determine their meaning is equal to that of whoever has looked at them below. See, e.g., Virginia Elec. & Power Co., 270 Va. at 315, 618 S.E.2d at 326; Waikoloa Ltd. P'ship v. Arkwright, 268 Va. 40, 47, 597 S.E.2d 49, 53 (2004); Pollard & Bagby, 258 Va. at 528, 521 S.E.2d at 763.

Finally, because the reviewing court is in as good a position as the lower court or other decisionmaking body below to interpret the meaning of a provision of law, it follows that it is well within the court's authority to do so, whether or not the decisionmaker below did so. The only impediment to a reviewing court's consideration and interpretation of a provision which the decisionmaker has failed or refused to interpret appears to be whether the matter was raised before that body since, as a general rule, the courts will not consider a matter that was not raised below. See, e.g., Brown v. Brown, 240 Va. 376, 381, 397 S.E.2d 837, 840 (1990); Bd. of Suprv'rs of Fairfax County

v. Miller & Smith, Inc., 222 Va. 230, 238, 279 S.E.2d 158, 162 (1981); see also Va. Sup. Ct. R. 5:25 (errors must generally have been stated below at time of ruling).

The purpose of the rule is to afford the initial decisionmaker the opportunity to rule on the issue—not to foreclose the reviewing court from making an appropriate determination if the decisionmaker below failed to do so. See Buck v. Jordan, 256 Va. 535, 545-46, 508 S.E.2d 880, 885-86 (1998) (and cases cited therein).[11]

It should be clear, therefore, that interpretation of the proffer, whether in the appeal or the declaratory judgment action, would not have been beyond the circuit court's authority on review and is not beyond this Court's authority in the present appeal. Quite to the contrary, since the proffer interpretation issue was clearly raised and argued at every stage below, it is this Court's obligation to determine the issue. See McDonald v. Nat'l Enters., Inc., 262 Va. 184, 191, 547 S.E.2d 204, 208 (2001) (where plaintiff had affirmatively pleaded defense and supported it in a memorandum to the circuit court, the supreme court would address the merits of the issue).

By refusing to interpret the proffer and remanding for the Zoning

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[11]Clearly, having the trial court rule on the issue, in the first instance, also avoids unnecessary appeals and reversals. Id. at 545-46, 508 S.E.2d at 885-86.

Administrator to take the application through the process, the circuit court abdicated its duty to interpret the rezoning proffer. This abdication is particularly puzzling, given that both parties urged the court to interpret the meaning of "over-the-road truck carrier." (A. 245.) Not only did the court abdicate its duty, but it essentially ordered a completely futile exercise. The court, in fact, acknowledged as much, noting that the interpretation of the proffer presented a question of law, that the parties would probably be back before it again, and that it would then have to determine what an over-the-road truck carrier is. (A. 186-87, 243.)

There is no question that the Zoning Administrator has made a determination, based on his reading of the rezoning terms, and that he has no intention of allowing Appellants' plan, even if the whole process were to be completed, based on his speculation that the proffer terms could be violated. (See A. 216, 224, 201-04, 223-24, 237-39, 241.) As the circuit court acknowledged, after the whole application process is over, the case will undoubtedly again be before the court—in fact, the exact same question will be before the court, except that, as the court explained it, it will be reviewing an interpretation of the proffer, rather than interpreting the proffer itself. (See (A. 229, 243.)

Of course, the proffer has already been interpreted—that is exactly what

the Zoning Administrator did. (A. 64-65.) He interpreted the proffer and decided that Appellants' activities could be in violation of the proffer if the application were granted. The BZA, furthermore, in declining to reverse the Zoning Administrator's action, effectively accepted his interpretation. (A. 11, 21.) The court, therefore, already had an interpretation to review—there was absolutely no need to have the whole application process completed in order for it to determine whether the administrative interpretation was correct, and, without additional guidance on the meaning of the proffer, there was absolutely no reason for the Administrator or the BZA to revisit the existing interpretation. The remand is, accordingly, a futile measure and a waste of everyone's time and resources.

It is, of course, well established that the courts will not require futile acts. E.g., Snead v. Harbaugh, 241 Va. 524, 526, 404 S.E.2d 53, 54 (1991) (court would not dismiss for failure to amend pleadings where amendment would have been a futile act); Thomas Branch & Co. v. Riverside & Dan River Cotton Mills, 147 Va. 522, 531-32, 137 S.E. 614, 617 (1927) (court would not have remanded had it been futile to do so); see also Hairston v. McLean Trucking Co., 520 F.2d 226, 232 (4th Cir. 1975) (courts will not require exhaustion of administrative remedies where it would be futile, as law does not require a futile act as a precondition of relief). As the court explained in an early case

which is analogous to the present one:

> It is argued that there was a breach of the contract, in that it was terminated without the giving of the 30-day notice provided and that damages should be allowed, in any event, with respect to the two carloads of refrigerators actually ordered prior to its termination. As pointed out above, however, the plaintiff had the option to purchase at cost all refrigerators which the defendant had on hand when notice of cancellation should be given; and the law would not require the vain formality of delivering the, refrigerators ordered to the end that the option of buying them back might be exercised.

Motor Car Supply Co. v. Gen. Household Utils. Co., 80 F.2d 167, 171 (4th Cir. 1935) (emphasis added).

In the same way, the law should not require Appellants to go through the formality of the entire application process, just so that the Zoning Administrator can again deny the application, as he has already done, for the same reason, as he has made it perfectly clear he will do. It was not the stage of the application process which was the problem but, rather, the underlying interpretation of the proffer. That interpretation, as already noted, the circuit court could have, and should have, addressed.

Had the court addressed the issue, it would, under well-established principles of statutory construction,[12] necessarily have rejected the County's

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[12]The rules of statutory construction, of course, apply equally to the interpretation of ordinances, including zoning and rezoning ordinances. E. Shore Dev. Corp., 277 Va. at 202-03, 671 S.E.2d at 162-63; see also Land & Learning Dev., LLC v. Shenandoah County Bd. of Suprv'rs, 2001 WL 34037305, at *1 (Shenandoah County, Va., Cir. Ct. 2001) (citing Higgs v.

argument that the proffer's term "over-the-road truck carriers" means the same thing as, or includes, truck stops and tractor-trailers. As an initial matter, if the language of a zoning or rezoning ordinance admits to being understood in more than one way, is difficult to understand, or lacks clarity, it is ambiguous. E.g., Travelers Prop. Cas. Co. of Am. v. Ely, 276 Va. 339, 344, 666 S.E.2d 523, 526 (2008) (and cases cited). As already noted, where the language of a provision which is before the court is ambiguous, it is the province, and the duty, of the court to construe the proper meaning of that language. Lawrence, 205 Va. at 213, 135 S.E.2d at 794-95.

In fulfilling that duty, the court must assume that the words used in a legislative provision were chosen with deliberation and care. See, e.g., Miller v. Highland County, 274 Va. 355, 364, 650 S.E.2d 532, 535 (2007) (and cases cited); Saunders v. Commonwealth, 48 Va. App. 196, 203-04, 629 S.E.2d 701, 704 (2006). The court must also assume that the legislative body has acted with full knowledge of existing laws which relate to the same subject matter. E.g., Gillespie v. Commonwealth, 272 Va. 753, 758-59, 636 S.E.2d 430, 432-33 (2006) (and cases cited); Wright v. Commonwealth, 53 Va. App. 266, 279, 670 S.E.2d 772, 778 (2009) (and cases cited).

It follows that the court must recognize that the drafters' careful choice

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Kirkbride, 258 Va. 567, 522 S.E.2d 861 (1999)).

of certain words necessarily implies that other words were omitted with equal care. E.g., Cent. Va. Ob. & Gyn. Assocs., P.C. v. Whitfield, 42 Va. App. 264, 280-81, 590 S.E.2d 631, 639-40 (2004). A court may not, therefore, by means of judicial interpretation or otherwise, effectively change the language used or add language to broaden the scope of a legislative provision. Townes v. Commonwealth, 269 Va. 234, 240-41, 609 S.E.2d 1, 4 (2005).

When two or more provisions that are closely interrelated use different terms, the court must read and construe them together, giving full force and effect to the different provisions where possible. See, e.g., Gilman v. Commonwealth, 48 Va. App. 16, 29-30, 628 S.E.2d 54, 61, mandate vacated on other grounds on rehearing, 49 Va. App. 1, 635 S.E.2d 309 (2006); see also Sansom v. Madison County Bd. of Suprv'rs, 257 Va. 589, 595, 514 S.E.2d 345, 349 (1999) (where county ordinance used phrase "stream or substantial surface drainage course," county must not have intended for the terms "substantial surface drainage course" and "stream" to denote the same kind of topographical features). When a provision which is an amendment to an existing law uses a different term than the existing law does, the court must, therefore, necessarily conclude that a different meaning was intended. See Gilman, 48 Va. App. at 29-30, 628 S.E.2d at 61; cf. Saunders, 48 Va. App. at 201-04, 629 S.E.2d at 703-05 (where term "self-propelled machinery"

had been interpreted to include mopeds under another, existing law, and the same term was then inserted into the habitual offenders' statute, it was to be interpreted as also including mopeds).

As this Court recently explained, in interpreting the meaning of the term "condominium-type ownership" in another county's ordinance:

> All of these classifications apply to the physical structure of buildings to be erected within the district. The classification in question, "Condominium-type ownership," applies instead to the legal form of land tenure to be adopted, not to the physical structure of buildings to be erected.
>
> It is the duty of the Court to read legislative enactments to give meaning to all the words used. We cannot read them "to render any words meaningless." Corns v. School Board of Russell County, 249 Va. 343, 349, 454 S.E.2d 728, 732 (1995); Equity Investors, Ltd. v. West, 245 Va. 87, 91, 425 S.E.2d 803, 806 (1993). This rule of construction applies to local ordinances and acts of the General Assembly alike. See Monument Associates v. Arlington County Board, 242 Va. 145, 149, 408 S.E.2d 889, 891 (1991). The reading of the ordinance advocated by ESDC would give effect only to the word "Condominium" in the phrase in question, rendering the remaining five words meaningless.
>
> Although the board of supervisors might have amended the zoning ordinance after following the proper procedure, it was not at liberty to disregard it. Acts of a local governing body that are in conflict with its own ordinances exceed its authority and are void and of no effect.

E. Shore Dev. Corp., 277 Va. at 202-03, 671 S.E.2d at 162-63.

In the present case, similarly, the County could have negotiated a

proffer[13] that excluded "truck stops," "gasoline service stations," tractor-trailers," and/or all SIC 5541 uses, all of which are clearly defined. It did not—instead, it negotiated a proffer that excluded only uses involving the sale of diesel fuel for "over-the-road truck carriers." Certainly, it must be assumed that the County was aware of the existing terms and their definitions and that, by using a different term in the rezoning proffer, it intended something different.[14] Neither the Zoning Administrator, nor the BZA, nor this Court may disregard the words actually used or render them meaningless.

Furthermore, just as a prohibition against selling cigarettes to minors does not mean that a convenience store may not sell cigarettes at all, despite the possibility that the prohibition might be violated, so the prohibition against uses involving the sale of diesel fuel for over-the-road truck carriers does not mean that a person may not engage in permitted uses involving the sale of diesel fuel, just because of the possibility that the prohibition might be violated. In short, an interpretation that disregards the words actually used, allowing the exception to swallow the rule, would violate not only the rules of construction, but also the rule of law.

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[13]As already noted, the use of proffers to exclude otherwise permissible uses in a district, as was done in this case, necessarily violates the statutory uniformity requirement.

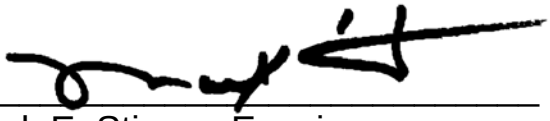
[14]Locally used trucks and tractor-trailers, for example, do not come within the definition of over-the-road truck carriers.

## CONCLUSION AND PRAYER

This Court should reverse the circuit court and declare that the proffer was void ab iniitio. Should this Court decline to make that declaration, it should reverse the circuit court's decision to sustain the demurrer and remand for further proceedings. In the alternative, the Court should interpret the rezoning proffer or at least state what it does not include in light of existing definitions in the County Code. Should this Court decline to address the proffer, it should reverse the circuit court decision to require the futile act of reapplying to the Zoning Administrator and should require it to interpret the proffer.

Respectfully submitted,

AROGAS, INC., and PAT MANNING
By Counsel



Mark E. Stivers, Esquire
Va. State Bar No. 32662
Post Office Box 1737
Winchester, VA 22604
Telephone: (540) 722-6168
Facsimile: (540) 722-6169

Counsel for Appellants

## CERTIFICATE OF SERVICE AND
## CERTIFICATE OF COMPLIANCE WITH RULE 5:17(e)

Pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia, counsel for the plaintiff certifies as follows:

(a) The appellants, Arogas, Inc., and Pat Manning, are represented by Mark E. Stivers, Esquire, Post Office Box 1737, Winchester, Virginia 22604, Telephone: (540) 722-6168, E-Mail: markestivers@comcast.net.

(b) The Appellees, Frederick County Board of Zoning Appeals and Frederick County Board of Supervisors, are represented by Robert T. Mitchell Jr., Esquire, 9 East Boscawen Street, Post Office Box 848, Winchester, Virginia 22604, Telephone: (540) 662-3200.

(c) In accordance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that I have filed the required 15 copies of Appellants' Brief and Appendix in the Clerk's Office, together with an electronic copy of this brief and Appendix in PDF, and mailed the required 3 hard copies of the Brief and Appendix to counsel for Appellees.

Given under my hand this 15th day of December 2009.

Mark E. Stivers
Attorney for Appellants