IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091502

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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

AROGAS, INC., AND PAT MANNING,

Appellants,

v.

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

Appellees,

BRIEF *AMICUS CURIAE* OF THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., IN SUPPORT OF THE BRIEF OF APPELLEES

Curt G. Spear, Jr. (VSB # 37385)
Assistant County Attorney, Prince William County
Noah B. Klein (VSB # 48462)
Assistant County Attorney, Prince William County
One County Complex Court
Prince William, VA 22192
Telephone: (703) 792-6620
Facsimile: (703) 792-6633
cspear@pwcgov.org
nklein@pwcgov.org
Counsel for Local Government Attorneys
of Virginia, Inc.

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond Virginia 23219 (800) 847-0477

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STATEMENT OF THE CASE

This brief is submitted as an *amicus curiae* by the Local Government Attorneys of Virginia, Inc. (LGA) in support of the Brief of Appellees filed by the Frederick County Board Zoning Appeals and the Frederick County Board of Supervisors. This Court's consideration of the Questions Presented will raise important issues of law that affect the land planning and zoning activities of all local governments. If this Court grants the relief sought by the appellants, its ruling may affect the validity of numerous local government legislative actions, and may deprive citizens of the Commonwealth of the protections created for them by the Commonwealth's conditional zoning statutes.

On April 13, 2006, Appellant Arogas submitted a site plan to Frederick County ("the County") which depicted a service station with a convenience market and fueling areas and pumps for the sale of gasoline and diesel fuel on 3.4 acres of property then owned by George M. and Carol T. Sempeles ("the Sempeles"). The County's Zoning Administrator determined that the site plan depicts facilities for the sale of diesel fuel to over-the-road trucks. The Zoning Administrator also determined that such use is specifically prohibited by the voluntary conditions submitted by the

owner as part of the conditional zoning of the property, and therefore did not accept the site plan for review.

Arogas appealed the Zoning Administrator's determination to the Frederick County Board of Zoning Appeals ("the BZA"), which upheld the Zoning Administrator's determination.

Arogas subsequently filed a Petition for a Writ of Certiorari and Declaratory Judgment ("the Petition") in the Circuit Court of Frederick County. Specifically, Arogas sought a declaration that the proffered condition at issue is invalid and void, as well an order overturning the BZA's decision. The County demurred with respect to the request for declaratory relief. The trial court sustained the County's demurrer, and granted Arogas leave to amend.

Arogas then filed an Amended Petition for Writ of Certiorari and Declaratory Judement ("the Amended Petition"), again seeking declaratory relief holding that the proffered condition at issue is void and an order overturning the BZA's decision. The County again demurred with respect to the request for declaratory relief. The trial court sustained the County's demurrer on June 2, 2008, and dismissed the Amended Petition.

On October 21, 2008, the trial court held a hearing on Arogas' appeal of the BZA's decision. Following the hearing, the trial court ruled that the

Zoning Administrator had erred in not accepting the site plan for review and reversed the BZA's decision. The trial court made no finding on the issue of whether Arogas' proposed use of the property was in violation of the proffered condition restricting the use.

Arogas appealed the trial court's decision to this Court, resulting in this proceeding.

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.

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 of the Board and in directing the Zoning Administrator to accept and process the site plan application.

QUESTIONS PRESENTED

1. Did the trial court err in sustaining the demurrer to the declaratory judgment relief requested? (Assignments of Error 1 and 2)

2. Did the trial court err in declining to interpret the proffer? (Assignment of Error 3)

STATEMENT OF FACTS

On April 27, 2004, the Frederick County Board of Supervisors held a public hearing to consider an application to rezone approximately 112 acres owned by Carol and George Sempeles. The application sought to rezone 10.3 acres from Rural Areas (RA) to Business General (B-2) and the other 101.92 acres from RA to Industrial (M-1). The applicant sought a conditional rezoning pursuant to § 15.2-2296 *et seq.*, VA Code Ann., and thus submitted a written statement voluntarily proffering to comply with the recited conditions. In that document, titled "Rezoning Request Proffer," the applicant included, *inter alia*, a condition that prohibited any use involving the retail or wholesale sale of diesel fuel on the site.

After the public hearing was conducted on the application on April 27, 2004, and following the subsequent discussion by members of the Board, the applicant agreed to revise the proffer recited above to state 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 either in the commercial or industrial zones." (A. 328).

Thus, the original draft of the proffer prohibited all retail or wholesale sales of diesel fuel on the property. The revised proffer merely prohibited retail or wholesale sales of diesel fuel to "over the road truck carriers" instead of prohibiting such sales categorically.

The Rezoning Request Proffer also stated at its outset that "[t]hese proffers shall be binding upon the applicant and their legal successor or assigns." (A. 326).

Arogas, though not involved in the rezoning application, is the current owner of the property, now standing in the place of the rezoning applicant who participated in the rezoning process and submitted the revised Rezoning Request Proffer.

Approximately two years later, on April 13, 2006, Arogas submitted a site plan to the County for review. The site plan showed a service station for a convenience market and fueling areas for the sale of gasoline and diesel fuel on 3.4 acres of the subject property. (A. 87). The County's Zoning Administrator rejected the site plan, determining that:

> "[i]t is clear that the commercial use is, in fact, a gasoline service station (SIC 5541) with fuel islands and parking spaces appropriately sized to accommodate over-the-road trucks. Additionally, the commercial entrance detail on Drawing Number C-14, and the pavement details on Drawing Number C-13, are designed to accommodate heavy truck traffic." (A. 64, 66-67).

The Zoning Administrator further determined that the use proposed by the site plan was prohibited by the proffer restricting the permitted uses of the property. (A. 64-65).

Arogas subsequently appealed the Zoning Administrator's determination to the BZA, which upheld the Zoning Administrator's determination. (A. 11).

Arogas then filed a Petition for Writ of Certiorari and Declaratory Judgment in the Circuit Court.

PRINCIPLES OF LAW AND ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN SUSTAINING THE DEMURRER TO THE REQUEST FOR DECLARATORY RELIEF.

A. INTRODUCTION.

This Court has repeatedly held that:

> [a] demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations . . . . A demurrer does not, however, admit the correctness of the pleader's conclusions of law.

Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 102, 540 S.E.2d 134, 136-37 (2001).

In their Amended Petition, the appellants allege that the revision of once sentence of the Rezoning Request Proffer renders the proffer, but not the rezoning itself, void ab initio. This is clearly a conclusion of law which is not admitted upon a demurrer.

In their complaint, the appellants must articulate a cause of action which entitles them to the relief sought. In the present case, the appellants have not and cannot do so. Instead, the appellants have mistakenly grasped on to a number of cases holding legislative acts to be void *ab initio*, none of which present situations analogous to the case at bar. For the reasons discussed below, there are no causes of action which support

the appellants' claim that one sentence of a proffer statement is void while the underlying rezoning remains intact.

B. THE BOARD'S ACTION WAS TAKEN IN ACCORDANCE WITH APPLICABLE LAWS AND ORDINANCES, AND DID NOT GIVE RISE TO ANY CAUSE OF ACTION.

The statutory framework that enables the Commonwealth's local governments to engage in the practice of zoning recognizes the flexibility needed to achieve the purposes of zoning, and is designed to allow local governments to make appropriate changes or modifications to draft plans and ordinances to achieve those purposes. A closer look at that statutory framework, and at Frederick County's zoning ordinance, shows that the Frederick County Board of Supervisors acted in accord with the procedural requirements set forth in the Virginia Code and in local ordinance. Thus, there is no cause of action which can avail the appellants of the relief they seek.

Local governments in the Commonwealth have been granted the power to adopt zoning ordinances pursuant to § 15.2-2280 *et seq.*, VA Code Ann. The General Assembly has specifically enumerated the purposes of zoning ordinances in § 15.2-2283, VA Code Ann., which states that "[z]oning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing

the objectives of § 15.2-2200.[1]" Both the Virginia Code and the Frederick County zoning ordinance must be read with this purpose in mind.

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[1] Following the cited sentence, § 15.2-2283 sets forth a more specific list of purposes which each local zoning ordinance must be designed to consider, including: "(i) to provide for adequate light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime and other dangers; (ii) to reduce or prevent congestion in the public streets; (iii) to facilitate the creation of a convenient, attractive and harmonious community; (iv) to facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (v) to protect against destruction of or encroachment upon historic areas; (vi) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, impounding structure failure, panic or other dangers; (vii) to encourage economic development activities that provide desirable employment and enlarge the tax base; (viii) to provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment; (ix) to protect approach slopes and other safety areas of licensed airports, including United States government and military air facilities; (x) to promote the creation and preservation of affordable housing suitable for meeting the current and future needs of the locality as well as a reasonable proportion of the current and future needs of the planning district within which the locality is situated; and (xi) to provide reasonable protection against encroachment upon military bases, military installations, and military airports and their adjacent safety areas, excluding armories operated by the Virginia National Guard. Such ordinance may also include reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and ground water as defined in § 62.1-

Because zoning matters are frequently of great local interest, the General Assembly has guaranteed the public the opportunity to be notified of proposed zoning ordinances and amendments, and the opportunity to be heard at a public hearing[2]. "The statute's obvious intent is to afford property owners who are closest to the land involved an opportunity to be heard by the Board." *Lawrence Transf. & Storage Corp. v. Board of Zoning Appeals*, 229 Va. 568, 571, 331 S.E.2d 460, 462 (1985) (decided under prior law). It should be equally obvious, then, that local governing bodies should have the ability to consider the input from affected citizens prior to taking final action.

In recognition of this principle, the General assembly has given local governments making decisions on zoning ordinances or amendments the flexibility to make appropriate changes to proposed ordinances or amendments – such as a zoning map amendment proposed by a rezoning

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255." It is clear from the depth and specificity of these purposes that the overriding purpose of the local zoning power is to allow local governing bodies the ability to protect their communities which may have a negative impact on their health, safety and welfare.

[2] The notice and hearing requirements for local zoning actions are contained in § 15.2-2204, VA Code Ann.

application – even *after the required public hearing has taken place.* Section 15.2-2285(C) states that:

> Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.2-2204, *after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment.* (emphasis added)

The obvious purpose for this subsection is to afford local governments the opportunity to be responsive to feedback received at public hearings, and allow local governments the flexibility to consider options beyond just the blanket adoption or denial of the proposed ordinance or amendment as drafted. The ability of local governing bodies to consider myriad options is vital to their capacity to strike a deliberate balance between private property rights and public interests[3].

Nowhere is the General Assembly's recognition of the need for this flexibility more apparent than in the Commonwealth's conditional zoning statutes. The practice of a property owner submitting proffered conditions during the rezoning process is governed by § 15.2-2296 *et seq.*, VA Code

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[3] In *Board of Supervisors of Fairfax County v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974), this Court recognized that striking this precise balance is at the heart of the local zoning function.

Ann. In declaring the legislative policy behind the conditional zoning statutes, that section states:

> Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and the same time to recognize effects of change. It is the purpose of §§ 15.2-2296 through 15.2-2300 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned.

Reduced to its essence, this policy states that the conditional zoning statutes are designed to protect the community by conditioning the legislative act of rezoning a property on certain voluntary commitments proffered by the landowner. As this Court has recognized:

> [p]roffers are voluntary commitments made by landowners in order to facilitate approval of conditional zoning and rezoning requests by ameliorating the impact of development of their property on the local infrastructure and the character and environment of adjoining land.

Hale v. Bd. of Zoning Appeals, 277 Va. 250, 273, 673 S.E. 170, 182 (2009).

The General Assembly has also recognized the need for flexibility in the amendment of proffered conditions after a public hearing on a conditional rezoning has begun. The fourth paragraph of § 15.2-2298(A) states, *inter alia*, 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." This portion of the statute specifically envisions the kind of action taken by the Frederick County Board of Supervisors in this case. This action is not only clearly consistent with the purpose and intent of the Commonwealth's zoning and conditional zoning statutes, it is specifically permitted by them on the face of the language contained in those statutes.

The appellants argue that because the language cited from § 15.2-2298(A) in the paragraph above was inserted by the General Assembly in a 2006 amendment, that it cannot be applied to the rezoning in this case which took place in 2004. This argument assumes that the General Assembly intended to *change* the statute in 2006 rather than *clarify* an issue on which the previous version of the statute was silent. At no time has § 15.2-2298(A) ever contained language prohibiting the amendment of proffered conditions at or after a public hearing on a conditional rezoning. This is likely because such language would have conflicted with the General Assembly's long held policies favoring flexibility in the enactment of local zoning ordinances as discussed above. As this Court held in *Boyd v. Commonwealth*, 216 Va. 16, 20-21, 215 S.E.2d 915, 918 (1975), when amendments are enacted after questions of interpretation have arisen, it is

logical to regard the amendment as a legislative interpretation of the original act. Again, given the General Assembly's long held policies on these issues, it is far more likely that the General Assembly's enactment of the 2006 amendment was a legislative interpretation of the previous statute, and was not intended to change its original meaning.

The appellants also assert that the amendment of the proffered condition after the public hearing violated § 165-13 of the Frederick County zoning ordinance, which requires that proffers be received in writing and signed by the owner and applicant at least five days prior to the advertised public hearing by the Board. (A. 252). In the present case, however, written proffers were submitted prior to that deadline. There is no provision in the Frederick County zoning ordinance which prohibits the amendment of proffered conditions prior to the public hearing by the Board. The section quite obviously contemplates the amendment of proffered conditions following the recommendation by the Planning Commission, and merely states an administrative deadline by which copies must be received. Such a deadline is necessary, as otherwise there would be no mechanism to ensure that appropriate copies would be available to the Board and to the public at the public hearing. There is no provision in the Frederick County zoning ordinance which prohibits the amendment of proffered conditions

prior to the public hearing by the Board. Indeed, such a prohibition would be inconsistent with the policies behind the enabling authority granted to the County by the General Assembly as discussed above.

For the foregoing reasons, the Frederick County Board of Supervisors' action in approving the rezoning conditioned on the amended proffer was lawful. It was fully consistent with both the letter and the spirit of both the Virginia Code and the Frederick County zoning ordinance. Accordingly, there is no cause of action which entitles the appellants to the relief requested, and the trial court did not err in sustaining the County's demurrer.

C. ASSUMING ARGUENDO THAT THE BOARD'S ACTION DID NOT TECHNICALLY COMPLY WITH THE COUNTY'S ZONING ORDINANCE, THERE IS NO CAUSE OF ACTION WHICH AFFORDS THE APPELLANTS WITH THE RELIEF REQUESTED.

1. THE APPELLANTS' REQUESTED RELIEF OF DECLARING THE PROFFER VOID *AB INITIO* IS INCONSISTENT WITH VIRGINIA LAW ON LEGISLATIVE INVALIDITY.

The Appellants request that a single proffer be declared void *ab initio* on the basis that the proffer was not first submitted to the Frederick County Board ("Board") in accordance with Frederick County Code § 165-13(A). In maintaining this claim, the Appellants are attempting to create a new procedural due process right unrecognized in Virginia law. More

importantly, the Appellants are improperly invoking the extreme remedy of declaring a legislative act void *ab initio*, when such remedy is only available where a local governing body lacked any authority to exercise its legislative zoning power. Due to clear separation of powers concerns, courts in Virginia are reluctant to substitute their judgment for that of a legislative body[4], and will declare a legislative act void *ab intio* only where the governing body has failed to meet a fundamental prerequisite to action.

A local governing body must comply with certain recognized requirements in order to exercise properly its legislative authority. It is well-settled in Virginia that the decision of a board of supervisors to deny or approve a rezoning is a legislative act, and that such act is presumed to be reasonable. *Gregory v. Board of Supervisors of Chesterfield County, supra*; *City Council of the City of Salem v. Wendy's of Western Va. Inc.*, 252 Va. 12, 471 S.E. 2d 469 (1996); *Board of Supervisors of Henrico County v. Fralin and Waldron,* Inc. 222 Va. 218, 278 S.E. 2d 859 (1981). This Court has determined that procedural due process does not attach to legislative decisions, as procedural due process is a constitutional right that

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[4] See e.g. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E. 2d 350 (1999) (where this Court held that the trial court properly elected not to substitute its judgment on behalf of the legislative body where the merits of a rezoning were fairly debatable)

only applies to individuals in adjudicative or quasi-adjudicative proceedings. *County of Fairfax v. Southern Iron Works*, 242 Va. 435, 444, 410 S.E. 2d 674 (1991). Rather, the only procedural requirements to be met by the Board are statutory notice and hearing. Id.

So to the extent that this Court has recognized concepts inherent in procedural due process, they are embodied in the statutory notice and hearing requirement. Because procedural matters address the authority of a governing body to legislate, failure to meet them can be fatal to any subsequent legislative enactments. As this Court held in *Glazebrook v. Board of Supervisors of Spotsylvania County*, 266 Va. 550, 587 S.E.2d 589 (2003) and *Gas Mart Corp. v. Loudon County Board of Supervisors*, 269 Va. 334, 611 S.E. 2d 240 (2005), failure to follow mandatory statutory notice provisions will render a subsequent zoning enactment void *ab initio*. In addition, failure to meet constitutional predicates for legislative action will also render that action void. For example, this Court has held that the failure to record the name of each member voting on legislation in accordance with art. VII, § 7 of the Virginia Constitution will render such act null and void. *Town of Madison, Inc. v. Carol W. Ford*, 255 Va. 429, 435-6, 498 S.E. 2d 235, 238 (1998).

2. THE APPELLANTS ARE IMPROPERLY CONFLATING THE PROFFER SUBMISSION REQUIREMENT WITH THE STATUTORY NOTICE PROVISIONS OF § 15.2-2204.

The Appellants argue that because the proffer was neither received in writing nor signed before the advertised hearing of the Board of Supervisors, as required by Frederick County Zoning Code 165-13(A), it has no legal effect and should therefore be deemed void *ab initio* (See App. Br. at 21). This argument depends entirely on conflating the proffer submission requirements contained in the Frederick County Code with the statutory notice deficiencies identified in the *Glazebrook* and *Gas Mart* cases. *Glazebrook* and *Gas Mart*, however, dealt only with *statutory* notice, in particular the "descriptive summary" requirement found in § 15.2-2204 (A). The instant matter only addresses a local proffer submission requirement; the Appellants are not challenging the proffer on the basis that the advertisement for the original rezoning lacked a proper descriptive summary in accordance with § 15.2-2204 (A). Moreover, the Appellants' reliance on *City Council of Alexandria v. Potomac Greens Association Partnership*, 245 Va. 371, 429 S.E.2d 225 (1993) is equally misplaced. *Potomac Greens*, like *Glazebrook* and *Gas Mart*, involved a statutory notice deficiency, in particular a failure to provide two notices prior to a hearing by the Planning Commission, in accordance with § 15.2-2204 (then § 15.1-

431). *Potomac Greens* at 378, 429 S.E. at 228. Again, there is no allegation in this case involving the failure to meet a statutory notice requirement.

Rather, the Appellants are attempting to create a new procedural due process right by elevating an alleged administrative deficiency to that of a fatal statutory notice deficiency on par with *Glazebrook* and *Gas Mart*. In doing so, the Appellants repeatedly refer to the proffer submission requirement at issue as a "notice requirement". (See App. Br at 18). Nowhere in the Appellants' argument, however, do they explain *how* the code section requiring that proffers be submitted in writing five days in advance of the public hearing at all constitutes a *notice* obligation. The Appellants do not point to any related provision in the Frederick County Code requiring that, once submitted, such proffers shall be published so as to inform the public of the nature of the proffers to be considered.[5] The Appellants' own cite to an unpublished and unreported circuit court case reveals that the provision in that case dealt specifically with a local notice requirement, notwithstanding the lack of any indication from the Appellants

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[5] Likewise, there is no parallel requirement in § 15.2-2204(A) that proffer statements be advertised in full, only that the published notice contain a "descriptive summary" of the rezoning. Again, the Appellants do not raise any statutory notice deficiency.

that the requested relief in that case was to declare a legislative act void *ab initio*. (App. Br. at 17-18). Because the county code provision is completely untethered to the concept of notice, and the Appellants have neglected to point to any provision in the county code that links the proffer submission provision to a notice-type requirement, then the Appellants' merging of the submission requirement with a notice obligation is improper and fails to provide any cause for relief.

3. A VIOLATION OF A LOCAL ORDINANCE PROVISION CAN BE FATAL TO ENSUING LEGISLATION ONLY WHERE THAT PROVISION CONSTITUTES A FUNDAMENTAL PREREQUISITE TO ACTION.

Assuming *arguendo* that the Appellants can successfully point to a technical defect in the county's proffer submission requirement, it is only when such a defect can be linked to a fundamental zoning eligibility requirement that this Court has deemed the ensuing legislative action to be void *ab initio*. As this Court held in *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E. 2d 352 (2006), a local government's failure to follow its own zoning eligibility requirements renders the subsequent enactment both arbitrary and capricious and void *ab initio*. 272 Va at 376, 634 S.E. 2d at 356. In *Renkey*, a group of residents successfully challenged the Arlington County Board's approval of rezoning from an R-5

district to a C-R district, on the basis that the County's own ordinance required as a condition precedent that the property first be zoned C-3. *Id.* at 372, 634 S.E. at 354. This Court determined that the Board acted arbitrarily and capriciously when it enacted a zoning classification that failed to meet mandatory eligibility criteria. *Id.* at 376, 634 S.E. 2d at 356.

In the instant matter, the Petitioner is not challenging the validity of the Board's decision to zone the subject property to the B-2 district. More importantly, the absence of any failure of the Board to meet any constitutional, statutory or local eligibility requirement addressing its fundamental *authority* to accept voluntary proffered conditions acts to defeat any claim that the proffer should be declared void *ab initio*.[6] The

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[6] Consistent with this Court's prior rulings, any challenge to the proffer would turn on whether the proffer is unreasonable as a matter of law, was approved arbitrarily and capriciously in violation of the Petitioner's property interests, or was otherwise contrary to the conditional zoning provisions of § 15.2-2297, *et seq.* See e.g. *Board of Supervisors v. Reed's Landing*, Corp, 250 Va. 397, 463 S.E. 2d 668 (1995) (where this Court found a proffer requirement to be an impermissible impact fee, and held invalid a denial of a rezoning where the sole basis for the County's denial was the landowner's refusal to proffer a certain monetary contribution); *contra Gregory v. Board of Supervisors*, *supra* (where this Court sustained a rezoning denial even though the landowner refused to proffer a certain monetary contribution, reasoning that the denial turned on additional land use concerns and not solely on the refusal to proffer the monetary contribution).

Appellants have only pointed to an administrative requirement concerning the timing of the proffer submission, and not to any violation of the county code that would speak to the authority of Frederick County to accept voluntary proffered conditions in the first instance. If the Appellant's contention is accepted, then a proffer statement submitted four days prior to the public hearing as opposed to the required five days would constitute a fatal flaw depriving the Board of the authority to legislate.

The Appellants cite to one case to support the contention that a local government's failure to follow its own ordinance, independent of a statutory notice or constitutional claim, renders the subsequent zoning act void *ab initio.* A review of the case, *Northampton County Bd of Zoning Appeals v. E. Shore Dev. Corp.*, 277 Va. 198, 671 S.E. 2d 160 (2009), reveals that it is neither factually nor legally analogous to the case at bar. In *Northampton*, a developer obtained a special use permit for a condominium development, and subsequently attempted to secure a site plan for the construction of a high-density multi family residential development. When the zoning administrator rejected the site plan on the basis that such a high-density development was prohibited in that zoning district, the developer challenged the denial on the basis that the special use permit specifically enabled it to pursue such a development. This Court agreed with the

County that the special use permit for a condominium development only spoke to the *ownership* of the units, not the *physical structure* of the units themselves. *Id.* at 202, 671 S.E. 2d at 162. (emphasis added)

Unlike the case at bar, the Northampton case involved a substantive challenge involving the interpretation of a particular zoning provision, and did not at all address the kind of alleged procedural defect being advanced by the Appellants in the instant matter. The *Northampton* case was decidedly *not* a case that rendered an act void *ab initio* due to a constitutional, statutory or fundamental zoning eligibility deficiency. Placed in its proper context, this Court's statement that a board of supervisors was not at liberty to disregard its own ordinance was in *furtherance* of the County's position that the grant of the special use permit could not affect the provisions of its zoning ordinance regarding condominiums. Accordingly, the Appellants' cite to this case fails to aid in any understanding as to why a proffer submission requirement should be deemed to be a fundamental prerequisite to the Board's authority to legislate.

4. CONCLUSION

Even if this Court accepts that there existed a violation of an administrative proffer submission requirement, it should nevertheless find

that such a defect does not act to render the proffer void *ab initio*. Consistent with established precedent, the remedy of declaring a legislative act void *ab initio* is only available where the local governing body has not met a fundamental prerequisite to action. In particular, where there exists a failure to meet a constitutional, statutory notice or local eligibility requirement, such failure will deprive the governing body with the ability to zone in the first instance. In this case, the alleged deficiency relates only to a local requirement that speaks merely to the *timing* of the proffer statement submission as opposed to the proper *noticing* of it. The Appellant has not shown how the county code provision is an eligibility requirement deserving of protection by this Court, nor do the cases cited support their contention that there exists a fatal procedural violation. Accordingly, the judgment of the trial court in this matter was proper, and this Court should sustain the Appellees' demurrer for failure to state a cause of action to declare the proffer void *ab initio*.

D. THE APPELLANTS WERE REQUIRED TO CONTEST THE 2004 REZONING WITHIN THIRTY (30) DAYS OF THE BOARD'S ACTION.

Finality is of great importance in any legislative action, and never more so than in the enactment of zoning ordinances or amendments.

Recognizing this, the General Assembly has codified in § 15.2-2285(F) that:

> [e]very action contesting a decision of the local governing body adopting or failing to adopt a proposed zoning ordinance or amendment thereto or granting or failing to grant a special exception shall be filed within thirty days of the decision with the circuit court having jurisdiction of the land affected by the decision.

The appellants contend that the subsection above only applies to actions contesting the reasonableness of the legislative body's action, not its validity. If this Court holds that the appellants are free to challenge the legislative act based on an alleged failure to comply with an administrative deadline in a local ordinance, it will have a profound impact on the land use industry. Local governments must be able to adopt and rely on rezonings and their acceptance of proffers if they are to adequately protect the health, safety and welfare of their citizens, properly plan and deliver necessary infrastructure to their communities, and otherwise accomplish the legislative intent of the General Assembly as expressed in §§ 15.2-2200 and -2283. Citizens and landowners must also be able to rely on seemingly final zoning actions.

E. AROGAS DID NOT HAVE STANDING TO CONTEST THE 2004 REZONING ORDINANCE ADOPTED BY THE BOARD OF SUPERVISORS.

In this case, the appellants are successors in title to the owners of the property at the time of the rezoning, standing in the place of a participant in the entire rezoning application. Yet the argument advanced by the appellants is that the Board acted in violation of local "notice" requirements in that transaction – one in which their predecessor in title participated voluntarily. The situation in the case at bar is wholly distinct from the cases cited by the appellants such as *Glazebrook v. Spotsylvania County Board of Supervisors*, 266 Va. 550, 587 S.E.2d 589 (2003), *Gas Mart Corp. v. Loudoun County Bd. of Supervisors*, 269 Va. 334, 611 S.E.2d 340 (2005), and *City Council of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 429 S.E.2d 225 (1993), which involved members of the public who had not received sufficient statutory notice of a proposed legislative action. In this case, the appellants are claiming that the Board's action constituted a technical violation of a local ordinance provision, that the local ordinance provision at issue is a notice provision, and therefore the action is void. The appellants cannot, however, demonstrate that they somehow lacked notice of the proposed action, *as their predecessor in title voluntarily*

agreed to the substance of the proffer they are now challenging, as well as the process by which it was accepted by the Board.

If this Court overrules the trial court and confers standing on the appellants, it will allow the appellants to challenge a legislative action despite the fact that it now stands in the place of the landowner who petitioned the Board for that action. This Court will essentially be sanctioning the practice of landowners who wish to obtain relief from commitments made during the conditional zoning process by scouring the record years after the fact, hoping to find some perceived deficiency in the manner in which those commitments were made. In fact, the Court would create the incentive for property owners to prepare and submit proffered conditions in ways inconsistent with state or local statute. The result would be manifestly unfair.

F. GRANTING THE RELIEF SOUGHT BY THE APPELLANTS WILL FRUSTRATE THE PURPOSE AND INTENT OF BOTH THE FREDERICK COUNTY BOARD OF SUPERVISORS AND THE GENERAL ASSEMBLY.

Again, it should be noted that the appellants are seeking a declaration that *one sentence* in the Rezoning Request Proffer is void, but the balance of the proffered conditions and the rezoning itself continue to stand. Such a result would clearly run afoul of the purpose of the Commonwealth's zoning and conditional zoning statutes, which as

discussed above, are aimed at promotion of the public health, safety and welfare, as well as the protection of communities from the potentially harmful affects of certain uses of land by ameliorating the impact of development through the implementation of proffered conditions.

The original draft of the proffered condition at issue prohibited the retail or wholesale sale of diesel fuel on the property. The amended draft limited that prohibition to the retail or wholesale sale of diesel fuel to over the road truck carriers. Under neither draft was the sale of diesel fuel to over the road truck carriers permitted. However, if that single proffered condition is declared void *ab initio*, and the rezoning itself is allowed to stand, the appellants will left free to engage in that use, even though it was never contemplated as an available use of the property by either the Board or the public. The appellants would have this Court declare them free to engage in that use, even though it was never in the realm of possible uses the public had the opportunity to comment upon, and even though it was never approved as a permitted use by the Board. It would permit the appellants to use the property in a manner never approved by the Board, without implementing all of the proffered conditions relied upon by the Board for the protection of the public when it approved the rezoning. Significantly, this would permit a use more intense than either possibility

considered by the Board based on the two drafts of the proffered condition considered at its public hearing. This would constitute an intense perversion of the purpose behind both the notice requirements and the substantive elements contained in the Commonwealth's zoning and conditional zoning statutes.

Simply put, the decision whether sale of diesel fuel on the property would be an appropriate use is a legislative matter that is within the sound discretion of the Board. The appellant is seeking to have that decision removed from the Board's hands by virtue of an alleged technical defect of a wholly administrative nature. This would result in the torture of the relevant statutes rather than the implementation of them.

If this Court determines that the amended proffer is void, it must declare that the entire rezoning is void, not merely one sentence in the Rezoning Request Proffer.

2. THE TRIAL COURT DID NOT ERR IN DECLINING TO INTERPRET THE PROFFER.

After a hearing, the trial court ruled that the Zoning Administrator should have accepted the site plan submitted by the appellants for a full review of all issues related to the site plan, and that the appellants were entitled to have the site plan reviewed in accordance with the normal

process. (A. 241-42; 245). The trial court declined to make a ruling as to the proper interpretation of the proffered condition.

Having already determined that the Zoning Administrator erred in not accepting the site plan for review, it was well within the discretion of the trial court to decline any further ruling. For the simple purpose of judicial economy, the trial court should review all issues related to the site plan at the same time, including the interpretation of the proffered condition at issue. As the Zoning Administrator had not yet reviewed the site plan for any other deficiencies, it was entirely proper for the trial court to withhold making any ruling until all site plan-related issues could be considered together.

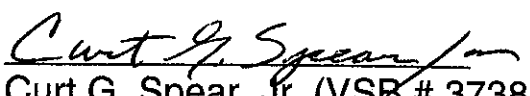
CONCLUSION

For the reasons stated above, this Court should affirm the trial court. Alternatively, should this Court rule that the proffered condition at issue is void, it should declare the entire ordinance granting the conditional rezoning of the property void.

Respectfully Submitted,

LOCAL GOVERNMENT ATTORNEYS
OF VIRGINIA, INC.

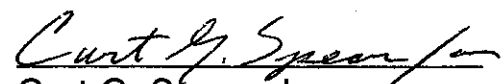
By: Counsel



Curt G. Spear, Jr. (VSB # 37385)
Assistant County Attorney
Noah B. Klein (VSB # 48462)
Assistant County Attorney
Prince William County Attorney's Office
Counsel for Local Government Attorneys
of Virginia, Inc.
One County Complex Court
Prince William, VA 22192
Telephone: (703) 792-6620
Facsimile: (703) 792-6633

CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that I have filed fifteen (15) copies of this Brief *Amicus Curiae* in the Office of the Clerk of this Court, together with an electronic copy of this Brief *Amicus Curiae*, and have mailed three (3) copies of this Brief *Amicus Curiae* to Mark E. Stivers, Esquire, P.O. Box 1737, Winchester, VA 22604, Counsel for Appellants, and to Robert T. Michell, Jr., Esquire, HALL, MONAHAN, ENGLE, MAHAN & MITCHELL, 9 East Boscawen Street, P.O. Box 848, Winchester, VA 22601, Counsel for Appellees, this 11th day of January, 2010.



Curt G. Spear, Jr.