In the

Supreme Court of Virginia

At Richmond

Record No. 112233

CHARLOTTESVILLE AREA FITNESS CLUB OPERATORS ASSOCIATION, ATLANTIC COAST ATHLETIC CLUBS OF VIRGINIA, INC., and GYM QUEST, INC. d/b/a GOLD'S GYM CHARLOTTESVILLE,

Appellants,

– v. –

CHARLOTTESVILLE CITY COUNCIL and MAURICE JONES, in his official capacity,

Appellees.

OPENING BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

1. The trial court erred in holding that the Respondent City of Charlottesville pled facts which demonstrated a rational basis to distinguish between for-profit and non-profit fitness facilities in advertising a lease and inviting bids pursuant to Code § 15.2-2100 et seq., particularly where the price of entry to the facility is fixed by the lease.[1] J.A. 114

2. The trial court erred in finding, on Demurrer, that there was no evidence that the City's restriction of the lease to non-profit businesses was for the purpose of manipulating the bidding process.[2] J.A. 114

3. The trial court erred in holding that the Use Agreement was an appropriate restriction on a lease advertised under Code § 15.2-2100.[3] J.A. 114

4. The trial court erred in holding that a City may procure services pursuant to Code § 15.2-2100, and that the City was not required to follow the Virginia Public Procurement Act (§ 2.2-4300 et seq.) for such procurement.[4] J.A. 114

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[1] This assignment of error was preserved based on Appellants argument at pages 6 and 7 of their Response to Demurrer and subsequent objection to the entry of the trial court's order granting the demurrer.

[2] This assignment of error was preserved based on Appellants argument at pages 6 and 7 of their Response to Demurrer and subsequent objection to the entry of the trial court's order granting the demurrer.

[3] This assignment of error was preserved based on Appellants argument at pages 6 and 7 of their Response to Demurrer and subsequent objection to the entry of the trial court's order granting the demurrer.

[4] This assignment of error was preserved based on Appellants argument at pages 6 and 14 of their Response to Demurrer and subsequent objection to the entry of the trial court's order granting the demurrer.

5. The trial court erred in holding that the Use Agreement was not an attempt to procure fitness services for the citizens of Charlottesville.[5] J.A. 114

6. The trial court erred in holding that Code 15.2-953 constitutes an exception to the Virginia Public Procurement Act ("VPPA") and grants local governments the implied power to procure goods and services through conditional donations to non-profit entities.[6]

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

In 2007, the Piedmont Family YMCA approached the Charlottesville City Council to allow them to construct a fitness and recreational facility in McIntire Park, on land owned entirely by the City. J.A. 3. However, legal constraints prevented the City from simply giving the land to the YMCA. Instead, the City set up a façade – it advertised a Request for Proposal specifically tailored to allow it to "lease" the land to the YMCA in such a way that no other entity could compete. J.A. 3-4. Because the YMCA would be the only bidder, the City could then grant them the lease for $1 per year without having to explain why it rejected potential bids to lease the land for

[5] This assignment of error was preserved based on Appellants argument at pages 3 and 14 of their Response to Demurrer and subsequent objection to the entry of the trial court's order granting the demurrer.

[6] This assignment of error was preserved based on Appellants argument at pages 6 and 14 of their Response to Demurrer and subsequent objection to the entry of the trial court's order granting the demurrer.

thousands of dollars per month from any for profit entity, such as the Appellants. *Id.*

On May 12, 2010, Appellants filed a Complaint in the Circuit Court for the City of Charlottesville seeking declaratory judgment that the actions of the City of Charlottesville were *ultra vires*. Specifically, the City advertised a lease of public land in a manner, and with restrictions, intended to limit the potentially eligible bidders to its pre-selected winner, the Piedmont YMCA. By requiring a Use Agreement as a part of that lease, the City also solicited fitness services for its citizens without following the requirements of the VPPA. Pursuant to that Use Agreement, the City later paid $1.25 million in exchange for the provision of aquatic fitness services to its citizens, also without following the VPPA.

At their core, Code sections 15.2-2100 *et seq*. and 2.2-4300 *et seq*. of the VPPA exist to prevent exactly that kind of favoritism, particularly where the favoritism results in a pecuniary loss to the City and deprivation of a property right to individual businesses. By drafting the lease ordinance with restrictions designed to permit only a single entity, the YMCA, to be eligible to bid on the lease, the Charlottesville City Council cost the City tens of thousands of dollars a year in lease payments and business taxes. In addition, it directly damaged the Plaintiff businesses by excluding them

from this opportunity, and damaged the citizens by potentially depriving them of the improved services which could have been offered had the project been properly bid.

Appellants alleged that the City lacked a rational basis for the restrictions placed in the lease, in violation of the requirements of equal protection. The Appellants also alleged that these restrictions were arbitrary and capricious, identified specific facts in support of that allegation, and alleged that this distinction was only incorporated into the Lease to ensure that the YMCA would be the only bidder. In response, while the City argued that a distinction between non-profits and for-profits has at times been considered reasonable, it has failed to offer any justification for why that distinction is rational in this circumstance. Indeed, by requiring that the Use Agreement (which requires particular membership and entrance fees for City residents) be a part of the Lease, the City has eliminated the only possible basis for its non-profit / for-profit distinction – that a non-profit would offer its residents a lower price. As such, the Appellants having alleged that the distinction is arbitrary and was only incorporated to ensure that the YMCA would be the only bidder, the burden has shifted to the City to offer some rational basis for the distinction.

STATEMENT OF FACTS

In 2007 the Piedmont Family YMCA, Inc. (hereinafter "YMCA") approached the City of Charlottesville about a potential partnership that would allow the YMCA to build a fitness and recreation center within McIntire Park. J.A. 3, ¶13. On September 17, 2007, the City Council authorized staff to advertise a proposed ground lease for bidding pursuant to Code §15.2-2100(B). *Id.* at ¶15. The proposed Lease was restricted so that the only acceptable use was for a "non-profit youth and family community recreation program to construct a facility to operate their program." *Id.* at ¶16, J.A. 41-44 (emphasis added).

The property was to be 3-5 acres in the western side of McIntire Park. The Lease was to be for a period of 40 years, at a nominal rent of $1.00 per year, though the rent was not included in the Notice of Proposed Lease. J.A. 3, ¶¶17, 20, J.A. 41-44. The advertisement sought bids from those interested in developing and operating a non-profit fitness and recreation center for the benefit of the citizens of Charlottesville. J.A. 4,. ¶19, J.A. 46. In addition, the advertisement required that any bid for the lease must also include the Proposed Use Agreement (J.A. 4, ¶22,), which was required to describe everything from the hours of operation to the

reduced rate membership benefits for City and County residents. J.A. 4, ¶23.

As intended, the YMCA was the only party to submit a proposal in response to the City's advertisement. J.A. 4, ¶25. Thereafter, the City decided that the Use Agreement submitted by the only bidder, the YMCA, would instead be subject to negotiation. J.A. 4, ¶24. On December 17, 2007 the City Council passed an ordinance awarding the lease to the YMCA. J.A. 3, ¶13, J.A. 59-71. The City then continued the negotiations it had begun with the YMCA prior to the Notice of Proposed Lease. J.A. 5, ¶26, J.A. 48-50. As a result, the City negotiated for the YMCA to provide aquatic fitness services to certain of its residents on a priority, reduced fee basis in exchange for the payment of $1.25 million. J.A. 5, ¶28, J.A. 48-52.

AUTHORITIES AND ARGUMENT

STANDARD OF REVIEW

Where a circuit court decides a case upon a demurrer without an evidentiary hearing, the facts consist of those allegations actually made and all those reasonably and fairly implied in the light most favorable to the Appellants. *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 137 (2001). A demurrer tests only whether a complaint states a cause of action upon which relief may be granted. *Tronfeld v.*

Nationwide Mutual Ins. Co., 272 Va. 709, 712-13, 636 S.E.2d 447, 449 (2006). A demurrer tests the legal sufficiency of facts alleged in the pleadings, but not the strength of proof. *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). Because the decision whether to grant a demurrer is a question of law, the Court reviews the circuit court's decision de novo. *Mark Five Construction, Inc. v. Castle Contractors*, 274 Va. 283, 287, 645 S.E.2d 475, 477 (2007).

ARGUMENT

I. The City's Payment of Additional Funds Contingent on Construction of Additional Aquatic Space is not Authorized by Code 15.2-953, and Violates the Virginia Public Procurement Act (Assignments of Error 4-6).

In response to Count II of the Complaint, the trial court held, consistent with its opinion in *Charlottesville Fitness Club Operators Association v. Albemarle County Board of Supervisors, et al.*, Record No. 110741, that the City's payment of $1.25 million to the YMCA was an action authorized by Code § 15.2-953, which governs donations to charitable institutions and associations, etc., even though the Complaint specifically alleges that the payment was not in fact a donation, but was instead contractually contingent upon the construction of additional aquatic space that would be exclusively available to the City during certain hours. J.A. 8,

¶49. The trial court made no explanation as to how this holding can be squared with the City's argument to the trial court that it does not have the delegated authority to procure recreational services for its residents. J.A. 99.

The trial court's holding was in error because the City's actions were *ultra vires*. Code § 15.2-953 does not authorize the City to make a donation which is specifically conditioned on the construction of a particular amenity and the exclusive use of that amenity. Indeed, the contractual nature of the payment makes it impossible to characterize it as a donation.

a. Dillon's Rule Restricts the Manner by which a Locality May Make an Appropriation Pursuant to Code 15.2-953.

Dillon's Rule specifically limits the manner in which a city may exercise its authority. "Dillon's Rule stipulates that municipal corporations have only those powers expressly granted by statute, those necessarily implied therefrom, and those that are essential and indispensable to the exercise of those expressly granted." *Advanced Towing Co. v. Fairfax County Board*, 280 Va. 187, 193, 694 S.E.2d 621 (2010). As applied by this Court, trial courts are to engage in the following analysis:

> Thus, the Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end. On the other hand, where a power is found to exist but the question is whether it has been exercised properly, then the "reasonable selection of method" rule may be applicable, and, as we will demonstrate later, the inquiry is directed to whether there may be implied the authority to execute the power in the particular manner chosen.

Commonwealth v. Arlington County Bd., 217 Va. 558, 575, 232 S.E.2d 30 (1977).

In this context, the ability to contract with a charitable organization for the acquisition of goods or services is not "necessarily implied" in the language of the statute nor is it "indispensable to the exercise of [the] expressly granted" right to make donations or appropriations. *Advanced Towing Co. v. Fairfax County Board,* 280 Va. 187, 694 S.E.2d 621 (2010). "To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied." *Commonwealth v. Arlington County Bd.,* 217 Va. at 577. "If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body." *Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995).

In the present case, the trial court has lumped together two different legal concepts: (1) the method by which the City actually makes the payment (*i.e.* the appropriation of public funds, transfer of real estate, etc.) and (2) the conditions or performance required by the City in exchange for the payment (*i.e.* the building of additional aquatic space per the Use Agreement and preferential rates for City residents). Indeed, the trial court apparently gave no weight to the fact that the City's payment created obligations for the YMCA which are contractual in nature.

Code § 15.2-953 provides that the City is authorized to make an appropriation of funds, donation of real estate or otherwise to a non-profit organization, but does not spell out that it must be made by any particular method: budget line item, special distribution, placement in the CIP, or similar action. Pursuant to the "reasonable selection of method" rule,[7] the City is free to make the donation in whatever form it chooses, so long as

[7] When the statutory grant of authority has been expressly made, but the statute is silent upon the "mode or manner" of execution, localities are to use a "reasonable selection of method." *Advanced Towing, supra, citing Commonwealth v. Arlington County Bd.*, 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977).

that method is contemplated by statute.[8] The "reasonable selection of method" permitted does not extend to impliedly confer the authority to make the payment conditional upon a *quid pro quo* or by contract in such a manner as to trade a "donation" for performance under a contract in order to evade the public policy requirements embodied in the VPPA. Such a condition crosses the line from the authority to make a donation by whatever form into the unauthorized requirement of *quid pro quo* in exchange for the donation.

In holding that Code § 15.2-953 authorizes the City to make the donation conditional on a contractual performance, the trial court found that the $1.25 million dollar payment was not subject to the VPPA. This holding ignores the allegations in the Complaint, and the language in the Use Agreement, that the $1.25 million dollar payment was made for the express purpose of acquiring the construction of additional aquatic space by the lessee and exclusive use of that space for City residents. Though the trial court adopted its previous ruling that Code § 15.2-953 actually authorizes conditional donations, the nature of the City's payment in this case is

[8] AG Op. ADMINISTRATION OF GOVERNMENT, 2002 Va. AG 70 (01-094) (Town not authorized to provide in-kind services to civic association because in-kind contributions not included in section 15.2-953.)

qualitatively different from the County's "donation" in *Charlottesville Area Fitness Operators*, Record No. 110741.

Under the logic advanced by the City, the Use Agreement is simply an attachment to the Lease. Unfortunately, this argument ignores that the City has given the YMCA something of significant monetary value – a *de facto* payment which is renewed each year equal to the difference between the cost of a market lease on this very desirable tract of land and the $1 per year actually charged. When coupled with the $1.25 million which guarantees the construction of additional aquatic space and exclusive use of that space to the City (See J.A. 23, J.A. 49 and J.A. 56), it is clear that the City was seeking a service which should have been subject to an RFP, but desired to award the "contract" to the YMCA without outright public bidding. Such actions are an impermissible attempt to end-run the VPPA.

II. Section 15.2-953 of the Code of Virginia does not constitute an exception to the Virginia Public Procurement Act (§ 2.2-4300 et seq.) (Assignment of Error 6).

One of the stated purposes of the VPPA is to ensure that "all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree. . ." Code § 2.2-4300(C). Courts interpreting the VPPA have also found that one of the

purposes of the VPPA is to prevent favoritism in the awarding of contracts. *Holly's, Inc. v. City of Greensville*, 250 Va. 12, 18 (1995); *citing Newport News v. Doyle & Russell, Inc.*, 211 Va. 603, 608 (1971). If allowed to stand, the trial court's ruling would frustrate those purposes. Va. Code § 15.2-953[9] governs donations to non-profits, while the VPPA governs the acquisition of goods and services. Clearly, the procurement of fitness services at a discount for City residents is the conduct of public business by the City.

a. The Lease and the Use Agreement are Inextricably Entwined.

The Lease and the Use Agreement cannot be seen as independent of one another. As set forth in the Complaint, the public notice for bids on the Lease attached a Use Agreement and required that a Use Agreement be included in all bids. J.A. 4, ¶22. Other than this Use Agreement and its provisions for exclusive space reserved for City use and favorable rates for City residents, the only *quid pro quo* for the Lease was a rent of $1. Consequently, when analyzing the Lease, it is necessary to do so within the context of its relationship to the Use Agreement, and *vice versa*.

[9] Code 15.2-953 was enacted to permit "Donations to charitable institutions and associations, volunteer and nonprofit organizations, chambers of commerce, etc."

b. The Appropriation and Use Agreement are Part of a Contractual Arrangement between the City and the YMCA.

The arrangement between the City and the YMCA is not simply a donation or appropriation. It is a contract with all the indicia of a contract: offer, acceptance, consideration and *quid pro quo*. There is nothing in the language of Code §15.2-953 that gives the City the authority to enter into what amounts to a sole-source contract with the YMCA to provide discounted fitness services to City residents. Had the General Assembly intended to give municipalities the authority to enter into contracts exempt from the VPPA when dealing with non-profit entities, it would have done so expressly, either within the provisions of the VPPA or within Code §15.2-953.

c. Nothing in the VPPA or in Code §15.2-953 Exempts the Procurement of Goods and Services through a Non-Profit Entity from the Requirements of the VPPA.

Nothing in the language of the VPPA, Code §15.2-953, or any Virginia case interpreting either act has ever held that a City may procure services under §15.2-953. By its express language, the VPPA provides for only limited exceptions to its competitive bidding requirements. Code §2.2-4303. These exceptions are referenced by the language "unless otherwise authorized by law," and recognize that the General Assembly has only

exempted certain specific contracts from the general applicability of the VPPA. Code § 2.2-4303(A). None of these enumerated exceptions provide a categorical exception for all charitable or non-profit entities.

Within the VPPA, the General Assembly has provided for certain exceptions and limitations to the otherwise broad applicability in the section aptly titled "Exemptions and Limitations" (Code §2.2-4343 to §2.2-4346). None of these exceptions are applicable here. Outside those express exceptions found within the VPPA, the General Assembly has only chosen to exempt three types of contracts from the VPPA: advertising contracts by the Virginia Wine Board (Code §3.2-3006), contracts for the printing of ballots and other election materials (Code § 24.2-602) and certain design-build contracts (Code §33.1-12(b)), all three of which by their statutory language specifically reference the VPPA.

By contrast, neither the VPPA nor § 15.2-953 provide an exception allowing a City to enter into a public contract with a non-profit contractor for the acquisition of goods or services by calling it an appropriation or donation. Prior to the trial court's ruling, here and in the companion County case, no Virginia court had ever interpreted Code §15.2-953 in such a manner.

Unlike the Code sections recited above, Code § 15.2-953 makes no mention of the VPPA. The similarity of the language used in those other Code sections (§§ 3.2-3006, 24.2-602, and 33.1-12) demonstrates that, where the General Assembly wishes to exempt a type of public contract from the VPPA, it does so expressly. *Logan v. City Council*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) ("We determine the General Assembly's intent from the words employed in the statutes.").

Moreover, the City has not recited any public policy embodied in Code §15.2-953 which would explain or justify overriding the express public policy of the VPPA and exempting non-profit entities from its mandated bidding process. Indeed, the VPPA exists for its own strong public policies recited above: to provide equal protection for persons and entities seeking to provide goods and services to the government and to prevent favoritism in the administration of government contracts. *Holly's, Inc., supra.*

It is a well-settled principle of statutory interpretation that the specific controls the general. *Morales* v. *Trans World Airlines, Inc.,* 504 U. S. 374, 384-385 (1992). When comparing the VPPA to §19.2-953, the VPPA is undoubtedly the more specific statutory scheme, particularly when it comes to contracting and procurement. The inescapable conclusion is that the General Assembly intended that <u>all</u> public contracts be regulated by the

VPPA, and that charitable donations or appropriations be governed by Code § 15.2-953.

d. The City's Appropriation is not Properly Characterized as a Donation.

In tying the lease, the Use Agreement and the City's appropriation together, the City has used the entire transaction to both procure the use of space for City residents and to procure favorable rates for City residents. Any attempt to characterize this as a donation under Code §19.2-953 ignores the essential nature of the transaction. "Donative intent on the grantor's part is an essential element of a gift." *Ott v. L&J Holdings, LLC*, 275 Va. 182, 188, 654 S.E.2d 902 (2008), *citing Theismann v. Theismann*, 22 Va. App. 557, 566, 471 S.E.2d 809, 813 (1996). Moreover, by definition, a gift cannot be supported by consideration. *Ott,* 275 Va. at 188. Furthermore, donative intent is a question of fact to be determined by the trier of fact. *Utsch v. Utsch*, 266 Va. 124, 128 (2003); *Capozzella v. Capozzella*, 213 Va. 820, 827 (1973).

To accept the trial court's conclusion is to create a wholesale exception from the VPPA for charitable institutions, an exception the General Assembly has not chosen to create. While Code § 15.2-953 specifically states that it does not limit a City's right to make a contract with

a sectarian charitable organization, neither does it exempt such a contract from the VPPA. The circuit court's conclusion that Code § 15.2-953 operates as an exception to the VPPA is therefore in error.

III. Code §15.2-953 does not give municipalities the implied power to enter into contracts to govern the terms and conditions of a donation (Assignment of Error 6).

The trial court also erred when it held that Code §15.2-953 conferred on municipalities the implied power to enter into contracts to govern the donations or appropriations it makes under that code section. The authority to make a donation does not imply the authority to use contracts to bind the recipient of those funds to take certain specified actions. As stated above, under the Dillon Rule, "[t]o imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied." *Commonwealth v. Arlington City Bd.,* 217 Va. at 577. "If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body." *Reed's Landing Co.*, 250 Va. at 400.

Prior to the enactment of Code § 15.2-953 and its predecessor, Dillon's Rule operated to prohibit localities from making donations of public funds or property. Code § 15.2-953 was enacted to permit localities to make these donations, and has been expanded over time to increase the

pool of eligible recipients. *See* House Bill 436 (Toscano, sponsor), approved April 11, 2010. Without these specific authorizations, Dillon's Rule would otherwise prohibit a locality from making such a gift or donation.

The purpose of the statute is to enable localities to make donations to non-profit entities, but nowhere does it state that it intends to exempt such transactions from the provisions of the VPPA. The ability to contract with a charitable organization for the acquisition of goods or services is not "necessarily implied" in the language of the statute nor is it "indispensable to the exercise of [the] expressly granted [right to make donations]." *Advanced Towing Co. v. Fairfax County Board,* 280 Va. 187. "Legislative intent is determined from the plain meaning of the words used." *City of Richmond v. Confrere Club*, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990) and "[a]ny fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied." *Board of Sup. Loudoun City. v. Town of Purcellville*, 276 Va. 419, 437, 666 S.E.2d 512 (2008). Code 15.2-953 does not evidence an intent by the General Assembly to exempt these types of contracts from the provisions of the VPPA.

IV. Appellees' Failure to Comply with Code 15.2-2100 *et seq* and the VPPA violated Appellants' Due Process Rights (Assignments of Error 1, 2, 3, 4 and 6).

While it is true that not every violation of state law rises to a constitutional violation, where a locality violates state law designed to ensure equal treatment and due process, that violation does rise to the level of a constitutional violation. One of the stated purposes of the VPPA is to ensure that "all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree…" Code § 2.2-4300(C). Code § 15.2-2100 *et seq* has been interpreted similarly: "The lease of any municipal property, whether or not dedicated to public use … must be made pursuant to the notice and competitive bidding requirements of §§15.1-307 through 15.1-310.[10]" 1989 Va. AG 125, 126-127 (1989).

Where, as here, the City chooses not to comply with the terms of a state law designed to provide procedural protection to Appellants and others similarly situated, that violation of state law rises to a violation of procedural due process. "Procedural due process imposes constraints on

[10] The predecessors to Code 15.2-2100 *et seq.*

governmental decisions which deprive individuals of … "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319 (1976)

The VPPA creates a liberty or property interest in all "offerors" of the right of "access to public business." Code § 2.2-4300(C). Code § 15.2-2100 *et seq* has a similar competitive bidding requirement, and therefore creates the same bidding right. While this right does not guarantee a right to any particular contract, it does grant a right in the bidding process, and that process is not one which the City has the discretion to arbitrarily deny to selected potential bidders. Here, the City deprived Appellants of that right by refusing to lease the property in accordance with Code § 15.2-2102 or to follow the strictures of the VPPA. This constitutional question is intimately tied to the question above: whether Appellees failure to award the lease in accordance with state law or to comply with the terms of the VPPA was in violation of state law. The constitutional inquiry only serves to further underscore the obligation that Appellees had to comply with state law to ensure that "all qualified vendors have access to public business."

V. With Respect to Count I, Equal Protection Requires that the City Demonstrate a Rational Basis for Distinguishing Between a for-profit and non-profit facility (Assignments of Error 1, 2 and 3).

Under equal protection, the basis of the distinction between for-profit and non-profit "must have a direct relation to the purpose of the law, and must present a distinction which renders one class, in truth, distinct or different from another class." *City of Newport News v. Elizabeth City County*, 189 Va. 825, 841, 55 S.E.2d 56, 65 (1949). Equal protection requires that "the classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments not be so disparate, relative to the difference in classification, as to be wholly arbitrary." *City of Portsmouth v. Citizens Trust Co.*, 216 Va. 695, 698, 222 S.E.2d 532, 534 (1976); *quoting Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954).

The trial court recognized that state law does not specifically empower the City to differentiate between for-profit and non-profit businesses in the awarding of a lease pursuant to Code § 15.2-2100 *et seq*. J.A. 111. Instead, the trial court applied the holding in *Miller v. Ayers*, 231 Va. 251 (1972), among others, to hold that the City can rationally "differentiate between profit and nonprofit business" in at least the context of leasing pursuant to Code § 15.2-2100 *et seq.* and the VPPA. However,

the trial court did not identify the rational basis for this distinction, and in fact there is none, particularly where, as here, membership rates were spelled out in the Use Agreement attached to the notice, thereby removing the only basis this Court has recognized as supporting the for-profit/non-profit distinction: cost to the end-user.

a. Dillon's Rule

Appellants do not challenge that the City of Charlottesville has the authority, pursuant to Code § 15.2-2100, to lease public land to a private, non-profit entity. However, that lease must be made pursuant to Code §§ 15.2-2101 and 15.2-2102, which govern the sale and lease of municipal property.

Though no court in Virginia has been called upon to render an opinion on the purpose or goals of §15.2-2100 *et seq* and its predecessor statutes, the Attorney General's office has issued an opinion that "the lease of any municipal property, whether or not dedicated to public use … must be made pursuant to the notice and <u>competitive bidding requirements</u> of §§15.1-307 through 15.1-310." 1989 Va. AG 125, 126-127 (1989) (emphasis added). The purpose of §§15.2-2100 et seq. "is to safeguard public property and ensure that it not be appropriated by private self-interests for an extended term to the detriment of the public without due

consideration by the governing body." 2004 Va. AG 38, 39 (2004). "The notice and public bid requirements prevent the hasty or clandestine disposition of municipally owned real property by a city or town council." *Id., citing* 2 A. Howard, Commentaries on the Constitution of Virginia 854-55 (1974); *Town of Victoria v. Ice, Etc., Co.*, 134 Va. 124, 132, 114 S.E. 89, 91 (1922); 1986-1987 Att'y Gen. Ann. Rep. 135, 139 n. 3, 86-87 Va. AG 135, 139 n.3.1 The restrictions imposed by § 15.2-2100 on the power of a city or town to lease its property are strictly construed. *See Town of Victoria*, 134 Va. at 128-29, 114 S.E. at 90.

This presents two difficulties for the City. The first is whether the City is allowed to issue a lease notice which restricts the subsequent use of the land for the purpose of a fitness or recreational facility. The second is whether it is allowed to restrict the property for use only by a non-profit entity. With respect to the restriction on use, the trial court apparently accepted Appellees' argument that state law does not "limit the municipality's discretion in prescribing the terms and conditions of such a lease," citing to Code 15.2-1810 ("The terms and provisions of any such lease shall be prescribed by the governing body…"). However, this citation to the code section addressing the lease of land for the specific purpose of swimming pools reveals the weakness of the more general argument. Code

§ 15.2-2100 *et seq* does not contain similar language, nor does it authorize the lease of land for a specific purpose like Code § 15.2-1810.[11]

Interestingly, Appellees conceded below that they did not have the authority to provide for fitness services for City residents. J.A. 99. However, the trial court apparently rejected this position, as it adopted its ruling in *Charlottesville Area Fitness Club Operators Association, et al. v. Albemarle County Board of Supervisors*, currently before this Court as Record No. 110741. The City clearly entered into the Lease and Use Agreement in order to procure fitness services for its residents. "The proposed Lease was restricted so that the only acceptable use was for a 'nonprofit youth and family community recreation program to construct a facility to operate their program.'" J.A. 3, ¶16. By tying the lease to the Use Agreement (J.A. 4, ¶¶21-23), the City mandated the acquisition of reduced rate services for its residents (J.A. 5, ¶27). With respect to each of these restrictions, the City must demonstrate that it has some rational basis for the exercise of that authority.

[11] Indeed, Va. Code 15.2-1810 specifically contemplates that a locality will gain revenue from such a lease, and use that revenue to construct its own recreational facilities. "All moneys received by a locality under this section shall constitute a fund for the development and improvement of recreational facilities within such locality." Va. Code § 15.2-1810

b. Distinction between profit and non-profit

The City provides no rational basis for the distinction between non-profit and for-profit entities with respect to the actions it took and therefore cannot satisfy the requirements of equal protection. The Use Agreement, the acceptance of which was required to otherwise bid on the lease, mandates a particular preferential rate structure for City residents. J.A. 54. By requiring a particular rate structure, the City undercuts its only argument as to why a distinction between a for-profit and a non-profit furthers the goals of the City in leasing the land. Having already required a particular rate structure for the operation of the facility in the Use Agreement, the basis for the distinction in the Lease cannot have been cost to the end-user.[12] Without the ability to state a rational basis for the distinction, it must be considered arbitrary.

Recognizing this problem, the City has instead relied on an argument that a distinction between for-profit and non-profit facilities is always valid. The trial court relied on *Miller v. Ayres*, 213 Va. 251 (1972), in which this Court noted that it was rational to distinguish between aid to students attending for-profit versus non-profit institutions. However, the basis for this

[12] This assumes that the cost to the public to use the facility in question is a valid basis to award a lease subject to 15.2-2102 in the first place.

distinction was that students attending for-profit schools would be using government money to "pay[] tuition fees set at a level which makes possible profit," i.e. likely higher tuition. As noted above, by requiring a particular rate structure, the City has already ensured that anyone wishing to operate a for-profit facility would have to charge the same fees to City residents as would the non-profit facility, thereby rendering the distinction in *Miller* and *Thurmond* entirely irrelevant.[13]

This Court has never recognized the presumptive validity of a for-profit/non-profit distinction. In fact, the U.S. Supreme Court has rejected this same distinction in the targeting of tax exemptions, so the trial court's apparent holding that such discrimination is always valid must be incorrect. *See, e.g. Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 587-588 (1997).

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[13] The City has also failed to identify any evidence that a for-profit facility would naturally result in a higher cost to the citizen. Indeed, scholarly research produced since *Miller* was decided indicates that for-profit and non-profit institutions may have similar costs to the end-user. *See, e.g.* Frank A. Sloan and Robert A. Vraciu, Investor-Owned And Not-For-Profit Hospitals. *Health Affairs*, 2, no.1 (1983):25-37; James E. Wallace, Financing affordable housing in the United States, *Housing Policy Debate*, Vol. 6, Issue 4 pp. 785-814 (1995).

Instead, in order to satisfy Dillon's Rule, the City of Charlottesville must provide some rational basis for its decision to limit the scope of bidders to only those willing to operate a non-profit facility, particularly where the City has already demonstrated that it would be a direct customer of that facility. Though the trial court held that a rational basis existed, it did not identify one, nor have Appellees. Particularly at demurrer, it is difficult to see how the City could have introduced evidence of reasonableness since its decision to restrict bidders made it impossible for it to entertain competitive bids from anyone interested and competent to do so. "When presumptive reasonableness 'is challenged by probative evidence of unreasonableness, the challenge must be met by <u>evidence of reasonableness</u>.'" *Schefer v. City Council of Falls Church*, 279 Va. 588, 595, 691 S.E.2d 778 (2010)(emphasis added), *quoting Board of Supervisors v. McDonald's Corp*., 261 Va. 583, 590, 544 S.E.2d 334, 339 (2001). Because the Complaint alleges facts more than sufficient to show probative evidence of unreasonableness, the burden would shift to the City to provide evidence of reasonableness. Even if such a thing could be done at demurrer, neither the trial court nor the City has identified any such evidence.

CONCLUSION

For all of these reasons, both the Lease and Use Agreement are in violation of both Code § 15.2-2100 et seq. and the VPPA. As such, they are void *ab initio*, and must be properly re-noticed.

Respectfully submitted,
CHARLOTTESVILLE AREA FITNESS CLUB OPERATORS ASSOCIATION, ATLANTIC COAST ATHLETIC CLUBS OF VIRGINIA, INC., GYM QUEST, INC. d/b/a GOLD'S GYM CHARLOTTESVILLE, and TOTAL PERFORMANCE SPORT AND FITNESS, LLC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies the following:

1) The appellants are: Charlottesville Area Fitness Club Operators Association, Atlantic Coast Athletic Clubs Of Virginia, Inc., Gym Quest, Inc. D/B/A Gold's Gym Charlottesville, And Total Performance Sport And Fitness, LLC

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5) Counsel for the appellant requests oral argument in person

6) On this the 9th day of April 2012, three copies of the foregoing Opening Brief of Appellant as well as two copies of the Joint Appendix were delivered by third-party commercial carrier to opposing counsel at the above address. This same date, fifteen copies of the same were hand delivered to the clerk's office.

/s/ Edward B. Lowry