In The

Supreme Court of Virginia

RECORD NO. 112233

CHARLOTTESVILLE AREA FITNESS CLUB OPERATIONS 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.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The three Appellants, the Charlottesville Area Fitness Club Operators Association, Atlantic Coast Athletic Clubs of Virginia, Inc., and Gym Quest, Inc. d/b/a Gold's Gym Charlottesville, ("Fitness Clubs"), filed a two-count Complaint seeking declaratory relief against Appellees Charlottesville City Council and City Manager Maurice Jones ("City"). In Count I (Joint Appendix ("JA") 5 – 7) the for-profit Fitness Clubs alleged that the City acted arbitrarily and violated their constitutional rights by seeking proposals to lease public park property for the construction and operation of a nonprofit fitness and recreation facility. In Count II (JA 7 – 9) the Fitness Clubs alleged that the City violated the Virginia Public Procurement Act ("VPPA") because the resulting written lease between the City and the YMCA provided for a conditional charitable contribution from the City to the YMCA.

The City demurred to the Complaint and filed a special plea of the statute of limitations and laches. (JA 94 – 105). Following a hearing the Trial Court granted the Demurrer, finding that there was a rational basis for distinguishing between for-profit and nonprofit uses in the leasing process, and that the lease between the City and YMCA was not a purchase of services that required compliance with the VPPA. (JA 111 – 114).

STATEMENT OF THE FACTS

In 2007 the Piedmont Family YMCA, Inc. ("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. (JA 3, Para. 13). Since state law requires a public bid process for the lease of municipal property for a term in excess of five years, the Charlottesville City Council directed City staff to publicly advertise and seek competitive proposals for a lease of approximately 3 – 5 acres of property within McIntire Park. (JA 3, Para. 15 – 17). The McIntire Park site was seen as an appropriate location for a fitness center because it was centrally located in the City and convenient for students attending the adjacent Charlottesville High School, especially those who would use portions of the facility such as the competitive pool. (JA 42).

When the City Council agreed to seek competitive proposals for the lease, City staff noted that the operation of the fitness facility, and any programs, classes or activities on the leased premises, would be conducted in accordance with a "Use Agreement" executed by the City and the lessee. As described by City staff the Use Agreement would, *inter alia*, identify the potential users of the facility, address whether the lessee adhered to a policy of non-discrimination, include a description of the core

functions, activities and programs to be conducted at the facility, and state the availability of the facility for use by students and athletic teams at Charlottesville High School. (JA 42). A draft Use Agreement was in fact included with the draft ground lease at the time it was advertised, and ultimately attached to and incorporated into the Lease. (JA 28, Para. 7).

The published advertisement sought bids from "persons interested" in developing and operating a non-profit fitness and recreation center of approximately 70,000 square feet for the benefit of the citizens of Charlottesville. The advertisement further noted that a public hearing would be held and that any person could appear to express their view on the proposed lease, which was available for inspection in the office of the City's Clerk of Council. (JA 4, Para. 18 – 19; JA 46).

The YMCA was the only party to submit a proposal in response to the advertisement, and on December 17, 2007 the City Council passed an ordinance awarding the lease to the YMCA. (JA 4, Para. 25; JA 64 – 66). The Lease provides that the facility will be open to all residents of the City and Albemarle County; any non-resident member of the YMCA; and residents of the YMCA's service area, which includes all or portions of the counties of Greene, Nelson, Madison, Fluvanna, Orange and Louisa. (JA 53, Para. 4). The Lease also provides that if the City committed by May 20,

2008 to a capital contribution of $1.25 million for construction of the facility, the YMCA pool would include at least six 25-yard competitive swimming lanes and a one meter diving board and diving well, and the Charlottesville High School swim team would be allowed priority access to those six lanes for two hours immediately after the end of school classes during the high school winter swim season. (JA 56, Para. 12).

There were no allegations in the Complaint that any of the Fitness Clubs (1) submitted a proposal for the lease; (2) objected to the terms of the advertisement for the lease; (3) sought an interpretation as to whether they were qualified to submit a proposal in response to the advertisement; or (4) took any action in response to the bidding procedure and award of the lease to the YMCA during the approximately 2 ½ years between the advertisement and the filing of their Complaint.

SUMMARY OF THE ARGUMENT

The Trial Court's judgment granting the City's Demurrer to Count I should be affirmed, because there was no denial of equal protection or due process. There was a rational basis for distinguishing between private for-profit and nonprofit uses of public park space, and the Fitness Clubs did not have a constitutionally protected property interest in receiving a lease from the City.

The Trial Court's judgment granting the City's Demurrer to Count II should also be affirmed, as the City had express authority to make a charitable contribution to the YMCA for a specific purpose, and implied authority to enter into a contract to implement that authority. The City's Lease and Use Agreement with the YMCA was not a purchase of services subject to the requirements of the VPPA.

The City addresses the six Assignments of Error below seriatim. In the Appellant's Opening Brief, Assignments of Error 1, 2 and 3 are addressed in Sections IV and V; Assignment of Error 4 is addressed is Sections I and IV; Assignment of Error V is addressed in Section I; and Assignment of Error 6 is addressed in Sections I, II, III and IV. This arrangement appears to be in conflict with the requirement that "[w]ith respect to each assignment of error, the standard of review and the

argument – including principles of law and the authorities – shall be stated in one place and not scattered through the brief". Va. Sup. Ct. R. 5:27(d).

STANDARD OF REVIEW

The well-established principles applicable to an appellate court's review of a judgment sustaining a demurrer are as follows:

> The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted. A demurrer tests the legal sufficiency of facts alleged in the pleadings, not the strength of proof. Accordingly, we accept as true all properly pled facts and all inferences fairly drawn from those facts. Because the decision whether to grant a demurrer involves issues of law, we review the circuit court's judgment de novo.

Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 356-57, 699 S.E.2d 483, 486-87 (2010). In order to survive a demurrer, a complaint must allege more than just conclusions of law. "A pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 558, 708 S.E.2d 867, 870 (2011); *see also* Kitchen v. City of Newport News, 275 Va. 378, 385, 657 S.E.2d 132, 136 (2008) (the complaint must allege sufficient facts to constitute a "foundation in law" for the judgment sought, and not just conclusions of law). Last, a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that

properly are a part of the pleadings. Ward's Equipment, Inc. v. New Holland North America, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997).

ARGUMENT AND AUTHORITIES

I THE CITY'S DECISION TO LIMIT THE LEASE OF PUBLIC PARK PROPERTY TO NONPROFIT USES WAS NOT A DENIAL OF EQUAL PROTECTION OR A DEPRIVATION OF THE DUE PROCESS RIGHTS OF THOSE SEEKING TO OPERATE A FOR-PROFIT BUSINESS IN THE PARK (Assignments of Error 1 and 2).

In accordance with Virginia Code sec. 15.2-2101 the City of Charlottesville published a notice seeking proposals from any persons interested in leasing property within McIntire Park for the development and operation of a non-profit fitness and recreation center. In their Complaint the Fitness Clubs alleged that the limitation to a non-profit use violated their right to equal protection and due process under both the United States and Virginia Constitutions. (JA 6, Para. 38). The Due Process protections under the state constitution are the same as those found in the federal constitution, Shivaee v. Commonwealth, 270 Va. 112, 119, 613 S.E.2d 570, 574, *cert. denied*, 546 U.S. 1005, 126 S. Ct. 626, 163 L. Ed. 2d 509 (2005) and the Virginia Constitution provides no greater rights of equal protection than the federal constitution. Buchanan v. City of Chesapeake, 237 Va. 50, 53, 375 S.E.2d 736, 738 (1989).

The Fitness Clubs do not allege that the non-profit classification affected a suspect class or infringed upon a fundamental right. The classification must therefore be examined under the "rational basis" test, which is satisfied "if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose". Etheridge v. Medical Center Hospitals, 237 Va. 87, 104, 376 S.E.2d 525, 534 (1989) (citations omitted); *see also* Cox Cable Hampton Roads, Inc. v. City of Norfolk, 247 Va. 64, 67, 439 S.E.2d 366, 367 (1994) (in applying the rational basis test, "we consider whether any state of facts reasonably may be conceived for the statutory classification"). The trial court granted the City's Demurrer on the constitutional claims, finding that there was a rational basis for distinguishing between nonprofit and for profit businesses. (JA 111 – 112).

A. THE FITNESS CLUBS HAVE THE BURDEN TO SHOW THAT THERE IS NO REASONABLY CONCEIVABLE SET OF FACTS THAT COULD PROVIDE A RATIONAL BASIS FOR THE CHALLENGED CLASSIFICATION.

In their Brief the Fitness Clubs argue that their Equal Protection claim should not have been dismissed because "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". (Appellant's Opening Brief at 28). That argument is in direct contradiction to established precedent

under both the state and federal constitutions. In affirming the grant of a demurrer to an equal protection claim in Finn v. Virginia Retirement System, 259 Va. 144, 155, 524 S.E.2d 125, 131 (2000), the Court held that the government:

> . . .has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

(Quoting FCC v. Beach Communications, Inc, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993).

In Club Italia Soccer & Sports Organization, Inc. v. Charter Township of Shelby, 470 F.3d 286 (6th Cir. 2006), the plaintiff claimed a denial of equal protection because the Township accepted a soccer complex development proposal from a for profit entity without first granting the plaintiff, a non-profit organization, the opportunity to submit a proposal on the same terms. In affirming the dismissal of the equal protection claim the court noted that:

> Plaintiff tries to avoid dismissal of its equal protection claim by attempting to shift the burden of proof to Defendant. Plaintiff argues that Defendant has offered no rational basis for its actions and that therefore Plaintiff should succeed. Under rational basis review, Defendant need not offer any rational basis so long as this Court can conceive of one; the burden

> falls entirely to Plaintiff to show there is no rational basis, not the other way around.

Id at 299.

The Fitness Clubs alleged that "the City Council did not provide any reasons as to why" it required the lease to be used for the development and operation of a non-profit facility, and assert that "without any such justification" the decision was arbitrary and unconstitutional. (JA 6, Para. 37 – 38). The notion that a local governing body must specify the "justifications" for its legislative classifications, presumably so that they may be subjected to judicial review, is completely contrary to the concept of separation of powers. Respect for the separation of powers of the legislative and judicial branches of government dictates that a "considerable deference must be accorded by the courts to legislative policy choices". Advanced Towing Co., LLC v. Fairfax Board of Supervisors, 280 Va. 187, 191, 694 S.E.2d 621, 623, *cert. denied*, ___ U.S. ___, 131 S. Ct. 524, 178 L. Ed. 2d 374 (2010). The Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id*. (*quoting* FCC v. Beach Communications, *supra*, 508 U.S. at 313 – 315). S*ee also* United States Retirement Board v. Fritz, 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980) ("where . . . there are plausible reasons for [legislative] action, our inquiry is

at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision."); Baltimore Gas and Electric Co. v. Heintz, 760 F.2d 1408, 1424 (4th Cir.), *cert. denied*, 474 U.S. 847, 106 S. Ct. 141, 88 L. Ed. 2d 116 (1985) (Where there is no evidence bearing on the actual purpose for a legislative classification, our analysis necessarily focuses on the suggestions of counsel).

B. THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS A RATIONAL BASIS FOR DISTINGUISHING BETWEEN NONPROFIT AND FOR-PROFIT USES WHEN LEASING MUNICIPAL PROPERTY.

Legislative distinctions between for profit and non-profit endeavors or entities are not only reasonable, they are commonplace. In rejecting an equal protection challenge to state legislation that authorized loans for students attending certain nonprofit institutions, the Court in Miller v. Ayers, 213 Va. 251, 265, 191 S.E.2d 261, 272 (1972) held as follows:

> It is commonplace, however, for government to make distinctions between those in business for a profit and those who have eleemosynary motives . . . It is certainly rational, and therefore compatible with the Equal Protection clause, for government to pursue a policy which does not funnel state loans into the hands of students who, attending institutions conducted for profit, necessarily are paying tuition fees set at a level which makes possible that profit.

(Emphasis added). *See also* Thurmond v. Block, 640 F. Supp. 588, 593 (W.D. Tenn. 1986) (upholding the limitation of certain federal food stamp

benefits to nonprofit group homes, noting that "by their very nature for profit institutions exist to create profits, nonprofit institutions do not."); European Connections & Tours, Inc. v. Gonzales, 480 F. Supp. 2d 1355, 1378 (N.D. Ga. 2007) (legislative classification based on non-profit / for-profit entity upheld); Club Italia Soccer & Sports Organization, Inc., *supra*, 470 F.3d at 298-99 (rational basis for treatment of non-profit sports organization).[1]

In this case the Charlottesville City Council limited the potential lessees of public park property to those whose mission would be to provide services to City residents, rather than to include those who exist to make money for their owners and shareholders. It was certainly rational for the Council to conclude that the private recreation and fitness center, located in the midst of a public park open to all, would be more accessible and affordable if it was not operated as a for profit enterprise. The for profit Fitness Clubs may be correct when they boast of their ability to provide a "superior . . . more upscale or advanced facility" (JA 6, Para. 33, 36), but it was a nonprofit organization that was able to covenant that no City resident would be denied use of the facility for financial reasons. (JA 55, Para. 8).

[1] The Fitness Clubs' reliance on Camps Newfound / Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997) is misplaced. That opinion does not involve the Equal Protection Clause, but found a violation of the Commerce Clause arising from a state statute that gave a tax exemption to nonprofit charities, unless the charity was operated primarily for the benefit of nonresidents of the state.

It was reasonable, and clearly within the Council's legislative discretion, to opt for the latter over the former.

Since the Trial Court found a rational basis for distinguishing between for profit and nonprofit businesses, it naturally followed that the court would conclude that the City was not trying to improperly manipulate the bidding process so that the YMCA would be the only entity to place a bid. (JA 112, Para. 6). "Courts are not concerned with the motives which actuate members of a legislative body in enacting a law, but in the results of their action". Chesapeake and Potomac Telephone Co. v. City of Newport News, 196 Va. 627, 639, 85 S.E.2d 345, 352 (1955) (summarily rejecting a claim that a tax ordinance was devised to coerce the plaintiff to bid on a franchise).

C. THE FACTS PLED BY THE FITNESS CLUBS, EVEN IF ASSUMED TO BE TRUE, DO NOT ALLEGE A DEPRIVATION OF PROPERTY WITHOUT PROCEDURAL DUE PROCESS.

The Fitness Clubs alleged in the Trial Court that they suffered a deprivation of property in the form of a "loss of profits" without procedural due process of law. (JA 108, Para. 3). The activity of making a profit is not, however, "property" protected by the due process clause. *See* College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 675 (1999). While they have asserted a revised form of that

claim on appeal (Appellants' Opening Brief at 20 – 21), it is unrelated to any Assignment of Error. The Assignments of Error (JA 116 – 117) do not mention "due process" or the deprivation of a property interest. The dismissal of the due process claim in the court below therefore should not be considered on this appeal.

The Fitness Clubs now claim that they had a protected property interest in the statutory procedures required for the leasing of municipal property, Virginia Code sec. 15.2-2100 *et seq*., and in the Virginia Public Procurement Act, Va. Code sec. 2.2-4300 *et seq*. They classify their alleged property interest as "the right of access to public business". (Appellants' Opening Brief at 21).

In any case alleging a denial of property without due process of law the "first inquiry is whether the interest is a property interest protected by procedural due process guarantees". McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995). Protected property interests cannot be created by the Fourteenth Amendment itself, but rather must be created or defined by an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Board of Regents v. Roth, 408 U.S. 564, 576-77, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); County of Giles v. Wines,

262 Va. 68, 75, 546 S.E.2d 721, 725 (2001). In order to have a property interest in a benefit a person must have more than a mere "unilateral expectation of it" or abstract need or desire for it. Equity in Athletics, Inc. v. Department of Education, 639 F.3d 91, 109 (4th Cir. 2011), *cert denied*, 556 U.S. 1127, 129 S. Ct. 1613, 173 L. Ed. 2d 993 (2012). To claim a protected property interest the claimant must have a "legitimate claim of entitlement" to the benefit. Board of Regents v. Roth, *supra*, 408 U.S. at 577.

A legitimate claim of entitlement to a benefit, whether it is a permit, a land use approval, a government contract or a lease of public property, arises only when the government has virtually no discretion to deny the benefit. In Biser v. Town of Bel Air, 991 F.2d 100 (4th Cir.), *cert. denied*, 510 U.S. 864, 114 S. Ct. 182, 126 L. Ed. 2d 141 (1993), the plaintiff alleged a denial of due process when he was denied a special exception that would have allowed him to construct two commercial office buildings. In concluding that there was no property interest in the special exception before it was granted, the court held as follows:

> . . . . we have held that if a local agency has "any significant discretion" in determining whether a permit should issue, then a claimant has no legitimate entitlement and, hence, no cognizable property interest . . . . Here the Board of Appeals had significant discretion in deciding whether to grant Biser's application for a special exception. In making its decision, the Board had to determine whether granting the exception "would adversely affect the public health, safety, security, morals or

> general welfare, or would result in dangerous traffic conditions or would jeopardize the lives or property of people living in the neighborhood . . . It is difficult to imagine a more flexible standard.

Id. at 104. The City's discretion in selecting a lessee of public park land is at least as great. Pursuant to Virginia Code sec. 15.2-2102, the City may reject a proposal "if, in its opinion, some reason affecting the interest of the city or town makes it advisable to do so". State law provides further that the City "shall have the right to reject any and all bids . . ". Va. Code section 15.2-2101.

Similarly, courts have held that unsuccessful bidders on public contracts do not have a protected property interest when the award of the contract is discretionary. *See* Sowell's Meats and Services, Inc. v. McSwain, 788 F.2d 226, 228 (4th Cir. 1986); Lanier Construction Co. v. City of Clinton, 812 F. Supp. 696, 700 (E.D.N.C. 2011). If a solicitation under the Public Procurement Act had been required in this case the City would have retained considerable discretion in selecting an entity to perform any services that were subject to the solicitation. *See* Virginia Code sec. 2.2-4301(3)(b) ("the public body shall select the offeror which, in its opinion, has made the best proposal").

Admittedly, in this case the Fitness Clubs do not claim to be unsuccessful bidders for the lease, but rather that they were somehow

precluded from submitting a proposal for the lease because of their "for profit" status. For purposes of due process analysis that is a distinction that is of no legal consequence. In Club Italia Soccer & Sports Organization, Inc. v. Charter Township of Shelby, *supra*, the plaintiff alleged that the terms of an "invitation to compete" prevented it from submitting a bid to construct a soccer complex. Relying on prior precedent the court summarily rejected the plaintiff's due process argument:

> Plaintiff argues that since it is not a disappointed bidder, the proper inquiry is not whether Plaintiff had a property interest in the *government contract* but whether Plaintiff had a property interest in *the right to bid itself*. . . . Plaintiff asserts that the "invitation to compete" created a property interest in the right to bid itself, so there existed a protected property interest. While we agree that this is the proper inquiry, we are unpersuaded by Plaintiff's argument. In TriHealth Inc., this Court rejected the identical argument and concluded that the plaintiff in that case had not alleged a protected property interest.

470 F.3d at 297 (Emphasis in original; citations omitted).

Count I of the Fitness Clubs' Complaint, even when construed in the most favorable light, failed to plead a viable constitutional claim, and was properly dismissed.

II. THE CITY HAD THE DISCRETION TO PRESCRIBE THE TERMS AND CONDITIONS FOR THE USE OF ITS PROPERTY IN THE LEASE AND USE AGREEMENT (Assignment of Error 3)

After noting that a Virginia municipality "has broad discretion to ensure that the lease of its property will benefit its citizens", the Trial Court concluded that the Lease and Use Agreement included appropriate "terms and conditions designed to benefit the citizens of Charlottesville." (JA 112, Para. 4 and 7). The Fitness Clubs assert in Assignment of Error 3 that the court erred in holding that the Use Agreement was an "appropriate restriction" on a municipal lease of real property. While it is not clear why the Fitness Clubs attempt to categorize the Use Agreement as a "restriction" on the lease, they only reference this Assignment of Error in their arguments on Equal Protection and Due Process. (Appellants' Opening Brief at 20, 22). To the extent that this Assignment of Error implicates the constitutional issues, the City relies on its arguments in response, *supra*.

In Virginia if a city or town intends to lease its real property for a term in excess of five years, the city or town must, "after due advertisement, publicly receive bids therefore, in such manner as is provided by sec. 15.2-2102, and shall then act as may be required by law". Virginia Code sec. 15.2-2100(B). Section 15.2-2102 sets forth the procedure for

receiving and accepting bids, and vests considerable discretion in the local governing body when awarding a lease of public property. Reflecting the legislative nature of granting such a lease, section 15.2-2102 allows a city council to reject a higher bid and award the lease to a lower bidder, "if, in its opinion, some reason affecting the interest of the city or town makes it advisable to do so . . . ".

State law does not dictate what must be placed in the advertisement for a lease, nor does it limit the municipality's discretion in prescribing the terms and conditions of such a lease. The observations of the Court in City of Danville v. Hatcher, 101 Va. 523, 530-31, 44 S.E. 723, 726 (1903), are applicable here:

> The language in which the grant of power is couched in this case is unmistakable, and too plain to admit of elucidation. It leaves it absolutely within the control of the Council to determine whether they will wholly suppress or grant the privilege, subject to such restrictions as they may see fit to impose. Within the sphere of their delegated powers, municipal corporations have as absolute control as the General Assembly would have if it had never delegated such powers and exercised them by its own enactments, and the courts can no more interfere with the acts of the one than the other. To permit such interference would be to deny the existence of a discretionary power, and transfer its exercise from one coordinate branch of the government to another.

The Fitness Clubs failed to allege facts showing that the terms and conditions of the Use Agreement were arbitrary or capricious, beyond the

authority of the City Council, or an "inappropriate restriction" on the City Lease.

III. THE CITY'S LEASE OF REAL PROPERTY PURSUANT TO VIRGINIA CODE SEC. 15.2-2200 *et seq.* AND ITS CHARITABLE CONTRIBUTION TO THE YMCA PURSUANT TO VIRGINIA CODE SEC. 15.2-953 WERE NOT A PURCHASE OF GOODS OR SERVICES SUBJECT TO THE VIRGINIA PUBLIC PROCUREMENT ACT, VIRGINIA CODE SEC. 2.2-4300 *et seq.* (Assignments of Error 4 – 6)

A. ASSIGNMENTS OF ERROR 4 AND 6 CHALLENGE RULINGS THAT WERE NOT MADE BY THE TRIAL COURT, AND ARE THEREFORE BARRED BY VA. SUP. CT. R. 5:17(C).

Assignments of Error 4, 5 and 6 relate to Count II of the Complaint (JA 7 – 9), wherein the Fitness Clubs alleged that the Use Agreement and the City's charitable contribution to the YMCA were in violation of the Virginia Public Procurement Act. Assignment of Error 5 directly challenges the Trial Court's conclusion that "the Use Agreement was not an attempt to procure fitness services for the citizens of Charlottesville, and the City was not required to follow" the Public Procurement Act. (JA 112, Para. 7). Assignments of Error 4 and 6, however, challenge rulings that the Trial Court never made. The Trial Court did not rule, as alleged in Assignment of Error 4, that the City could procure services pursuant to Virginia Code sec. 15.2-2100, which governs the lease of municipal real property. The Trial Court simply held that the City had broad discretion in prescribing the

terms and conditions of a lease of its property, to ensure that the Lease will benefit its citizens. (JA 112, Para. 4 – 5).

Nor did the Trial Court rule that Va. Code sec. 15.2-953 "grants local governments the implied power to procure goods and services through conditional donations to non-profit entities". (JA 117). To the contrary, the Trial Court held that the Use Agreement, which contained the "conditional donation", was not a purchase of services, as noted in Assignment of Error 5. In summary, the Trial Court did not make two contradictory rulings that the City had the implied authority to purchase services through the Use Agreement (Assignment of Error 6), and that the City was not attempting to purchase services through the Use Agreement (Assignment of Error 5).

If an assignment of error does not reflect the trial court's actual ruling it is barred by Va. Sup. Ct. R. 5:17(c), which requires an appellant to assign error to the specific ruling of the circuit court. Heinrich Schepers GMBH & Co., KG v. Whitaker, 280 Va. 507, 514, 702 S.E.2d 572, 576 (2010). Accordingly, Assignments of Error 4 and 6 should be dismissed for noncompliance with Rule 5:17.

B. THE CITY HAS AUTHORITY TO MAKE CHARITABLE CONTRIBUTIONS FOR SPECIFIC PURPOSES, AND TO ENTER INTO CONTRACTS TO ENSURE THAT THE CONTRIBUTION IS EXPENDED FOT ITS INTENDED PURPOSE.

While Va. Const. Art. IV, Section 16 prohibits most state appropriations to charitable institutions, that Section of the Constitution does allow the General Assembly to "authorize counties, cities, or towns to make such appropriations to any charitable institution or association". Virginia Code sec. 15.2-953 is the primary enabling legislation for localities to make those charitable contributions. The only limitations imposed by the General Assembly on that grant of authority are: (1) the recipient must be a charitable institution or association; (2) the institution must be located within the locality, or if outside of the locality it must provide services to residents of the locality; and (3) the institution must not be controlled in whole or in part by any church or sectarian society. The General Assembly clearly envisioned YMCAs as eligible recipients of local charitable contributions – the statute specifically states that the term "sectarian society" does not include a nondenominational YMCA.

The Use Agreement states that if the City agrees to make a $1.25 million contribution to the YMCA, the YMCA will include six competitive swim lanes and a diving board and well in the family aquatics center it will

build in its new building. (JA 56, Para. 12). Section 15.2-953 does not prohibit localities from making charitable donations for a specific purpose. As examples, charitable contributions have been made for the purpose of providing housing information and counseling, 1974-75 Op. Va. Atty. Gen. 52; for the expenses of operating a fine arts center, 1982-83 Op. Va. Atty. Gen. 33; for the cost of equipping a cannery, 1974-75 Op. Va. Atty. Gen. 105; for the construction and operation of a nursing home for the aged, 1967-68 Op. Va. Atty. Gen. 17; and for the construction or operation of hospitals, 1967-68 Op. Va. Atty. Gen. 20. The Attorney General has also recognized that section 15.2-953 "authorizes the appropriation of funds to organizations performing activities which the city is not authorized to perform". 1974-75 Op. Va. Atty. Gen., *supra*, at 53.

The Fitness Clubs do not argue that the City's contribution to the YMCA runs afoul of any of the statutory restrictions. Nor does it appear that they are directly challenging the authority of the City to make a donation to the YMCA for a particular purpose. Instead, they argue that a charitable contribution is *ultra vires*, or in violation of the Dillon Rule, if there is a contractual agreement between the locality and the charity that obligates the charity to expend the donation for the purpose for which it was given. (JA 8 – 9; 18 – 19). In essence the Fitness Clubs argue that

"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". (Appellants' Opening Brief at 18).

Since section 15.2-953 does not provide express statutory authority for localities to enter into contracts that define the terms and conditions of their charitable contributions, the appropriate question in a Dillon Rule analysis is whether there is implied legislative authority:

> If the power is not expressly granted, we then determine whether the power is necessarily or fairly implied from the powers expressly granted by the statute. 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. Questions concerning implied legislative authority of a local governing body are resolved by analyzing the legislative intent of the General Assembly. Legislative intent is determined from the plain meaning of the words used. Thus, the central focus of our analysis [in applying the Dillon Rule] is to ascertain and give effect to the General Assembly's intent in enacting the provisions.

Marble Technologies, Inc. v. City of Hampton, 279 Va. 409, 418, 690 S.E.2d 84, 88-89 (2010) (citations omitted). The test in applying the doctrine of implied powers is reasonableness, "in which concern for what is necessary to promote the public interest is a key element". Commonwealth v. County Board of Arlington County, 217 Va. 558, 577, 232 S.E.2d 30, 38 (1977).

If a locality decides, in its legislative discretion, to donate funds for a particular purpose or program, the public interest dictates that the locality have the authority to ensure that the funds are actually used for that purpose or program. As evidenced by section 15.2-953, it is clearly the General Assembly's intent to authorize the use of public money to fund private organizations that are providing a program that has a public purpose. "Private charitable organizations often perform functions that, were they not the subject of private initiative, would surely have to be performed by public bodies at public expense". A.E. Howard, II Commentaries on the Constitution of Virginia 551 (1974). The argument of the Fitness Clubs, however, is that while a locality may make a charitable contribution, it cannot retain any enforceable contractual right against the recipient to ensure that the funds are spent as intended. If true that would in large part frustrate the intent of the General Assembly in authorizing the public funding of charitable organizations that provide services for the benefit of the locality's residents. The municipality could make the donation, but could only hope that it would be used for the purpose intended. Such fiscal irresponsibility could not have been the intent of the General Assembly.

With regard to the implied power of a locality to enter into contracts, the Court in South Hampton Apartments, Inc. v. Elizabeth City County, 185 Va. 67, 79, 37 S.E.2d 841, 847 (1946) held that "[u]nquestionably a county is capable of contracting and has the power to make all contracts which are proper and reasonably necessary to the execution of its corporate objects and purposes". *Accord* Concerned Residents of Gloucester County v. Board of Supervisors of Gloucester County, 248 Va. 488, 499-500, 449 S.E.2d 787, 794 (1994). Here, through the Use Agreement the City exercised its "unquestionable" power to contract to ensure that its $1.25 million contribution was expended in the manner intended. There was no *ultra vires* act or violation of the Dillon Rule. The City had the express authority to make a charitable contribution to the YMCA, could make the contribution for a particular purpose, and had the implied power to enter into a contract in furtherance of its express power to make a charitable donation.

C. THE USE AGREEMENT WAS NOT A PURCHASE OF SERVICES FOR CITY RESIDENTS THAT WAS SUBJECT TO THE COMPETITIVE SOLICITATION REQUIREMENTS OF THE VIRGINIA PUBLIC PROCUREMENT ACT ("VPPA").

The Lease between the City and the YMCA incorporates the terms of a "Use Agreement", which sets forth many of the operational details of the proposed new YMCA fitness and recreation center. Since a lease of real property is clearly beyond the scope of the VPPA, *see* R.I.S.E., Inc. v. Kay, 768 F. Supp. 1141, 1144 (E.D. Va. 1991), *aff'd without op.*, 977 F.2d 573 (4th Cir. 1992), the Fitness Clubs alleged below that the Use Agreement itself should have been subject to a competitive procurement process because it was merely "included as an exhibit to the Lease", and was actually "a unique contract between the City, YMCA, and County", and was a "separate legal contract". (JA 7, Para. 42 – 43). The Fitness Clubs now argue that the Lease and Use Agreement are "inextricably entwined", and "cannot be seen as independent of one another". (Appellants' Opening Brief at 13).

The Fitness Clubs assert that the Use Agreement, coupled with the City's charitable contribution, is a "purchase of services" subject to the VPPA for two reasons. First, they claim that the City was procuring fitness services for its residents because the Use Agreement provides for "discounted membership fees" or "more favorable rates" for residents of the

City and County, (JA 5, Para. 27; JA 8, 50) (*See also* Appellants' Opening Brief at 4 and 26) (the Use Agreement requires particular membership and entrance fees for City residents, and mandates a particular preferential rate structure for City residents). Second, the Fitness Clubs argue that the Use Agreement was a purchase of services because it provided for the "exclusive use" of "aquatic space" for City residents. (JA 8, Para. 50); (*see also* Appellants' Opening Brief at 11, 13) (referencing the "exclusive use of space for City residents", or the "exclusive space reserved for City use").

In reality the Use Agreement contains no mandate or requirement with respect to membership rates and admission fees. The rates and fees set forth in the Use Agreement for both City and Albemarle County residents are prefaced by the following sentence: "The membership and fee structure of Lessee *at the time of the opening of the facility is anticipated to be* as follows, and shall be *subject to change by the Lessee's Board of Directors*" (emphasis added). (JA 54, Para. 7). Under the Agreement the YMCA retains the right to establish membership categories, and membership, daily admission, class and program fees, and to modify the criteria for financial aid. (JA 55, Para. 7 – 8).

With regard to the alleged provision of "aquatic space" for the "exclusive use" of City residents, the City assumes that the referenced

aquatic space means the competitive swimming lanes and the diving board. Since these amenities are available for all users of the YMCA facility, the Fitness Clubs attempt to show the purchase of a "service" by the City by alleging that the aquatic space was for the "exclusive use" of City residents. Apparently that is the Fitness Clubs' interpretation of the provision allowing members of the Charlottesville High School swim team priority access for two hours after the end of classes during the winter swim season. (JA 56, Para. 12)

The Trial Court correctly found that the Use Agreement was not an attempt to procure services for City residents, and the City was not required to follow the VPPA to secure the Use Agreement. (JA 112, Para. 7) Virginia Code sec. 2.2-4303(A) states in part that the VPPA applies to public contracts for the purchase or lease of goods or services. Since "purchase" is not defined in the VPPA, it must be given its common, ordinary, and accepted meaning. Huffman v. Kite, 198 Va. 196, 199, 93 S.E.2d 328, 331 (1956). The most relevant definition of "purchase" in this context is "the acquiring of title to or property in anything for a price". *Webster's Third New International Dictionary* 1845 (2002). "Services" are defined in the VPPA to mean "any work performed by an independent contractor where the service rendered does not consist primarily of

acquisition of equipment or materials, or the rental of equipment, materials and supplies". Va. Code sec. 2.2-4301.

When any locality makes a contribution to a local charity it is entitled to expect a public benefit for its residents in return. That resulting public benefit does not turn the contribution into a "purchase of services" under the VPPA, even when the charity is contractually obligated to provide the benefit. In this case the City decided to contribute toward the cost of a new facility, on the condition that certain amenities will be provided that would benefit all users, including City residents. The City is not purchasing anything from the YMCA, and the YMCA is not performing services for the City.

A close examination of what the Fitness Clubs are proposing demonstrates the fatal flaw in their argument. According to the Fitness Clubs, the City should have issued a solicitation pursuant to the VPPA that invited private fitness clubs to submit bids or proposals to provide club memberships or fitness services to all City residents. The Fitness Clubs have been unable to identify, either in the Trial Court or in their Opening Brief, the source of the City's authority to purchase or subsidize private health or fitness club memberships or benefits for its citizens. *See* Arlington County v. White, 259 Va. 708, 528 S.E.2d 706 (2000) (locality

lacked the authority to provide health insurance benefits to the domestic partners of its employees). There certainly is no express authority for such a contract. Under the Fitness Clubs' interpretation of the Dillon Rule, the City does not have the implied power to enter into a contract in furtherance of its express statutory authority to make a charitable contribution, but it does have the implied power to enter into a contract to defray the costs of private fitness club services for City residents.

One of the factors supporting the lease of property within McIntire Park for a recreation and fitness center was the proximity of the location to Charlottesville High School, and the ability of the students to take advantage of amenities such as the competitive pool. (JA 42). While the City and the YMCA chose to have that benefit reflected in the Lease, the Fitness Clubs apparently believe it should have been the subject of a separate transaction under the VPPA. The exact "service" that the City was supposed to procure is not exactly clear. The only "aquatic benefit" provided that is not available to all users of the facility is the CHS swim team's priority access for two hours after school during a few months of the year. The Fitness Clubs have not explained whether the City was supposed to seek proposals under the VPPA from entities that would provide that "service" on the YMCA's leasehold, where the City wanted it

provided, or whether the City was compelled to consider proposals from other locations that would not be in such close proximity to the school.

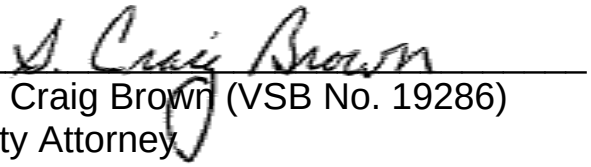
The Fitness Clubs also argue that the VPPA applies in this case because Va. Code sec. 15.2-953 does not constitute an exception to the VPPA. The General Assembly has, in Va. Code sec. 2.2-4343 *et seq.*, exempted certain purchases of goods or services from the coverage of the VPPA. There is, of course, no need to provide a statutory exception for a transaction that would not otherwise be within the scope of the VPPA. The Fitness Clubs consider the appropriation of public funds for a charitable contribution pursuant to Va. Code sec. 15.2-953 as a "purchase", and the public benefit resulting from that contribution as a "service". Neither the VPPA nor section 15.2-953 supplies any support for that conclusion. Since the challenged transaction was not, as a matter of law, the purchase of goods or services subject to the requirements of the VPPA, the City's Demurrer to Count II of the Complaint was properly granted.

CONCLUSION

The City respectfully submits that the Judgment of the Charlottesville Circuit Court granting the City's Demurrer to Counts I and II of the Complaint should be affirmed. The Fitness Clubs failed to allege a denial of equal protection or due process, even if the factual allegations of the Complaint are accepted as true. The Lease between the City and the YMCA was not a purchase of services subject to the Virginia Public Procurement Act. The Lease and accompanying Use Agreement was an appropriate exercise of the City's authority to make charitable contributions for specific purposes, and affords the Fitness Clubs no cause of action.

Respectfully submitted,

Charlottesville City Council and
Maurice Jones, in his official capacity
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia:

1. Fifteen bound copies, and one electronic copy on CD, of this foregoing Brief of Appellees were hand-filed with the Clerk of the Supreme Court of Virginia, this 4th day of May, 2012.

2. Three bound copies, and one electronic copy on CD, of the same, were served via UPS Ground Transportation upon Counsel for Appellant at the below stated address, this 4th day of May, 2012.

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