In the

Supreme Court of Virginia

At Richmond

Record No. 181043

LOCH LEVAN LAND LIMITED PARTNERSHIP; WELLESLEY LAND LIMITED PARTNERSHIP; HHH LAND, LLC; and HHHUNT CORPORATION,

Appellants,

– v. –

BOARD OF SUPERVISORS OF HENRICO COUNTY, VIRGINIA and THE COUNTY OF HENRICO,

Appellees.

BRIEF OF AMICI CURIAE THE HOME BUILDERS ASSOCIATION OF VIRGINIA, INC. and THE VIRGINIA ASSOCIATION OF REALTORS, INC.

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INTEREST OF THE AMICI

The Home Builders Association of Virginia, Inc. ("HBAV") is the trade association for the single-family and multi-family residential land development and construction industry in the Commonwealth. Based in Richmond, Virginia, the HBAV represents thousands of member companies involved in new construction and adaptive reuse residential projects, including builders, developers, architects, engineers, land-use practitioners, and the countless trades that are involved in the various stages of land development and construction. Founded in 1956 as the state chapter of the National Association of Home Builders, the HBAV is comprised of 15 local associations including the Augusta Home Builders Association, Blue Ridge Home Builders Association, Home Builders Association of Central Virginia, Fredericksburg Area Builders Association, New River Valley Home Builders Association, Northern Virginia Building Industry Association, Peninsula Housing and Builders Association, Piedmont Virginia Building Industry Association, Home Builders Association of Rappahannock, Home Building Association of Richmond, Roanoke Regional Home Builders Association, Shenandoah Valley Builders Association, Home Builders Association of Southside Virginia, Tidewater Builders Association, and the Top of Virginia Building Association.

The HBAV represents the interest of the industry before the Virginia General Assembly and state regulatory agencies, including the Department of Environmental

Quality, the Department of Housing and Community Development, the Department of Professional and Occupational Regulation, the Department of Health, and the Department of Historic Resources. Its mission is to serve as a resource and a partner for state and local elected officials and policy makers on all matters impacting the residential land development and construction industry with the goal of fostering a healthy and sustainable business climate to meet the growing demand for a diversity of owner-occupied and rental housing opportunities for Virginians.

The Virginia Association of Realtors, Inc., ("Virginia REALTORS®") is one of the largest professional trade associations in Virginia, representing nearly 35,000 real estate professionals engaged in the residential, commercial, and property management real estate business in every locality in the Commonwealth. Founded in 1920, the Association serves as an advocate for and represents the interests of property owners and real estate professionals in the Commonwealth of Virginia. The real estate industry is one of the largest contributors to Virginia's economy and is a driver of the state's revenues to the tune of many billions of dollars. Virginia REALTORS® is uniquely qualified to speak to matters of real property and real estate transactions that come before this Court.

The Amici respectfully suggest that this case will have far reaching implications on the residential and commercial land development industry if Henrico County's decision to abandon a portion of Dominion Club Drive specifically to stop

the development of Petitioners' property in violation of Petitioners rights, is permitted to stand. Thus, the Amici submit that they must add their voices to those of the litigants.

ASSIGNMENTS OF ERROR

1. The trial court erred in holding that HHHunt[1] did not have a vested right to the continuation of Dominion Club Drive under Va. Code § 15.2-2261. (JA 784-785, 1667)[2]

A. The trial court erred in holding that Va. Code § 15.2-2261(F) did not apply because HHHunt recorded plats of subdivided property that had been conveyed to third parties. (JA 784-785, 1667)

2. The trial court erred in holding that HHHunt did not possess constitutionally guaranteed vested rights in the continuation of Dominion Club Drive. (JA 784-785, 1667)

3. The trial court erred in holding that the County properly employed the abandonment provisions of Va. Code § 33.2-914, *et seq*., to eliminate the extension of Dominion Club Drive, rather than the appropriate provisions of Title 15.2 relating to subdivisions. (JA 784-785, 1667)

4. Even assuming that the County correctly employed Title 33.2 for the abandonment of the right of way for the completion of Dominion Club Drive, the trial court erred in finding that the abandonment was legislative in nature and subject to the fairly debatable standard. (JA 784-785, 1667)

5. Even assuming that Title 33.2 applied and actions thereunder are subject to the fairly debatable standard, the trial court erred in holding that the abandonment of the right-of-way was for a proper public purpose, as the

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[1] The parties hereto are Loch Levan Land, LP, Wellesley Land, LP, HHH Land, LLC, and HHHunt Corporation. Pursuant to Rule 5:26(f) of the Rules of this Court, all will be referred to as "HHHunt" since all of the other parties are its affiliates.

[2] The Joint Appendix is referred to herein as "JA."

abandonment was arbitrary, capricious, and unreasonable, and not fairly debatable. (JA 784-785, 1667)

6. The trial court erred in finding that public opposition per se is a legitimate basis for sustaining the abandonment of a right of way that has been a critical part of HHHunt's long term development plan, and of which the County and the residents of Wyndham have known for decades. (JA 784-785, 1667)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The Amici adopt HHHunt's statement of the nature of the case and the material proceedings below, as set forth in its Opening Brief.

STATEMENT OF FACTS

The Amici adopt HHHunt's Statement of Facts, as set forth in its Opening Brief.

AUTHORITIES AND ARGUMENT

I. The relevant background to this case.

A. The County's abandonment of a portion of Dominion Club Drive was intended to prevent the continued development of the Wyndham community into Hanover County even though the County and the residents had known about it for years.

The Wyndham community is a development that Henrico County and its Board of Supervisors (the "Board," "Henrico," or the "County") understood and approved, from the day it was first rezoned in 1989, until the moment it became politically unpalatable to permit it to continue into Hanover. While Henrico may not have known the precise elements of the portion of Wyndham to be built in Hanover

County, it always knew that the development was to extend into that County. See, e.g. JA 545-546. So too could every current resident of Wyndham, because Dominion Club Drive was to be the access to those Hanover properties and had been shown on the County's Comprehensive Plan as extending to the Chickahominy for years – until the County was threatened by this litigation. JA 813-814, 1702.[3] In addition, Dominion Club Drive has also been a part of Hanover County's Comprehensive Plan. JA 2047.

Indeed, the evidence before the trial court was that Dominion Club Drive had been designed and built to a standard necessary to accommodate future development beyond its planned terminus at the Chickahominy River, and beyond its current terminus just past its intersection with Isleworth Drive.[4] HHHunt had built Dominion Club Drive most of the way towards the River, and maintained performance bonds for its continued construction for years. JA 1215-1221. It first posted a separate bond for the completion of the road to the Chickahominy in 1992, increased that bond at the County's behest in 2004, and renewed it in 2015, and again in 2017. JA 1220-1221, 2143-2144. The road remained a bonded public improvement until November

[3] The Hanover properties were acquired beginning in the 1990s, and a golf course developed on a large parcel called the Vaughan Tract. The initial conceptual plans for Wyndham showed an extension of Dominion Club into Hanover. In 2010, HHHunt annexed its Hanover properties into Wyndham by amendment of the applicable covenants. JA 1204-1205.

[4] Henrico, unlike most Virginia Counties, owns and controls most of its roads.

16, 2017 – three days after the County lost its argument on its demurrer in this case. JA 2145.

The County never doubted that HHHunt intended to complete Wyndham as planned, and to finish Dominion Club Drive beyond the point at which the abandonment of a small sliver of that road occurred. JA 1223. It was the fact that HHHunt intended to do so that caused the upwelling of sentiment leading the County to act as it did.

The specific events leading to those actions appear to have commenced in 2012, when Hanover County amended its Comprehensive Plan to include the extension of Dominion Club Drive into that County to access HHHunt's Hanover properties. JA 1127-1128. By 2016, Wyndham was still being developed, with approximately 2,400 homes then built, with an internal road network including Dominion Club Drive, all of which had been constructed at the cost of millions, and dedicated – and, relevant to this case, all but for the remaining portion of that road connecting to the Henrico border.

Then, in 2016, HHHunt filed a rezoning application with Hanover County for HHHunt's properties in that County. Henrico thereupon determined that it simply had to alter access to the north – by ending it. This was not done by the vacation of subdivision plats, or a downzoning, but by a change to its Transportation Plan and the abandonment (not vacation) of a tiny portion of already dedicated Dominion

Club Drive under the provisions of Article 3 of Title 33.2 of the Virginia Code. Henrico cannot deny that it did so expressly so that it would be impossible for HHHunt to provide access to the Hanover properties, leaving them separated from the rest of Wyndham.

The County did this through mechanisms that violated HHHunt's rights and were arbitrary and capricious.

II. HHHunt has vested rights under Va. Code Ann. § 15.2-2261(F).

A. The Standard of Review.

The question whether a landowner or developer has a vested right is a question of law and is considered by the Court de novo. Norfolk 102, LLC. v. City of Norfolk, 285 Va. 340 (2013).

B. The Trial Court erred in concluding that § 15.2-2261(F) did not apply.

This Court has addressed vested rights, a matter close to the heart of all builders and developers but as ephemeral as a quark, on a handful of occasions since 1975. To the best of the Amici's knowledge it has done so but once in the context of subdivision. This was when Culpeper County rezoned certain property after it had rejected a preliminary subdivision plat for that property. The trial court found that the County had improperly rejected that plat, because the developer had vested rights in the development of its property. This Court rejected that argument and found no such vested right. Bd. of Sup'vrs v. Greengael, 271 Va. 266, 278-282 (2006).

The Court has never, however, considered the question of vesting pursuant to the provisions of Va. Code § 15.2-2261(F), a section in the subdivision enabling statutes. That section provides that

> [a]n approved final subdivision plat that has been recorded, from which any part of the property subdivided has been conveyed to third parties (other than to the developer or local jurisdiction), shall remain valid for an indefinite period of time unless and until any portion of the property is subject to a vacation action as set forth in §§ 15.2-2270 through 15.2-2278.

Emphasis added.

The trial court concluded that this section (incorrectly cited as § 15.2-2260(F)) (JA 1663-1664) was inapplicable, because Dominion Club was "subdivided and dedicated on a separate plat that did not convey subdivided properties to third parties" and the developer's rights were limited to five years and no longer. Id.

But no homes or lots in Wyndham actually front on or directly access Dominion Club, from its commencement to its end. JA 805.[5] This is not at all uncommon in developments where the intention is to avoid direct driveway access to spine roads. The County's theory would require all developers to ensure that any plat containing any road also include residential lots, even if those lots were as yet unconnected to appropriate access, or require all to have driveways.

[5] The proffers for the community required a 25' greenbelt buffer on both sides of the road for natural open space and scenic vistas. JA 804-805, 1689. There are sidewalks along its entirety.

Amici suggest that all plats for Dominion Club Drive are plainly a part of the subdivision development of Wyndham, specifically including the adjacent subdivision sections containing homes to be sold identified as Manor Park and Wexford. Without the dedication and bonding of Dominion Club Drive as required, those sections of homes could not have been recorded, built, and sold. The County's efforts to separate and isolate the road dedication plats from the communities associated with them both for convenience and sensible common practice, are nothing more than a "cover" for what was actually occurring, which was the effort to strip HHHunt of its continuing protection under the Subdivision Enabling Statutes. It was concededly clever, but it makes a farce of the reality of land development.

By convincing the court below that it need focus only on the plats for the street that is Dominion Club, in isolation from the Wyndham phases that it services, the County succeeded in freeing itself to change its policies and regulations, and to avoid the processes of subdivision plat vacation required pursuant to § 15.2-2261(F), so that it could "abandon" a tiny sliver of an already dedicated portion of Dominion Club Drive to halt its extension, and thus halt the further development of Wyndham.

Indeed, the County recognized its own weakness in this regard by its very act of electing abandonment over vacation. It was necessarily concerned that if it sought to vacate any portion of the subdivision plats for Wyndham, it would draw the trial

court's attention to the fact that it was attempting to thwart the completion of "an approved development" under § 15.2-2261(C) and that it was interfering with a subdivision "valid for an indefinite period of time" under § 15.2-2261(F). It was, in short, too clever by half.

C. The trial court correctly recognized that vested rights are constitutionally as well as statutorily based but incorrectly concluded that those rights had not been diligently pursued.

The trial court recognized that a "landowner may have a constitutional vested right in the use of its land provided it diligently pursues a permitted use . . . ." JA 1662. It further acknowledged that HHHunt "expended substantial sums in reliance on the transportation plan and dedicated roadway in Henrico." Id. But it then miraculously concluded that the construction of Dominion Club Drive to the Chickahominy had not been diligently pursued. To so conclude it had to ignore that HHHunt has been constructing Wyndham and Dominion Club Drive without material cease to the extent of hundreds of homes that use that road for access, for decades. It is absolutely critical to recognize that the unbuilt portion of the road remained under performance bond for completion – precisely until that fell moment when Henrico County unilaterally released it, immediately after lost its demurrer to the Complaint in this case. Communities as large as Wyndham are not built

overnight.[6] They are built in phases over many years. The trial court, however, apparently expected HHHunt to build the entire community, or at least Dominion Club Drive, at once, or lose its rights to do so when the County chose to terminate them.

D. The statute creates a vested right under the facts of this case.

The Court has not itself referred to a vested right as a constitutional right, but it has said that "a vested right in a land use is a property right which is created and protected by law." Holland v. Johnson, 241 Va. 553, 556 (1991). It first addressed vested rights in the land use context many years ago in Bd. of Sup'vrs of Fairfax Cty. v. Medical Structures, 213 Va. 355 (1972), where it held that because a special use permit had been granted, a bona fide site plan had been filed and diligently pursued, and substantial expense had been incurred in good faith before a change in zoning, the property owner had acquired a vested right to the land use described in its special use permit and could not be deprived of it by subsequent legislation.

The same day, the Court decided Bd. of Sup'vrs of Fairfax Cty v. Cities Service Oil Co., 213 Va. 359 (1972). An owner who received a special use permit

[6] Dale City, in Prince William County, is home to more than 70,000 people. It was commenced in the 1960s, and is as yet not completed. It is serviced by a single spine road, Dale Boulevard, that is more than 7 miles long and stretches from U. S. Route 1 to Hoadly Road. The community, and Dale Boulevard, have been built in dozens of sections, consistently with the Comprehensive Plan for that unincorporated area of the County.

to build a gasoline service station and simply filed a site plan, was subjected to a rezoning that precluded the station. The Court found that the owner purchased the property after the special use permit was granted based on the zoned value, and that it significantly altered its position by substantial expense to prepare and file the site plan in good faith reliance on its prior zoning. The Court held that the owner's right to the land use described in the use permit vested when the site plan was filed, and that the County had acted arbitrarily and capriciously in attempting to rezone the property.

Following those two decisions, however, the Court did not find another vested right until after significant revisions to Va. Code § 15.2-2307 in 1998 created a codified vested rights scheme that sought to broaden the circumstances in which rights could vest. In fact it was not until City of Suffolk v. Board of Zoning Appeals for Suffolk, 266 Va. 137 (2003), that the Court had occasion to address the revised statute. There the Court held that a "general development plan" was a significant governmental act authorizing a "specific project," and that a five-year delay in action upon it was immaterial to diligent pursuit since the developer had taken "intermittent action" for many years, prior to a rezoning that would have prohibited pursuit of the approved general development plan. Id. at 144-46. The Court further held that the expense and effort expended with respect to a portion of the property that was

indubitably vested was sufficient to constitute diligent pursuit of the entire development. Id. at 147-49.

Thereafter, the Court did not again find a vested right for another fourteen years, until Bd. of Sup'vrs of Richmond Cty. v. Rhoads, 294 Va. 43, 54-55 (2017), where it found a different kind of vested right under Va. Code § 15.2-2311(C), whereby a property owner is protected not against a change in the applicable zoning ordinance, but from a change in the locality's interpretation or administration of its ordinance where that owner has placed justifiable reliance on an administrative official's previous order, requirement decision or determination.

Here, the Court is faced with another and different kind of vesting, in the context of a subdivision where millions of dollars have been spent on the completion of a development and the extension of a road pursuant to recorded subdivision plats. This is not a case where the nature of the "specific project" is in doubt, or where the interests of the developer are speculative in any way. See Norfolk 102 v. City of Norfolk, 285 Va. 340, 352-355 (2013); Hale v. BZA of the Town of Blacksburg, 277 Va. 250, 272-73 (2009). Rather, it is a case in which a development plan crystalized and was pursued for years, was under bond until it was convenient that the bond be released for purposes of this litigation, and clever and able counsel thought of a way to make it seem as if the subdivision itself was somehow unformed, rather than known.

Vested rights concededly limit the authority of government to address what may be legitimately changed circumstances. But the constriction of those rights can have profound economic consequences that are equally significant to the development community and to the home buying public, and it did so in this case, when the General Assembly has intended to limit the authority of localities to interfere with the rights of subdividers to continue with a "complete development."

This Court has found vested rights derive from specific approvals of specific projects, justified reliance on those approvals, and landowner changes in position in reliance on those approvals that have been diligently pursued. In this case each of those elements is present, with the trial court doubting only the last. Yet to do so, it had to conclude that decades of work to extend Dominion Club Drive toward the Chickahominy, as Wyndham was constructed in phases toward Hanover County, was irrelevant to the acquisition of any vested right to the completion of an approved subdivision development. This constrained understanding of land development led that court to a myopic result that this Court should not adopt.

III. The abandonment of the "sliver" of Dominion Club Drive tests the outer limits of the "fairly debatable" standard, if it is applicable at all.

A. The present standard of review.

The Court has said that

> [t]he legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of

> zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.

Bd. of Sup'vrs v. Snell Constr. Corp., 214 Va. 655, 658 (1974).

B. Assuming that this case is to be gauged by the "fairly debatable standard," however, the Amici urge the Court to consider an approach to the judicial review of land use cases that recognizes a role for the judiciary, while respecting the separation of powers.

The Amici wish, however, to suggest to the Court that if the fairly debatable standard applies to this case, the Court should consider a different lens through which to view legislative action in the land use context, one that continues to respect the separation of powers, while at the same time restoring a role for the judiciary long lost in the mists of time.

1. The historical treatment of the fairly debatable standard has shifted from one unreasonable extreme to another.

The trial court concluded, as the County argued, that the Board's decision to abandon 0.25 acres of previously dedicated public right-of-way was legislative in nature, and that the fairly debatable standard applied to that abandonment. Although the County claimed to have adduced evidence that showed there were good and sufficient reasons for that abandonment, such as the potential for future road

maintenance costs and safety concerns (on a road that had been overdesigned to accommodate its future requirements and that it has already accepted into the County's system), the Amici submit that it is impossible not to see these post hoc justifications as a complete pretext for the accommodation of the political opposition of a vocal component of the existing residents of Wyndham who simply did not want their community extended into Hanover County, despite the millions of dollars that HHHunt had spent preparing to do so with the full knowledge and previous acquiescence of Henrico County. This acquiescence extended from the commencement of the development of the community as a matter of both public and private planning, to the day that it acted to stop that development.

Given this Court's standard of review, however, applicable for the past 40 years, the trial court ruled that the County's pretextual assertions were essentially "good enough for government work" no matter how flimsy.

This Court has long stated its position as to consideration of legislative action by localities. Martin v. City of Danville, 148 Va. 247, 250 (1927); West Bros. Brick Co. v. Alexandria, 169 Va. 271 (1937). But perhaps no recent opinion has done so quite as superbly as the dissent by Justice Russell, joined by Justice Mims, in Town of Leesburg v. Giordano, 280 Va. 597 (2010), in which they acknowledged that the Court will essentially take no role in the review of such actions, on the grounds that such absolute deference is mandated: "We consistently adhere to the 'fairly

debatable' standard because of the constitutional principle of separation of powers. It is not the proper function of the judicial branch of government to second-guess legislative judgments made by the duly-elected representatives of the people." 280 Va. at 609.

But the Amici suggest there is nothing in the history or theory of judicial review of legislative action by localities that requires what has become something much closer to judicial abdication than a form a deference to local legislators. Unfortunately, however, our courts' employment of the fairly debatable standard has meant in practice that there is simply no limit on the exercise of the legislative power in the land use context. To conclude that an action is subject to the fairly debatable standard is to decide the case – private interests will lose. Perhaps the last time that this Court sustained a decision against a locality in a legislative land use case was 40 years ago. Vienna Council v. Kohler, 218 Va. 966 (1978). The single clear outstanding outlier was Norton v. City of Danville, 268 Va. 402 (2004), in which the Court found that the City had put on "no evidence" to support its position. When one considers that former Chief Justice Kinser wrote, and emphasized, that "any evidence in the record sufficiently probative to make a fairly debatable issue of the . . . decision to deny" will suffice to defeat any evidence that a losing applicant may adduce (Bd. of Sup'vrs v. Robertson, 266 Va. 525, 536 (2003) (emphasis in the original)), it is painfully obvious to the Amici that the parameters of a land use case

consist of whether there was no evidence, or any evidence.[7] Moreover, the courts are not to evaluate whether the locality has retained the services of a nincompoop as an expert, when a landowner has retained a master, for Robertson also teaches us that the question is not "who won the battle of the experts." 266 Va. 525 at 537. See also Bd. of Sup'vrs v. Stickley, 263 Va. 1, 11 (2002). It is apparently enough to call one to the stand.

Because there are no incompetent local government lawyers, there are rarely cases with "no evidence," and all land use cases involve experts.

Alas, the Amici suspect that there are but few practicing land use lawyers, landowners, or developers, who have not experienced a case lost to an unknown, unknowable cause unrelated to any concept of good planning and zoning practice, as to which after-developed evidence is drummed up, as the Amici believe was the

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[7] In Renkey v. Cty. Bd., 272 Va. 369, 376 (2006) the County acted in direct violation of its zoning ordinance when it rezoned a portion of property from one zoning classification to another, without first rezoning it to an intervening classification, and thus without complying with an explicit requirement in its own ordinance. The Court characterized this as being arbitrary and capricious, and not fairly debatable. It could, however, just as readily have characterized this as a procedural defect case since the fact pattern is wholly unlike that in other fairly debatable land use cases.

In Estes Funeral Home v. Adkins, 266 Va. 297 (2003), the Court overturned a local ordinance establishing a schedule of waste disposal fees on the grounds that the locality had "failed to present evidence of reasonableness sufficient to make the issue fairly debatable." 266 Va. at 307. This was an equal protection case, but it represents an example of the "no evidence" end of the fairly debatable test.

case here, but for which there is no remedy. Indeed, the County here aggressively employed the "knew or could have known" standard of Industrial Development Authority v. La France, 216 Va. 277 (1975) as far as it could be pressed, for example with respect to the ostensible validity and applicability of the "California Bearing Ratio" capacity of certain soils under Dominion Club Drive, which, as noted, it had already taken into the public system. See JA 1467-1469. This evidence was so flimsy that even the trial court expressly said it did not take it into account in its decision. JA 1666. But for the County, under the Court's present standard of review, nothing ventured, nothing gained.

It is undoubtedly so that in the majority of cases localities exercise their best good faith judgment in matters such as these, and Amici do not offer a wholesale condemnation of local government land use decision making. But it is equally true that the development community spends thousands upon thousands of dollars preparing plans and proposals in the knowledge that the fairly debatable standard as applied by our courts today, renders every last dollar spent, every last citizen meeting attended, every last effort to accommodate and mitigate the impact of development potentially fruitless, when the local governing body knows that its decision is essentially unchallengeable regardless how closely any given application comes to advancing goals and aspirations that a locality itself has articulated for the future development of its lands and its communities.

There was a time when this Court held a different view of its role in the land use process. See e.g., Bd. of Cty. Sup'vrs v. Carper, 200 Va. 653 (1959); Board of Sup'vrs v. Allman, 215 Va. 434 (1975); Board of Sup'vrs v. Williams, 216 Va. 49 (1975); City of Richmond v. Randall, 215 Va. 506 (1975). Each of those cases stated the fairly debatable standard as it is stated today. But as Professors Lillian BeVier and Denis Brion concluded in their 1981 study for the Institute of Government, the Court of that time applied a "single criterion of validity" to its decision making processes, to wit, the land use preferences of the individual developer: to encourage economic development activities. L. BeVier and D. Brion, Judicial Review of Local Land Use Decisions in Virginia: A Report to the Joint Land Use Task Force of the Virginia Association of Counties and the Virginia Municipal League (1981).[8] In those days the locality lost, and the landowner won.

After Kohler, however, in rapid succession the Court decided Bd. of Sup'vrs of Loudoun Cty. v. Lerner, 221 Va. 30 (1980), Bd. of Sup'vrs v. Jackson, 221 Va. 328 (1980), and Bd. of Sup'vrs v. International Funeral Servs., 221 Va. 840 (1981). In each of these cases the Court upheld rezoning denials by Virginia localities articulating precisely the same fairly debatable standard as it had shortly before in

[8] This Report is difficult to obtain today, and so it may be found at this hyperlink: http://bit.ly/JudicialReviewVA1981.

overturning those denials.[9] The formulation of the standard has never changed; only the results have.

The Amici suggest that Justice Russell's (and Justice Mims') dissenting observations in Giordano, perhaps unintentionally, shined a laser on the Court's disinclination to play any substantive role in review of local legislative land use decisions, be they rezonings – or as noted later – road abandonments. In Giordano this Court upheld the authority of Leesburg to set utility rates for residents living outside the Town, as to which those extra-territorial residents had no say, and where a majority of the Court found the Town's exercise of its authority to be "fairly debatable."

Justices Russell and Mims doubted whether such rate setting should have been tested against that standard at all. Their concern arose because

> [i]f the "fairly debatable" standard is applied to such cases, the out-of-town customers are left to the mercies of an unregulated monopoly against which they have no redress either at the polls or in the courts. If litigation such as this is subjected to the "fairly debatable" standard, the rate-making body, to prevail, needs only to find an expert witness who will opine that the rate-maker's pre-determined decision was "fair and reasonable" with respect to water rates, or "practicable[,] equitable [and] uniform" with respect to sewer rates. That will end the case, no matter how persuasive the complainants' evidence may have been.

[9] Even in 1981, Professors BeVier and Brion wondered whether these decisions were harbingers of "A New Era?" See their Report at p. 100. They proved to be just that.

280 Va. at 610, emphasis supplied.

Giordano, of course, is not a land use, or a road abandonment, but a "rate," case. The Amici respectfully suggest, however, that when stripped of the language relating to rate-making, this passage depicts exactly what happens in today's land use context, where the "fairly debatable" standard is automatically applied, the locality finds an expert who will testify to the imminently fair and reasonable nature of the decision of the locality, and "that … end[s] the case, no matter how persuasive the complainant's evidence may have been."[10]

Moreover, these Justices acknowledged that the remedy of the ballot box is simply insufficient when one has been treated unfairly by the local monopoly in the rate-making [read land use] process. The Amici, while surely respecting the democratic process, suggest that the ballot box is a diaphanous remedy for an

[10] Increasingly, in fact, localities do not even have to find a witness, but can instead rely on the statements of a governmental staff report, and have the case decided on demurrer. Unlike most civil actions, land use challenges to a governing body's legislative decisions can be decided on demurrer. Eagle Harbor, L.L.C. v. Isle of Wright City, 271 Va. 603 (2006); Friends of the Rappahannock v. Caroline Cty. Bd. of Sup'vrs, 286 Va. 38, 48-50 (2013) EMAC, L.L.C. v. Cty. of Hanover, 291 Va. 13 (2016); Resk v. Roanoke County, 73 Va. Cir. 272 (2007). The inclusion of the record before the governing body, through oyer or otherwise, has been enough to establish "fair debatability" and there is never a trial. In candor, counsel for the Amici has used this very process when defending the approval of a rezoning and thus benefiting from the Court's present standard of review.

individualized harm, as to which the courts simply abjure review.[11] The Giordano dissent itself observes how ineffectual the courts have been as a source of redress for problems as to which the question is, in effect, little more than how the Court elects to characterize a governmental action.

2. The Court's treatment of the fairly debatable standard leaves the landowner/developer with essentially no recourse, and subject to the misuse of the land use process by localities as happened in this case.

The Amici do not advocate for, nor do they expect, the Court to abandon the fairly debatable standard for the review of legislative decision making, nor the presumption of validity of legislative action, nor the return to a single criterion of validity. Nor do they suggest that the standard is not underpinned by the separation of powers doctrine.

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[11] Justice Russell also noted that "[t]he rationale underlying the 'fairly debatable' standard is that the decision affects those who elected the legislators, empowering those elected to make decisions for them. If displeased by those decisions, the voters have a ready remedy at the next election." Giordano, 280 Va. at 609-10. The Amici know that in a democracy this must be accepted, but it must be accepted as a matter of faith rather than as an effective principle, since in the Hobbesian world of land use today the locality has an unregulated monopoly on what may be done with land. Even from the beginning of American zoning, however, the United States Supreme Court acknowledged that when the police power is exceeded in the zoning context, it cannot be sustained. Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928). It is also the case that many developers in today's economy are not residents or voters in the jurisdictions in which they own and develop land, and so can hardly have a "ready remedy at the next election."

What they do suggest, however, is that by abandoning a judicial role in the review of land use decision making, the governing bodies of Virginia localities are made judge, jury, and executioner in an area of economic activity that constitutes a large component of the Virginia economy, and of social needs that are by the nature of jurisdictional boundaries highly parochialized.[12] The courts are the only venue available in which the development community can even begin to hope to find a modicum of protection from abuses of the land use process when they do occur. Though the courts have phrased this as a question of the separation of powers, the Amici suggest that it is also a question whether the concept of checks and balances in our governmental framework yet plays a continuing role.

There are cases, if a minority, in which the locality has overreached, and the Amici believe that this is plainly one of them. The proposition that the Henrico public, or even the residents of Wyndham, would suffer from the extension of an existing, dedicated, bonded public road that was designed and constructed to accommodate the additional traffic already anticipated, to service areas of Wyndham that were a known component of that project, justified the abandonment of the sliver of Dominion Club Drive on these facts, must be considered against the evidence actually produced as to the flimsiness of these contentions against the County's overt

[12] There was a time not so long ago when the bumper stickers said "Don't Fairfax Prince William," and then morphed to "Don't Prince William Fauquier."

purpose of satisfying a discontented cohort of homeowners who already have "theirs," and wished to preclude others from sharing it.

Testimony as to public opposition came principally, though not solely, from the long time President of the Wyndham Foundation, which administers the restrictive covenants for the community. He testified that in 2016 residents were opposed to the continued development "because it included the road going through and there was nothing in it for Wyndham. . . ." JA 1419. He contacted his Supervisor and asked him "[w]hat do I need to do to stop that road from going through?" Id. 1423. The Supervisor put him in contact with the County Attorney's Office, which instructed the President how to proceed: ask the Board to amend the Master Transportation Plan and seek "the abandonment of the small section of the road before the cattle gate on Dominion Club Drive." Id. at 1425.[13] The County itself prepared the abandonment plat. Id. at 1450. The County staff thus coached opponents in the course of action that the Foundation President then initiated by letter to the Assistant to the County Manager, and the County constructed the necessary exhibit.

Perhaps the trial court's most troubling ground of decision for the Amici and their members is its ruling that "clear citizen input" (JA 1661) and "strong public

[13] The County Attorney's Office apparently first recommended "vacation" of a subdivision plat, but later changed that advice to "abandonment." JA 1425-1426.

opposition to the road" (JA 1666) constituted a basis for sustaining the Board's action in the abandonment of the sliver of Dominion Club Drive. If "public opposition" unhinged from truly probative evidence of the public necessity for this abandonment suffices to sustain the fairly debatable standard, then there is almost surely no legislative land use decision that can ever survive – for there is virtually none that do not face "public opposition."[14] Yet the trial court specifically cited this as a valid legal reason for sustaining the road abandonment in this case.

The reasonableness of legislative action cannot be measured by "counting noses" at public hearings, or adding up emails, petitions, or phone calls. This does not, and cannot, take into account the opinions of those who are supportive of a proposal, or who may be supportive but who (as land use counsel has often seen) are deterred from voicing their opinions by neighbors, those who simply choose not to engage with public figures, or those that are simply unable to attend public meetings in addition to their commitments to their profession and family. Allowing a relatively small sample of opinion to condemn a development project by branding it with the status of having "strong public opposition" by which a legal basis for denial of an application can be manufactured, is to relegate land use determinations and community and economic development to an unpredictable and everlasting

[14] Perhaps every land use case involves public outreach in an effort to reduce or eliminate "public opposition," not always successfully, and undersigned counsel is not alone in addressing a public hearing attended by police protection.

"political purgatory." Although this particular case is centered on the Wyndham community, the implications of this matter extend far beyond that neighborhood and Henrico County. Communities across the Commonwealth are struggling to meet the growing demand for a diversity of housing opportunities for individuals and families across the income spectrum. In the type of environment mentioned above, the Amici believe that a vocal minority will be emboldened to leverage raw public anger against growth and development as a means of molding their community to their particular preference, to the detriment of others. A function of land use control, whether it be subdivision, zoning, or even the peculiar use of the power of vacation of dedication right-of-way, is to promote the public welfare, and not to protect the interests of a few.

3. There is an intellectually and legally defensible approach to the fairly debatable standard that would permit courts to analyze what constitutes a fairly debatable legislative action in the land use context, and it commences with whether that action is reasonably consistent with the locality's Comprehensive Plan.

The Amici suggest that an approach to the question of the validity of legislative action in land use actions such as that before this Court should commence, though it cannot not end, with the locality's Comprehensive Plan.

The Amici are well aware that this Court has said that "a comprehensive plan . . . is merely a guide for development, rather than an instrument of land use control." Bd. of Sup'vrs v. Williams, 216 Va. 49, 59-60 (1975). "The statutes do not make the comprehensive plan a zoning ordinance but only a comprehensive guideline for zoning ordinances." Bd. of Sup'vrs v. Snell Constr. Corp., 214 Va. 655, 660 (1974); see also Bd. of Sup'vrs v. Safeco Ins. Co., 226 Va. 329, 335 (1983).

The Amici do not propose otherwise. But every Virginia jurisdiction is required to have such a plan. Va. Code Ann. § 15.2-2223. Each is obliged at least every five years to "determine whether it is advisable to amend the plan." Va. Code Ann. § 15.2-2230. Since the decisions cited above, the General Assembly has amended the statutes relating to comprehensive planning dozens of times. While such a plan shall still be "general in nature, in that it shall designate the general or approximate location, character, and extent of each feature . . . shown on the plan . . ." localities are now – for but one specific example – mandated to develop detailed transportation plans that include such things as cost estimates for road improvements, consistency with the Commonwealth Transportation Board's Statewide Transportation Plan, and a plan to take into account the current and future needs of residents in the location while considering the current and future needs of

the planning district in which the locality is situated. Va. Code Ann. § 15.2-2223.[15] Even though the General Assembly speaks in relative absolutes in such language, this Court tells us that the Comprehensive Plan is naught but a guide to development that may essentially be ignored in specific land use decisions.

Still further, with respect to public facilities, the Comprehensive Plan is not simply a guide. It is the "zoning ordinance" for public facilities pursuant to Va. Code Ann. §15.2-2232. That statute provides in relevant part and with respect to streets and roads for an example (since this case focuses on a street or road):

> Whenever a local planning commission recommends a comprehensive plan or part thereof for the locality and such plan has been approved and adopted by the governing body, <u>it shall control the general or approximate location, character and extent of each feature shown on the plan</u>. Thereafter, unless a feature is already shown on the adopted master plan or part thereof or is deemed so under subsection D, no street or connection to an existing street, . . . shall be constructed, established or authorized, unless and until the general location or approximate location, character, and extent thereof has been submitted to and approved by the commission as being substantially in accord with the adopted comprehensive plan or part thereof.

[15] The original requirement for a comprehensive plan to provide a "designation of a system of transportation facilities such as streets, roads, highways, parkways, railways, bridges, viaducts, waterways, airports, ports, terminals, and other like facilities" was first amplified in 2004, expanded again in 2005, then again in 2006, and most dramatically in 2012 by Chapter 729 as part of significant transportation legislation. The extensive and mandatory 2012 amendments can be found at http://lis.virginia.gov/cgi-bin/legp604.exe?121+ful+CHAP0729.

The same observation may be made about virtually every other aspect of the current comprehensive planning process in Virginia. What was once a generalized plan for the future development of a jurisdiction is now become a complex, detailed, and fine ground document that may now include urban development areas. Va. Code Ann. § 15.2-2223.1. If it is a Tidewater jurisdiction, it must include "coastal resource management guidance." Va. Code Ann. § 15.2-2223.2. If it is in the Hampton Roads Planning District, it must incorporate sea-level rise and recurrent flooding plan strategies. Va. Code Ann. § 15.2-2223.3. This is not simply true of these jurisdictions, for all Virginia localities must now engage in more detailed studies as a precondition to the adoption or amendment of their plans. Va. Code. Ann. § 15.2-2224.

Not only do localities refer to their Comprehensive Plans when considering land use decisions, but so do prudent property owners and developers. In the Amici's experience it is increasingly difficult, if not impossible, to obtain a land use approval that is inconsistent with the local Plan (and often difficult to obtain that approval when a proposal <u>is</u> consistent with it). But both the public and private sectors look first to the locality's Comprehensive Plan when contemplating the feasibility of a given land use proposal. If there is any document that establishes a base line for both parties, and for the public generally, it is the local Comprehensive Plan.

Furthermore, such Plans are themselves the product of a legislative process. They are attended by all of the procedural protections and public notice as is any specific land use proposal. Why they should be relegated to the status of "nice to know" when an actual case is being considered is somewhat mystifying, especially as the nature of such plans as changed over the years since the Court first began referring to them solely as "guides to development."

The Amici do not, however, contend that the enabling statutes make Virginia a "concurrency state," one in which individualized decisions must be consistent with the applicable comprehensive plan, as, for example, in Florida. Florida Statutes §163.3161(6).

Rather, Amici suggest only that when a court commences its review of a land use decision in which the fairly debatable standard applies, that review should begin with a consideration of the extent to which the decision corresponds to the policies and principles that the locality itself has articulated as applying to a given land use decision. It would remain the plaintiff's burden to demonstrate this, and to show that the decision was contrary to those principles. If the court makes the necessary finding that the plaintiff has carried its burden of demonstrating that the action was arbitrary, capricious, or unreasonable, then the locality would still need to produce evidence of the reasonable basis or bases upon which it deviated from those principles in the actual decision rendered on that case. If the court were satisfied that

the locality had demonstrated this by a preponderance of the evidence, then it would sustain the locality.

But in analyzing the evidence presented by both parties, the trial court, and this Court on appeal, would do so against the backdrop of the policies that the locality had adopted for the use, or the location, in which the use was proposed, when those policies were adopted outside of the heated cauldron of adhocracy that land use proceedings are today, from the Blue Ridge to the Bay.

As that review might apply to the case in hand the County may say that its Comprehensive Plan supported the abandonment of its smidgen of Dominion Club Drive. But in addition to the evidence that has been recited elsewhere and in HHHunt's Opening Brief, the Amici observe that while the County asserts that it had sound reason to act as it did, immediately prior to its abandonment of Dominion Club Drive its Comprehensive Plan had showed that road extending to the Chickahominy since 1991, and since 2012 it had been a part of Hanover County's Major Thoroughfare Plan – a fact that any resident of Wyndham could have ascertained despite any protestation to the contrary. It was not until November 9, 2016, that the Board removed it from the Plan as part of its attack on the completion of Wyndham. One hundred and eleven days later, on February 28, 2017, the abandonment was effected. Amici suggest that both actions were mixed into the same cauldron and the resulting brew was poisonous.

The Amici suggest that no profound injury would be done to the powers of local governments by the institution of such a framework as a basis for analysis. Local governments have complete control over their comprehensive planning processes, and are free to revisit them at any time, and not just every five years. And as suggested, these reviews are accomplished with more light and less heat than individual land use applications.

If this Court were to consider the Comprehensive Plan as something modestly more than a "guide" to development, but rather as the underpinning of a rational basis for judicial analysis, then it would avoid what must trouble any judge – that of being called upon to substitute his or her judgment for that of an elected governing body. On the contrary, the courts would be grounding their legal reasoning in the very foundational act of a local government as to future land use. After all, it is the purpose of a locality's comprehensive plan to

> plan for the physical development of the territory within its jurisdiction. . . . The comprehensive plan shall be made with the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities.

Va. Code Ann. § 15.2-2223 (A).

It does no injury to a locality to expect it to treat land use applications in general in the manner that it has planned. This does not mean that all applications

will prevail, and it does not mean that courts must somehow become the extra vote on a governing body. But it does mean that the law would regain a role in one of the most important functions that local government plays today – the regulation of land use.

Amici should not be understood to suggest that what Henrico did here is a proper employment of the comprehensive planning process. Its amendment of its Plan a handful of days before it used that change to provide a gossamer cover for its claim that the extension of Dominion Club to the Chickahominy – an extension it had considered essential for decades – was suddenly a really bad idea, is a perversion of the notion of good planning and zoning practice. In fact, it simply amplifies and magnifies the arbitrariness of what the County did to HHHunt.

Had the trial court thought that this Court would adhere to a standard of review that commenced with an analysis of the County's own long-standing planning (and not simply deferred to its short term pretextual patches), then we might not be here today.

4. Judicial treatment of an enhanced standard of review in equal protection cases provides a further framework for revisiting the fairly debatable standard.

It is possible to analogize this Court's employment of the fairly debatable standard to the manner in which courts have historically employed the "rational basis test" when analyzing equal protection claims under the 14th Amendment to the

United States Constitution. Traditionally, where no suspect class is involved, the courts have employed that test, which is, of course, the most deferential level of scrutiny that the courts employ for such cases. Under it, a law or ordinance will be sustained if it can be said to "advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group or if the rationale seems tenuous." Romer v. Evans, 517 U.S. 620, 632 (1996). If an action was subject to rational basis review, it effectively meant that the law or ordinance would always be sustained, no matter how compelling the evidence against it was. The quote from Justices Russell and Mims in their dissent in Giordano, above at page 21, makes it plain that when the fairly debatable standard is applied in Virginia, it is the same, and the locality has laid a feather on the scales of justice "[t]hat will end the case, no matter how persuasive the complainants' evidence may have been. Giordano, 280 Va. at 610 (emphasis supplied).

Over time, however, the rational basis test has evolved to alleviate this harsh result by recognizing a heightened level of scrutiny in some cases. This test is known as "rational basis with bite" or "rational basis plus." See, Steven Menashi and Douglas H. Ginsburg, Rational Basis with Economic Bite, 8 New York University Journal of Law & Liberty 3, 1068 (2014). When the rational basis with bite test first emerged, the triggering factor seemed to be that the challenged legislation infringed on some fundamental right, or harmed a vulnerable group of individuals. In Cleburne

v. Cleburne Living Center, 473 U.S. 432 (1985), the Supreme Court overturned a local zoning decision that denied a permit to construct a home for the mentally handicapped specifically finding that no rational purpose for the zoning decision was present. In Romer, the Court used the rational basis with bite test to strike down a Colorado constitutional amendment that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons. 517 U.S. at 624, 635-36. In his dissent, Justice Scalia observed that there was obviously a rational basis for the constitutional amendment, and thus that under the traditional rational basis test the Court would not (and presumably should not) have overturned the amendment, and acknowledging that the majority had indeed applied a different, and elevated, standard in a case that did not, certainly at that time, involve a protected class. Id. at 640.

In United States v. Windsor, 570 U.S. 744, 750-55 (2013), a case involving both Equal Protection and Due Process, the Supreme Court struck down a key provision of the federal Defense of Marriage Act that denied certain federal tax exemptions to same-sex marriages even in states where such marriages were lawful. The Court held that that the Fifth Amendment's Due Process Clause "contains within it the prohibition against denying any person the equal protection of the laws [and] withdraws from Government the power to degrade or demean in the way this law does." Id. at 774. It further held that the statute was invalid because "no legitimate

purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Id. at 775. The dissenting Justices again criticized the decision precisely because the majority applied a heightened level of scrutiny to the legislature's actions although, as Justice Roberts said, their "central propositions are taken from rational-basis cases . . . . But the Court certainly does not apply anything that resembles that deferential framework." Id. at 794 (emphasis in the original).

It is not simply in cases involving marriage or gay rights, or in cases of profound national significance that one finds the Court peering under the cover of legislative motivation.[16] Each of these cases involved a legislature's assertion that it had a rational basis for its action, and each involved the Court's willingness to look behind that assertion when it considered the rights of the individuals or groups involved to require it.

The most significant issue with the application of the rational basis with bite test is what triggers it, and how it might be useful in the present context. Messrs. Menashi and Ginsburg, cited above, have said that "[r]ational basis review becomes

[16] See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (striking the government's decision to deny federal food assistance to persons who were not related because there was no legitimate support for the government's argument); St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013) (striking law allowing only a licensed funeral director at a funeral home to sell caskets to the public, after review of the asserted grounds for the statute).

genuine scrutiny when the Court believes it can detect the actual purpose behind the challenged law or has a principled normative framework for evaluating it."

That is not difficult in this case. Equal protection, due process, and their first cousin, "fair debatability," share the proposition that there is indeed a principled framework for evaluation of the purpose behind what Henrico has done. Its decision to abandon Dominion Club Drive was in derogation of its own comprehensive planning process (and not the one that it jury-rigged days before it abandoned any of Dominion Club Drive). The Amici submit, as set forth above, that the trial court could have – and should have – evaluated what Henrico did in this case with a colder eye and a greater level of scrutiny as to its purpose, rather than giving the blind deference to its actions that the current standard demands.

IV. The fairly debatable standard does not even apply to the abandonment of a road under Va. Code Ann. § 33.2-920.

1. The Standard of Review.

As Justices Russell and Mims observed in Giordano, this case turns on the proper standard for determining whether an abandonment is lawful. The Amici maintain that the fairly debatable standard is not applicable in this case at all, and that the case should be remanded to the trial court for reconsideration under the

appropriate legal test, which is a de novo adjudication whether the abandonment satisfies the applicable legal test.[17]

2. The road abandonment in this case was not tested according to the properly applicable standard and should be remanded to the trial court for further proceedings.

The abandonment of the Dominion Club Drive right-of-way was accomplished pursuant to Va. Code Ann. § 33.2-914 and appealed under § 33.2-920, and not under any authority found in Title 15.2, Counties, Cities, and Towns. Abandonments under Article 3 of Title 33.2 may only be done if the governing body is properly "satisfied that no public necessity exists for the continuance of a section of road as a public road . . . or that the welfare of the public would be served best by abandoning the section of road as a public road. . . ."[18]

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[17] The Amici recognize that to the extent that the trial court must make findings of fact, they would be entitled to the deference accorded such findings. But the lower court made no such findings here, and only observed that the portion of Dominion Club that had been abandoned, at the time of abandonment "serve[d] no traffic." It chose to look no further because "I don't think the statute was [designed] to make judges the transportation planners for future development." Nor do the Amici think so – because as noted in the text Henrico County had already done that planning for the Court, by long planning the extension of Dominion Club to the Chickahominy until it moved to stop HHHunt.

[18] Although the Board found there to be no public necessity for the abandoned sliver of Dominion Club, it had previously mandated a performance bond for its completion to the Chickahominy because it was a "required public improvement" under § 19-93 of the Henrico County Code. Moreover, the County's logically inconsistent arguments were essentially that there was no need for the road, but conversely there is too much traffic on it.

Section 33.2-920 mandates that upon a challenge "[t]he circuit court shall hear the matter de novo with further right of appeal as provided by law." (Emphasis supplied). Moreover, under that same statute "if it appears to the court that by the abandonment of such section of road . . . as a public road . . . any party to such appeal would be deprived of access to a public road, the court . . . may enter such orders as seem just and proper for keeping open such section of road . . . for the benefit of such party or parties." The trial court is even empowered to appoint viewers who may second guess the local governing body, and make contrary recommendations to the court, and which recommendations the court may accept.

The Amici contend that this statutory framework is completely contrary to the concept of a legislative function. It makes no sense for a court to be given the power of de novo review of an abandonment, the authority to send viewers to render an independent opinion contrary to that of the governing body, and the power to keep the road open, and yet for the fairly debatable standard to apply.[19] This, however, is

[19] The Court has said that "[w]hile there are no bright-line rules for the determination of whether an act is administrative or legislative, we have said that administrative acts generally implement existing laws while legislative acts create new ones." Helmick v. Town of Warrenton, 254 Va. 225, 228-29 (1997) (internal citation omitted). The abandonment of a road creates no new law.

what the trial court concluded, and the Amici maintain it was in manifest error to do so. JA 1666.[20]

If the fairly debatable standard is inapplicable to the abandonment of any portion of Dominion Club Drive, then the trial court's decision to uphold it simply must be revisited under a proper standard of review. This is precisely what this Court did in Lamar Co. v. City of Richmond, 287 Va. 322 (2014), when it reversed a circuit court for applying the fairly debatable standard in a challenge to the denial of a variance, rather than employing the proper standard of review set out in Va. Code § 15.2-2314.

If the Court does not otherwise find for HHHunt, this case must be remanded to the trial court for further proceedings.

CONCLUSION

The Amici urge that this Court:

(a) Hold that HHHunt has established vested rights in its subdivision of Wyndham that precluded the abandonment of any portion of Dominion Club Drive, so rule, and dismiss this case.

(b) Alternatively, hold that the trial court erred in its application of the fairly debatable standard to this case and find either (i) that the County's actions were

[20] The abandonment effected in this case actually leaves one of the HHHunt parcels landlocked. E.g., JA 866-869.

arbitrary, capricious and unreasonable and find for HHHunt and dismiss this case, or (ii) remand this case to the court below for further proceedings upon an appropriate standard of review as prayed for in this brief.

(c) Alternatively, hold that the trial court applied the incorrect standard of review to the abandonment of Dominion Club Drive, and remand this case to the lower court for further proceedings consistent with this Court's direction.

Respectfully submitted,

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OF VIRGINIA, INC.

THE VIRGINIA ASSOCIATION OF
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CERTIFICATE PURSUANT TO RULE 5:26

I hereby certify that Rule 5:26(e) of the Virginia Supreme court has been complied with and pursuant to that Rule on February 25, 2019, an electronic version, in Portable Document Format (PDF), was filed with the Clerk of the Supreme Court of Virginia and served on counsel for all parties vie e-mail. In addition, 3 printed copies were filed with the Clerk of the Supreme Court of Virginia. Copies of this brief were served on counsel of record, via e-mail and third party commercial carrier as follows:

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