In The

Supreme Court of Virginia

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 and THE COUNTY OF HENRICO,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

The Henrico County Board of Supervisors (the "Board") and the County of Henrico ("Henrico") present this Statement of the Case because they disagree with the argumentative characterizations presented in HHHunt's Nature of the Case as well as numerous factual assertions which are not supported in the record.

HHHunt initiated this litigation by filing a complaint challenging the Board's November 2016 action to remove a portion of Dominion Club Drive from the County's Major Thoroughfare Plan. This was Case No. CL16-3336. HHHunt subsequently amended its complaint in that case. Joint Appendix ("J.A.") 1. Five months later, HHHunt filed a complaint challenging the Board's February 2017 action to abandon the dead-end portion of Dominion Club Drive. This was Case No. CL17-942. J.A. 213. The trial court consolidated the cases for trial.

After a four-day trial in which the trial court heard from 16 witnesses and admitted 111 exhibits, the trial court ruled for the Board and Henrico on all counts. J.A. 1661-66. The trial court entered final judgment, and HHHunt appealed. J.A. 784, 786.

STATEMENT OF FACTS

HHHunt's president testified that HHHunt has had a "superb" relationship with Henrico. J.A. 1262. Although not all of its zoning applications have been successful, HHHunt "has developed several large master planned communities" in

Henrico. J.A. 1263, 1173-74. Henrico and HHHunt are currently cooperating in the extension of Woodman Road for HHHunt's development of a 1,000-home project known as River Mill. J.A. 1262-64.

In 1989, the Board rezoned 1,089 acres for HHHunt's Wyndham development. J.A. 1688. Wyndham's plans included construction of Dominion Club Drive from Wyndham Park Drive north to the Chickahominy River, which forms the boundary between Henrico and Hanover County ("Hanover). J.A. 1685.

When the property was rezoned, HHHunt owned a 107-acre parcel in Hanover directly across the Chickahominy River from the terminus of Dominion Club Drive at the Henrico county line. J.A. 1774, 1183-84. HHHunt also owned a non-contiguous 43.9-acre parcel in Hanover north of what became the Manor Park subdivision in Wyndham. J.A. 51.

In 1990, HHHunt asked Hanover to approve a corridor across the 107-acre parcel that would connect Dominion Club Drive in Henrico to Route 624 in Hanover. J.A. 541, 1774. As part of its request to Hanover, HHHunt submitted a traffic study that stated the 107-acre parcel "will be capable of accommodating 71 single-family housing units" but "it is extremely doubtful that this level of development will be achieved." J.A. 2319. Hanover approved the subdivision plat establishing the road corridor in March 1991. J.A. 541-44.

Although the Wyndham plans showed Dominion Club Drive going to Hanover, they did not show any specific development in Hanover. J.A. 1682, 1703. There is no evidence HHHunt told Henrico of plans to develop the Hanover parcels as an extension of Wyndham in 1989. Nor is there evidence that HHHunt advised Henrico officials of its intent to develop its Hanover property to the same density as Wyndham at any time prior to May 2016 when it shared its plans with the Henrico County Manager as "a courtesy." J.A. 1226-27. Indeed, until it purchased the Tiller property in 2017, HHHunt could not combine its Hanover parcels to create a "comprehensive development." Opening Brief ("Op. Br.") 11, 34.

In its ruling, the trial court found that in 1992 "future development in Hanover County was foreseen but the scope was unknown." J.A. 1661.

After the 1989 rezoning approval of Wyndham, local government officials and employees in Henrico and Hanover helped HHHunt as well as residents regarding various issues in the Wyndham area. For example, Henrico "stepped in to try to help us and to try to talk to Mr. Cosby" when HHHunt needed to obtain an easement for development. J.A. 1263. HHHunt had numerous meetings with Hanover officials and employees starting in 1993 to discuss scenarios for developing HHHunt's Hanover properties. J.A. 1189. And because land development is a "political process," HHHunt often met with local government officials and employees in both jurisdictions. J.A. 1257-58.

After Henrico's approval of the original rezoning case in 1989, HHHunt divided its 1,089 acres into approximately 2,400 lots that have been developed. J.A. 1179. By 2005, Wyndham was fully developed except for one short section of Dominion Club Drive. J.A. 1217. In 2007, HHHunt rezoned and purchased the Cosby tract and added the property to the original Wyndham development. J.A. 1201-02. Only the added property is currently under development. J.A. 1202.

The unbuilt section of Dominion Club Drive at issue is the northernmost half of Phase 1-C of the road. Phase 1-C extends north from the intersection of Dominion Club Drive and Old Wyndham Drive (the end of Phase 1-B) to the Henrico County line. J.A. 1716.

On January 22, 1991, the County's Planning Department responded to a HHHunt proposal "for the division of the portion known as Phase 1-C." J.A. 1712. HHHunt wanted to split Phase 1-C into two sections because "[w]e don't want to spend money until we are absolutely going to use that infrastructure." J.A. 824.

The Planning Department agreed to the proposal, with the proviso that "[t]he final portion of Dominion Club Drive must be completed with the development of the property on the west side of this road section, or earlier should circumstances warrant. (completion of the Hanover County portion of the road)." J.A. 1713. The "property on the west side of this road section" later became the Manor Park subdivision. J.A. 894.

On August 6, 1991, the County approved, and HHHunt recorded, the plat for the Wexford subdivision that adjoins the eastern boundary of Dominion Club Drive and the floodplain bordering Hanover. J.A. 1707. HHHunt also recorded the Wyndham Collector Roads Phase 1C – Section 1 plat (hereafter "1C-1 plat") the same day. J.A. 1716. The 1C-1 plat "provides the access to both Wexford and Manor Park." J.A. 890. It dedicated right-of-way from the northern edge of Phase 1-B of Dominion Club Drive to just north of its intersection with Isleworth Drive. J.A.1716, 1707. However, the 1C-1 plat does not run to the Henrico county line.

When HHHunt recorded the Wexford subdivision plat, it could have dedicated the right-of-way for all of Phase 1-C of Dominion Club Drive to the Henrico county line. J.A. 1106-07. However, HHHunt chose to reserve the right-of-way for Section 2 of Phase 1-C for "Future Development" on the plat. J.A. 1707. This reservation —instead of dedication — allowed HHHunt to avoid the cost of either building Section 2 of Phase 1-C as part of the Wexford subdivision or providing a bond to guarantee its future construction. J.A. 824.

A year later, the County approved, and HHHunt recorded, the plat for the Manor Park subdivision which adjoins the western boundary of Dominion Club Drive and the floodplain bordering Hanover. J.A. 1718. It also recorded the plat for Wyndham Collector Roads Phase 1C – Section 2 (hereafter "1C-2 plat") the same day. J.A. 1725. Like the 1C-1 plat, the 1C-2 plat only dedicated right-of-way, and

it did not subdivide property into lots for conveyance to third parties. J.A. 889-92. The right-of-way on the 1C-2 plat runs from north of Isleworth Drive to the Henrico County line. J.A. 1725.

HHHunt constructed the 1C-1 road section, and Henrico County accepted it into its road system in August 1992. J.A. 2246. Despite having final plat approval from both Henrico and Hanover to connect Dominion Club Drive across the Chickahominy River, HHHunt has never submitted plans to construct the 1C-2 section all the way to the Henrico County line, to cross the Chickahominy River, or to build a connecting road in Hanover. J.A. 882-83, 1101-02, 2026.

Instead, HHHunt did some clearing and rough grading outside the floodplain, laid a thin layer of stone on part of the 1C-2 section, and erected a barrier at the end of the 1C-1 section to prevent the public from using the 1C-2 right-of-way. J.A. 873-76, 2045. HHHunt did not do any paving in the 1C-2 road section, and there has never been public passage over the 1C-2 right-of-way. J.A. 874-76.

According to HHHunt's engineer, "HHHunt has been at liberty to construct 1C-2 at any time." J.A. 880-81. In 1996, HHHunt asked Henrico to release the bond guaranteeing completion of the 1C-2 section because "[t]his project has been postponed indefinitely." J.A. 2260. There is no evidence of any construction work on the 1C-2 section after that date.

HHHunt did not introduce any evidence of any construction work on the Dominion Club Drive road corridor on the 107-acre parcel in Hanover.

On February 28, 2017, the Board conducted a public hearing pursuant to Code of Virginia § 33.2-919. During the hearing, the County's Director of Public Works advised the Board why there was no public necessity for continuation of a 0.025-mile portion of Section 1 of Phase 1-C of Dominion Club Drive and why the public welfare would be best served by its abandonment. J.A. 1347-50. At the conclusion of the hearing, the Board abandoned the dead-end section of road that HHHunt barricaded to prevent public passage. J.A. 2195-96.

STANDARD OF REVIEW

Because Assignments 1, 2, 5, and 6 involve mixed questions of law and fact, the Court reviews the lower court's application of the law to the facts under a *de novo* standard but gives deference to the lower court's factual findings and views the facts "in the light most favorable to the prevailing party." *Nielsen Co. (U.S.), LLC v. Cty. Bd. of Arlington Cty.*, 289 Va. 79, 87 (2015) (citation omitted).

The standard for review of Assignments 3 and 4 is *de novo* because those assignments involve issues of statutory interpretation which are pure questions of law. *JSR Mech., Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 383 (2016) (citations omitted).

ARGUMENT

In its ruling, the trial court identified four independent claims presented by HHHunt: (1) the Board's abandonment action "was violative of the statutory scheme for such action," (2) HHHunt has "statutory and constitutional vested rights," (3) the Board's actions "were arbitrary and capricious," and (4) HHHunt "requested a de novo review of the abandonment action as permitted by the statute." J.A. 1661-62. Because the trial court's ruling properly decided these independent claims, this Court should affirm.

I. This Court should affirm the trial court's public necessity and public welfare determinations based upon the trial court's de novo review under Code of Virginia § 33.2-920.

Dominion Club Drive is part of the County road system. J.A. 2246. HHHunt appropriately appealed the Board's abandonment action under Code of Virginia § 33.2-920.

Section 33.2-920 provides "the circuit court shall hear the matter de novo." A circuit court is to "ascertain and by its order determine whether public necessity exists for the continuance of the section of road . . . or whether the welfare of the public will be served best by abandoning the section of the road." *Id*. In applying a virtually identical road abandonment statute, this Court stated "the statute is in the disjunctive, and the road may be abandoned if either requirement is met." *Smith v. Bd. of Supervisors*, 201 Va. 87, 89 (1959).

During closing arguments, the trial court emphasized its statutory obligation to perform a de novo review under § 33.2-920. Trial transcript, 1026-27. The trial court also noted its "de novo review authority" when it announced its § 33.2-920 rulings. J.A. 1665.

Despite these statements, HHHunt and the Amici submit the trial court erroneously applied the fairly debatable standard instead of the de novo standard in its § 33.2-920 review. Op. Br. 36, Amici Br. 40-41. This claim lacks any support in the record. The trial court's ruling expressly identified "de novo review" for the § 33.2-920 appeal. J.A. 1662, 1665. The trial court did not mention the "fairly debatable" standard, and it only referred to "legislative action" in addressing HHHunt's "arbitrary and capricious" claim. J.A. 1666. The trial court's ruling applied the proper legal standard for the § 33.2-920 appeal.

A. The trial court's § 33.2-920 public necessity and public welfare determinations are final because HHHunt did not assign error to them.

"Only assignments of error assigned in the petition for appeal will be noticed by this Court." Va. Sup. Ct. R. 5:17(c)(1)(i).

The trial court made specific § 33.2-920 public necessity and public welfare determinations. J.A. 1665-66. The petition for appeal did not assign error to either § 33.2-920 determination. Indeed, the petition for appeal only addressed public necessity and public welfare considerations in Assignment 5's discussion of the

independent issue of whether the abandonment action had a "rational basis" or was "arbitrary, capricious, and unreasonable, and not fairly debatable." Petition, 29-33.

Accordingly, the trial court's public necessity and public welfare determinations under § 33.2-920 are "final" and bar "any appellate relief that might otherwise have been available" for them. *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 308 (1994) (citations omitted).

B. The trial court correctly determined that no public necessity exists for continuance of the road section.

The first § 33.2-920 review criterion is stated in the present tense: whether "public necessity exists for the continuance" of the road. The trial court determined "[t]he road currently serves no through traffic" and "[n]o public necessity . . . consideration will be served by maintaining the short section of road at issue." J.A. 1665-66.

In road abandonment cases, "[t]he rulings of the trial court, based on its factual findings, will be upheld on appeal unless they are plainly wrong or without evidence to support them." *Kirby v. Claremont*, 243 Va. 484, 488 (1992) (citation omitted).

The trial court's "no public necessity" determination is supported by substantial evidence. The abandoned section is — and always has been — a dead end road, barricaded at its north end by HHHunt to prevent public passage. J.A. 873-76. Three professional engineers testified there is no public necessity for the

road section. J.A. 1315, 1347-48, 1583. Indeed, HHHunt's own traffic engineer admitted there is no "present need" for the road connection. J.A. 1045-46.

C. The trial court correctly determined the welfare of the public will be served best by abandoning the road section.

The trial court also determined no "public welfare consideration will be served by maintaining the short section of road at issue." J.A. 1666. This ruling is supported by the evidence that the abandoned road section is only 132 feet long and ends at a barricade. J.A. 2221, 873. *See Bd. of Supervisors v. Va. Elec. & Power Co.,* 213 Va. 407, 410 (1972) ("landowners of a county have an interest in the maintenance of an efficient and useful system of roads").

The trial court acknowledged HHHunt's theory that the public would benefit from a road extension when there is future development in Hanover. J.A. 1665. However, Hanover has stopped review of the pending rezoning application and has not approved any development plans for the property. J.A. 1138. In addition, HHHunt does not know what plans Hanover and state and federal regulatory agencies will approve. J.A. 1259-60. Thus, HHHunt may never build a Hanover development of the type and density of Wyndham in Henrico. Given the speculative nature of future land development, the trial court reasoned that in reviewing abandonments, the statute does not "make judges the transportation planners for future development." J.A. 1665-66. Rather, the trial court properly based its public welfare determination on current conditions.

Moreover, there is substantial evidence that any future benefit to Hanover residents would be offset by significant harm to current Henrico residents. *See, e.g.,* J.A. 1315-16, 1348-50. There are already substantial traffic delays at the intersection of Dominion Club Drive and Wyndham Park Drive on weekdays. J.A. 1579-80. The virtually unanimous opposition of Henrico residents to the asserted "benefits" undercuts HHHunt's argument. HHHunt has confused its economic self-interest with the broader interest of the public.

II. The trial court correctly ruled HHHunt does not have a vested right under Code of Virginia § 15.2-2261 to the continuation of Dominion Club Drive. (Assignment 1)

In Assignment 1, HHHunt claims the trial court erred in holding HHHunt does not have a statutory vested right under Code of Virginia § 15.2-2261.

A. Under § 15.2-2261(C), HHHunt's right to commence and complete development of Section 2 of Phase 1-C of Dominion Club Drive expired "five years after approval" of the 1C-2 plat.

"When interpreting statutes, courts 'ascertain and give effect to the intention of the legislature.'" *Boynton v. Kilgore*, 271 Va. 220, 227 (2006) (citation omitted). "That intent is usually self-evident from the words used in the statute." *Id.* (citation omitted).

Section 15.2-2261(C) provides as follows:

> For so long as the final site plan remains valid in accordance with the provisions of this section, **or in the case of a recorded plat for five years after approval**, no change or amendment to any local ordinance,

> map, resolution, rule, regulation, policy or plan adopted subsequent to the **date of approval** of the **recorded plat** or final site plan shall adversely affect the right of the subdivider or developer or his successor in interest to commence and complete an **approved development in accordance with the lawful terms of the recorded plat** or site plan unless the change or amendment is required to comply with state law or there has been a mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare. (emphasis added)

Because HHHunt relies upon § 15.2-2261(F) (discussed below), it tacitly concedes subsection C applies "in the case of a recorded plat for five years after approval." Op. Br. 25. In accordance with subsection C, the trial court ruled "the developer's rights to complete development are limited to five years." J.A. 1664.

In 1992, HHHunt recorded the 1C-2 plat for the sole purpose of dedicating right-of-way for completion of Dominion Club Drive to the Henrico county line. J. A. 1725. Applying the plain language of § 15.2-2261(C) to the 1C-2 plat, the trial court properly concluded HHHunt's "statutory rights to complete this road had expired." J.A. 1662.

B. The phrase "approved development in accordance with the lawful terms of the recorded plat" in § 15.2-2261(C) refers only to the development shown on the recorded 1C-2 plat, not all 1,089 acres of Wyndham.

To avoid the trial court's application of § 15.2-2261(C) to the 1C-2 plat, HHHunt contends the words "approved development" should be interpreted to mean the entire 1,089 acres of Wyndham. Op. Br. 26. This argument violates several principles of statutory interpretation.

First, the argument effectively reads the words "in accordance with the lawful terms of the recorded plat" out of the statute. "It is the duty of the Court to read legislative enactments to give meaning to all the words used." *Northampton Cty Bd. of Zoning Appeals v. E. Shore Dev. Corp.*, 277 Va. 198, 202 (2009).

Second, HHHunt's argument impermissibly isolates two words from the remainder of the statute. "Under basic rules of statutory construction, we examine a statute in its entirety, rather than by isolating particular words or phrases." *Cummings v. Fulghum*, 261 Va. 73, 77 (2001) (citations omitted). The "entirety" of § 15.2-2261 concerns individual subdivision plats and site plans. It uses the words "recorded plat" three times and does not use the words "overall development" or any similar term. Moreover, subsection A of the statute specifically allows the planning commission or other agent to extend the period of validity of an individual site plan or plat. HHHunt's isolation of the words "approved development" in subsection C is incompatible with the rest of the statute.

Third, the doctrine of *noscitur a sociis* counsels that related words are to be read together to determine their proper interpretation.

> The maxim of *noscitur a sociis* provides that the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.

Andrews v. Ring, 266 Va. 311, 319 (2003) (citation omitted). Under this doctrine, the words "approved development" in § 15.2-2261(C) refer to the development shown on the recorded 1C-2 plat.

HHHunt further contends the "plain language" of § 15.2-2261(C) applies to "'final' approval of a project." Op. Br. 26. But subsection C does not use the word "project," and "[c]ourts cannot 'add language to the statute the General Assembly has not seen fit to include.'" *Wakole v. Barber*, 283 Va. 488, 495 (2012) (citations omitted).

Moreover, the General Assembly has specifically addressed vested rights for "projects" elsewhere in the Code of Virginia. Section 15.2-2307(A)[1] provides for a vested right when the landowner "obtains . . . a significant affirmative governmental act which remains in effect allowing development of a specific project." Section 15.2-2307 uses the words "specific project" three times, but those words are absent in § 15.2-2261. "[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011) (citations omitted).

[1] The parties agree that § 15.2-2307 does not apply here because this case does not involve "a subsequent amendment to a zoning ordinance."

HHHunt also argues the "clear intent" of § 15.2-2261 is "to protect a developer's vested rights in the overall development – not just constituent parts of the development." Op. Br. 28. But the language of § 15.2-2261 does not evidence such an intent. Section 15.2-2261 is directed solely to the validity of individual recorded plats and final site plans.

Similarly, there is no merit to HHHunt's claim that the IC-2 plat is "associated directly and inextricably" with the Manor Park and Wexford subdivisions. Op. Br. 29. Not only did HHHunt choose to record the 1C-2 plat separately from the Manor Park and Wexford plats when it could have dedicated all of Phase 1-C of Dominion Club Drive on the Wexford plat, it completed both subdivisions many years ago without completing the IC-2 road section.

As for another HHHunt contention, there are two statutory reasons why application of the trial court's interpretation of § 15.2-2261 would not, as HHHunt alleges, allow "local governments to stop developments by abandoning roads necessary for the overall functioning of the development." Op. Br. 28. First, § 15.2-2261(C) gives developers the right to "commence and complete" the development shown on a recorded plat for five years after approval. If a road truly is "necessary," a developer would surely build it within the five-year period. Second, § 33.2-920 gives circuit courts the power to overturn road abandonments when there is a public necessity for the road. But that is not this case.

Here, HHHunt's claim about the road's necessity to Wyndham is not supported by the record. HHHunt admits that "all the approximately original 1,100 acres that comprised the Wyndham Community have received final subdivision plat approval and have been converted into approximately 2,400 lots." Op. Br. 28-29. HHHunt simply wants completion of the 1C-2 road section to make rezoning and marketing of its Hanover property in the future easier.

C. The conditions for construction of the Wexford and Manor Park subdivisions did not require completion of Dominion Club Drive to the Henrico county line, as HHHunt claims.

HHHunt asserts "one of the conditions for construction of the Wexford and Manor Park subdivisions, a 'lawful term[] of the recorded plat or site plan,' § 15.2-2261(C), was that Dominion Club Drive would be completed to the Hanover County line." Op. Br. 27. This argument —without a citation to the record — is factually incorrect.

Neither recorded plat contained a "condition" on the plat requiring completion of the road to the Hanover county line. J.A. 1717-18, 1707-08. Nor did the Planning Department condition plat approval upon completion of the road. Condition 20 of the Wexford final plat approval merely stated "[a]ll roads necessary to serve this subdivision must be dedicated and constructed to a level whereas safe all-weather access is provided prior to occupancy permits being issued." J.A. 1715. The Manor Park final plat approval did not include a condition

regarding roads. J.A. 1719-20. However, Condition 13 of the Manor Park final approval provided "[t]he plat shall be revised as shown in red on Staff plan dated November 21, 1991, which shall be as much a part of this approval as if all details were fully described herein." J.A. 1719. Comment 2 on the Staff plan stated: "The final phase of Dominion Club Drive must be dedicated and bonded prior to the recordation of this development. (See letter dated January 22, 1991)." J.A. 1721. Therefore, neither plat approval required completion of the road to the Henrico County line as a condition for construction of the subdivisions.

In making its claim regarding completion to the County line, HHHunt may be referring to the January 22, 1991, letter from the Henrico Planning Department which approved its engineer's request to split Phase 1-C of Dominion Club Drive into two sections. J.A. 1712-13. The letter provided that "[t]he final portion of Dominion Club Drive must be completed with the development of the property on the west side of this road section [the Manor Park subdivision], or earlier if circumstances warrant. (completion of the Hanover County portion of the road)." J.A. 1713. But the January 22, 1991, letter did not require completion to the Henrico County line before construction of either subdivision, and HHHunt did not complete the road before, during, or after constructing Manor Park. Thus, completion of the road to the Henrico County line was not a condition "for construction of the Wexford and Manor Park subdivisions." Op. Br. 27.

D. HHHunt could have dedicated the right-of-way for all of Phase 1-C of Dominion Club Drive on the Wexford plat.

HHHunt insists "the 1-C-1 plat dedicating Dominion Club Drive had to be recorded *before* HHHunt could record the Wexford subdivision plat, and the 1-C-2 plat (also dedicating Dominion Club Drive) had to be recorded *before* HHHunt could record the Manor Park subdivision plat." Op. Br. 27 (emphasis in original).

This assertion is simply wrong as to the Wexford subdivision plat. Ann Tignor, one of HHHunt's engineers, testified that the conditions for approval of the Wexford subdivision required the road be recorded prior to the subdivision, J.A. 1067. However, Condition 17 of the October 26, 1990, conditional plat approval for Wexford stated that "[t]he dedication of Road D-D [Dominion Club Drive], Road B-B, and Nuckols Road Relocated (Road A-A) must be completed prior to, *or concurrent with* the recordation of this subdivision." J.A. 1710 (emphasis added). In addition, she admitted that the March 7, 1991, final plat approval "doesn't require recordation of a separate road dedication plat before Wexford." J.A. 1107.

Therefore, the right-of-way for Phase 1-C of Dominion Club Drive did not have to be recorded before recordation of the Wexford subdivision plat. Moreover, HHHunt did not offer evidence that the County prevented it from dedicating all of Phase 1-C of Dominion Club Drive to the Henrico County line on the Wexford plat. As Tignor testified, "subdivisions get recorded all the time that subdivide

property for lots and also dedicate right-of-way to the county." J.A. 1106. In fact, she admitted, "the Wexford plat, the Manor Park plat, they both subdivided property for the lots and dedicated right-of-way to the county." *Id*. *See also* J.A. 1717-18, 1707-08. Because HHHunt could have dedicated right-of-way for all of Phase 1-C of Dominion Club Drive on the Wexford plat, it has no basis to complain about the trial court's ruling that § 15.2-2261(F) does not apply to the 1C-2 plat.

On a related note best addressed here, HHHunt contends in its Assignment 2 argument that the trial court ignored a HHHunt engineer's testimony that "as a practical matter the posting of a performance bond is 'as good as building' the road." Op. Br. 32 (citing J.A. 834). However, HHHunt's partial quotation of Webb Tyler's testimony omits the context of his statement. Tyler testified that recording and bonding a road is "as good as building it from a standpoint of transferring lots because it gives the municipality the assurance that they can, in fact, draw those monies and build that road segment." J.A. 834. Tyler did not testify that the unbuilt barricaded road section was "as good" as the finished sections of Dominion Club Drive or that posting a completion bond for a dead-end road was "as good" as a road open to the traveling public. The trial court correctly found there is no public necessity for a road that is not open to the traveling public. No one could ride HHHunt's bond across the Chickahominy River.

"Everyone is entitled to his own opinion, but not his own facts." *Daniel Patrick Moynihan: A Portrait in Letters of an American Visionary*, Steven R. Weisman, ed. (2010). HHHunt cannot escape two simple facts. First, HHHunt could have met the County's requirement for public road access to the Wexford and Manor Park subdivisions by dedicating the entire Phase 1-C right-of-way when it recorded the Wexford subdivision plat. Second, HHHunt could have avoided this litigation had it submitted construction plans and built the 1C-2 road section to the Henrico County line within five years after it recorded the 1C-2 plat in 1992.

E. The County's interpretation of § 15.2-2261 does not lead to absurd results.

HHHunt contends the County's interpretation of § 15.2-2261 "would lead to absurd results." Op. Br. 29. This argument misunderstands this Court's precedents.

The term "absurd results" describes "situations in which the law would be internally inconsistent or otherwise incapable of operation." *Cook v. Commonwealth*, 268 Va. 111, 116 (2004). A statute does not create an "absurd result" if "it is entirely possible to carry out the law as written in unambiguous terms in a manner consistent with the General Assembly's apparent intent." *Id.*

"[T]he anti-absurdity principle — understood in its legal sense — serves only as an interpretive brake on irrational literalism. This fail-safe applies in situations in which a purely literal reading forces the statutory text into an

'internally inconsistent' conflict or renders the statute 'otherwise incapable of operation.'" *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 280 (2016).

Under these standards, § 15.2-2261 does not create absurd results. It provides that recorded plats are valid for five years unless the approving authority grants an extension or unless the plat subdivides property which is conveyed to third parties and triggers the application of subsection F. "That interpretation does not offend logic or render the statute inoperable" or "create an irreconcilable inconsistency in the statutory text." *Id*. at 281.

HHHunt suggests the County's interpretation will cause some subdivision plats to be treated differently than others. Op. Br. 29. Yet, that is exactly what the statute provides. Subsection F specifically treats plats on which land has been subdivided and sold differently than other plats.

HHHunt also claims the General Assembly "certainly did not intend to with one hand give land developers protections . . . and take those protections away with the other hand . . . by eliminating access to the development." Op. Br. at 29-30. But § 15.2-2261 says nothing about "access."

The Board respectfully submits that the Court should decline HHHunt's invitation to rewrite the statute with an interpretation that suits HHHunt's theory of the case.

F. The trial court correctly ruled that § 15.2-2261(F) does not apply to the 1C-2 plat because the 1C-2 plat did not subdivide property that was conveyed to third parties.

HHHunt tacitly concedes § 15.2-2261(C) applies to recorded plats "for five years after approval." Op. Br. 25. It then points to subsection F as "an important provision that maintains the validity of a subdivision plat indefinitely." *Id*. But the Opening Brief does not directly contend subsection F applies to the 1C-2 plat.

Instead, HHHunt exaggerates when it mentions "approval for its subdivision plats and site plans for nearly three decades[2] —which clearly showed Dominion Club Drive and its extension into Hanover County[3]" and advances a claim "that the subdivision plats and the related road dedication plats operate together and are inseparable." Op. Br. 25-26.

HHHunt's inseparability claim collapses under scrutiny. HHHunt deliberately recorded the Wyndham collector road sections separately from the neighborhood plats. HHHunt's decisions over a 25-year period not to complete the road shows the 1C-2 plat did not "operate together" with either the Manor Park or Wexford subdivisions. And there is no evidence the Board's abandonment action

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[2] HHHunt has not "submitted and obtained approval for its subdivision plats and site plans for nearly three decades." Op. Br. 25. According to Tyler, "the last Wyndham subdivision recorded for property covered by the 1989 rezoning approval for Wyndham" was "[p]robably sometime in the late 1990s." J.A. 893.

[3] The last recorded subdivision plat that showed Dominion Club Drive extending into Hanover was the 1C-2 plat recorded in 1992. J.A. 1725.

will have any detrimental effect on the property covered by the 1989 Wyndham rezoning.

Moreover, the Wyndham bond reports indicate Wyndham was fully developed by 2005 except for the unbuilt 1C-2 section. J.A. 1216-17. HHHunt does not claim vested rights for any Wyndham plat other than the 1C-2 plat, and it does not explain how approval of other subdivision plats is relevant to the question of whether § 15.2-2261(F) is applicable to the 1C-2 plat.

The 1C-2 plat only dedicated right-of-way for Dominion Club Drive. J.A. 1725. HHHunt's engineer admitted the 1C-2 plat did not "subdivide any property that could be conveyed to third parties." J.A. 892. The trial court correctly ruled that § 15.2-2261(F) does not apply to the 1C-2 plat "because the road was subdivided and dedicated on a separate plat that did not convey subdivided property to third parties." J.A. 1664. In doing so, the trial court properly rejected HHHunt's claim that § 15.2-2261(F) gives it vested rights that can only be extinguished by vacating the plat under Code of Virginia § 15.2-2270. J.A. 1664.

G. The General Assembly did not extend the five-year period in § 15.2-2261(C) when it added subsection F in 2008.

HHHunt also contends the five-year period in subsection C of § 15.2-2261 should be disregarded because subsection F "maintains the validity of a subdivision plat indefinitely." Op. Br. 25. However, neither the statutory language nor the enactment history supports its contention.

Section 15.2-2261(F) provides as follows:

> An 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.

"The one canon of construction that precedes all others is that '[w]e presume that the legislature says what it means and means what it says.'" *Tvardek*, 291 Va. at 277 (citation omitted). Nothing in the language of subsection F changes the five-year period in subsection C. In fact, subsection F does not even mention subsection C. Similarly, there is nothing in the language of subsection C to indicate that the General Assembly wished to change its "five years after approval" period when it enacted subsection F.

Instead, the "shall remain valid" language of subsection F complements the "shall be valid" language of subsection A which provides that recorded plats shall be valid for five years. Read together, subsections A and F provide that a recorded final plat shall be valid (1) for five years, (2) for a longer period if the planning commission or other approving agency determines a longer period is reasonable, or (3) for an indefinite period if "any part of the property subdivided has been conveyed to third parties." VA. CODE ANN. § 15.2-2261(F). *See Va. Elec. & Power Co. v. Bd. of Cty Supervisors,* 226 Va. 382, 387-88 (1983). ("[I]t is our duty to interpret the several parts of a statute as a consistent and harmonious whole").

The purpose of subsection F is to provide that a subdivider does not have to submit and record a new subdivision plat after expiration of the period of validity in subsection A if the subdivider has recorded a plat "from which any part of the property subdivided has been conveyed to third parties." VA. CODE ANN. § 15.2-2261(F). This interpretation is consistent with subsection B.1 which allows the local planning commission to "grant one or more extensions" of the subdivision plat approval "[u]pon application of the subdivider or developer filed prior to the expiration of a recorded plat." VA. CODE ANN. § 15.2-2261(B)(1).

This interpretation is further bolstered by a statute the General Assembly first enacted in 2009 to address the housing crisis during the Great Recession. 2009 Act of Assembly c. 196. Section 15.2-2209.1(A) currently provides in relevant part:

> Notwithstanding the time limits for validity set out in § 15.2-2260 or 15.2-2261, . . . any recorded plat or final site plan valid under § 15.2-2261 and outstanding as of January 1, 2017, shall remain valid until July 1, 2020, or such later date provided for by the terms of the locality's approval, local ordinance, resolution or regulation, or for a longer period as agreed to by the locality.

Furthermore, the General Assembly did not change the five-year period for recorded plats in § 15.2-2261(C) when it added subsection F in 2008. *See* 2008 Acts of Assembly c. 426. In fact, the General Assembly has not changed the "in the case of a recorded plat for five years after approval" language of § 15.2-2261(C) since it enacted subsection C in 1992. *See* 1992 Acts of Assembly c. 843.

The plat validity periods in subsections A and F have a different purpose than the five-year "commence and complete" period in subsection C. If the General Assembly had wanted to conform the "commence and complete" period in subsection C to the plat validity periods in subsections A and F, the General Assembly could have easily done so. It could have eliminated the "in the case of a recorded plat for five years after approval" language in subsection C in its entirety. It could have amended subsection C to begin "For as long as the final site plan **or recorded plat** remains valid in accordance with the provisions of this section . . ." Or the General Assembly could have changed the "five years after approval" language in subsection C to exempt plats for which the "the local planning commission or other agent" had determined a "longer period" is "reasonable" under the authority granted in subsection A. The fact that the General Assembly did none of those things indicates that the General Assembly did not intend to conform the "five year after approval" provision for recorded plats in subsection C to the plat validity periods in subsections A and F of § 15.2-2261.

H. This Court should reject HHHunt's additional claim of trial court error under § 15.2-2209.1.

HHHunt asserts an additional claim that the trial court erred because the 1C-2 plat showing Dominion Club Drive remains "valid at least through January 1, 2020" under § 15.2-2209.1(A). Op. Br. 30.

Although the petition for appeal briefly mentioned this argument in its discussion of § 15.2-2261 in Assignment 1, it did not assign error to this claim, and the claim is not properly before this Court. *United Leasing*, 247 Va. at 308.

In addition, HHHunt's claim that the 1C-2 plat remains valid because it is a plan or permit "associated" with the Wexford and Manor Park plats is incorrect and irrelevant for several reasons.

First, the 1C-2 "plat" is not a "plan or permit associated" with the Wexford and Manor Park plats. Section 15.2-2209.1(A) expressly distinguishes between "recorded plat" and a "plan or permit associated with such plat." "Virginia courts 'presume that the legislature chose, with care, the words it used when it enacted the relevant statute.'" *Tyardek*, 291 Va. at 277 (citation omitted).

Second, the words "plan or permit" in the statute refer to plans and permits required for development of subdivision plats. These include such things as erosion and sediment control plans, stormwater management permits, and building permits. *See, e.g.,* §§ 62.1-44.15:55 (E & S plans), 62.1-44.15:34 (stormwater management permits), and 36-105 (building permits).

Third, the 1C-2 road dedication plat is not "associated" with the Wexford or Manor Park plats for purposes of § 15.2-2209.1(A) because HHHunt deliberately recorded it separately and still has not built the road.

III. The trial court correctly ruled that HHHunt does not have a constitutionally guaranteed vested right in the continuation of Dominion Club Drive. (Assignment 2)

The Board is unaware of any case in which this Court has held the judicial doctrine of vested rights bars a road abandonment under Title 33.2 of the Code of Virginia. Instead, this Court has stated "[v]ested rights only protect a landowner's right to develop a specific project under existing zoning conditions and allow continuation of the non-conforming use when that zoning designation is amended or changed." *Bd. of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 282-83 (2006).

Nonetheless, HHHunt insists in Assignment 2 the trial court erred in holding HHHunt did not possess constitutionally guaranteed vested rights to extend Dominion Club Drive. The trial court stated Virginia cases "hold that a landowner may have a constitutional vested property right in the use of its land provided he diligently pursues a permitted use." J.A. 1662. It then ruled that HHHunt did not have constitutional vested rights because "the 25-year gap between the road dedication and the board's action does not evidence diligent pursuit." J.A. 1662.

A. HHHunt fails to identify the constitutional basis for its claim of vested rights in this case.

This Court has stated in two road abandonment cases that there is no vested right in a public road. *Va. Elec. & Power Co*., 213 Va. at 412 (quoting *Smith*, 201 Va. at 94). The Amici concede "[t]he Court has not itself referred to a vested right as a constitutional right." Amici Br. 11. Yet, HHHunt claims "constitutionally

guaranteed vested rights" without identifying a constitutional provision justifying its claim. HHHunt also fails to identify any case or rationale for creation of a constitutional guarantee.

Furthermore, the three cases HHHunt cites as precedents do not premise their holdings on either the United States or Virginia constitutions. *Bd. of Supervisors v. Med. Structures*, 213 Va. 355 (1972); *Bd. of Supervisors v. Cities Serv.*, 213 Va. 359 (1972); *Bd. of Zoning Appeals v. Caselin*, 256 Va. 206 (1998). In addition, they are distinguishable on their facts because, unlike this case, each involved a change in zoning after the developer obtained a governmental approval. They are, therefore, irrelevant to this appeal.

B. HHHunt did not diligently pursue completion of the 1C-2 road section of Dominion Club Drive.

This Court need not reach the question of whether vested rights are constitutionally guaranteed because HHHunt did not diligently pursue completion of the 1C-2 road section. As this Court stated in one of HHHunt's cases, "our test requires that the landowner establish that he has diligently pursued the use authorized by the government permit or approval." *Id.* at 210-11.

HHHunt recorded the 1C-2 plat in 1992. J.A. 1725. It thereafter began work on part of the 1C-2 road section and then stopped. J.A. 873-74. There is no evidence of construction work on the 1C-2 road section since 1996. J.A. 2260.

HHHunt alleges the trial court's decision "ignored that the unbuilt portion of Dominion Club Drive had remained under performance bond for completion for decades." Op. Br. 32. However, maintaining a performance bond "for decades" actually proves HHHunt's lack of diligent pursuit. The bond was only required because HHHunt had not built the road. Tyler admitted, "[n]obody can ride on a bonded completed road" that "is not construction completed." J.A. 894.

In addition, Tyler testified that "HHHunt has been at liberty to construct 1-C-2 at any time that they wished to do so." J.A. 880-81. Yet, the construction plan Tyler's firm prepared for HHHunt in 1992 "stops essentially at the floodplain," J.A. 882, approximately 585 feet from the Henrico County line. J.A. 1570. Even the construction plans submitted to Henrico County in 2016 did not provide for completing the road all the way to the County line. J.A. 2030. This evidence supports the trial court's finding that "the 25-year gap between the road dedication and the board's action does not evidence diligent pursuit." J.A. 1662.

HHHunt protests that "the County's claim that HHHunt did not diligently pursue the construction of Dominion Club Drive is disingenuous considering the agreement reached decades earlier by the County and HHHunt." Op. Br. 33. The supposed "agreement" was that "the County agreed that Dominion Club Drive could be completed in phases so long as HHHunt posted a performance bond." Op. Br. 34.

This argument turns the evidence on its head. The County's 1991 agreement "that Dominion Club Drive could be completed in phases" was not an agreement that HHHunt could postpone completion indefinitely. J.A. 2260. The Planning Department's January 22, 1991, agreement to split Phase 1-C into two sections was coupled with the condition that "The final portion of Dominion Club Drive must be completed with the development of the property on the west side of this road section, or earlier should circumstances warrant. (completion of the Hanover County portion of the road)." J.A. 1713. The fair reading of this "agreement" is that the County envisioned completion of the "final portion" of Dominion Club Drive "with the development" of Manor Park or at the time of "completion of the Hanover County portion of the road" if that occurred "earlier." *Id.*

Without any citation to the record, HHHunt argues "[t]he trial court also overlooked evidence showing that it was impractical for HHHunt to move forward with the expansion of Dominion Club Drive until after it assembled the full complement of property in Hanover County." Op. Br. 34. The record refutes this claim as well.

HHHunt's 107-acre parcel in Hanover had a "gravel road that ran from the Chickahominy River all the way to Cauthorne Road." Op. Br. 10. HHHunt "intended for Dominion Club Drive to generally follow the same path as this gravel road." *Id.*; J.A. 1187. HHHunt's 2016 rezoning application shows the

Hanover portion of Dominion Club Drive in this alignment. J.A. 2169-70. Because Hanover had approved the road corridor in 1991, HHHunt could have built the 1C-2 road section in Henrico and connected it to the Hanover road corridor long before it purchased the Tiller parcel in 2017. Op. Br. 11. All HHHunt had to do was construct a small part of the approved road corridor in Hanover and build a connecting culvert across the Chickahominy River which is "actually more of a ditch." J.A. 1101-02, 795. It could then build the remainder of the Hanover portion of Dominion Club Drive after it assembled the remainder of its desired property.

HHHunt's claim that it had to wait until it assembled a "full complement of property in Hanover" does not justify HHHunt's lack of diligent pursuit of Henrico's 1992 approval of the 1C-2 road section. If it did, the "diligent pursuit" requirement would be meaningless.

IV. The Board properly abandoned the road section under Title 33.2 of the Code of Virginia, and it was not obligated to use subdivision plat vacation procedures of Title 15.2. (Assignment 3)

In Assignment 3, HHHunt shifts its attention from its claim of vested rights to the Board's abandonment of a 0.025-mile (132 linear feet) portion of the completed 1C-1 road section accepted into the County's road system in 1992. J.A. 2221. In addition to arguing § 15.2-2261(F) provides that a subdivision plat is valid indefinitely unless it is vacated under the subdivision provisions in Title 15.2,

HHHunt asserts roads "platted as part of a subdivision" may not be abandoned under Title 33.2 of the Code of Virginia. Op. Br. 35.

As explained in Part II(F) above, § 15.2-2261(F) does not apply to this case because the 1C-1 and 1C-2 plats did not subdivide property that "has been conveyed to third parties." The vacation language in subsection F is irrelevant.

Moreover, there is no conflict between statutes as HHHunt contends. *Id*. Code of Virginia § 33.2-925 provides that "the procedure for vacations in subdivision 2 of § 15.2-2272" is an "alternative method" for abandonment of a road. By providing the vacation process as an "alternative to the procedure prescribed by this article," § 33.2-925 gives governing bodies the choice of abandoning subdivision roads by using Title 15.2 or Title 33.2 procedures.

Finally, HHHunt argues "the specific provisions of Title 15.2 apply" rather than Title 33.2 because the 1C-1 plat is a subdivision plat. Op. Br. 36. However, this is not a vacation case, and Article 3 of Chapter 9 of Subtitle II of Title 33.2 authorizes the abandonment of a road that is a "county road maintained by a county and not part of the secondary state highway system." VA. CODE ANN. § 33.2-915.[4] It does not contain an exception for roads platted in a subdivision. The "specific over general" maxim does not apply.

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[4] Article 3 applies to Arlington and Henrico Counties because they build and maintain their own roads. *See* 1976-77 Op. Va. Att'y Gen. 102.

V. The trial court did not find that the abandonment was legislative in nature and subject to the fairly debatable standard under Title 33.2 of the Code of Virginia. (Assignment 4)

In Assignment IV, HHHunt contends "the trial court erred in finding that the abandonment was legislative in nature and subject to the fairly debatable standard." It argues that the procedure for de novo review in § 32.2-920 "is entirely inconsistent with the concept of a legislative action that is presumed correct and will be upheld if fairly debatable." Op. Br. 37.

Assignment 4 reflects HHHunt's confusion about the trial court's ruling. In stating the issues for decision at the outset of its ruling, the trial court separated HHHunt's request for a de novo review under § 33.2-920 from HHHunt's claim that the abandonment action was arbitrary and capricious. J.A. 1662.

There is no indication in the trial court's ruling the trial court presumed the abandonment action to be correct in the § 33.2-920 appeal or that it conducted its § 33.2-920 review under the fairly debatable standard. In fact, the trial court's ruling did not mention either a presumption of correctness or the fairly debatable standard. The trial court's only mention of legislative action was in its consideration of HHHunt's separate claim of arbitrary and capricious action. J.A. 1666.

The trial court's ruling indicated it performed a de novo review when analyzing the Board's action under § 33.2-920. J.A. 1666. It noted HHHunt's

request for a "de novo review of the abandonment action as permitted by the statute," identified its "de novo review authority over the abandonment of a road," identified the two § 33.2-920 criteria for decision, and stated its conclusion on each § 33.2-920 criterion. J.A. 1662, 1664-66.

Thus, for purposes of the § 33.2-920 appeal, the trial court did not review the action as a legislative matter subject to a presumption of correctness or the fairly debatable standard.

VI. The trial court properly ruled that the Board's abandonment action was not arbitrary and capricious. (Assignment 5)

In Assignment 5, HHHunt submits that the abandonment was arbitrary, capricious, unreasonable, and not fairly debatable. It also alleges "the County had no rational basis for abandoning the road." Op. Br. 38.

A. The Board's abandonment action was not arbitrary or capricious.

An action is "arbitrary and capricious" if "it is 'willful and unreasonable' and taken 'without consideration or in disregard of facts or law or without determining principle' or when the deciding body 'departed from the appropriate standard in making its decision.'" *James v. City of Falls Church*, 280 Va. 31, 42 (2010) (citations omitted).

After a public hearing, the Board abandoned a 0.025-mile portion of Section 1 of Phase 1-C of Dominion Club Drive. J.A. 2195-96. The Board's resolution recited the history of the road, cited the relevant provisions of the Code of Virginia, and stated the section of road "has not been extended northward, does not connect to a road for public passage north of Isleworth Drive, and ends at a graveled cul-de-sac bounded by a gate." J.A. 2195. HHHunt has no basis to argue that the Board took the abandonment action "without consideration or in disregard of facts or law." *James*, 280 Va. at 42 (citations omitted).

In addition, after hearing all the evidence during a four-day trial, the trial court found that "[p]ublic opposition, safety concerns, and intersection failure are all proper concerns for the board's decision, and they cannot be seen as arbitrary and capricious." J.A. 1666. The record contains ample evidence of all three factors cited in the trial court's ruling.

HHHunt accuses the County of inventing traffic concerns because of "the unfounded fears of politically active residents." Op. Br. 38-39. However, over 2,000 residents signed petitions opposing the road extension, and the opposition originated with Wyndham residents. J.A. 1454-56, 1419, 1421, 1430-31. It was not "unfounded" for them to believe that traffic coming from Hanover would adversely affect the safety and enjoyment of their neighborhood. They knew from personal experience in their cars every weekday morning about the backups at the failed

intersection of Dominion Club Drive and Wyndham Park Drive described below. It was also public knowledge that the Hanover Major Thoroughfare Plan includes proposed major collector roads feeding traffic onto Dominion Club Drive in Hanover County. J.A. 2047. And residents know firsthand about the congestion and the dangers of crosswalks within Wyndham. J.A. 1349.

With regard to traffic safety, three professional engineers testified that extension of Dominion Club Drive would create safety issues in Wyndham. They cited the increased "potential for accidents," access for emergency vehicles, "more conflicts" with pedestrians at crosswalks, and difficulty in crossing congested roads. J.A. 1282, 1315-16, 1348-49, 1629.

And there was specific evidence of "intersection failure" on Dominion Club Drive. Assistant Director of Public Works Michael Jennings testified that on weekday mornings, traffic at the intersection of Dominion Club Drive and Wyndham Park Drive backs up "almost four, five hundred feet sometimes all the way to Brentmoor Drive." J. A. 1579-80. His expert opinion was that if traffic were increased on Dominion Club Drive, the intersection of Dominion Club Drive and Wyndham Park Drive "would fail miserably." J.A. 1629-30.

The trial court's ruling that the Board's action was not arbitrary and capricious was correct.

B. The Board's abandonment action was reasonable because valid traffic concerns and citizen opposition provided a rational basis for its action.

HHHunt contends the abandonment action had no rational basis because the trial court relied on "unsubstantiated traffic concerns and public opposition itself to justify the County's action." Op. Br. 42. It points to "evidence of independent traffic studies" prepared by its consultants that purported to show that "the extension of Dominion Club Drive to Hanover County would have a minimal effect on traffic." Op. Br. 40.

But the trial court heard substantial testimony discrediting HHHunt's traffic studies. For example, Scott Dunn, the author of HHHunt's 2015 traffic study, admitted (1) the study did not analyze the number of vehicles that would use Winns Church Road Extended to come into Henrico County via a connection with Dominion Club Drive, (2) the study did not consider the recommended land uses in the Hanover Comprehensive Plan, (3) the study did not include traffic that will be generated by planned future business development along Winns Church Road Extended, and (4) the study did not take into account traffic coming from a proposed major collector road from Route 1 to Winns Church Road Extended. J.A. 1045. Two County engineers explained why Mr. Dunn's study undercounted potential future traffic and gave other reasons for traffic concerns. J.A. 1292-1300, 1570-74. There was a rational basis for traffic concerns of Wyndham residents.

HHHunt also claims the road "was designed and built to handle far greater traffic than currently exists." Op. Br. 40. HHHunt's desire to make this claim is puzzling because the trial court stated that although the Board "could have also seen the pavement failure . . . this does not figure into my decision." J.A. 1666. In addition, Dunn admitted that his study's conclusion that Dominion Club Drive in Henrico County was "overdesigned and under capacity" had "nothing to do with the pavement carrying capacity of Dominion Club Drive." J.A. 1041.

The claim is also surprising because the parties stipulated to the admission of a letter written several months after soils testing done by an independent consulting firm. J.A. 1681. That letter recommended a more robust pavement design for Dominion Club Drive — **because the previously-tested soil was gone**. *Id.* Nonetheless, HHHunt installed the materials in its original pavement design even after its engineer reported the following:

> Although I was told that original soil tests showed good top soil and "B" horizon soils in the CBR-15 range, there is none of this available now. The good soil must have been stripped for use at building sites or for the golf course.

J.A. 1681. Because of the substandard soil underneath the pavement installed in Dominion Club Drive, Mr. Jennings testified that the pavement in the road section nearest the intersection of Dominion Club Drive and Wyndham Park Drive can only handle an additional 26 cars a day under VDOT road standards. J.A. 1569.

As for public opposition, HHHunt argues the County was wrong for supposedly trying to make citizens opposed to the road extension "happy" and to "take care of our constituents" because of "some issues." J.A. 1229. However, the citizen opposition provided an additional rational basis for the Board's action.

To illustrate, the Fourth Circuit Court of Appeals ruled in 1998 that citizen opposition could satisfy the requirement for "substantial evidence" to justify a land use decision under the federal Telecommunications Act.

> It is not only proper but even expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters . . .
>
> Indeed, we should wonder at a legislator who ignored such opposition. In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluation. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy.

AT&T Wireless PCS v. City Council of Va. Beach, 155 F.3d 423, 430-31 (4th Cir. 1998).

While HHHunt implies the Board threw reason out the window in a "weak-kneed" effort to appease an angry mob, Op. Br. 30, the record shows that the Board carefully listened to HHHunt and to the citizens' concerns and enlisted the assistance of the County's professional staff in resolving the matter with attention to the interests of all.

C. The Board's action was fairly debatable.

Finally, Assignment 5 alleges that the Board's action was not fairly debatable. This is important because HHHunt acknowledges legislative actions will be upheld if "fairly debatable." Op. Br. 38. A matter is fairly debatable "when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Bd. of Supervisors v. Williams*, 216 Va. 49, 58 (1975).

The Board's abandonment action was legislative in nature. Section 33.2-915 requires the governing body to determine the road is "no longer necessary for public use" and to consider "the historic value, if any, of such road." Section 33.2-919 requires the governing body to decide before abandoning a road "that no public necessity exists for the continuation of the section of road . . . or that the welfare of the public would be served best by abandoning the section of road."

A governing body's balancing of what is best for the welfare of the public and its consideration of historic value and public necessity is "characteristic of legislative decision-making." *Helmick v. Town of Warrenton*, 254 Va. 225, 230 (1997) (refusal to vacate a subdivision plat is legislative action). In *Helmick*, this Court concluded that refusal to vacate a subdivision plat was legislative in nature because "[v]acating a recorded subdivision plat requires the decision-maker to consider the desires of the landowner in conjunction with the interests of the

community in light of the circumstances existing at the time of the proposed vacation." *Id.* at 230. Because refusal to vacate a subdivision plat is a legislative decision, so too was the Board's decision as to whether to abandon a road section in a subdivision.

HHHunt also argues "[o]bjective and reasonable persons cannot conclude that trammeling on HHHunt's rights to extend Dominion Club Drive based on groundless fears of traffic congestion is in the public interest." Op. Br. 39. However, as explained above, HHHunt does not have "rights to extend Dominion Club Drive," and the record shows that "fears of traffic congestion" are not "groundless." After hearing four days of evidence, the trial court agreed with the Board. At the very least, the opposition of over 2,000 residents, their justifiable traffic concerns, and their rejection of the supposed benefits of the road extension makes the "public interest" question fairly debatable.

VII. The trial court did not find that public opposition, standing alone, was a legitimate basis for sustaining the Board's abandonment action. (Assignment 6)

In Assignment 6, HHHunt argues that the trial court erred in finding that public opposition "cannot satisfy the fairly debatable standard." Op. Br. 42-3. This argument is based upon a misreading of the trial court's ruling and relies on premises rebutted in Part VI above.

After announcing its § 33.2-920 determinations about public necessity and public welfare, the trial court gave three separate reasons to reject HHHunt's claim that "the board's action was arbitrary and capricious."

> The board saw or could have seen strong public opposition to the road, increased traffic concerns to safety, and the intersection failure . . . Public opposition, safety concerns, and intersection failure are all proper concerns for the board's decision, and they cannot be seen as arbitrary and capricious.

J.A. 1666. In addition, the Board's response to Assignment 5 shows that its action was justified by more than the "[p]ublic opposition untethered to reason and logic." Op. Br. 43. HHHunt's hyperbole about "the use of a yeller's veto to stop property development throughout the Commonwealth" is overblown and contrary to the record in this case. *Id*.

CONCLUSION

The Board exercised its lawful authority under Title 33.2 to abandon a dead-end section of road for which the trial court found no public necessity and concluded the public welfare would best be served by abandonment. HHHunt has no vested rights under § 15.2-2261, and it did not complete the road section in diligent pursuit of Henrico's approval of the 1C-2 plat in 1992. Finally, the trial court's ruling that the Board's action is not arbitrary and capricious is fully supported by the record.

The Court should affirm the trial court's ruling in its entirety.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2019, pursuant to Rule 5:26(h), three paper copies of the Brief of Appellees have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellees was served, via email, upon:

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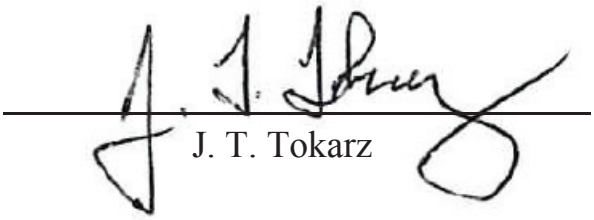

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