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In the

Supreme Court of Virginia

At Richmond

Record No. 190580

KATHLYN ROWLAND; ELBERT MICHAEL USSERY; ELIZABETH S. USSERY; CRAIG A. UPDYKE; LEE T. ROWLAND; CAROLD HEGWOOD,

Appellants,

– v. –

TOWN COUNCIL OF WARRENTON; EAST SIDE INVESTMENT GROUP, LLC; SPRINGFIELD REAL PROPERTIES, LLC; REMLAND, LLC; WALKER DRIVE INVESTMENT GROUP, LLC,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

This is an appeal of a legislative land use decision of the Town Council, (the "Council"), of the Town of Warrenton, (the "Town").

On July 11, 2017, the Council granted a Zoning Map Amendment 2016-01, (the "Rezoning"), upon the application of Eastside Investment Group, LLC, Walker Drive Investment Group, LLC, Remland, LLC, and Springfield Real Properties LLC, (the "Landowners"). The Rezoning changed the classification of four contiguous properties from Industrial (I) Zoning, to Industrial Planned Unit Development (I-PUD) Zoning, a special zoning category.[1]

Several nearby residents (the "Neighbors") filed suit against the Council, to which it demurred. The trial court sustained that demurrer to each of the counts on the grounds that the Neighbors had not alleged a particularized harm sufficient to establish their standing but gave them leave to replead.[2]

The Neighbors filed an amended complaint, now containing ten counts. The Council and the Neighbors agreed to bring in the Applicant Landowners as party

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[1] There is reference in the record to 15 parcels of land that were part of the Application. Most of these "parcels" are condominium units in existing buildings on the site. The four larger parcels actually made up the bulk of the Property. *See* JA 333.

[2] This Order is not in the Joint Appendix but will be found in the Record on Appeal.

defendants. JA 808-809. Most significantly, the Neighbors, the Landowners, and the Council then entered into an agreed order granting oyer of the entire legislative record made in the processing of the Rezoning, and it became an integral part of the Neighbors' complaints. JA 806-807.

The Council and the Landowners again demurred. By an Order entered August 20, 2018, (JA 828-840) incorporating the trial court's Letter Opinion of July 18, 2018, (JA 821-827), those demurrers were sustained in part with prejudice, and overruled in part, and one Neighbor was dismissed with prejudice for lack of standing.

Although the Council's and Landowners' demurrers to certain counts were sustained, the remaining Neighbors were permitted to amend yet again. Although the lower court concluded that while they had sufficiently alleged proximity to the rezoned Property, they had not alleged an adequate particularized harm. The court "found standing in reference to the traffic issue and the light pollution, for some identified Plaintiffs, [although] there was 'no count' seeking relief on these grounds." JA 827.

The trial court granted the remaining Neighbors yet further leave to amend "where appropriate, including adding any new related counts." *Id.* Specifically, they were permitted to amend their Count IX, alleging that certain proffered modifications to the Town's Zoning Ordinance (the "Ordinance") requirements were

"lesser" than those in the Ordinance rather than additional thereto "provided [the Neighbors] set forth the conditions which are unreasonable or lesser than existing regulations, *and* which further impact or effect the Plaintiffs." (*Id*. Emphasis in the original.)

Undaunted, the remaining Neighbors filed a "Twice Amended Complaint" with six counts. Each count asserted that the Council had acted arbitrarily, capriciously and unreasonably in rezoning the Property.

The Council and the Landowners filed a Joint Demurrer, followed by briefing and a lengthy hearing before the court below. Thereafter, that court issued its Letter Opinion on January 14, 2019 (JA 878-884), sustaining each of the Defendants' demurrers, and dismissing the Twice Amended Complaint with prejudice. It entered its Final Order dismissing the action on February 5, 2019. JA 885-895.

STATEMENT OF FACTS

I. The Landowners apply for and amended their Application for the Rezoning.

The issues upon which this Court has granted the Neighbors' appeal relate to very specific elements of the case, and focus on the nature of conditional zoning under the relevant facts, specifically whether a proffer could be used to effectuate a waiver of a certain development standard, the role of the Town's Planning Commission (the "Commission") in making a recommendation to the Council as to

the Application as it regards that standard, and whether the Council properly exercised its legislative judgment. The facts here set forth focus on those issues.

In January of 2016 the owners of four adjacent properties zoned to the Town's sole Industrial zoning classification sought to rezone approximately thirty-two acres (JA 331-338), under a proposed Master Development Plan[3] therefor (JA 339-344) (the "Application"). The Landowners eventually filed two traffic impact analyses, and all the requisite materials necessary to pursue the Rezoning. As is usual, the Town's staff processed the Application, and negotiated revisions.

Thus, on April 15, 2016, the Landowners filed a substantially revised Application. JA 345-38. This submission included the first draft of a Proffer Statement that included, among many other things, proposals for two waivers or modifications of provisions of the Ordinance, including a waiver of the "Land Use Mix" discussed further below. JA 356.

After continuing negotiations with the Town's staff and the Virginia Department of Transportation, the Landowners again revised the Application and submitted revised Proffers on July 28, 2016, (JA 375-380), together with a revised Master Development Plan. JA 385-390.

[3] The Master Development Plan is the graphic representation of the proposed development and is explicitly tied to the Proffer Statement which commits the developer to construct the project in conformity with that Plan, among other proffers.

Yet a further submission was made on September 29, 2016, with Proffers dated September 27th (JA 417-423), and a revised Master Development Plan dated September 19, 2016. (JA 640-646).

On December 5, 2016, another revised submission of Proffers (JA 470) was prepared, with a newly revised Master Development Plan. JA 464-469. Further submittals made after the Commission hearings are detailed below.

II. The Commission takes up consideration of the Rezoning.

On October 18, 2016, while negotiations with the staff were ongoing and revisions to the Proffers and the Master Development Plans were still underway, the Commission took up consideration of the Application at a work session.[4] The agenda for that work session specifically noted that "[t]he rezoning request includes proffers, waiver requests, a Master Development Plan, Design Guidelines, Transportation Impact Analysis, and [an] Economic Analysis." JA 508. The staff report prepared for that work session contains a specific reference to the Landowners' request for a waiver of the "Land Use Mix" percentages as those percentages are set out in § 3-5.2.4 of the Ordinance.[5]

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[4] Work sessions are public meetings of the Commission that are more informal than public hearings and are designed so that the Commission members may ask questions of the staff and the applicants in pending cases, among other business.

[5] The brief minutes of that October 18th work session do not reference discussion of any waiver of the Land Use Mix, and no transcript was made.

On January 24, 2017, the Commission held a second work session on the Rezoning. During that work session the request for a waiver of the Land Use Mix was raised to the Commission by the Planning Director (JA 175-176) and by Landowners' counsel. JA 179-182.

On February 21, 2017, the Commission held its formal public hearing on the Application. Again, there was explicit reference to the proposed waiver/modification of the Land Use Mix for the Land Bays within the Project. JA 170, 175, 179, 180-81. At the conclusion of the hearing, the Commission recommended against approval of the Rezoning and the matter was forwarded to the Council. There was no separate or specific motion or vote sought or made with respect to the Land Use Mix waiver.

III. The Rezoning Application was further amended and ultimately approved by the Council.

After the Commission had made its recommendation, the staff and the Landowners continued to work on the details of the complex Application. A resubmission was made after the Commission's action on March 13, 2017, (JA 483-496)[6] with a revised Master Development Plan also dated March 13, 2017. JA 514-

[6] This Proffer Statement introduced an innovative "Post-Submission Master Development Plan Process." Concerns had been expressed that because the proposed development had no identified end users, and because it was based on the possibility of different uses that would be consistent with the I-PUD zoning, that it could be difficult for the Town to assure overall compliance with the approved zoning once

519. After yet further negotiations with the Town's staff, the Landowners filed a revised Proffer Statement (JA 72-94) and Master Development Plan (JA 95-100) with the Town on May 19, 2017.

This proved to be the last version of the Proffers, and as had the Proffer Statements presented to the Commission, this version contained a provision for waivers/modifications. By this time, however, Paragraph 35 of those Proffers had eliminated all other requests for waivers or modifications in previous versions, and said only that "[p]ursuant to § 3-5.2.4.1 of the Zoning Ordinance, the Land Use Mix as it is set forth on the Land Bay Plan is hereby approved for the Property." JA 82.

The final Land Bay Plan Tabulation Chart on the Land Bay Plan (a note on the Master Development Plan) showed Industrial use of 39.32% of the total land area to be developed, Commercial of 25.19% and Residential of 35.49%.[7] JA 42.

Although the Neighbors insist that it was not possible for the Commission to have understood what waiver of the requirements of the Land Use Mix in § 3-5.2.4.1

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development was completed. The "PSMDP" requires the developer to present proof to the Zoning Administrator, at each stage of development, as to the cumulative development in each Land Bay, and compliance with the requirements for the overall development of the Property, so that those requirements are not exceeded.

[7] As further set out below, the development standards chart in the Ordinance sets target figures for these categories at a maximum of 50%, and a minimum of 30%, and 20% respectively.

of the Ordinance were being proposed when the case was before it, because of the lack of information with which to make those calculations – and even provide a picture to make the point (Op. Br., p. 11-12)[8] – the "Site Tabulations" found on the *September 19, 2016,* Master Development Plan (JA 641) plainly set forth the "Estimated Use Percentages by Land Area" for Industrial, Commercial, and Mixed-Use Residential uses on the Property, at that time, at 45.2%, 33.5%, and 21.3% respectively.

SITE TABULATIONS

EXISTING SITE AREA = 31.9193 AC. (1,390,404 SF)
EXISITING ZONING: I, INDUSTRIAL
PROPOSED SITE AREA (ESTIMATED) = 31.5520 AC. (1,374,405 SF)
PROPOSED ZONING: I-PUD, INDUSTRIAL - PLANNED UNIT DEVELOPMENT
PROPERTY GPINS: 6984-74-5565; 6984-73-7494; 6984-72-3635; 6984-73-6957-101; 6984-73-6957-202; 6984-73-6957-201; 6984-73-6957-203; 6984-73-6957-204; 6984-74-8242-001; 6984-74-8242-002; 6984-74-8242-003; 6984-74-8242-006; 6984-74-8242-007; 6984-74-8242-004; 6984-74-8242-005

ZONING REQUIREMENT: I-PUD (INDUSTRIAL-PLANNED UNIT DEVELOPMENT)

MINIMUM LOT SIZE: ONE (1) ACRE
MAXIMUM LOT COVERAGE (FAR): 0.60

SETBACK REGULATIONS (OUTER BOUNDARY):
SIXTY-FIVE FEET (65') FROM THE RIGHT-OF-WAY OF A COLLECTOR STREET HAVING RIGHT-OF-WAY GREATER THAN FIFTY FEET (50').

FORTY FEET (40') FROM THE RIGHT-OF-WAY AND AND SERVICE DRIVE

FIFTY FEET (50') FROM THE RIGHT-OF-WAY OF A LOCAL STREET HAVING RIGHT-OF-WAY OF FIFTY FEET (50'), OR LESS.

FRONTAGE REQUIREMENTS: MINIMUM ONE-HUNDRED FEET (100').

YARD REGULATIONS (OUTER BOUNDARY):

SIDE: TWENTY-FIVE FEET (25') ADJACENT TO "C" OR "I" DISTRICT; FIFTY FEET (50') ADJACENT TO "R" DISTRICT
REAR: FORTY FEET (40') ADJACENT TO "C" OR "I" DISTRICT; SIXTY-FIVE FEET (65') ADJACENT TO "R" DISTRICT

INTERNAL LOT LINES: ZERO SETBACK

PROPOSED LOT COVERAGE:

NON-RESIDENTIAL BUILDING AREA (GSF EST.) = 254,453 SF
RESIDENTIAL BUILDING AREA (GSF EST.) = 140,824 SF
TOTAL BUILDING AREA (GSF EST.) = 395,277 SF (254,453+140,824)
TOTAL LOT COVERAGE (FAR EST.) = 0.288 (395,277/1,374,405)
TOTAL GREEN AREA (EST.)* = 362,008 SF
TOTAL GREEN AREA (EST. % OF TOTAL SITE) = 26.3% [(362,008/1,374,405)X100%]
PEDESTRIAN AREA OPEN SPACE = 88,323 SF
EXISTING SWM AREA = 69,428 SF
TOTAL OPEN SPACE PROVIDED** = 380,983 SF (362,088+88,323-69,428)
TOTAL OPEN SPACE AREA (EST. % OF TOTAL SITE = 27.7% [380,983/1,374,405)X100%]

*- BASED ON THE GREEN OPEN SPACE ILLUSTRATED ON THE SCHEMATIC SHOWN ON SHEET 2 MINUS PEDESTRIAN OPEN SPACE AREAS.
**- EXCLUDES EXISTING/PROPOSED SWM FACILITY AREA

ESTIMATED USE PERCENTAGES BY LAND AREA:

USE TYPE	ESTIMATED USE %	TARGET USE %
INDUSTRIAL	45.2%	50% MIN.
COMMERCIAL	33.5%	30% MAX.
MIXED USE RESIDENTIAL	21.3%	5% MIN., 35% MAX.
TOTAL OPEN SPACE (% OF SITE AREA)	27.7%	20% MIN.

NOTE: LAND USE TABULATIONS SHOWN ARE BASED ON FLOOR AREAS SPECIFIED IN THE LAND BAY TABULATIONS CHART, REQUIRED PARKING AREA FOR EACH USE TYPE AND BUILDING PAD AREAS AS SHOWN ON THE ILLUSTRATIVE PLAN SHOWN ON SHEETS 4 AND 5. THE LAND USE AREA FOR THE EXISTING AND PROPOSED BY-RIGHT BUILDINGS WERE DETERMINED USING EXISTING BUILDING PAD AREAS, PLUS THE AREA OF REQUIRED PARKING FOR THESE BUILDINGS. THE OPEN SPACE PERCENTAGE IS COMPUTED USING THE ILLUSTRATIVE PLAN ON SHEETS 4 AND 5 FOR REFERENCE ALONG WITH THE OPEN SPACE SCHEMATIC SHOWN ON SHEET 2.

[8] References to "Op. Br." are to the Neighbor's Opening Brief in this appeal.

Although the Neighbors maintain that the Commission was ignorant of what the Landowners proposed with respect to a modification to the Land Use Mix, this chart was presented to the Commission before it made its recommendation to the Council. Figure 4 in the Neighbors' Opening Brief is taken from the *December 2, 2016*, Master Development Plan, also provided to the Commission, which does not contain the same block. There can, however, be no doubt that the earlier Plan was available to the Commission at its October 18, 2016, work session. JA 616, 641.

The Council held work sessions on the Application on March 10, 2017, and May 4, 2017, and conducted its public hearing on July 11, 2017. There was at that time discussion of the Land Use Mix. JA 170-71, 175-76, 181-82, 219-20, 229. After hearing from the staff and from several citizens, most in opposition to the Application, the Council voted 6-1 to approve it and to accept the Proffers.

When the Council acted, it not only accepted the Proffers, but it approved, as a Proffer, a modification of the Land Use Mix, based in part on a recommendation from its Planning Staff:

Staff finds the deviations to be consistent with the intent of both the I-PUD District and the Comprehensive Plan based on the use of the restaurant use in industrial category. Staff detailed analysis is provided in Attachment B for further consideration.

I-PUD Land Use Mix	**Zoning Ordinance (Article 3-5.2 2016 Amendment)**	**Proffered**
Industrial	Minimum 50%	39.32%
Commercial	Maximum 30%	25.19%
Residential	Maximum 20%	N/A
Mixed Use Residential	Minimum 5%/Maximum 35%	35.49%
Open Space	Minimum 20% (15% with Healthy Lifestyle Bonus)	Minimum 20% (15% with Healthy Lifestyle Bonus)

JA 42.[9] The appeal to the Circuit Court ensued, and now the appeal to this Court.

THE STANDARD OF REVIEW

a) To the extent that this appeal involves the interpretation of ordinances and statutes, the Council and Landowners agree with the Neighbors that interpretation of applicable statutes is a question of law subject to *de novo* review by this Court. *E.g.*, *Barr v. Atl. Coast Pipeline, LLC*, 295 Va. 522 (2018); *Commonwealth v. Amos*, 287 Va. 301, 305 (2014). As analysis of the facts of the case will demonstrate, however, statutory interpretation should prove largely unnecessary, given the actual language to be found in the Ordinance.

b) At the heart of the Neighbors' Assignments of Error is their assertion that the actions of the Council in approving the Rezoning, or at least the consideration and modification of the Land Use Mix as described below, were, by being in violation of its Ordinances, arbitrary, capricious, and unreasonable. This is a classic challenge to the validity of legislative action. The standard of review for such claims is the fairly debatable standard, whether it is a "traditional" such claim, or one based on the subtleties of *Renkey v. Cty. Bd.*, 272 Va. 369 (2006).

[9] In the end, staff did not support the Land Use Mix revision, but only because the Applicant had not yet shown a "hardship" requiring it. JA 60. The Warrenton Zoning Ordinance does not require such a showing in connection with a modification of that Mix.

The standard of review on appeal for all legislative cases is so often stated that it virtually needs no repetition.

> This presumption of validity is a presumption of reasonableness. Legislative action is reasonable if the matter at issue is fairly debatable. An issue is fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. Under the fairly debatable standard, the governing body is not required to go forward with evidence sufficient to persuade the fact-finder of reasonableness by a preponderance of the evidence. [Rather, w]here presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the legislative action must be sustained. If not, the evidence of unreasonableness defeats the presumption of reasonableness and the legislative action cannot be sustained.

Newberry Station Homeowners Ass'n v. Bd. of Supervisors, 285 Va. 604, 621 (2013) (quoting *Town of Leesburg v. Giordano*, 280 Va. 597 (2010)); *see also*, *Norton v. City of Danville*, 268 Va. 402, 409 (2004).

ARGUMENT AND AUTHORITIES

Summary of the Argument.

Conditional zoning in Virginia is a unique system created for the express purpose of providing localities great flexibility in the "tailoring" of land use approvals to meet the needs of the community. To that end, "proffers," conditions that are voluntary offered by a rezoning applicant, may be "in addition to" or in "modification of" the underlying requirements of a local ordinance, to the extent the

local ordinance provides. Common rules of statutory construction permit this Court to harmonize the General Assembly's definition of conditional zoning with the three separate but related forms of that system that the legislature has created for Virginia localities.

Perhaps more importantly, however, the Warrenton Zoning Ordinance itself contains provisions that recognize that a proffer may be both in addition to, and modification of, an otherwise mandatory provision of that Ordinance.

Moreover, this Court has already reviewed a situation that is essentially identical to that presented here, and has held that it is permissible to use a proffer to effectuate a waiver or "deviation" from the otherwise mandatory provisions of a local ordinance, and that the governing body's decision on such a waiver is a legislative act tested against the fairly debatable standard.

Further, the Town did not err in failing to obtain a specific and separate recommendation from its Planning Commission as to the initial and final proposal for the revision to the Land Use Mix. First, the Commission *did* have information as to proposed modifications to that Mix before it, prior to its recommendation to the Council on the Rezoning. Second, it provided the Council a recommendation on the Rezoning, as statutorily required, and there is no statute or decision that requires it to have rendered a separate recommendation as to the Land Use Mix at any time, either upon its original consideration, or before Council acted. Indeed, this Court has

held that it would not have the authority to hinder the Council's freedom of legislative action were it otherwise.

Finally, there was ample reason, and the trial court so found, to conclude that the Council had before it bases upon which, at the very least, reasonable people could differ as to the merits of the Rezoning, and the reasonableness of the Land Use Mix.

The Council and Landowners submit that this Court should dismiss the appeal and affirm the trial court's able decision.

Assignments of Error No. 1 a. and b.

VIRGINIA LOCALITIES ARE AUTHORIZED TO ACCEPT PROFFERS THAT MODIFY PROVISIONS OF THE REGULATIONS OF ZONING DISTRICTS

I. Conditional zoning is a unique element of Virginia land use that was created to provide flexibility in land use decision making for both localities and landowners.

The Neighbors are correct that Virginia's system of conditional zoning is unique among the American states. Op. Br., p. 22. Before its creation, Virginia localities had no means of "tailoring" a rezoning application to specify or accommodate the uses proposed in a zoning classification in rapidly growing localities, a classification that might permit a multiplicity of uses other than that for which application was actually made. A locality might approve a rezoning for a proposed retail shop, only to end up with a drive-through restaurant with hundreds of unanticipated in and out vehicle trips. There was no lawful and defensible way to

create site specific conditions (where no special use permit was involved) that could address the requirements of the user, or the needs of the community or the governing body.

The solution was found in conditional zoning.[10] Conditional zoning was originally adopted for only a handful of Virginia localities, as Va. Code Ann. § 15.1-491, (which became § 15.2-2303 upon the 1997 recodification of Title 15.1).[11] As

[10] In Fairfax County, in the late 1960s, landowners and developers had begun to use "development conditions" with Planned Development Districts that were ostensible commitments, which were then extended to non-planned development zonings, to accomplish some of those things that proffers may now do. But there was no enabling legislation for this process, and they were of doubtful validity and enforceability. It was principally the development industry that pushed for the first conditional zoning statute. *See* "Proffer Reform (SB 549) – Why It Is Necessary," Douglas Fahl, Unpublished Manuscript (August 5, 2016). *See*, https://bit.ly/34o9PNM. Mr. Fahl, who worked with the engineering and planning firm of Dewberry for decades, had been a major participant in the development of conditional zoning and its evolution.

[11] The original form of conditional zoning at § 15.2-2303, sometimes called "old" conditional zoning, applied to counties, or towns therein, which have planning commissions, where the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county – and, because that is the way legislation gets written – in the counties east of the Chesapeake Bay. As conditional zoning has evolved, with additional forms available, "old" conditional zoning may now be elected by all Virginia high growth jurisdictions otherwise subject to § 15.2-2298.

originally enacted, and as remains the case, there are few restrictions on what may be proffered or accepted by a locality under this form of conditional zoning.[12]

After the passage of this first of the conditional zoning enabling acts, in 1978 the General Assembly added another form of conditional zoning that, however, subjected its use to a number of restrictions. Most importantly among these was a restriction on the acceptance of cash proffers. Va. Code Ann. § 15.1-491.2, now § 15.2-2297. Also, and for the first time, the legislature added a statement as to what conditional zoning was meant to achieve.

> It is the general policy of the Commonwealth . . . to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. *In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and the same time to recognize effects of change. It is the purpose of §§ 15.2-2296 through 15.2-2300 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned*. The exercise of authority granted pursuant to §§ 15.2-2296 through 15.2-2302 shall not be construed to limit or restrict powers otherwise granted to any locality, nor to affect

[12] There are, in fact, some restrictions on what may be proffered and accepted that are established by a separate statute, Va. Code Ann. § 15.2-2303.4, which mandates "reasonable" proffers, but that statute has no implication in this case.

> the validity of any ordinance adopted by any such locality which would be valid without regard to this section.[13]

Va. Code. Ann. § 15.1-491.1, now § 15.2-2296, emphasis added.[14]

Conditional zoning proved so popular and successful, that in 1989 the General Assembly passed a third form that was less restrictive than that provided by what is now § 15.2-2297, but not quite so open ended as that available to its original beneficiaries, as Va. Code Ann. § 15.1-491.2:1, now § 15.2-2298. "High growth" localities that did not qualify for "old" conditional zoning, could now use a close relative, with restrictions, but with the right to accept cash proffers.[15]

Many Virginia jurisdictions have now adopted one or more forms of conditional zoning. They have done so for the reasons that its original form was enacted, and to which the statutory policy speaks: to provide a more flexible and adaptable zoning method to cope with differing situations through conditional zoning, for rezonings subject to conditions voluntarily proffered by the zoning

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[13] The policy that was adopted in 1978 is not addressed to "old" conditional zoning under § 15.2-2303, but only to later forms. Notwithstanding the fact that that section is not expressly referenced in the statement of policy, it is clear that conditional zoning under §15.2-2303 seeks to achieve the same flexibility as do later forms of conditional zoning. The General Assembly meant to make it easier for localities to craft a rezoning as appropriate to the location and the uses proposed, and to the community in which it to be set.

[14] This has often been denominated "new" conditional zoning.

[15] This, the last, has been denominated "new-old" conditional zoning.

applicant for the protection of the community and for resolution of issues that are not generally applicable to land similarly zoned. It was the missing means by which localities may "tailor" rezonings, as their judgment and the voluntary efforts of applicants, lead them to do. No two properties are like, and thus rezonings are more properly structured to reflect that fact.

II. Proffers may be in addition to or modification of the underlying requirements of a Zoning Ordinance, and so says the Town's Ordinance.

According to the General Assembly,

> "Conditional zoning" means, as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, *such conditions being in addition to, or modification of* the regulations provided for a particular zoning district or zone by the overall zoning ordinance.

Va. Code Ann. § 15.2-2201, emphasis added.

Despite this definition, the Neighbors contend that the Council lacked the authority to "modify" any provisions of the Town's I-PUD ordinance using a proffer as the device for doing so. The modification of which they complain is straightforward: the Warrenton I-PUD zoning classification includes a series of development standards, among which is found a chart that establishes a preferred mix of uses in the I-PUD District. § 3-5.2.4.1. That chart also carries with it a crucial footnote, shown below.

PUD Development Standards:			
Category	**R-PUD Underlying base residential zoning district**	**C-PUD Underlying base commercial zoning district**	**I-PUD Underlying base industrial zoning district**
Land Use Mix *			
Industrial	Maximum 15% (limited to Office only)	Maximum 35%	Minimum 50%
Commercial	Maximum 35%	Minimum 50%	Maximum 30%
Residential	Minimum 50%	Maximum 15%	Maximum 20%
Mixed Use Residential		Minimum 5% Maximum 15%	Minimum 5% Maximum 35%

* The proposed Land Use Mix and FAR are based on the total land area within each PUD (e.g.: no more than 35% of the allowable uses in the C-PUD may be industrial, and in any event development may be at a density no greater than the maximum permitted coverage expressed as FAR). The Land Use Mix may be modified pursuant to § 3-5.2.4.3.

The Council did, in fact, approve a different Land Use Mix, presumably because it concurred with the Landowners' proposal and did not seek to create a purely industrial park at Walker Drive, and to leave the land zoned purely Industrial by right. As the footnote to the Land Use Mix chart itself says, "[t]he Land Use Mix may be modified pursuant to" other provisions of the Ordinance found at § 3-5.2.4.3 under which the Council "may modify (making the criteria *more, less or equally restrictive*) or waive" the Land Use Mix. Emphasis added.

Faced with the question whether the Council could modify a provision of the Ordinance by proffer in the manner that it chose, the trial court ruled that:

> What *is* apparent from [the Second Amended Complaint] is that the Plaintiffs believe that the existing zoning regulation cannot be modified to reduce the industrial development. They ignore the language of Va. Code § 15.2201 which permits conditional zoning as a "modification of the regulation." Further § 11-3.9.17 of the Warrenton Zoning Act states rezoning allows for "conditions being in addition to, or <u>modification</u> of the regulation of an existing zone . . . ." (emphasis added). Therefore, zoning regulation may be modified as expressly stated.
>
> It is unclear how the Court could deny the Council the right to modify the zoning regulation when it is expressly permitted as set forth above. Therefore, this Count will be dismissed with prejudice.

JA 884, emphasis in the original.

The Neighbors maintain, however, that the Virginia Code only permits *additional* regulations and requirements by proffer, since the sole purpose of conditional zoning is to ameliorate the impact of a rezoning and not to amplify it. *E.g.*, Op. Br., p. 23.[16]

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[16] One of the undersigned counsel is flattered that the Neighbors have seen fit to quote him with regard to whether a proffer may be in modification of an underlying ordinance as well as in addition to that ordinance. Op. Br., pp. 22, 24. That undersigned counsel actually wrote that there is

> an anomaly in the Code with respect to whether proffered conditions can only be "in addition" to district regulations, or may be something else. . . . The definitional provisions of Va. Code § 15.2-2201, however, say that "conditional zoning" permits reasonable conditions "in addition to, *or modification of*" those regulations (emphasis supplied). It is uncertain whether this is a distinction with a difference, but the specific provisions of the several enabling statutes may be read together, and

To this end, the Neighbors assert that the Town has enacted its conditional zoning Ordinance pursuant to Va. Code Ann. § 15.2-2296 *et seq*., and that accordingly there is no possibility that a proffer may modify (and thus make "worse") a provision of the Ordinance, because § 15.2-2297(A) says that proffers shall be "in addition to" the regulations provided for the zoning district or zone by the Ordinance. Op. Br., p. 24.

The Neighbors must acknowledge, however, that their contention as to the source of the Town's conditional zoning authority is not even technically correct. They quote the Ordinance with profound selectivity. It is true that § 11-3.9.17(2) says that

> [a]s a part of an *application* for rezoning or amendment to the zoning district map, the owner or owners of the property involved may, prior to a public hearing before the Town

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> proffered conditions may modify the otherwise applicable regulations in a particular district, if the local ordinance so provides. In Prince William, for example, the ordinance establishes basic height limitations in certain districts, but provides that they may be modified and increased from underlying ordinance requirements, if an accepted proffer so authorizes. . . . A few jurisdictions, based on this author's experience (most recently the Town of Culpeper), have permitted proffers to modify the provisions of an otherwise applicable ordinance.

The Neighbors suggest that the author of these remarks was of the view that a proffer could not be "in modification of" a provision of an underlying ordinance, but it is evident that his position was much more nuanced, and recognized that they most certainly could be so used and *are* being so used.

> Council, voluntarily proffer in writing such reasonable conditions, *in addition to* the regulations provided for the zoning district or districts as herein set forth, as he deems appropriate for the particular case to address impacts of the proposed use.

They cannot avoid the fact, however, that immediately prior to that section of the Ordinance, § 11-3.9.17 (1) says that

> [a]s part of a *petition* to rezone property and amend the official zoning map, the property owner may voluntarily proffer in writing certain conditions and restrictions on the use and development of his property, such conditions being *in addition to, or modification of,* the regulations provided for a particular zone or zoning district by this Ordinance.

The Neighbors say, however, that there is a magical and material difference between a *petition* to rezone property, and an *application* for rezoning, and that the Landowners here did not *petition* the Council, but only made *application* to it. Thus, they claim that although the Ordinance contains the explicit definitional language used in Code § 15.2-2201, it really does not matter because the Landowners submitted a "Land Development *Application*."[17] Op. Br., p., 28, n. 9. JA 332. This is simply a frivolous argument, because there is no difference between the two provisions and the Town has not created one. Whether one files a petition or an application for a rezoning, one is seeking an amendment of the zoning map, and if

[17] The Town does not even possess a form for a *Petition* to Rezone Land. It has only a Land Development Application on which one checks a box for "Zoning/Rezoning," or one of the other possible land use activities intended. JA 332.

an applicant is so moved, submits voluntary proffers with it. Va. Code Ann. § 15.2-2285.

Still further, according to its Ordinance the Town requires that "an application shall be filed for an amendment of . . . proffered conditions. Applications can be filed by any landowner subject to conditions proffered pursuant to § 15.2-2297, 15.2-2298, 15.2-2303 or 15.2-2303.1 and Section 1 of this Article." *See* 11-3.9.17(15).[18] This subsection, found under the same section that includes the very §§ 15.2-2296, *et seq.*, the Neighbors maintain constitutes the sole authority for The Town's conditional zoning scheme, references the *entire universe of Virginia conditional zoning enabling statutes*. A property owner could not amend a proffer submitted pursuant to other forms of condition zoning, such as § 15.2-2303, if he or she had not first *submitted and obtained approval* of a proffer under that statute.

The Town has thus recognized and incorporated into its Ordinance Va. Code Ann. § 15.2-2303, for which the Town qualifies under its terms,[19] which, as noted, is the first of the conditional zoning enabling statutes, and which says at the very outset that "[a] zoning ordinance may include reasonable regulations and provisions for conditional zoning *as defined in § 15.2-2201*." Emphasis added. The Town has

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[18] Provision for amendment of proffers is enabled by Va. Code Ann. § 15.2302.

[19] *See* note 11, above.

therefore expressly incorporated the State Code definition of conditional zoning in its Ordinance, and thus the ability for proffers both to be in addition to, and in modification of, the underlying zoning requirements.

III. Fundamental rules of statutory interpretation require the Court to read the conditional zoning enabling statutes to give localities the full extent of the authority contemplated by the General Assembly.

Even if statutory interpretation were yet required of statutes that incorporate the very definition that the Neighbors assert that it does not, the Neighbors ask this Court to read out of the conditional zoning enabling statute that they contend applies to the Town (and all other Virginia localities that may employ new, or new-old, conditional zoning systems), the ability to use proffers to "modify" zoning regulations.

To them, a modification can only mean an action increasing obligations and burdens on the community. They rely for this on a single circuit court opinion (*Clark v. Town of Middleburg*, 26 Va. Cir. 472, 476-78 (Loudoun Cty. 1990)) that is, unfortunately, inconsistent with a decision of this Court, discussed below.

The General Assembly has used the same relevant language in all three conditional zoning statutes.[20] Even granddaddy § 15.2-2303 says that localities may

[20] Va. Code Ann. § 15.2-2297 provides for the "voluntary proffering in writing, by the owner, of reasonable conditions . . . in addition to the regulations provided for the zoning district or zone by the ordinance[.] Section 15.2-2298 for

provide for the proffering of reasonable conditions "in addition to the regulations provided for the zoning district by the ordinance[.]" However, as noted above, by providing that a "zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201" the General Assembly has thus married the concept of proffers as being additional to the underlying zoning ordinance, with the statutory proposition that they can also modify its terms where the locality has so provided.

The three proffer enabling statutes must therefore be considered collectively to establish the intent of the General Assembly.

> When the language of a statute is unambiguous, we are bound by the plain meaning of that language. And if the language of the statute is subject to more than one interpretation, [this Court] must apply the interpretation that will carry out the legislative intent behind the statute.
>
> To ascertain its plain meaning, this Court evaluates a statute in its entirety "to place its terms in context" in order to "interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." ("It is one of the fundamental rules of construction of statutes that the intention of the legislature is to be gathered from a view of the whole and every part of the statute taken and compared together, giving to every word and every part of the statute, if possible, its due effect and meaning." (citation and internal quotation marks omitted)). This Court "presume[s] that every part of a statute has some effect, and

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high growth jurisdictions mirrors this language exactly, but also provides that high growth jurisdictions may elect to employ old conditional zoning under § 15.2-2303 if they so choose.

> [] will not consider any portion meaningless unless absolutely necessary."

May v. R.A. Yancey Lumber Corp., 297 Va. 1, 14 (2019) (internal citations omitted).

The key to interpreting Virginia's conditional zoning scheme, therefore, is to recognize that the General Assembly intended *each* of them to serve the same policy of advancing flexibility in rezonings, and that § 15.2-2303 and its incorporation of the statutory definition of conditional zoning set the stage for all that was to follow. In none of the versions of conditional zoning did the General Assembly mean to take away with one hand what it had granted localities with the other – the power to use conditional zoning to shape a rezoning application consistently with provisions by which its local ordinance authorized the use of the conditional zoning system, and to permit localities the maximum degree of flexibility necessary to shape a rezoning to accommodate its estimation of the public necessity.

Indeed, the Court has said that

> [i]n evaluating a statute . . . we have said that "consideration of the entire statute . . . to place its terms in context to ascertain their plain meaning does not offend the rule because 'it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" Thus, "'[a] statute is not to be construed by singling out a particular phrase.'"

Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 427 (2012) (internal citations omitted).

It is therefore proper, indeed necessary, for this Court to harmonize the General Assembly's use of the term "addition to" in all references in the enabling statutes with "modification of." The words "in addition to" mean generally "over and above," and "modification" means "a small alteration, adjustment, or limitation." Websters II New Riverside University Dictionary (1984). The difference is minimal. And in conditional zoning, *proffers of all kinds*, whether they add to or modify provisions of an underlying ordinance are conditions "in addition to" the zoning regulations otherwise applicable to a subject property. Once accepted by the governing body proffers are legislative enactments, and are therefore *additional* elements of the zoning ordinance applicable to the land to which appended. *Jefferson Green Unit Owners Ass'n v. Gwinn*, 262 Va. 449 (2001).

Still further, while the Neighbors maintain that the individual conditional zoning enabling statutes are the more specific of the pieces of legislation, as opposed to the definition of conditional zoning at § 15.2-2201, they have it exactly backwards. Op. Br., pp. 27-28. It is the *definition* that is more specific, and the three enabling acts that are the more general.[21]

> When one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific

[21] The three forms of conditional zoning each have different restrictions on its use, but they all permit the use of "conditional zoning."

> manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.

Frederick County Sch. Bd. v. Hannah, 267 Va. 231 (2004). Any other interpretation than that which the Council and Landowners submit is correct, would fail to harmonize the term "modification" used in the definition of "conditional zoning" with its compatriot "in addition to."

IV. The Neighbors offer only their opinion that the modification of the proffers in this case resulted in harm to the public weal.

As further observed below, whether a modification to a proffer actually creates a greater burden on surrounding properties, or lightens it, is often in the eye of the beholder, and thus for the governing body to judge. *See also*, pp. 43-47, below. In continuing maintenance of their claim that a proffer cannot be in modification of the Ordinance, because they can only be offered to ameliorate the adverse impact of development, the Neighbors offer their completely subjective opinion that the modification to the Land Use Mix the Council approved *must necessarily* worsen their situation. Op. Br., pp. 27-32.

However, among other things, the underlying Industrial zone applicable to the land before the Rezoning permitted a density of development of 0.60 FAR.[22] The

[22] FAR is, of course, floor area ratio, the amount of land coverage permitted per gross acre. An FAR of 0.6 on 32 acres would permit development of more than

density under the Rezoning as it was proposed, and approved, authorized a density of FAR of 0.289+/, or less than half the development density that could have been developed by right. JA 38.[23]

At the public hearing before the Council, the then Director of Planning and Community Development (now Town Manager) told the Council, among other things, that

> the by-right transportation would generate anywhere from 75 to 90 percent of the anticipated trips. The by-right development could be more intense with greater square footage numbers. It could potentially be less attractive and it could create more of an – in industrial type impact with truck traffic on the adjacent neighborhood.

JA 231.

While the Neighbors insist that they would prefer to live with the kind of uses that have so far been developed on Walker Drive in the vicinity of their homes, they have no guarantee that the uses of the Property would replicate any previous pattern of development. Thus, they write that "this suit was brought by neighboring homeowners in a quiet residential area, who would share Walker Drive with the

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836,000 square feet of building space. An FAR of .0289, however, would permit not more than 402,800 square feet, less than half the potential development intensity.

[23] Even the Comprehensive Plan, which could not limit by-right development under the Industrial zone, contemplated development at a density of .35 FAR. JA 38. The approved development was, effectively, a low density mix of uses.

proposed development. They did not object to the light industrial uses permitted by right and anticipated by the Comprehensive Plan, like medical offices and upholstery shops." Op. Br., p. 30.[24]

This assumes what they could never prove, that these are the uses with which they were destined "to share Walker Drive," since they could just as readily have found themselves confronted with conference centers, contractor's office and warehouses without outdoor storage, crematoria, flex office and industrial uses, wholesale establishments, storage warehouses, distribution centers, or furniture moving enterprises, all of which are by right uses in the Town's Industrial District, and all of which would produce greater truck traffic than the approved uses at a density perhaps twice that of the approved Rezoning. JA 220, 599-600. There is no requirement for open space in the Industrial District, but there is a requirement for 20% in the I-PUD, which the Landowners have provided.

The choice was not theirs to make, but the Council's.

[24] It is irrelevant to a by right use what the Comprehensive Plan may have to say about future uses. A use by right simply requires a site or subdivision plan and building permits.

V. The enabling legislation requires that the local ordinance specify where conditional zoning may be employed and for what.

Conditional zoning legislation is not self-effectuating and must be adopted in a local ordinance. "A zoning ordinance may include and provide for the voluntary proffering . . . of reasonable conditions . . . for the zoning district or zone" in which a use is proposed. *E.g.*, § 15.2-2297. It is not possible for a rezoning applicant simply to propose to alter an entire zoning ordinance classification so as to change its character from residential to commercial, or to insert industrial uses in residential zones where they are not otherwise permitted, solely by use of a proffer – no zoning ordinance of which counsel are aware does so. The local ordinance must provide for what a proffer may do.

The Town has done this both generally, in its adoption of a conditional zoning program, and more specifically in connection with the I-PUD *waiver* provision, as has been noted elsewhere. The ability to modify the land use mix is expressly authorized by § 3-5.2.4.3(5) of the Ordinance, and in this case, it was accomplished by means of a proffer.

VI. This Court has already addressed this question and has approved the use of a proffer for the purpose to which Warrenton has put it.

This case thus presents the targeted question as to whether a locality may authorize a modification or waiver of a provision of its Ordinance, using a proffer, when the Ordinance so provides.

It turns out that this use of a proffer to effect a waiver is precisely the ordinance vehicle that Fairfax County used to consider "deviations" from otherwise mandatory setback requirements along the Dulles Airport Access Road. That very process was at the heart of *Bd. of Supervisors v. Robertson*, 266 Va. 525, 528 (2003). Mr. Robertson owned property along the DAAR but was subject to a 200' setback requirement. He sought a "deviation" from that setback to reduce it, and made application to the Board. He was denied and brought suit.

This Court upheld the denial. It held, among other things, that whether a governing body approves, or rejects, an application proposing such a deviation (here substitute "waiver" for "modification" in the sense that it was a *reduction* in the otherwise mandatory setback) from the provisions of an ordinance is a legislative decision subject to review under the fairly debatable standard. The Court concluded that "[h]aving examined the record, we find sufficient evidence of reasonableness to make the Board's rejection of Robertson's request for a deviation a fairly debatable issue," *i.e.* the evidence "would lead objective and reasonable persons to reach

different conclusions." 266 Va. at 537 (internal citations omitted).[25] Implicit in *Robertson*, and perhaps even explicit (for the Court could not have decided the case as it did if it saw the matter otherwise) is the recognition that when a locality elects to provide for such "deviations" from the mandatory provisions of an ordinance, *it may be done by proffer when so permitted*.

The Neighbors' argument that the Council cannot use the conditional zoning system to accomplish the kind of modification to its Ordinance that it has expressly authorized, cannot be reconciled with *Robertson*.

VII. This is not a *Renkey* case, despite the Neighbors' attempts to make it so.

It has become commonplace in land use litigation for plaintiffs, who recognize that an outright challenge to a legislative action is difficult at best when subjected to the fairly debatable standard, to recast all errors as claims that the locality violated its ordinances. Thus, they seek to turn garden-variety claims into *Renkey* challenges, and assert that essentially any violation of a local ordinance is fatal to a legislative action. *Renkey v. Cty. Bd.*, 272 Va. 369 (2006). Here, the Neighbors claim that

[25] In *Robertson*, of course, the Board rejected Robertson's request for a "deviation" from an ordinance requirement by proffer, and here the Council *approved* a "modification" request specifically authorized by proffer. There is no consequential difference. Moreover, the trial court in this case had before it the entire legislative record from which it could conclude that reasonable people could differ as to the merits of the decision – the fairly debatable standard was met.

because the Council violated its own ordinances in one or more particulars, its decision was necessarily and unavoidably arbitrary, capricious, and unreasonable to fatal effect. Each of their Assignments of Error, 1(a) and (b), 3, and 4 are such challenges.

In *Renkey*, this Court held that if a locality violated its own zoning ordinance *in the* particular *manner identified in that case*, its action would be arbitrary and capricious, and therefore void. But the facts of that case are crucial to an understanding of what this Court did. A provision of the Arlington County Zoning Ordinance required that before a property could be rezoned to the C-R Class Designation, it first had to be zoned to the C-3 District. The Arlington Board had thus established a rezoning "*eligibility requirement*," and then ignored it, bypassing that initial step. Having failed to satisfy the eligibility requirement, the Court held that the C-R rezoning necessarily failed.

But in *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604 (2013), this Court declined to apply *Renkey* because "the cited provisions do not restrict the authority of the Board to act." *Id.* at 621. The distinction is of great significance here, since none of alleged violations of the Ordinance that the Neighbors identify constitutes a similar "eligibility requirement." While the Neighbors actually cite *Newberry Station* in support of their contention that any

violation of an ordinance is fatal,[26] the case stands for precisely the opposite proposition for none of their asserted violations creates such a restriction on the Council's authority to act on the application.

The *Robertson* case, above, makes plain that the Town did not violate its own ordinance at all, and so there can be no *Renkey* claim to be made.

Assignment of Error No. 3

THE COUNCIL RECEIVED AND ACTED UPON THE STATUTORY RECOMMENDATION OF THE COMMISSION.

I. The Town did not err in failing to obtain a specific recommendation from its Commission as to the Land Use Mix, and it was not bypassed. It had the necessary information, and it is not required to have seen or considered the version of that Mix that was ultimately before the Council.

The Neighbors argue that there is yet another fatal error in these proceedings, since the *specific terms* of the waiver of the Land Use Mix, that is the *exact number* by which the various components of industrial, commercial, residential, and mixed-use residential, was not presented to and ruled upon by the Commission, and therefore the Council was stripped of any power to grant a waiver of that Land Use Mix.

[26] Op. Br., p. 22.

The Neighbors rely on §3-5.2.4.3(5) of the Ordinance: the "Town Council shall, upon recommendation of the planning commission, have the authority to modify (making the criteria more, less or equally restrictive) or waive, the criteria established §3-5.2 et seq. for Commercial or Industrial Planned Unit Development[.]"

The Neighbors argue first that the Council was powerless to act without a *specific* recommendation from the Commission as to a waiver and of the percentages in the Land Use Mix, as opposed to its recommendation as to the rezoning application itself. Second, they claim that even if the Commission was presented with information as to the Land Use Mix, because it was never shown the *final* calculations, which were ultimately approved by the Council, the Council was powerless to act upon the application unless and until the Commission was afforded a second opportunity to offer its recommendation on the version of that Mix *that the Council negotiated*.

After multiple work sessions of the Commission, the Application was brought to a public hearing on February 21, 2017. The waivers were by proffer and the proffer statement was presented to the Commission. A Master Development Plan, containing the mix of uses, was presented to the Commission. The Commission voted to recommend denial of the Application without any separate vote on any waivers, sought or proposed.

The Neighbors can point to no statute or case law that supports their arguments. The Council agrees with the proposition that it must obtain a recommendation as to a rezoning from its Commission, for that is statutorily required. Va. Code Ann. § 15-2-2285(B) tells us that "[n]o zoning ordinance shall be amended or reenacted unless the governing body has referred the proposed amendment or reenactment to the local planning commission for its recommendations."[27]

The structure of the Ordinance is, however, consistent with state law in that it calls for the Commission's recommendation on land use issues in a number of matters, as it is required to do. Neither the Council nor the trial court interpreted §3-5.2.4.3(5) of the Ordinance to create a condition precedent for the Council to grant waivers. The Council received the Commission's recommendation to deny the Application and negotiated and approved the Proffers and the waiver. The trial court ruled that the Neighbors' argued interpretation would create a veto power in the Commission which, by law, serves "in an advisory capacity[.]" JA 824. This Court

[27] It should be noted that "[f]ailure of the commission to report 100 days after the first meeting of the commission after the proposed amendment or reenactment has been referred to the commission, or such shorter period as may be prescribed by the governing body, shall be deemed approval[.]" Va. Code Ann. § 15.2-2285(B). There is, then, at least one circumstance in which the commission's affirmative recommendation is not required.

has said that the role of a Commission is advisory and not legislative. *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 19 (2012).

It is also clear from the Statement of Facts, that the Commission was neither ignorant nor unaware of the Landowners' application for a change to the Land Use Mix when the Application was before it. Contrary to representations that it had no information with respect to what was then proposed, the September 19, 2016, Master Development Plan (JA 641) showed relevant information from which the Commission could have understood the nature of the request. After the Application had left the Commission, there were further revisions to the Proffer Statement, and Master Development Plan, and to the Land Use Mix, negotiated by the Town staff and the Council, such that a final proposal was presented to the Council, which used its legislative judgment to conclude that the proposed waiver was acceptable.

It should also be noted that when the Commission made its recommendation, it did not take separate action on the Land Use Mix, either to approve or reject it, or even to take note that it did not have sufficient information upon which to act. It simply made its recommendation to the Council. JA 739. It is the Neighbors who have conjured up a new responsibility for the Commission that it did not presume for itself.

II. This Court has made it clear that the functions of a Commission are to be strictly construed and cannot limit the legislative authority of the governing body.

The Neighbors' argument that the Council does not even have the authority to act on a *waiver* of the Land Use Mix without the Commission's say so runs afoul of this Court's prior, and quite similar, jurisprudence.

In *Sinclair, supra*, the Court observed that the General Assembly has allowed localities to delegate certain functions to planning commissions, but only those functions. Planning commissions prepare comprehensive plans to recommend to the local governing body. Va. Code Ann. § 15.2-2223. They may also prepare an official map. Va. Code Ann. 15.2-2233. They may consult with the local governing body about the creation of an agricultural and forestal district. Va. Code Ann. § 15.2-4305. They may prepare and recommend a subdivision ordinance. Va. Code Ann. § 15.2-2251. They also may prepare and recommend a zoning ordinance for adoption or recommend that the local governing body amend the zoning ordinance, as the Warrenton Commission did here, Va. Code Ann. §§ 15.2-2285, -2286(A)(7).

> But after reviewing the seventy sections in which the term "planning commission" appears in Title 15.2 of the Code, *we have not identified a single provision of state law authorizing planning commissions to consider and rule upon departures from a zoning ordinance*.
>
> * * *
>
> [The General Assembly] has not . . . authorized local governing bodies to delegate to planning commissions

> approval of departures from zoning ordinances or any other powers to administer or enforce an existing zoning ordinance.

Sinclair, 283 Va. at 582-584 (2012) emphasis added.

Here, the Council did not affirmatively delegate to the Commission the authority to grant or deny the waiver of the requirements for the Land Use Mix, or even to make a separate and specific recommendation upon that and that alone. The Neighbors contend that the Council was powerless to act upon the Rezoning in this case unless it had a *specific recommendation* from the Commission either as to the waiver of the Land Use Mix, or even more critically, that Council was powerless to act without the Commission's later recommendation as to the *specific Land Use Mix percentages* the Council had negotiated and had before it when it voted on the Rezoning on July 11, 2017.

The Neighbors' argument is the functional equivalent of a claim that the Council has delegated its legislative authority over any waiver request to the Commission, for without the Commission's blessing of a specific waiver or number, the Council is constrained in the exercise of that authority. As this Court has said, this is not a power that can be granted to a Commission.[28]

It is also not a delegation that needs to be read into the Warrenton Ordinance. That Ordinance requires the "recommendation" of the Commission in not fewer than

[28] This, too, was the view of the trial court. JA 824.

seven separate circumstances, including that cited by the Neighbors.[29] In none is there any suggestion that its recommendation is required with respect to anything other *than the application before it*, as opposed to separate pieces thereof, or as to what may be finally considered by the Council. The Council has, as in this case, not interpreted the recommended language to set any condition precedent to the Council's authority to act, except that all rezonings must be referred to the Commission for recommendation prior to the Council's consideration.

As a purely practical matter, a rezoning application often changes several times between the moment it is filed, a planning commission holds its public hearing on it, and the time the governing body takes it up. While the Commission is held to a statutory time limit for its consideration of a case, there can be delays of months between the planning commission and the governing body, during which there are negotiations with citizens, staff, and members of the governing body itself. Elections can intervene. Once a public hearing has been held by the planning commission, and its recommendation received, the governing body of a locality must balance public and private interests to the benefit of the entire community, and in the exercise of its legislative authority on behalf of the people it represents.

[29] These are § 3-5.2.4.2 (5); § 3-5.2.4.2 (6); § 11-3.9.1; § 11-3.9.8; § 11-3.10.7; § 11-3.10.8; and § 11-3.11.3.

The Neighbors complain that the Council never sent the Application back to the Commission after its recommendation had been given, despite the changes made to it, and that the final submittal differed from what the Commission had reviewed. Op. Br., pp. 13, 16-17. They cannot point to any case, or statute, that requires a resubmission to the Commission, because there is none.[30]

Assignment of Error No. 4

THE COUNCIL CONCLUDED THAT THE MASTER DEVELOPMENT PLAN COMPLIED WITH THE ORDINANCE, AND THAT THERE WAS AMPLE EVIDENCE TO SUPPORT THE REASONABLENESS OF ITS DECISION AS TO THE MODIFICATION OF THE LAND USE MIX

I. Whether there was a "unified and cohesive" Master Development Plan for the Property was a question for the Council, and not for the Neighbors or the trial court, and it is most assuredly not a question for this Court.

The Neighbors maintain that because §3-5.2.4.3(2) of the I-PUD says that "[t]he [Master Development] Plan shall provide for integrated development of all of the proposed uses and the coordination of infrastructure as a cohesive entity, rather than separate components or independent cells of land use[]" and, in their opinion it

[30] "The commission shall hold at least one public hearing on a proposed ordinance or any amendment of an ordinance, after notice as required by Section 15.2-2204, and may make appropriate changes in the proposed ordinance or amendment as a result of the hearing." Va. Code Ann. § 15.2-2285(A). In this regard, once the Commission has conducted its "one public hearing" and made its recommendation, its job is done. This is very similar to what happened at the governing body level in *Arogas, Inc. v. Frederick Cty. Bd. of Zoning Appeals*, 280 Va. 221 (2010).

did not, because it "treated the land bays differently," then the legislative judgment of the Council must be overturned. Op. Br., p. 38.

Remarkably, the Neighbors then say the following:

> It's true that it was not up to the Homeowners or the trial court to determine what should or should not be in the Master Plan. But it *was* up to the Town Council—and the Town Council adopted Ordinance § 3-5.2.4.3(2), defining what that Master Plan needed to cover. By treating the land bays differently and not blending Land Bay E and the Existing Land Bay in with the rest of the project, the Defendants [the Town Council and the Landowners] breached this requirement.

Op. Br., p. 39 (emphasis in the original).

If it was not up to the Neighbors or to the court below to second-guess the elected Council as to the sufficiency of the unification and cohesion of the Master Development Plan for a major land use proposal, that married existing and proposed land uses into a planned development, one is exceptionally hard put to understand why it would be up to this Court to do so, and it is doubtful the Court would be so inclined. The Council knew what it was faced with, and made its judgment upon it.

II. There was ample evidence of record from which the trial court could find that the Council's decision was fairly debatable.

The Council is to be sustained when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. The only issue in this regard actually before this Court is whether the

Council's decision to accept the Master Development Plan, to grant the waiver of the Land Use Mix, and to approve the Rezoning, met this standard.

The Neighbors, faced with an extensive legislative record, can only muster a conclusory statements that land bays were treated differently because "existing buildings in one land bay were distinct from other land bays." Op. Br., P. 39. They then allude to the other ways in which they are displeased with the decision. The trial court reviewed the legislative record and concluded that the Master Plan was a "guide" and that it was not the trial court's job to micromanage the Council in what the Master Plan (including the Land Use Mix) should or should not contain, "unless it has a direct impact upon the" Neighbors. JA 826. Given that the Neighbors admit that it isn't for them to second-guess the Council as to the Master Plan, it follows that they cannot explain how that Plan has a "direct impact" on them.

The Neighbors do complain that there is too little of this and too much of that permitted by the Council in connection with the Rezoning, and that they will suffer a multiplicity of harms from what has been approved. Op. Br., p. 31. But the voluminous record that was examined by the trial court, especially since that record had been "enlarge[d]" by the Neighbors themselves by agreeing to oyer, containing information both for and against the Rezoning (JA 879), convinced the lower court that "[i]n point of fact, the Court would have difficulty visualizing a situation in which verbal testimony could materially amplify or expand upon the written

documentation already submitted." *Id.* The legislative record was sufficient upon which, after three Complaints, to decide the case.

As to the Rezoning in general, the trial court concluded, and the Town staff had agreed, for example, that the Landowners had offset their potential traffic impact from the proposed development. JA 882. The Landowners had negotiated and proffered improvements to Walker Drive and the intersections of surrounding roads, including contributions to the future construction of roundabouts both at the principal entrance to the project, and at Walker Drive and East Lee Street. JA 89-90.

The lower court also considered the Neighbors' claims that they would be impacted adversely by increased traffic, light, and noise from the development, even though their "quiet" neighborhoods are situated on a four lane "major collector roadway." JA 883. Having reviewed the legislative record that the Neighbors had included in their own pleadings, that court found that their allegations of harm were either "conclusory or speculative" and that it was not for the judiciary to weigh such claims, especially "after the town had engaged in a long and arduous hearing process, in which these issues and their mitigation were discussed." *Id.* It noted that among the things proffered were buffers designed to mitigate the impact of the effects of which the Neighbors complain. *Id.*

The evidence was, moreover, that *even without the Rezoning*, even with the by-right development of the property 90% of the anticipated vehicle trips would

eventuate during the weekday evening hours, 75% would still occur at Saturday mid-day, and 80% of the daily total would yet develop. JA 224 (comments of the Director of Planning at the Council's public hearing). Thus, the Council was aware that it, and the Neighbors, were facing significant traffic growth at the site and the neighborhood regardless whether the Property was rezoned, and facing it without the contributions to traffic impact mitigation to which the Landowners were committed.

This evidence considered by the court below is directly related to the Neighbors' central argument that the modification to the Land Use Mix is arbitrary, capricious, and unreasonable, and not fairly debatable. But the harms that they complain of stem in truth from the fact of the Council's approval of the Application at all. They cloak their real objection in the singular claim that "the Developers proffered conditions that relaxed otherwise applicable zoning restrictions by reducing the minimum industrial use mix in the I-PUD district from 50% to 39.32% (by their calculations) or less (by the Homeowners' math). JA 96, 795."[31]

[31] The "Homeowners' math" is based on their complaint that the staff and the Council treated restaurants as industrial, as opposed to commercial, uses for purposes of calculating the Land Use Mix, (Op Br., p. 16), although they can show no place in the record where the Town ever treated restaurants otherwise. This was the way staff, and not the Applicant, chose to classify that use in determining the Land Use Mix throughout the Application review process. The "Developers" used the "Town's math."

But their argument assumes what it needed to demonstrate, and could not, from the record they appended to their Twice Amended Complaint – *that the alteration in the Land Use Mix to produce a balanced, planned, development of industrial, commercial, and residential uses, from a minimum of 50% industrial to just under 40% of the total land area, of commercial uses from a maximum of 30% to just over 25%, and of mixed use residential*[32] *from a maximum of 35% of 35.5%, was so irrational that reasonable people simply could not disagree with them, and that this Court must step in to stop the Council from so acting.*

As noted throughout this brief, the Council could have concluded in its legislative wisdom, and despite the Neighbors' protestations to the contrary, that the alteration in the Land Use Mix offered a *better* composition of proposed uses in the near-and long term interests of the Town, in what was clearly intended to be, and based on the Council's approval desired to be, a new residential, office, entertainment, and retail community. It could have judged, and did judge, that a revision in the mixture of uses was, indeed, a choice to *ameliorate* the potential impact of by-right industrial uses along a major collector road, in favor of something more innovative and suitable. The record reviewed by the trial court was sufficient to the purpose.

[32] The Landowners proffered that all of the residential structures would have non-residential uses on all or a portion of the first floor. *See* note 3, JA 96.

CONCLUSION

For the reasons set forth above, the Council and the Landowners pray that the decision of the Court below be affirmed, and the case dismissed.

Respectfully submitted,

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RULE 5:26(h) CERTIFICATE

The undersigned counsel hereby certifies that on this November 18, 2019, in accordance with Rule 5:26(h) of the Rules of this Court, an electronic version, in Adobe Acrobat Portable Document Format ("PDF") format, has been filed with the Clerk of this Court pursuant to Rule 5:26(e) and served on:

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