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In the
Supreme Court of Virginia

Record No. 190580

KATHLYN ROWLAND, LEE T. ROWLAND, ELIZABETH S. USSERY, ELBERT MICHAEL USSERY, CRAIG A. UPDYKE, AND CAROL HEGWOOD,

Appellants,

v.

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

Appellees.

Reply Brief

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Introduction

The Appellees urge this Court to adopt a sweeping view of local-government authority. As we showed in our Opening Brief, the relevant statutes and ordinances limit allowable proffers to those "in addition to" existing zoning regulations. The Zoning Ordinance says that the Town Council can modify I-PUD land-use requirements only "upon recommendation" of the Planning Commission. And it says that every I-PUD needs a Master Plan that provides for integrated, cohesive development. These are reasonable restrictions on the Town Council's power. They mean exactly what they say.

The Appellees disagree. Touting their own "legislative wisdom," Br. 46, they explain that their pursuit of the "public weal," Br. 27, gives them great latitude to interpret these restrictions. And so they interpret them right out of existence. The Appellees conclude that a proffer "in addition to" existing zoning requirements is the same as one in "modification of" those requirements—encompassing "*proffers of all kinds*, whether they add to or modify provisions of an underlying ordinance . . .." Br. 26 (emphasis in original). They argue that the Planning Commission's recommendation doesn't actually have to relate

to the modification sought—the Planning Commission just needs to make some recommendation on a rezoning, and it's off to the races. Br. 40. And on the Appellees' account, the whole discussion of integrated development as a cohesive entity is just so fuzzy that they win as a matter of law.

In support, the Appellees offer straw men and strained interpretations of straightforward cases like *Board of Supervisors v. Robertson*, 266 Va. 525 (2003), and *Newberry Station Homeowners' Association v. Board of Supervisors*, 285 Va. 604 (2013).[1] On top of these overarching problems, their arguments suffer from the particular defects discussed below.

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[1] These strawmen include Br. 23 (accusing the Homeowners of arguing that the conditional-zoning statutes do not incorporate a definition, when the Homeowners addressed that definition at length at Opening Br. 25-29); Br. 23 (arguing that to the Homeowners, "a modification can only mean an action increasing obligations and burdens on the community," which is the opposite of their position); Br. 38 (claiming that the Homeowners argue "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" when the Homeowners argued the opposite at Opening Br. 34-35); Br. 39 (insisting that the Homeowners argue that "without the Commission's blessing of a specific waiver or number, the Council is constrained in the exercise of [its] authority" when the Homeowners argued the opposite at Opening Br. 34-35).

1. The Appellees misunderstand the standard of review.

The Appellees' arguments turn on two key misunderstandings of the standard of review. First, they forget that this is an appeal from a judgment sustaining a demurrer, so the facts must be viewed in the light most favorable to the Homeowners. See, e.g., *EMAC, L.L.C. v. City of Hanover*, 291 Va. 13 (2016). Yet the Appellees present the facts in the light most favorable to themselves, resolving conflicts their way.[2] They quibble with land-use calculations, as if the Court could work out those factual disputes in their favor. Br. 45. And they pepper their arguments with factual assertions outside the Record. E.g., Br. 40.

Second, the Appellees misunderstand *Renkey v. County Board of Arlington*, 272 Va. 369 (2006), and *Newberry Station*. Those cases hold that "when a legislative act is undertaken in violation of an existing ordinance, the board's 'action [i]s arbitrary and capricious, and not fairly debatable, thereby rendering the [legislative act] void and of no

[2] For example, while the Record shows that the rezoning affected 15 parcels, JA 38, the Appellees insist that it affected only four. Br. 1 & n.1.

effect."[3] *Newberry Station*, 285 Va. at 622 (quoting *Renkey*, 272 Va. at 376). *Newberry Station* teaches that a locality acts arbitrarily and capriciously when it acts outside the authority conferred by the zoning ordinance. *Id*. at 622-23. But when the locality applies standards in the zoning ordinance, its actions are presumptively valid. *Id*. at 623.

Here, all three Assignments of Error challenge actions outside the Town Council's authority. Assignment 1 challenges the Town Council's acceptance of invalid proffers. It presents a pure question of statutory interpretation. Assignment 3 challenges the Town Council's grant of a modification without the required Planning Commission recommendation. And Assignment 4 challenges Town Council's failure to require a Master Plan that complies with Ordinance § 3-5.2.4.3(2).

2. Developers cannot use proffers to avoid otherwise applicable zoning requirements.

A zoning ordinance can "provide for the voluntary proffering . . . by the owner, of reasonable conditions . . . in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a

[3] The Appellees insist that *Newberry Station* stands for "precisely the opposite proposition." Br. 34. But this is a quotation from the opinion. Either the Court was confused when it wrote these lines, or the Appellees have misread *Newberry Station*.

rezoning or amendment to a zoning map." Code § 15.2-2297; see also Code § 15.2-2298 (same), Code § 15.2-2303 (zoning ordinance may provide "for the adoption . . . of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered . . . by the owner of the property").[4]

This language means exactly what it says: A developer may proffer conditions over and above the existing zoning requirements.

At the same time, Code § 15.2-2201 says that 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."

These Code sections are easily harmonized. Code § 15.2-2201 provides a general definition of "conditional zoning." The more specific

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[4] The Appellees insisted below that *only* Code § 15.2-2297 applied here. R.5237-38; see also R.5694-95 (conceding error on that point). They've made a complete about face, now complaining that *only* Code § 15.2-2298 and Code § 15.2-2303—and not Code § 15.2-2297—govern. But since all three enabling statutes contain the same language requiring that proffers be "in addition to the regulations provided for the zoning district," this reversal cannot save their argument.

enabling statutes authorize zoning ordinances to allow the proffering of reasonable conditions "in addition to" existing zoning regulations. If there is tension between them, the enabling statutes control. They are more specific, because Code § 15.2-2201 is the general definitional section for all of Title 22. It defines "conditional zoning" within the overall legislative zoning process. The narrower enabling statutes specifically define what sort of proffers a zoning ordinance may allow.

The Appellees disagree, seeming to argue that "modification" and "in addition to" mean the same thing. Br. 26. They do not. *Webster's Third New Int'l Dictionary* 24, 1452 (2002); see also Opening Br. 25-26. Not all modifications are additions; some, for example, are deletions. And not all additions are modifications: Some are so substantial that they are no longer mere modifications but major changes. Interpreting the terms to mean the same thing would render one of them meaningless, in violation of the canon against surplusage. See, e.g., *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 14 (2019) ("This Court presumes that every

part of a statute has some effect, and will not consider any portion meaningless unless absolutely necessary.") (cleaned up).[5]

And it only makes sense that proffers would have to be "in addition to" existing zoning regulations. After all, proffers are just "voluntary commitments made by landowners . . . to facilitate approval of conditional zoning and rezoning requests by ameliorating the impact of development of their property on the local infrastructure and the character and environment of adjoining land." *Arogas, Inc. v. Frederick Cty. Bd. of Zoning Appeals*, 280 Va. 221, 227 n.2 (2010). A landowner can't voluntarily commit to do *less* than the law requires. Thus, a permissible proffer is one that commits to restrictions in addition to baseline zoning requirements. That is the type of modification that the conditional-zoning statutes allow.

Most localities seem to recognize this. The LGA tells us that proffers are common, and that most "routinely take the form of increased setback requirements, enhanced landscaping or buffering requirements, reduced building heights, the elimination of certain uses otherwise

[5] The Appellees' argument that Ordinance § 11-3.9.17(1) and (2) mean the same thing, even though they use different words, fails for the same reason. See Br. 20-22.

permitted in the district, etc." LGA Br. 8. These are exactly the types of proffers the statutes allow because they stand in addition to other zoning regulations. They commit the developer to do more than the zoning ordinance requires.

This harmonization also answers the LGA's parade of imponderables. The LGA worries that it will be impossible to tell if a given proffer is more or less restrictive, positing a hypothetical in which a developer offers to double the setback but exceed the building height limit. LGA Br. 9. Is this more or less restrictive? That's a question for the philosophers. But the proffer is not "in addition to" existing zoning regulations because it violates the building height limit. By proffering a violation of that restriction, the developer would be committing to do less than the law requires. So its proffer would be impermissible.

Consistent with this understanding, an applicant cannot proffer a revision of the land-use mix requirements for an I-PUD under Ordinance § 3-5.2.3.4(5). As the Appellees concede:

> 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.

Br. 30. Exactly. Here, the PUD ordinance specified land-use mixes for I-PUDs and C-PUDs. It follows from the Appellees' concession that the Developers could not override those requirements and rewrite the zoning scheme with a proffer. Yet that's exactly what the trial court let them do.

The Appellees try to use *Board of Supervisors v. Robertson*, 266 Va. 525 (2003), to prop up their arguments. On their telling, *Robertson* is "essentially identical" to this case, and the *Robertson* Court "held that it is permissible to use a proffer to effectuate a waiver or 'deviation' from the otherwise mandatory provisions of a local ordinance . . .." Br. 12.

Not so. *Robertson* involved a developer's request for a "deviation" from a setback requirement—which the Court treated as a request for a special use permit, not a conditional rezoning. 266 Va. at 531-32, 533-534 & n.4. The Board of Supervisors denied the request, but the circuit court overruled its decision, finding that it was arbitrary and capricious. *Id*. at 527, 531. This Court reversed, holding the developer to the existing regulations under the zoning ordinance. *Id*. at 527. It did so because the developer could not meet the standard of review (in that

case, fairly debatable). *Id*. at 537. So if *Robertson* is analogous to this case, the *Robertson* Court endorsed the Homeowners' position.

Even so, the Appellees speculate that the *Robertson* Court must have found it permissible to use a proffer to reduce a setback requirement in the first place. Otherwise, they argue, it would not have bothered analyzing the sufficiency of the applicant's proof. Br. 31-32, 34. This misunderstands appellate review. Appellate courts decide cases on the narrowest and best grounds available. *Rastek Constr. & Dev. Corp. v. Gen. Land Commer. Co., LLC*, 294 Va. 416, 423 (2017). To get there, they often engage in "assuming but not deciding" exercises, *Luginbyhl v. Commonwealth,* 48 Va. App. 58, 62 (2006), just as they did in *Robertson*, 266 Va. at 533-34. The narrowest and best ground of decision in *Robertson* was the standard of review. The Court decided the case on that basis without answering broader questions of statutory interpretation. That does not mean that it endorsed the applicant's argument. It certainly does not mean that *Robertson* stands for the unstated proposition that developers can use proffers to void zoning regulations.

And while the Appellees and the LGA do their best to conflate special use permits and proffers (Br. 31-32, LGA Br. 11-14), those devices are not the same. In the Town of Warrenton, special use permits are governed by Ordinance § 11-3.10, while conditional zoning is governed by Ordinance § 11-3.9.17. They have different application requirements. Ordinance § 11-3.10.2. Here, the Developers pursued a rezoning, not a special use permit. JA 332.

3. The Town Council was authorized to modify land-use requirements only on Planning Commission recommendation.

In all events, the Ordinance explains how to change the I-PUD land-use mix, and it's not through a proffer: "The Land Use Mix may be modified pursuant to § 3-5.2.4.3." Ordinance § 3-5.2.4.1. Section 3-5.2.4.3, in turn, says that the "Town Council shall, upon recommendation of the planning commission, have the authority to modify . . . or waive, the criteria established in § 3-5.2 et seq. for" C-PUDs and I-PUDs. Ordinance § 3-5.2.4.3(5).

Once again, this language means what it says. It limits the Town Council's authority to act under *Renkey*. The Appellees complain that giving the text its plain meaning would constitute an impermissible

delegation of legislative authority. Br. 38-41. That's wrong because the Town Council doesn't have to follow the Planning Commission's advice. It just has to get that advice in the first instance. This fits the Planning Commission's role as an advisory body, Code § 15.2-2210, as well as a raft of statutes authorizing planning commissions to make recommendations to their local governing bodies, see Code §§ 15.2-2204, 15.2-2229 15.2-2234, 15.2-2235, 15.2-2251, 15.2-2253, 15.2-2285, 15.2-4311.

As we showed in our Opening Brief, the Planning Commission could not have made any such recommendation here because the Developers did not present their proposed land-use mix to the Commission at its February 21, 2017 hearing. Opening Br. 8-13, 33-34; JA 176, 660, 674.

The Appellees argue that the proffered land-use mix was before the Planning Commission after all, because it was part of the Developers' September 19, 2016, Master Development Plan. Br. 7-9, 35-37. That's wrong for three reasons. First, the Master Development Plan that the Planning Commission considered was the December 1, 2016, version, which did not include land-use mixes—not the September 19, 2016, version, which did. JA 167, 659-60, 674. Second, Town staff repeatedly

stated that they did not have information on the proposed land-use mix. E.g., JA 167, 176, 660, 674. Third, the land-use mixes in the September 19, 2016, Master Development Plan differed from those the Town Council later considered and approved:

Use Type	**Estimated Use % 9/19/2016 MDP (JA 641)**	**Approved Use % (JA 60)**
Industrial	45.2%	39.32%
Commercial	33.5%	25.19%
Mixed Use Residential	21.3%	35.49%

So even if these numbers had been before the Planning Commission at the February 21, 2017, hearing, they would not have helped the Appellees. On top of that, Planning Commission did not make a recommendation on the land-use mix. It voted to recommend denial of the whole rezoning, stating its reasons—which did not include the land-use mix. JA 40, 738.

4. The Town Council impermissibly approved a Master Development Plan that did not provide for unified, cohesive development.

Finally, Ordinance § 3-5.2.4.3(2) says that an I-PUD needs a Master Plan that "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." Ordinance § 3-5.2.4.3(2).

The Developers' Master Plan did not comply with this provision. As Town staff noted, "For transportation, trails, signage, open space, design, Property Owners Association, and other components, the applicant has treated the existing buildings and Land Bay E as 'sufficiently distinct' from Land Bays A-D." JA 60. The Developers included an internal trail network for Land Bays A-D, but not for Land Bay E or the Existing Land Bay. JA 530. The Developers imposed a unified sign program for Land Bays A-E but excluded the "Existing Land Bay" from its façade signage requirements. JA 43, 555. They proffered consistent building exterior design, materials, and features for Land Bays A-D but not Land Bay E. JA 42-43, 554. And their Post Zoning Master Development Plan covered the whole Property except Land Bay E. JA 46, 230.

Ignoring all this evidence—including their own staff analysis—the Appellees tell the Court that the Homeowners "can only muster a conclusory statement[] that land bays were treated differently because 'existing buildings in one land bay were distinct from other land bays.'"

Br. 43 (purportedly quoting Opening Br. 39). There are two problems here. First, this statement misrepresents the Homeowners position, as shown above. Second, the quotation the Appellees rebut does not appear on page 39 of the Opening Brief or anywhere else in that document. The Appellees made it up, then spent three pages arguing against it. It's hard to imagine a clearer signal that they have no answer to the substance of the Homeowners' positions.

Conclusion

The Court should reverse the Circuit Court's judgment and enter final judgment for the Homeowners or, in the alternative, remand the case for further proceedings.

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On December 2, 2019, three paper copies of this Reply Brief were hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies were filed by VACES. On the same day, electronic copies were served by email on

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