SCV: Submitted on 10-22-2019 13:00:15 EDT for filing on 10-22-2019

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.

Opening Brief of Appellants

James J. O'Keeffe, IV (VSB# 48620)
JOHNSON, ROSEN & O'KEEFFE, LLC
131 Kirk Avenue, SW
Roanoke, Virginia 24011
Tel: 540-491-0634
Fax: 1-888-500-0778
okeeffe@johnsonrosen.com

Bradley G. Pollack (VSB #25290)
753 South Main Street
Woodstock, Virginia 22664
Tel: 540-459-8600
Fax: 540-459-8670
bpollack@shentel.net

Counsel for Appellants

Table of Contents

Table of Authorities iii

Introduction 1

Assignments of Error 2

Statement of the Case 3

1. The Parties 3

2. The Property 4

3. The Developers applied for a Zoning Map Amendment. 6

4. The Developers submitted revised materials. 8

5. The Planning Commission recommended denial. 8

6. The Developers submitted revised application materials to the Town Council. 10

   A. The Developers' final application included land-use-mix percentages that the Planning Commission never saw, let alone considered. 10

   B. The application handled different land bays differently, rather than treating them as integrated parts of a cohesive whole. 13

7. The Town Council approved the revised application. 15

8. The Homeowners unsuccessfully challenged the rezoning in Circuit Court. 17

Standard of Review 21

Arguments and Authorities 22

1. The Defendants could not use conditional zoning to relax otherwise applicable zoning regulations. (Assignment 1.) 22

A. Conditional zoning lets local governments secure "proffers" from developers to protect the community. 22

B. The Circuit Court erred by letting the Defendants use proffers to alter zoning land-use-mix requirements. 29

2. The Circuit Court erred by letting the Defendants bypass the Planning Commission. (Assignment 3.) 32

3. The Circuit Court erred by allowing the Defendants to use a Master Plan that did not provide for unified, cohesive development. (Assignment 4.) 38

Conclusion 41

Certificate 42

Table of Authorities

Cases

A.H. v. Church of God in Christ, Inc., 831 S.E.2d 460 (Va. 2019).....31

Abi-Najm v. Concord Condominium, LLC, 280 Va. 350 (2010).....32

Barr v. Town & Country Props., Inc., 240 Va. 292 (1990).....26, 27

Bd. of Cty. Supervisors of Prince William Cty. v. United States, 48 F.3d 520 (Fed. Cir. 1995).....25

Clark v. Town of Middleburg, 26 Va. Cir. 472 (Loudoun Cty. 1990) 25

Conger v. Barrett, 280 Va. 627 (2010).....26

EMAC, L.L.C. v. City of Hanover, 291 Va. 13 (2016) 21

Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors, 286 Va. 38 (2013).....19, 40

Gregory v. Bd. of Supervisors of Chesterfield Cty., 257 Va. 530 (1999)..23

Hale v. BZA of the Town of Blacksburg, 277 Va. 250 (2009).....23

Newberry Station Homeowner's Ass'n v. Bd. of Supervisors, 285 Va. 604 (2013) 22

Renkey v. Cty. Bd. of Arlington, 272 Va. 369 (2006).....21

Riverview Farm Assocs. v. Bd. of Supervisors of Charles City Cty., 259 Va. 419 (2000).....23

Wilhelm v. Morgan, 208 Va. 398 (1967).....36, 37

Statutes

Va. Code § 15.1-493 .....36, 37

Va. Code § 15.2-2201 ..... passim

Va. Code § 15.2-2204 35

Va. Code § 15.2-2210 35

Va. Code § 15.2-2229 35

Va. Code § 15.2-2235 35

Va. Code § 15.2-2285 35

Va. Code § 15.2-2296 ..... passim

Va. Code § 15.2-2297 ..... 1, 2, 24, 27

Va. Code § 15.2-2298 ..... 1, 2, 24, 27

Other Authorities

Webster's Third New Int'l Dictionary (2002) 25, 26

Rules

Va. Sup. Ct. R. 1:4 32

Treatises

Greg Kamptner, *Albemarle Cty. Land Use Law Handbook* 23, 24, 25

John H. Foote, *Planning & Zoning* in *Handbook of Local Government Law* (2014) 22, 24

Ordinances

Ordinance § 11-3.9.17 ..... 20, 29

Ordinance § 11-3.9.17(1) 27

Ordinance § 11-3.9.17(11) 12

Ordinance § 11-3.9.17(2) 2, 28

Ordinance § 3-4.10.2 16

Ordinance § 3-4.12.3 16

Ordinance § 3-5.2.1 7

Ordinance § 3-5.2.4.1 ..... 2, 7

Ordinance § 3-5.2.4.3(2) ..... passim

Ordinance § 3-5.2.4.3(5) ..... passim

Introduction

The Town Council of Warrenton rezoned 15 parcels of largely quiet, wooded land for use as an industrial planned unit development, or "I-PUD." That rezoning was illegal for three reasons.

First, the rezoning turned on proffered conditions that relaxed otherwise applicable zoning restrictions. Yet under the relevant conditional-zoning statutes, Code §§ 15.2-2297 and § 15.2-2298, proffers must be conditions "in addition to" existing zoning regulations. They are meant to mitigate the development's effect on the community, not to intensify it. By allowing the developers to proffer more intense commercial and residential uses of the property than permitted by I-PUD standards, the Town Council violated both the language of the conditional-zoning statutes and the logic underpinning the system.

Second, the Town's Zoning Ordinance allows the Town Council to approve waivers and modifications to I-PUD land-use-mix requirements only "upon recommendation of the planning commission." Ordinance § 3-5.2.4.3(5). But here, the Town Council approved waivers and modifications that the Planning Commission never considered.

Third, the Ordinance requires a rezoning to treat a proposed development as an integrated, cohesive whole. Ordinance § 3-5.2.4.3(2). Here, however, the rezoning treated different land bays differently, as standalone parcels rather than pieces of a unified whole.

Assignments of Error

1. The Circuit Court erred by sustaining the demurrers to Count IX of the Amended Complaint and Count V of the Second Amended Complaint.

a. Although Virginia Code §§ 15.2-2297 and 15.2-2298 (and Warrenton Zoning Ordinance § 11-3.9.17.2) allow for proffered conditions "in addition to" the requirements of an applicable zoning district, the Circuit Court allowed the Town Council to accept proffered conditions that modified or reduced the requirements of the applicable zoning district.[1]

b. The Circuit Court read the general definition in Virginia Code § 15.2-2201 to control the specific requirements for conditional rezoning set out in Virginia Code §§ 15.2-2297 and 15.2-2298, in violation of settled rules of statutory interpretation.[2]

3. The Circuit Court erred in sustaining the demurrers to Counts I and II of the Amended Complaint. Warrenton Ordinance § 3-5.2.4.3.5 allows the Town Council to accept waivers and modifications to the PUD Development Standards at Warrenton Ordinance § 3-5.2.4.1 only upon recommendation by the Planning Commission. Here, the waivers

---

[1] Preserved at JA 29-30, 815, 819-20, 826-27, 838-39, 862-63, 874-77, 884, 895, 931-32.

[2] Preserved at JA 29-30, 819-20, 826-27, 838-39, 862-63, 874-77, 884, 895, 931-32. The Petition for Appeal said that this was also preserved at JA 878, but that was a typographical error.

and modifications at issue were also never presented to the Planning Commission, so the Planning Commission could not have made a recommendation.[3]

4. The Circuit Court erred in sustaining the demurrers to Count VIII of the Amended Complaint. A criterion provided in Warrenton Ordinance § 3-5.2.4.3.2 requires that the Master Plan show an industrial planned unit development as an integrated, cohesive entity. The Council approved a master plan that did not show this. The Court determined that the Homeowners had not demonstrated a direct impact from this violation. The Homeowners were not required to demonstrate such impact.[4]

Statement of the Case

1. The Parties

The Appellants are six homeowners who live in Warrenton: Kathryn and Lee Rowland, Elizabeth and Elbert Michael Ussery, Craig Updike, and Carol Hegwood (the "Homeowners"). Since the rezoning, Updike and the Rowlands have moved from their homes.

The Appellees are the Town Council of Warrenton, Virginia (the "Town Council") and the applicants who secured a rezoning of their property (the "Developers"). The Developers currently include East Side Investment Group, LLC; Springfield Real Properties, LLC; Remland, LLC; and Walker Drive Investment Group, LLC.

---

[3] Preserved at JA 15-17, 811-13, 824, 835-36, 862-63, 874-77, 884, 920-26.

[4] Preserved at JA 28-29, 826, 834-35, 838, 930-31.

2. The Property

This dispute centers on the rezoning of 15 parcels of land comprising about 31 acres just to the east of the Appellants' homes (the "Property"). JA 37, 52. The Property is bounded by U.S. 29 to the east, Walker drive to the west, Academy Hill Road to the north, and East Lee Street to the south. JA 38. East Lee Street serves as the gateway to Warrenton's historic district. JA 38. Walker Drive runs by peaceful neighborhoods where residential and light industrial uses coexist, including the Homeowners' neighborhoods. JA 3, 38, 264.

In 2016, the Property contained little but a small office park. JA 38, 99, 334. As Figure 1 shows, two office buildings stood near the northern end of the Property. They were each two stories tall and contained medical offices and fitness facilities. JA 38. A third building was under construction. JA 38. It was expected to house medical offices, fitness facilities, and general office space. The Property's northern and central portions were sloped, complicating any future development. Its southern section stood largely wooded and vacant. JA 38, 49, 99.

Figure 1: Aerial View of Undeveloped Property (JA 49)

The Property was zoned for industrial use. JA 52, 100. The Town's Comprehensive Plan anticipated light industrial use for it. JA 53.

3. The Developers applied for a Zoning Map Amendment.

On January 4, 2016, the Developers applied for a Zoning Map Amendment changing the Property's designation from Industrial to I-PUD. The Developers envisioned adding to the three existing buildings on the Property

- A 21,000 square-foot bowling alley,
- A 35,000 square-foot multiplex movie theater,
- 37,356 square feet of office space,
- 55,967 square feet of retail space,
- 33,550 square feet of restaurant space, and
- 116 apartment units.

JA 63, 335, 605, 688.

As proposed, the Property would look like Figure 2, with its woods cleared and its slopes graded and paved:[5]

[5] Figure 2 and other drawings of proposed new building layout were not included in the Developers' final application to the Town Council.

Figure 2: Design Guidelines April 15, 2016 (JA 358)

The Developers' application was the first rezoning under recent amendments to the Town's planned-unit-development rules. JA 593. Those rules encouraged innovation to increase economic opportunities while maintaining the Town's character. E.g., Ordinance § 3-5.2.1. To that end, an I-PUD like the Developers' project had to maintain a minimum industrial land use of 50%. Ordinance § 3-5.2.4.1. This minimum-use requirement distinguished an I-PUD from a Commercial Planned Unit Development, which required 50% minimum commercial use, or a Residential Planned Unit Development, which required 50% minimum residential use. Ordinance § 3-5.2.4.1.

The Ordinance provided that the Town Council would, "upon recommendation of the planning commission, have the authority to waive . . . or modify" I-PUD criteria like the land-use mix. See Ordinance § 3-5.2.4.3(5).

4. The Developers submitted revised materials.

In April, the Developers submitted additional materials, including a draft proffer statement. JA 345. Town staff responded with various concerns, pointing out that the Developers had failed to provide "specific percentages" for their proffered land-use mix. JA 364-65.

After working with Town staff, the Developers submitted an updated package in July. JA 39, 366. Commenting agencies gave the Developers detailed feedback and met with them twice in September. JA 39. The Developers submitted revised materials at the end of the month. JA 401.

5. The Planning Commission recommended denial.

The Planning Commission held two work sessions in October to address the application. JA 39. The Developers turned in revised application materials in December, and the Planning Commission held another work session in January. JA 39, 445. The Developers submitted

yet another updated package on February 1, 2017, including a Master Development Plan dated December 2, 2016. JA 110-11. That revision did not state the percentages of their proposed land-use mix. JA 719.

On February 21, 2017, the Planning Commission held a public hearing to consider the rezoning. JA 39. Staff warned that the Developers' application did "not provide a proposed land-use mix percentage." JA 674. Even so, the Developers sought "a waiver . . . from the land-use mix requirements." JA 674, 701. Town staff refused to support the waiver, noting that "the waiver does not specify what percentage waiver is being requested, resulting in any number of possible land use mix scenarios." JA 660, 674.

At the hearing, members of the public spoke out against the application. JA 39. Based on the information before it, the Planning Commission voted 6-1 to recommend denial. JA 40. The Planning Commission felt that (1) the project was unclear; (2) the application left too many unanswered questions; and (3) there was simply no need to rezone the Property. JA 40, 738.

6. The Developers submitted revised application materials to the Town Council.

A month later, the Developers submitted another application. JA 40. They met with Town staff and the Town Council in April and May. JA 40. They submitted two more proffer statements, one in March and the other in May.[6] JA 40, 72, 483, 550.

A. The Developers' final application included land-use-mix percentages that the Planning Commission never saw, let alone considered.

The Developers' new proffer statements differed from the ones that the Planning Commission had reviewed. JA 510. In their final proffer statement, the Developers added land-use-mix percentages. JA 96, 137.

The Developers had not provided this information to the Planning Commission. JA 17; compare JA 96 with JA 719. Figure 3 shows that Land Bay Tabulations that the Developers gave the Town Council, and Figure 4 shows the Land Bay Tabulations that they gave the Planning Commission.

---

[6] The record also includes an undated May 2017 proffer statement, which differs slightly from the Developers' final May 19, 2017, proffer statement. See JA 522.

Figure 3: Land Bay Tabulations--Town Council (JA 96, 137)

LAND BAY TABULATIONS					
SITE - SOUTHERN PORTION (LAND BAYS A-D)					
	USE	USE CATEGORY	MAXIMUM USE AREA (GSF)	LAND BAY AREA (AC.)	MINIMUM OPEN SPACE REQUIRED IN LAND BAY
LAND BAY "A"	GENERAL OFFICE	INDUSTRIAL	20,550	9.34	20% (SEE NOTE #5 THIS SHEET)
	RETAIL	COMMERCIAL	6,288		
	RESTAURANT	INDUSTRIAL	6,288		
	ENTERTAINMENT	COMMERCIAL	35,000		
LAND BAY "B"	ENTERTAINMENT	COMMERCIAL	21,000	2.99	
	RETAIL	COMMERCIAL	14,263		
	RESTAURANT	INDUSTRIAL	14,263		
LAND BAY "C"	GENERAL OFFICE	INDUSTRIAL	6,703	2.33	
	RETAIL	COMMERCIAL	15,814		
	RESTAURANT	INDUSTRIAL	2,500		
LAND BAY "D"	GENERAL OFFICE	INDUSTRIAL	10,103	3.77	
	RETAIL	COMMERCIAL	7,603		
	RESTAURANT	INDUSTRIAL	2,500		
	MULTI-FAMILY RESIDENTIAL	MIXED USE RESIDENTIAL	76 UNITS (80,824 GSF)		
SITE - NORTHERN PORTION (LAND BAY E & EXISTING LAND BAY)					
	USE	USE CATEGORY	MAXIMUM USE AREA (GSF)	LAND BAY AREA (AC.)	
EXISTING LAND BAY	OFFICE/HEALTH CLUB	INDUSTRIAL	73,139	7.8	
LAND BAY "E"	GENERAL OFFICE	INDUSTRIAL	20,000	3.39	
	MULTI-FAMILY RESIDENTIAL	MIXED USE RESIDENTIAL	40 UNITS (60,000 GSF)		
SWM/BMP AREA				1.93	
			TOTAL AREA (ACRES) =	31.55	
					USE PERCENTAGE
			TOTAL INDUSTRIAL GSF =	156,046	39.32%
			TOTAL COMMERCIAL GSF =	99,968	25.19%
			TOTAL RESIDENTIAL GSF =	140,824	35.49%
			TOTAL GSF =	396,838	

While the Developers did give the Planning Commission the estimated square footage of industrial and commercial uses by land bay, that would not have allowed the Planning Commission to calculate the land-use percentages for at least three reasons. First, as Figure 4 shows, the Land Bay Tabulations that the Developers gave the Planning Commission did not include the gross square footage of residential development in Land Bay D or E. JA 465. Second, those Tabulations used estimated figures that could vary by as much as 10%. JA 465. The final numbers would vary by just 5%. JA 96. Third, the Developers promised the Planning Commission only that "uses within

those Land Bays . . . [would] be in substantial conformance with the Land Bay Tabulations chart . . . subject to minor modifications approved by the Town."[7] JA 694.

Figure 4: Land Bay Tabulations--Planning Comm'n (JA 465)

LAND BAY TABULATIONS

SITE – SOUTHERN PORTION (LAND BAYS A-D)			
	USE	USE CATEGORY	MAXIMUM USE AREA (GSF)
LAND BAY "A"	GENERAL OFFICE	INDUSTRIAL	20,550
	RETAIL	COMMERCIAL	6,288
	RESTAURANT	INDUSTRIAL	6,288
	ENTERTAINMENT	COMMERCIAL	35,000
LAND BAY "B"	ENTERTAINMENT	COMMERCIAL	21,000
	RETAIL	COMMERCIAL	14,263
	RESTAURANT	INDUSTRIAL	14,263
LAND BAY "C"	GENERAL OFFICE	INDUSTRIAL	6,703
	RETAIL	COMMERCIAL	15,814
	RESTAURANT	INDUSTRIAL	2,500
LAND BAY "D"	GENERAL OFFICE	INDUSTRIAL	10,103
	RETAIL	COMMERCIAL	7,903
	RESTAURANT	INDUSTRIAL	2,500
	MULTIFAMILY RESIDENTIAL	RESIDENTIAL	76 UNITS
SITE – NORTHERN PORTION (LAND BAY E & EXISTING LAND BAY)			
	USE	USE CATEGORY	MAXIMUM USE AREA (GSF)
LAND BAY "E"	RETAIL	COMMERCIAL	12,000
	RESTAURANT	INDUSTRIAL	8,000
	MULTIFAMILY RESIDENTIAL	RESIDENTIAL	40 UNITS
EXISTING LAND BAY	OFFICE/HEALTH CLUB	INDUSTRIAL	73,139

NOTE:
The final square footage for each land bay for industrial and commercial uses may vary by 10%. However, the total square footage shown for the project, as a whole, can not exceed the total area for commercial and industrial use types shown above.

The Developers acknowledged that their proffered land-use mix would require a waiver or modification of the I-PUD ordinance. E.g., JA 82. They'd admitted as much throughout the application process. JA

[7] The Ordinance requires site plans, subdivision plats, and development plans to be in substantial conformity with proffered conditions. Ordinance § 11-3.9.17(11).

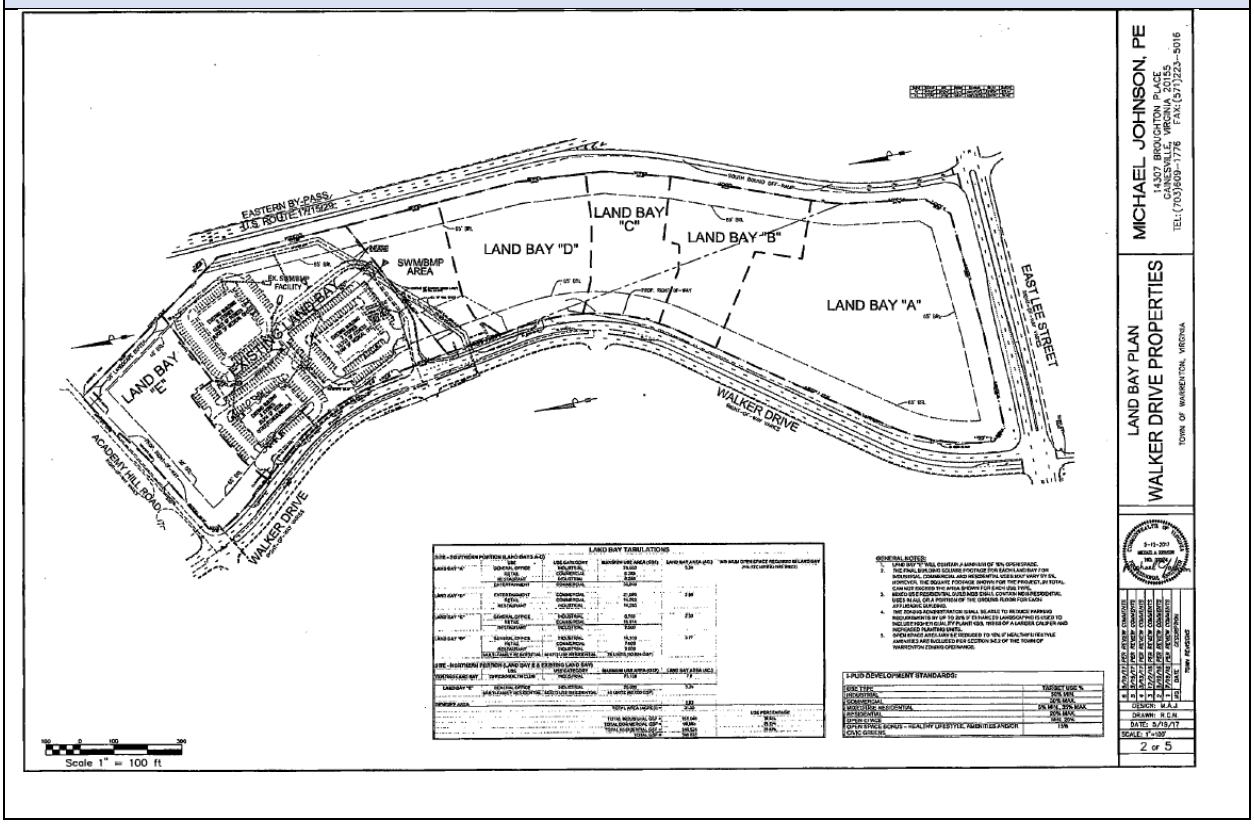
118, 353, 379-80, 422, 452, 478, 492, 531. Yet the Developers never submitted their final proffer statement to the Planning Commission for its review and recommendation.

Instead, they resubmitted the full zoning application—with its new land-use-mix percentages—to the Town Council on June 23, 2017. JA 40.

B. The application handled different land bays differently, rather than treating them as integrated parts of a cohesive whole.

Like its earlier iterations, the Developers' final application divided the Property into six separate "land bays," and it treated them differently. This disparate treatment was not lost on Town staff, which 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.

Figure 5: Land Bay Plan (JA 96)



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. So neither a vehicle nor a pedestrian would be able access Land Bay E without exiting onto Walker Drive. The proffer statement imposed a unified sign program for Land Bays A-E but excluded the "Existing Land Bay" from its façade signage requirements. JA 43, 555. The Developers proffered consistent building exterior design, materials, and features for Land Bays A-D but not Land Bay E. JA 42-43, 554. Finally,

the Developers' Post Zoning Master Development Plan covered the whole Property except Land Bay E. JA 46, 230.

7. The Town Council approved the revised application.

The Town Council held a public hearing on July 11, 2017, to consider the application. Before the hearing, Town staff warned that "[d]ue to the lack of detail in the application, staff [was] unable to verify that the application meets all applicable zoning ordinance requirements." JA 60. Staff also pointed out that the application did "not meet the adopted Zoning Ordinance land use mix for the I-PUD but instead proposes a new land use mix" which would apply nowhere else in the Town. JA 60. Staff noted how far the Developers' proffered land-use mix departed from the Ordinance's requirements:

Figure 6: Town's Land-Use-Mix Analysis (JA 60)

I-PUD Land Use Mix	Zoning Ordinance (Article 3-5.2 2016 Amendment)	Applicant Proposal
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)	Proffered to Meet

Even that breakdown was generous, because it treated restaurants as an industrial use (instead of a commercial use) and included the existing industrial buildings. Restaurants were permitted by right in the Commercial District, Ordinance § 3-4.10.2, but required a special-use permit in the Industrial District, Ordinance § 3-4.12.3. Treating restaurants as a commercial use would have reduced the industrial-use percentage to 32.8%. JA 794. Focusing solely on new construction and treating restaurants as a commercial use would have knocked the proposed industrial use down to just 12.3%, or less than a quarter of the I-PUD requirement. JA 795.

There was no question that the application the Town Council considered departed from the materials that the Planning Commission had reviewed. The Town's Vice Mayor admitted as much when she called for a vote:

> I also want to say how much I respect our Planning Commission. And I—if I think—I think if I were on the Planning Commission at the time this came through I probably would have voted against it. But the changes that our Planning Department and the influence that Council has suggested that we put into this proffer statements has changed drastically.
>
> And I really believe if it were to go back to the Planning Commission that there would be some people who

> would change their votes. I don't know that for a fact but I—I feel so many changes have been made that it's—it—it—I think it would have been a different vote.

JA 269.

But the Vice Mayor did not send the application back to the Planning Commission to find out. Instead, she called the vote, and the Town Council approved the rezoning 6-1. JA 271-72.

8. The Homeowners unsuccessfully challenged the rezoning in Circuit Court.

The Homeowners appealed that decision to the Circuit Court of Fauquier County. They filed an Amended Complaint challenging the rezoning on ten grounds, including

- *No Planning Commission Recommendation.* In Counts I and II, the Homeowners pointed out that under Ordinance § 3-5.2.4.3(5), the Town could modify or waive I-PUD criteria like the land-use-mix requirement only "upon recommendation of the planning commission." Since the Town approved waivers and modifications that the Planning Commission never considered, it violated the Ordinance. JA 15-17.
- *Unintegrated Development.* In Count VIII, the Homeowners noted that Ordinance § 3-5.2.4.3(2) requires that "[a] Master 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." The Homeowners pointed out that the Developers' Master Plan did not comply with this requirement because it treated the land bays differently. JA 28-29.

- *Proffers Not "In Addition To" Existing Zoning Requirements.* In Count IX, the Homeowners observed that under the conditional-zoning statutes, Code § 15.2-2296 et seq., proffers are reasonable conditions *in addition to* existing zoning regulations. Here, the Town and the Developers used proffers to relax otherwise applicable land-use-mix requirements. JA 29-30.

So the Homeowners asked the Circuit Court to find that the rezoning was void. JA 30.

The Circuit Court granted oyer over the entire record of the rezoning, incorporating all 4,644 pages of it into the Amended Complaint. JA 806-07. The Town Council and the Developers demurred, contesting both the Homeowners' standing and their substantive claims. JA 139-55.

The Circuit Court granted those demurrers. It first held that the Homeowners had standing to challenge the rezoning under *Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors,* 286 Va. 38 (2013).[8] JA 823-24. Yet it questioned the merits of their claims. The Circuit Court sustained the demurrers to Counts I and II with prejudice. JA 824. It reasoned that the Homeowners' reading of the Ordinance—allowing modifications and waivers only upon Planning Commission recommendation —would give the Planning Commission a veto over the Town Council, usurping its legislative authority. JA 824.

Next, the Circuit Court sustained the demurrers to Count VIII with prejudice, holding that it could not "micromanage" the Town's decision about what a Master Plan should include. JA 826. It wondered whether the Master Plan had a "direct impact" on the Homeowners, suggesting that they lacked a justiciable interest in the matter. JA 825-26. Finally, the Circuit Court sustained the demurrers to Count IX without prejudice on the theory that the Homeowners had identified no proffer that relaxed a zoning requirement. JA 826-27. (In fact, the

[8] The Circuit Court held that another plaintiff, William Semple, lacked standing and dismissed his claims with prejudice. JA 823, 828.

Amended Complaint pointed to the proffer modifying the land-use-mix requirements. JA 30.)

The Homeowners filed a Second Amended Complaint, incorporating their earlier pleadings. JA 841. In Count V, they repleaded and amplified their claim that the Defendants had improperly used proffers to relax zoning requirements. JA 862-63. They challenged the use of proffers to reduce the I-PUD minimum requirement of 50% industrial land use to 39.23% or less. JA 862.

The Circuit Court again sustained the Defendants' demurrers, ruling that Count V just restated Count IX from the Amended Complaint. JA 884-85. The court held that under Code § 15.2-2201 and Ordinance § 11-3.9.17, a proffer could be in addition to *or modification of* any zoning requirement. JA 884. So on the trial court's reading, there was no requirement that a proffer supplement existing zoning restrictions. JA 884.

The Circuit Court entered final judgment for the Defendants. JA 885. The Homeowners appeal. JA 896.

Standard of Review

This Court will review de novo whether the Circuit Court properly granted the Defendants' demurrers. See *EMAC, L.L.C. v. City of Hanover*, 291 Va. 13, 20 (2016). It will accept all facts properly pleaded and all inferences reasonably drawn from them. See *ibid.* Those facts include the documents brought into the case by oyer. *Id.* at 21. The Court may ignore allegations contradicted by authentic, unambiguous documents that are part of the pleadings. *Ibid.*

The Court will presume that the Town Council's zoning decision was valid. It will not set the rezoning aside unless it was unreasonable, arbitrary, and unrelated to the public health, safety, or general welfare. See *ibid.* That said, if the Homeowners present probative evidence of unreasonableness, the Defendants must then come forward with evidence to show that the question was fairly debatable. See *ibid.* An issue is fairly debatable when objective, reasonable people could reach different conclusions given the evidence. *Ibid.*

When a locality violates its own zoning ordinance, its action is not fairly debatable. It is unreasonable, arbitrary and capricious, and void. *Renkey v. Cty. Bd. of Arlington*, 272 Va. 369, 376 (2006); see also

Newberry Station Homeowner's Ass'n v. Bd. of Supervisors, 285 Va. 604, 621 (2013) ("When a legislative act is undertaken in violation of an existing ordinance, the board's action is arbitrary and capricious, and not fairly debatable, thereby rendering the legislative act void and of no effect.") (cleaned up).

Arguments and Authorities

1. The Defendants could not use conditional zoning to relax otherwise applicable zoning regulations. (Assignment 1.)

The Circuit Court erred by sustaining the demurrers to Count IX of the Amended Complaint and Count V of the Second Amended Complaint. Each challenged the Town Council's acceptance of proffered conditions that altered the Ordinance's existing I-PUD land-use requirements.

A. Conditional zoning lets local governments secure "proffers" from developers to protect the community.

Virginia's conditional-zoning system is unique in the United States. John H. Foote, *Planning & Zoning* in *Handbook of Local Government Law* 1-23 (2014) [hereinafter Foote]. It lets localities resolve competing and incompatible land uses where traditional zoning methods would fall short. Code § 15.2-2296. It does so by letting

developers voluntarily proffer conditions on their development to protect neighboring landowners. *Ibid.*; Greg Kamptner, *Albemarle Cty. Land Use Law Handbook* 11-1, available at http://www.albemarle.org/upload/images/Forms_Center/Departments/County_Attorney/Forms/LUchapter11-proffers.pdf (last visited Oct. 3, 2019) [hereinafter Kamptner]; see also *Riverview Farm Assocs. v. Bd. of Supervisors of Charles City Cty.*, 259 Va. 419, 428 (2000) ("Proffered conditions are permitted as part of a rezoning 'for the protection of the community' in which the property that is the subject of the proposed rezoning is located."); *Gregory v. Bd. of Supervisors of Chesterfield Cty.*, 257 Va. 530, 536 (1999) (same).

Proffered conditions—colloquially, "proffers"—thus facilitate "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." *Hale v. BZA of the Town of Blacksburg*, 277 Va. 250, 273 (2009). Virginia recognizes several forms of conditional zoning. "Under whatever form of conditional zoning may be available to it, a locality may accept 'proffered' conditions (when reduced to writing in advance of the public hearing before the governing

body) that are *in addition to* the general, uniform regulations otherwise applicable in the same zoning district." Foote 1-24 (emphasis added); contra *ibid.* at n.19 (hypothesizing in a footnote that proffers need not be "in addition to" existing zoning requirements, despite statutory language and case law to the contrary).

The Town adopted its conditional-zoning ordinance provisions under Code § 15.2-2296 et seq. The relevant statutes, Code §§ 15.2-2297 and 15.2-2298, both let a zoning ordinance "provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body*, in addition to the regulations provided for the zoning district or zone by the ordinance*, as a part of a rezoning or amendment to a zoning map . . . ." (Emphasis added.)

That language means exactly what it says: "Proffers impose additional requirements and restrictions, not alternative or lesser requirements or restrictions." Kamptner, 11-1. They are "concessions" exacted by the locality "as a condition to granting the necessary zoning changes and planning code approvals for proposed developments." *Bd. of Cty. Supervisors of Prince William Cty. v. United States,* 48 F.3d 520,

523 (Fed. Cir. 1995). They cannot be used to relax otherwise applicable zoning requirements.

To be sure, 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." (Emphasis added.) But given the purpose of conditional zoning, "the 'modification' clause in the definition of the term in Virginia Code § 15.2-2201 is not interpreted to mean that proffers may relax otherwise applicable zoning standards." Kamptner, 11-1. Proffers cannot be used to create a variance from the zoning ordinance, and a proffer that violates the zoning ordinance is unreasonable and therefore invalid on its face. *Clark v. Town of Middleburg,* 26 Va. Cir. 472, 476-78 (Loudoun Cty. 1990).

That much is apparent from the plain meaning of the terms used. "In addition to" means "over and above." *Webster's Third New Int'l Dictionary* 24 (2002). "Modification" is "the act of limiting the meaning or application of a concept or statement" or "the act or action of

changing something without fundamentally altering it." *Id.* at 1452. So a permissible "modification" under the statutes is one that imposes restrictions over and above existing zoning requirements without fundamentally altering them.

Thus, a developer cannot proffer the condition that he will not comply with existing zoning rules. But he can agree to do more than the rules require.

This result follows from standard norms of statutory interpretation. The primary objective of statutory construction is to determine and effect the General Assembly's intent. *Conger v. Barrett*, 280 Va. 627, 630 (2010). This Court gives unambiguous statutes their plain meaning. *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990). When a case involves related statutes, the Court reads them together to give full effect to each, harmonizing them if possible. *Conger*, 280 Va. at 630-31.

That harmonization is possible here. The General Assembly explained that the purpose of proffers is to protect neighboring landowners:

> 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 [where competing and incompatible uses conflict] 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.

Code § 15.2-2296. This is the logic underpinning the whole conditional-zoning system. It requires proffers to buttress the protection of neighboring landowners from the harms of incompatible land uses. Proffers cannot be used to change existing zoning rules to make the new use even more incompatible, and thus even more harmful to the community.

Aside from that, a specific statute controls a general one. *Barr,* 240 Va. at 294-95. So if there is any conflict between the general definitions in Code § 15.2-2201 and the specific enabling provisions in Code §§ 15.2-2297 and 15.2-2298, the specific provisions must control. Thus, a permissible proffered "modification" of existing zoning regulations is one that offers protection to the community over and above the minimum baseline requirements of the zoning ordinance.

The Town's Ordinance contains similar conditional-zoning provisions, which admit of a similar reading. Section 11-3.9.17(1) includes the "in addition to, or modification of" language:

> As 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.

(Emphasis added.)

Section 11-3.9.17(2), by contrast, allows only proffered conditions "in addition to" existing zoning regulations:

> As 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 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.

(Emphasis added.)[9]

For the reasons just explained, the reference to proffers in "modification of" zoning regulations should not be read to allow a developer to proffer a reduction in otherwise applicable zoning

[9] The Developers submitted an application for a zoning map amendment, not a petition. JA 330. So on a strict reading of the Zoning Ordinance, § 11-3.9.17(2), concerning applications—not subsection (1), concerning petitions—governs, requiring that proffers be in addition to other regulations.

requirements, increasing the project's impact on neighboring landowners.

B. The Circuit Court erred by letting the Defendants use proffers to alter zoning land-use-mix requirements.

Yet here, 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. These proffers were not a concession from the Developers to the Town to protect neighboring landowners; they were a concession from the Town to the Developers to allow more intensive use of the rezoned property than existing zoning allowed.

But when the Homeowners challenged the proffers, the Circuit Court sustained the Defendants' demurrers. It held that Code § 15.2-2201 and Ordinance § 11-3.9.17 allowed for the "modification" of existing zoning regulations through proffers. JA 884. That ruling was wrong. Under the plain terms of the governing statutes, proffered conditions must be in addition to existing zoning restrictions, to protect neighboring landowners.

The Circuit Court also doubted whether the Homeowners would even be harmed by the decreased industrial use. That skepticism was understandable. Heavy industrial uses are typically more intensive than residential or commercial uses. See, e.g., JA 231. So a reduced percentage of industrial land use might ordinarily give neighbors more protection.

But the Town of Warrenton does not allow heavy industrial uses. See JA 599-601. And this suit was brought by neighboring homeowners in a quiet residential area, who would share Walker Drive with the 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. E.g., JA 53, 599.

The Homeowners were, however, rightly concerned about the effects that increased commercial and multifamily residential uses that an I-PUD would bring—especially an I-PUD with a reduced (light) industrial-land-use percentage. The Homeowners explained how the increase in traffic, safety hazards, light, and noise associated with those uses would harm them:

- Traffic volume would nearly triple, threatening the Homeowners' personal health and safety.
- Apart from health and safety risks, the Homeowners would be exposed to increased traffic noise and light trespass.
- Light and noise from events at the development's proposed central plaza would also disturb the Homeowners.
- The Homeowners would be exposed to an increased risk of crime associated with commercial uses.
- Traffic backups would impede Hegwood's access to her home.

JA 5-15.

What's more, industrial uses and their associated traffic are typically 9-to-5 operations. Apartment buildings, restaurants, and movie theaters, by contrast, draw traffic at all hours.

These alleged harms are plausible. They do not rely on strained or unreasonable inferences. They put the Defendants on notice of the true nature of the Homeowners' claims. That should have been enough to survive demurrer. See, e.g., *A.H. v. Church of God in Christ, Inc.*, 831 S.E.2d 460, 465 (Va. 2019) (to survive a demurrer, a complaint must state claims with sufficient definiteness to let a court find a basis for

judgment); Va. Sup. Ct. R. 1:4 (a pleading is adequate if it informs the opposite party of the true nature of the claim).

If the Circuit Court was concerned that the record support for these harms was thin, that's because the case was before it on demurrer—which tests the legal sufficiency of the plaintiff's allegations, not the strength of her proof. *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 357 (2010). It also stood in an unusual procedural posture: Because the trial court had granted oyer of the entire rezoning record, it had before it all the Defendants' evidence but none of the Plaintiffs' proof. At trial, the Plaintiffs would have augmented their allegations with expert testimony, as they told the trial court. JA 894.

2. The Circuit Court erred by letting the Defendants bypass the Planning Commission. (Assignment 3.)

The Circuit Court also erred by letting the Town Council grant the Developers a waiver or modification of the I-PUD requirements without a recommendation from the Planning Commission. Section 3-5.2.3.4(5) of the Zoning Ordinance allows the Town Council to waive or modify I-PUD criteria only upon Planning Commission recommendation:

> 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, if in the opinion of Town Council it shall determine that such modification or waiver:
>
> a. Shall advance the legislative intent and general planning considerations underlying the PUD and this Ordinance,
>
> b. Shall be in general conformity with the adopted Comprehensive Plan, and
>
> c. Shall not create an adverse effect on adjacent land uses.

(Emphasis added.)

Here, the Developers sought and received a modification of the I-PUD land-use-mix requirement. JA 82. But the Town Council granted that modification without the required recommendation. That's because the Developers never presented the actual land-use-mix percentages to the Planning Commission, even though staff had noted that deficiency in their materials. JA 365, 674. Nor did they give the Planning Commission enough information to derive those percentages on its own because (1) the square-footage figures they provided the Planning Commission did not include the gross square footage of residential development in Land Bay D or E, (2) those figures could vary by as much as 10%, and (3) the Developers proffered only that uses within the

land bays would be "in substantial conformance" with the Land Bay Tabulations chart, "subject to minor modifications approved by the Town." JA 465, 694, 719.

Instead, the Developers presented their proposed land-use mix for the first time to the Town Council. By changing the I-PUD land-use-mix requirements without a recommendation from the Planning Commission, the Town Council violated the Ordinance and exceeded its authority.

The Circuit Court disagreed, concluding that the Town Council had "full freedom of action" and that "limiting the Council's freedom of action *after* the first recommendation or denial" would give the Planning Commission a "veto." JA 824 (emphasis in original).

The trial court was mistaken. By its terms, the Ordinance gave the Town Council authority to act on waivers or modifications only upon recommendation of the Planning Commission. To recognize this is not to grant the Planning Commission a veto. The Ordinance does not require Planning Commission approval. It does not require the Town Council to follow the Planning Commission's recommendation. It just

requires that the Town Council consult the Planning Commission in the first instance.

That requirement is perfectly reasonable. It tracks provisions in the Code that prevent localities from acting without recommendations from their planning commissions. See Code § 15.2-2285 ("No 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."); Code § 15.2-2229 ("After the adoption of a comprehensive plan, all amendments to it shall be recommended, and approved and adopted, respectively, as required by § 15.2-2204."); Code § 15.2-2235 ("Prior to making any such additions or modifications to the official map, the governing body shall refer the additions or modifications to the local planning commission for its consideration."). These rules make sense. A planning commission is an advisory board. Code § 15.2-2210. Its members have subject-matter expertise. It's perfectly logical to require a locality to consult the planning commission before making a zoning decision that significantly affects the community.

This Court's decision in *Wilhelm v. Morgan,* 208 Va. 398, 399 (1967), is not to the contrary. There, a landowner sought to rezone 110 acres of his land. His petition was referred to the planning commission, which recommended denial. *Ibid*. The Board of Supervisors then held a public hearing to consider the petition. *Ibid*. It adjourned to let the landowner file an amended petition, which he did. Without referring the amended petition back to the planning commission, the Board of Supervisors approved it. *Ibid*.

The landowner's neighbors sued. They complained that the failure to refer the amended petition back to the planning commission violated Code § 15.1-493, which said that "no zoning ordinance shall be amended . . . unless the governing body [the Board of Supervisors] has referred the proposed amendment to the local commission [the planning commission] for its recommendations." *Id*. at 399-400 (alterations in original). Code § 15.1-493 said that after holding one public hearing, the locality could "make appropriate changes or corrections in the . . . proposed amendment . . .." *Id*. at 400. This Court held that the statute did not require a second referral to the planning commission. Instead, it

allowed the locality to change the proposed amended after a public hearing. *Ibid*.

Wilhelm does not control this case. In *Wilhelm,* Code § 15.1-493 expressly authorized the Board of Supervisors to change the proposed zoning amendment after planning commission review. Ordinance § 3-5.2.4.3(5), by contrast, allows the Town Council to waive or modify I-PUD requirements only upon Planning Commission recommendation. In *Wilhelm*, the amendments came after the Board of Supervisors had held a public hearing with the benefit of the planning commission's recommendation. Here, by contrast, the Developers changed their application after the Planning Commission hearing but before the Town Council hearing. So the Planning Commission never considered the land-use-mix percentages, and the Town Council never reviewed a set of proposed waivers and modifications with the benefit of the Planning Commission's advice. And while *Wilhelm* dealt with Code § 15.1-493, a predecessor to current Code § 15.2-2285, this case is about Ordinance § 3-5.2.3.4(5), which imposes a separate (and differently worded) restriction on Town Council's ability to waive or modify I-PUD criteria.

3. The Circuit Court erred by allowing the Defendants to use a Master Plan that did not provide for unified, cohesive development. (Assignment 4.)

The Circuit Court further erred by sustaining the demurrers to Count VIII of the Amended Complaint because the application treated various land bays differently, rather than as integrated parts of a cohesive whole.

Section 3-5.2.4.3(2) of the Ordinance requires a Master Plan to guide the development as a "cohesive entity":

> A Master Plan shall be required to guide the development. This Plan shall include (i) a general development plan incorporating land bays and land uses as set forth in the Development Standards (§ 3-5.2.4.1) and Use Regulations (§ 3-5.2.6) and (ii) a narrative text that describes phasing, the location of and relationships between all development types, public facilities, roadways, open space and recreation areas, and other proposed major facilities. *The 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.*

(Emphasis added.)

The Developers submitted a Master Development Plan, but that Plan did not provide for a unified development because it treated the land bays differently. As Town staff pointed out: "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.

In their Amended Complaint, the Homeowners pointed out that the Master Plan violated the requirement that the development be integrated, and its infrastructure coordinated as a cohesive entity. JA 28. The Circuit Court disagreed: "It is not up to the Court or the Plaintiffs to micromanage the Town Council as to what should or should not be contained in the Master Plan which is a 'guide' to development, unless it has a direct impact upon the Plaintiffs." JA 826.

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 breached this requirement.

The Circuit Court also worried whether this noncompliance affected the Homeowners, seeming to wonder if they even had a justiciable interest in the first place. JA 825-26. That concern was

misplaced. As the Circuit Court correctly recognized, the Homeowners had standing under *Friends of the Rappahannock v. Caroline County Board of Supervisors*, 286 Va. 38 (2013). That required them to show that

- They owned real property near the rezoned land, establishing that they had "a direct, immediate, pecuniary, and substantial interest in the decision"; and
- They'd suffered a particularized harm different from that suffered by the public as a whole.

Id. at 48. The Homeowners alleged the facts needed to make that showing: They lived near the Property. JA 3-4. They would be directly harmed by the increased traffic, light, noise, and related hazards in ways that the general public would not. JA 5-15. So as the trial court correctly recognized, they had standing to protest the rezoning. JA 822-24. Because the Homeowners were "aggrieved parties," for standing purposes, they also had a "justiciable interest" interest under the Declaratory Judgment Act. In land-use litigation, those terms mean the same thing. See *Friends of the Rappahannock,* 286 Va. at 48.

Conclusion

The Court should reverse the Circuit Court's judgment and enter final judgment for the Homeowners, holding that the Zoning Map Amendment is invalid and void ab initio. In the alternative, it should reverse and remand the case for further proceedings.

/s/ James J. O'Keeffe, IV
James J. O'Keeffe, IV
VSB# 48620
JOHNSON, ROSEN & O'KEEFFE
131 Kirk Avenue, SW
Roanoke, Virginia 24011
Tel: 540-491-0634
Fax: 1-888-500-0778
okeeffe@johnsonrosen.com

Bradley G. Pollack
VSB #25290
753 South Main Street
Woodstock, Virginia 22664
Tel: 540-459-8600
Fax: 540-459-8670
bpollack@shentel.net

Counsel for Appellants

Certificate

On October 22, 2019, three paper copies of this Opening Brief of Appellants and Joint Appendix 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

Whitson W. Robinson, Esquire
35 South Fourth Street
Warrenton, Virginia 20186
whit@wwrobinson.com
(540) 347-2200 Telephone
(540) 347-6031 Facsimile

Henry Cleaves Day, Esquire
32 Waterloo Street, Suite 101
Warrenton, VA 20186
hank@hendrydaylaw.com
(540) 349-4300 Telephone
(540) 349-4713 Facsimile

Heather K. Bardot, Esquire
BANCROFT, MCGAVIN, HORVATH & JUDKINS, PC
9990 Fairfax Boulevard, Suite 400
Fairfax, Virginia 22030
HBardot@bmhjlaw.com
(703) 385-1000 Telephone
(703) 385-1555 Facsimile

Counsel for the Town Council of Warrenton

John H. Foote
WALSH, COLUCCI, LUBELEY & WALSH, P.C.
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192
jfoote@thelandlawyers.com
(703) 680-4464 Telephone
(703) 680-2161 Facsimile

Counsel for East Side Investment Group, LLC; Springfield Real Properties, LLC; Remland, LLC and Walker Drive Investment Group, LLC

/s/ James J. O'Keeffe, IV
James J. O'Keeffe, IV