VIRGINIA:

IN THE COURT OF APPEALS

ANNE EDWARDS HARTLEY and	)	
PROSPECT CEMETERY ASSOC.,	)	Court of Appeals
Appellants,	)	Record No. 1298-22-2
v.	)	Brunswick Circuit Court No.
BOARD OF SUPERVISORS OF	)	CL20000073-00
BRUNSWICK COUNTY, VIRGINIA,	)	
Appellee.	)	

REQUEST TO COURT OF APPEALS TO MOVE SUPREME COURT OF VIRGINIA TO ACCEPT AND CERTIFY CASE FOR TRANSFER

Appellants, Anne Edwards Hartley ("Hartley") and Prospect Cemetery Association ("PCA"), by counsel, hereby respectfully request this Court move the Supreme Court of Virginia to accept and certify this case for transfer for reasons to be stated more fully in this motion. Such request is authorized by Virginia Code § 17.1-409:

> **A.** In any case in which an appeal has been taken to or filed with the Court of Appeals, the Supreme Court in its discretion, on motion of the Court of Appeals, or on its own motion, may certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. The effect of such certification shall be to transfer

jurisdiction over the case to the Supreme Court for all purposes.

B. Such certification may be made only when, in its discretion, the Supreme Court determines that:

1. The case is of such imperative public importance as to justify the deviation from normal appellate practice and to require prompt decision in the Supreme Court;

REASON FOR REQUEST: DO COMPREHENSIVE PLANS AND STATUTES MATTER OR NOT?

Appellants submit that the Supreme Court of Virginia will ultimately need to answer these questions to provide finite legal clarity about intended Land Use Governance and Management across the Commonwealth. It is the opinion of the Appellants that because of what is a stake behind this case and since the fundamentals of this case are about the enforcement of Virginia law and will affect all Virginians for years to come — and may even have national influence — that a finite resolution requires ruling from the top, the Supreme Court.

Continuing within a Circuit Court that resulted in a Summary Judgment ruling avoiding a fair trial that defends the position that the Comprehensive Plan's role and related statutes can be circumvented by a Board of Supervisors vote under the false guise of "fairly debated" doctrine or that a Board's vote can add features to the current Plan instead of going through the statutory process of updating the Plan to ensure votes are aligned will be a continued waste of time and resources.

This case has just begun its fourth year in litigation at the Circuit Court level with exhaustive expense of both public and private resources. Appellants seek the support of this Court to help expedite transfer to the Supreme Court.

THE CRUX OF THE MATTER

The crux of the matter here regards the interplay between the Comprehensive Plan, Zoning Ordinances, the Code of Virginia — and the doctrines of "Fairly Debatable" versus "Arbitrary and Capricious". The outcome of this case will affect the analysis of these Plans, Ordinances, Laws, and Doctrines in a way that affects all Virginians.

We have just begun the fourth year of litigation regarding this matter! The appeal case began on February 28, 2020 and the Appellee's attorneys have taken a long and costly route while still avoiding a proper and fair trial. Appellants appealed a split 3-2 rezoning decision because of what is at stake – their fight is to save a rural community from destructive commercialization. This fight should have been avoided by following the County's Comprehensive Plan and related zoning statutes, as proper land use management laws are already in place in most of the Commonwealth.

The Appellants' position underpinned by "arbitrary and capricious" claims upheld in Demurrer is that Comprehensive Plans and statutes do matter, and it is a

duty of the locality's executives to either follow their guidance or properly modify the plans by statutorily defined procedure to reflect desired changes with proper due diligence and public input to consider the big picture and avoid unwanted side effects. More importantly these last five decades of planning do matter, and localities need to be cognizant of the fact that a "fairly debatable" decision does not rise above the Comprehensive Planning Process, the duly enacted Local Ordinances, or Virginia Law.

Appellee's defense is that one can have a "fairly debated" argument that is based on not following the Plan and statutes – as long as people with differing perspectives expressed themselves and it was heard, then "fairly debated" was accomplished – regardless of how the resulting decision lines up with the Comprehensive Plan, the local ordinances, or blackletter law. The Appellants' position is that the Plan and Statutes do matter and they must be followed as a condition precedent for a "fairly debated" defense to even be considered.

Virginia's use of proper planning and zoning has evolved over the last five decades or so. This has led to a lot of growing pains with improper decisions made as localities learn the process. Even worse, in some localities, there is a wholesale disregard for the Comprehensive Plans with the executives citing 1975 case law from the Virginia Supreme Court that states "a comprehensive or master plan does not have the status of a zoning ordinance. It is advisory only and serves as a guide to a

zoning body." *Bd. of Supervisors v. Allman*, 215 Va. 434, 441, 211 S.E.2d 48, 52 (1975).

The localities that embrace proper planning and enforcement use this "guide" to shape their ordinances to reflect and follow their plans, they also properly update and modify the plans if necessary. Those that do not want to follow their Plan for whatever reason rely on *Allman* to say the Plans do not matter and the "fairly debatable" doctrine trumps the need for planning and if just one citizen shows up to complain about actions not in substantial accord with the Comprehensive Plan then that equals "fairly debatable". This creates a climate where Comprehensive Plans, Ordinances and Codes are of no effect on the now "fairly debatable" non-compliant decisions made by the executives' rule.

Virginia Code § 15.2-2232 clearly states there is no discretion regarding the intended role of the Comprehensive Plan ("Plan"). Its use is not arbitrary. Once the Plan has been approved and adopted by the governing body: that Comprehensive Plan ***shall control*** the general or approximate location, character and extent of each feature shown on the Plans. It is both a control and guide that is intended to be followed as such. With this statute, localities seeking to circumvent their Comprehensive Plan may claim it only applies to infrastructure features and not private land.

Land use planning has local, regional, and even national implications and these land use decisions can impact more than just those with direct standing in the matter. This cluster of issues should best be resolved by the Supreme Court of Virginia, with subsequent review by the Virginia General Assembly.

If the Court of Appeals hears the case, it will be decided by three judges with discretionary review en banc available. If the Supreme Court of Virginia hears this case, it will be decided by the entire Court sitting. It will have the standing of a decision of this Commonwealth's highest court.

PUBLIC IMPORTANCE

There is public importance in deciding if a local government entity can go against their Comprehensive Plan mandated by statute because it is "merely a guide" and if going against the Plan is "arbitrary and capricious" per se or if the "fairly debatable" doctrine allows long term planning decisions to be disregarded at will.

This is more than just a decision about the alleged spot zoning within an A-1 Agricultural District to B-1 Business or to allow inappropriate and destructive commercialization in established, historic and scenic, rural residential and agricultural communities. This issue can arise in any political subdivision in the Commonwealth.

It is much more important than a simple dispute between landowners and a locality's executive board. A Supreme Court's decision will prevent unnecessary litigation, the defense of which by a local government involves the spending of tax dollars that ought to go for roads, schools, proper planning, or other civic improvements.

The indiscriminate proliferation of Dollar Stores especially in rural America is a fundamental factor behind this rezoning matter that applies to every County in the Commonwealth. The only way to control it is through enforcement of local land use governance as intended to prevent the approval of incompatible locations with detrimental side effects to impacted communities.

Waiting for months or years to see if reversing and remanding to a locality that does not adhere to its Comprehensive Plan is a circuitous route to the remedy we are seeking with this request.

CASE SUMMARY

A destructive, controversial, split 3-2 zoning decision by the Brunswick County Board of Supervisors on January 29, 2020 rezoned 2+ acres within an undivided 8+ acre parcel of land in an A-1 Agricultural District to B-1 Business to allow a 9100 sq. ft. box store (Dollar General) generating a proposed 587 trips per day in traffic volume to an already congested and unsafe section of road. This

decision is intended to allow Dollar General to be located in the heart of the historic and quaint rural, picturesque, residential, agricultural community of Ebony, VA – near Lake Gaston. Located on the VA-NC border.

The targeted location lies across the road from the two existing, community stores that would be put at risk and between Hartley's active farming operation with historic family homeplace completed in 1936 and the original Ebony Post Office built in 1870 that has been preserved and historic Prospect cemetery owned by PCA which is adjacent to the historic Prospect Church in its current location since 1887.

The home district Supervisor and one other Supervisor voted in opposition; the remaining three Supervisors overrode the vote with an approval. Because of what was at stake, the decision was timely appealed on February 28, 2020.

This rezoning application should have never made it past the Planning Department because A-1 zoning ordinances clearly state that a Conditional Use Permit is to be used for any business development in an A-1 district to ensure there is no negative impact to the rural community. A Conditional Use Permit as required by the County's Zoning Ordinance would limit the size of the store to one half of the size approved. Furthermore, this Ebony location is **not** designated on the Future Land Use Map of the Comprehensive Plan for commercial development such as a business corridor that is designated in other rural communities like nearby Gasburg, VA. Circumventing the Comprehensive Plan, the Subdivision Ordinance and the

Zoning Ordinance, the Planning Commission recommended for approval the rezoning to support a Dollar General at a second meeting (Dec 2019) – after interrupting the vote following the public hearing (Nov 2019).

Multiple generations of families that grew up within a 10-mile radius of Ebony and many who have moved to the area over the last 50 years with the draw from Lake Gaston view authentic Ebony as a rural community treasure to be protected and preserved. They came out in force at the public hearings, on social media, and are now supporting the litigation to get this rezoning decision reversed to prevent Ebony's destruction.

Those who are in favor of the Dollar General simply do not care about the detrimental side effects; nor do they care about whether the decision to allow a Dollar General in the Ebony location is aligned with statutory planning and governance tools. Sadly, because of one Supervisor's vote, the County, without oversight, is paying their attorneys handsomely to defend this position and have rejected multiple proposals to settle this matter and stop the litigation.

DEMURRER FAILED TO DISMISS THE CASE

Appellants' "arbitrary and capricious" claims were upheld by a judge in Brunswick County Circuit who presided over a Demurrer the Appellee filed dismissed. Subsequently, a second judge, in lieu of scheduling a trial at a scheduling

hearing, allowed a Summary Judgment filed at the last minute 1.5 years after the Demurrer by Appellee based on "fairly debated" defense to be heard instead and ruled in favor of the Appellee, circumventing a trial that the first judge deemed warranted for Appellants.

The Summary Judgment ruling discounted the statutory role of the Comprehensive Plan, the related Zoning Ordinances and the Virginia Code in deference to the Appellee's "fairly debated" defense and did not allow Appellants a trial for corresponding claims which were upheld by Demurrer. The Summary Judgment judge then retired.

Hence, this request to the Virginia Court of Appeals to file a motion with the Supreme Court of Virginia to accept and certify this case to be transferred to the Supreme Court of Virginia for clarification and resolution of these important questions.

ARBITRARY AND CAPRICIOUS CLAIMS

Appellants' arbitrary and capricious claims that were upheld in the Demurrer:

a. This decision was in substantial conflict with the Comprehensive Plan that is designed to prevent the exact decision that prevailed. Prior to the recommendation vote by the Planning Commission, the Planning Director publicly advised the Planning Commission that the

Comprehensive Plan was largely a suggestion that did not have to be followed and no legal binding. It is "just a guide" and you can make a decision that does not align since it is not legally binding.

b. **Virginia Code § 15.2-2232** clearly states there is no discretion regarding the intended role of the Comprehensive Plan ("Plan"). Its use is not arbitrary. Once the Plan has been approved and adopted by the governing body: that Comprehensive Plan ***shall control*** the general or approximate location, character and extent of each feature shown on the Plans. It is both a control and guide that is intended to be followed as such.

c. **Virginia Code §§ 15.2-2283 and -2284** that call out specific impacts to be considered and consequences to be avoided when approaching zoning matters were not properly considered and mitigated. These include neighborhood impacts, safety, surrounding land use, other businesses, natural resources, historic areas, and harmony and character of the community.

COLLATERAL DAMAGE

When statutory exemptions and the typical "fairly debatable" doctrine are allowed to prevail regardless of whether or not statutory guides are followed, those

decisions create precedent allowing localities to circumvent land use planning or overrule the controlling statutory guides at will. This is contrary to the public policy that desires proper planning and Virginia Code that mandates it.

Through findings of this case, Appellants have also learned that Brunswick County established an early pattern of unilaterally spot zoning agricultural land to B-1 Business to accommodate special "business-related" uses instead of properly defining and using a Conditional Use Permit that would preserve and protect the integrity of the district, character of the community, historic areas, local businesses, nearby church and cemetery, beautiful rural landscape, agricultural operations, and ensure the safety of neighboring families that live in the communities.

An example of the collateral damage is found in a second case appealed by Hartley, as landowner and sole Appellant, that was intended to reverse an earlier improper rezoning decision from 2003 which should have been handled with a Conditional Use Permit. The 2020 rezoning request was denied by Brunswick Couty by the same split vote that approved the Dollar General rezoning case. The County used the **improper and never implemented** 2003 rezoning decision to justify the rezoning for Dollar General seventeen (17) years later.

Since the filing of these cases CL20-073 (requested transfer to Supreme Court) and CL20-458 also under appeal, the County, as a subsequent remedial measure, now pursues Conditional Use Permits instead of indiscriminately rezoning

land to B-1 Business and losing control over its end use which is how this rezoning request under appeal should have been handled to avoid destructive commercialization.

NATIONAL ISSUE OF DESTRUCTIVE DOLLAR STORE PROLIFERATION IN RURAL AMERICA IS AT PLAY WITH THIS CASE

This particular case is about rezoning agricultural land in the heart of historic Ebony, VA to unrestricted B-1 Business to allow destructive commercialization. In this case it is exacerbated by the national issue of the continued unchecked and unneeded proliferation of Dollar Stores that is now decimating rural America.

If the Commonwealth of Virginia does not wish for her open beautiful rural landscape and locations of preserved heritage to be invaded by Dollar Stores completely destroying her rural and beautiful landscapes — from the beach to the mountains, causing local businesses to shut down — then attention to land use planning, governance, and statutory enforcement is essential to ensure appropriate locations are selected for Dollar Stores that are a fit for location and do no harm.

Rural America is considered an easy target for this proliferation because it is assumed to have no land use governance in place to force discerning decisions of location and impacts of negative consequences to be considered. However, that is

not the case for Virginia and Brunswick County – if the governance tools were followed.

For a greater understanding of the unchecked Dollar Store proliferation problem in Virginia and across the country and why citizens and landowners of Ebony are using all possible resources and legal channels to fight the decision, please see Attachment (https://tinyurl.com/m9tdnp2z) - *The Dollar Store Invasion: Communities are in Revolt, But the Chains' Predatory Tactics Also Call for Federal Action*. Appellants included 2020 research material about Dollar Store proliferation threats from same publisher as Exhibit L to Petitioner's Response in Opposition to Respondent's Demurrer.

At the end of last year, the New York Times discovered the Ebony opposition fight among others across the country and has since visited Ebony and is in the process of writing an article about Ebony's fight that will be published in the next few weeks.

It only takes one landowner to say yes to a Dollar Store developer's proposal to set this travesty in motion if a county's Planning Commission and Board of Supervisors are willing to create false narratives and turn a blind eye to land use governance that provides the local tools to control and prevent destructive and essentially illegal commercialization in rural settings. When this happens, the

resulting decision is in clear violation of the Comprehensive Plan, Zoning Ordinances, and zoning statutes in Virginia Code.

That is what happened in Ebony. Two other landowners — with Hartley being one of the two — had been approached separately by a Dollar General developer a year earlier about the construction of a store on either property. Both, independently of each other, said 'no' that this type of store was not right for the community and would have detrimental impacts on many levels – and furthermore thought the community was well served by the existing local stores and other Dollar Stores in addition to full-service options within 6 – 10 miles.

While there may be places where a Dollar Store is a fit for the location, Ebony is NOT one and the responsibility and accountability of County leadership is to enforce prevailing laws designed to ensure business uses are the right fit for rural communities and do no harm. This applies to every County across the Commonwealth.

HISTORIC DISTRICT ELIGIBILITY

The location that would be impacted by the construction of the proposed Dollar General is part of a historic district eligibility evaluation that was recently approved by the VA Department of Historic Resources (DHR) with a high score — in its current state without the construction of the proposal Dollar General. This

eligibility is for Historic District nomination to National Register of Historic Places and the Virginia Landmarks Register. The period of historic significance is 1870 – 1962. Any conflicting change to the current picturesque setting, configuration of historic buildings, and both business and domestic architecture will diminish this eligibility.

Bolstered by multiple generations of public community pride, the multigeneration landowners in the community have used their own resources to preserve the historic integrity of this special community to the extent possible. The citizens were under the impression that it was further protected by the county's Vision, Comprehensive Plan, and planning statutes.

This recent evaluation by DHR concluded it was a very rare example of a historic village with so many of the early structures – both business and domestic – that are still standing, and the area has remained picturesque. It would be the first listing of its kind in Brunswick County – a County that prides itself on *Preserving Heritage* as one of the four pillars of its Comprehensive Plan. All this stands to be destroyed by the County's rezoning decision with indiscriminate approval of incompatible commercialization.

NOT TOO LATE FOR EBONY TO BE SAVED

We can apply lessons learned throughout the Appeal and still save Ebony. We do not need to sacrifice the Ebony community as a monument to misuse of "fairly debatable" doctrine to circumvent the Comprehensive Plan and planning statutes. There is yet no harm and no foul as the Dollar General developer has elected not to purchase the property and begin construction since the Appeal has been underway.

Reversing this rezoning decision will save Ebony — and avoid irreversible damage to its citizens, existing local stores, as well as the Prospect Cemetery and Church (now and future generations) and the loss of a rare, cherished historic village for the County and Commonwealth. The legal clarity we ask for will set the precedent for all Counties in Virginia – and across America.

CONCLUSION

For the foregoing reasons, Appellants request the Virginia Court of Appeals to submit a motion to the Supreme Court of Virginia to accept and certify this case for transfer from the Court of Appeals to the Supreme Court of Virginia.

In addition to a decision, Appellants respectfully ask that the Supreme Court of Virginia take this leadership opportunity to clarify intent of land use governance to protect rural lifestyles and neighborhoods, scenic landscapes, agriculture, timber farming, and historic areas – when incompatible and damaging commercialization

is proposed. This applies not only to Brunswick County but also for the rest of the counties in Virginia. Because of the connection to the uncontrolled proliferation of Dollar Stores, this case and outcome will be on the radar across the US.

If Brunswick County leadership correctly followed their Comprehensive Plan, zoning ordinances, and related statutes in the Virginia Code then they would have had no choice but to prevail with a 'no' to the rezoning decision that was approved and is now a threat to this treasured rural community.

We submit to this Court that it is in the manifest public interest to see these issues resolved once and for all by the Supreme Court of Virginia. Hence, we ask the Court of Appeals to defer to and ask the Supreme Court to take and hear this case and resolve these issues.

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Respectfully submitted,

<u>/s/ John M. Janson</u>
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2023, in accordance with Virginia Code § 17.1-409, one copy of the foregoing Request for the Virginia Court of Appeals to Move the Supreme Court of Virginia to Accept and Certify Transfer to the Supreme Court was filed via the Virginia Appellate Courts Electronic System with the Clerk of the Virginia Court of Appeals. A copy was served by electronic and first-class mail upon the following:

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