

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE COUNTY OF BRUNSWICK**

<b>ANNE EDWARDS HARTLEY, et al.,</b>	)	
	)	
<b>Petitioners,</b>	)	
	)	<b>Case No. CL20000073-00</b>
<b>v.</b>	)	
	)	
<b>BOARD OF SUPERVISORS OF</b>	)	
<b>BRUNSWICK COUNTY,</b>	)	
<b>VIRGINIA,</b>	)	
	)	
<b>Respondent.</b>	)	

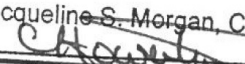
**PETITIONERS' BRIEF IN OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT OF  
SUPERVISORS OF BRUNSWICK COUNTY, VIRGINIA**

COME NOW Petitioners Anne Edwards Hartley (“Hartley”) and the Prospect Cemetery Association (the “Cemetery”) (collectively referred to as “Petitioners”), by counsel, and hereby submit their Brief in Opposition to the Motion for Summary Judgment of Supervisors of Brunswick County, Virginia (the “Board”) concerning the portions of the Petitioners’ Petition that were not previously dismissed.

**INITIAL MATTERS**

**I. THE BOARD’S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AS FATALLY FLAWED**

The Board’s motion for summary judgment sets forth and is premised on an incorrect legal standard. Although the Board relies on *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 740 S.E.2d 548 (2013), its motion omits critical language from that case.

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In *Newberry Station*, the Virginia Supreme Court emphasized 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 effect.’” *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557 (quoting *Renkey v. County Bd. of Arlington County*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006)). The question whether there exists “some evidence of reasonableness” that is “sufficient to make the question fairly debatable” comes into play only if the board’s action was not undertaken in violation of existing Virginia state or local law. *Id.* (internal quotation marks omitted).

In this case, the Board wholly fails to prove that its legislative action met the first required prong of the *Newberry Station* test. Specifically, as detailed below, there is **no evidence** that the Board considered the numerous factors required by Virginia Code §§ 15.2-2283 and -2284 prior to authorizing the rezoning to allow the construction and operation of a 9,100 square foot Dollar General store at the proposed Ebony location. **Under *Newberry Station*, *Renkey*, and other Virginia cases discussed below, this failure alone renders the Board’s action void and of no effect.** Consequently, the Board’s motion for summary judgment must be denied.

By moving for summary judgment on the grounds of “some evidence of reasonableness,” the Board wrongly ignores this critical point. There is simply no need to delve into the reasonableness issue. Instead, *Newberry Station* and *Renkey* mandate the outright denial of the Board’s motion.

**II. BY PROPERLY FOCUSING THE ANALYSIS ON FLAWED COMPREHENSIVE PLAN ENFORCEMENT PROCESS, AND MISALIGNMENT WITH LAND USE MANAGEMENT STATUTES, IT IS BEYOND DEBATE THAT THE BOARD’S GRANT OF PAR 5’S REZONING APPLICATION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE**

Even if the Court should evaluate the merits of the Board's motion for summary judgment, the motion should still be denied. There is insufficient evidence to render the reasonableness of the Board's actions "fairly debatable." *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557. A question is fairly debatable "when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Id.* (internal quotation marks omitted). Thus, for purposes of evaluating a board of supervisors' decision, "reasonable" is equivalent to "not debatable." *See id.*

To determine whether the Board's grant of Par 5's Rezoning Application to construct a 9,100 square foot Dollar General store on the subject Ebony property was indubitably reasonable, the focus of analysis should be on land use management within Brunswick County, a topic that is primarily addressed in the Brunswick County Comprehensive Plan 2037 ("Comprehensive Plan"). *See* Virginia Code § 15.2-2223 (discussing the scope and purpose of a locality's comprehensive plan); *Helmick Family Farm, LLC v. Comm'r of Highways*, 297 Va. 777, 793, 832 S.E.2d 1, 9 (2019) (explaining that the comprehensive plan "identifies those areas planned for future growth and the anticipated land use associated with such growth"). Both parties previously submitted copies of the Comprehensive Plan to the Court.<sup>1</sup>

The Board's rezoning decision must conform to the land use framework described in the Comprehensive Plan. *See* Virginia Code §§ 15.2-2223 (requiring a general location for each feature of the Comprehensive Plan, with "feature" being a general location for industry, residential, business, parks, etc.), 15.2-2229 (providing that zoning cases are decided based on the

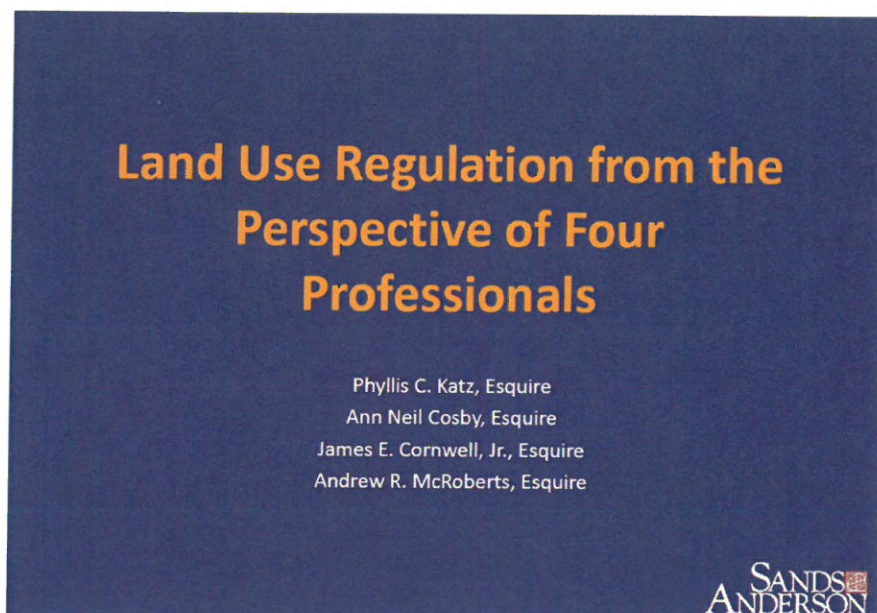
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<sup>1</sup> Petitioners initially submitted a complete copy of the Comprehensive Plan as Exhibit I to their Response in Opposition to the Board's Demurrer. The Board also included a copy of the Comprehensive Plan when it submitted the legislative record in conjunction with its Motion Craving Oyer.

appropriateness of the proposed use within the general area of the Comprehensive Plan feature and that due process is required for any zoning amendment). 15.2-2232 (stating that the Comprehensive Plan “shall control”).

“The Supreme Court of Virginia has acknowledged the responsibility of local governing bodies to abide by the provisions of its established plan.” *In re Hill*, 56 Va. Cir. 553, 557, 2000 Va. Cir. LEXIS 620, at \*10 (Hanover County Cir. Ct. 2000) (citing *City Council v. Wendy’s of W. Va.*, 252 Va. 12, 18, 471 S.E.2d 469, 473 (1996)). Previous zoning decisions do not relieve the Board of the duty to enforce the features of the current Comprehensive Plan. *See* Virginia Code § 15.2-2229; *Wendy’s of W. Va.*, 252 Va. at 18, 471 S.E.2d at 473; *Hill*, 56 Va. Cir. at 557, 2000 Va. Cir. LEXIS 620, at \*10. The proper amendment process is to be followed to ensure the Board’s decisions always reflect the enforcement of the current Comprehensive Plan. *See* Virginia Code § 15.2-2229.

These principles are reiterated in materials published by the Board’s own counsel, Sands Anderson. These materials were downloaded from the VACO website in 2020. And attached as Exhibit O to Amended Petition for Case 02-073. Relevant pages are included below:



## Comprehensive Plan

- Addresses the physical development of the land.
- Goal is to have coordinated and harmonious land development.
- It surveys, studies and maps existing conditions and development patterns.
- It designates the location of roads, historical areas, mineral resources, urban development areas, etc.

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## Legal Effect of Comprehensive Plan

- Both a guide (Va. Code § 15.2-2223)
  - Must designate the approximate location, character, and extent of each feature.
  - Must indicate where existing lands or facilities are to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use.
- And a control to development (Va. Code § 15.2-2232)
  - the comprehensive plan “shall control the general and proximate location, character, extent of each feature shown on the plan.”
- Capital Improvement Plan must be based on the Comprehensive Plan (it is adopted annually).

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## Proposed Use of Land Must Be in Conformity with Comprehensive Plan

- Planning Commission to review any deviation from Comprehensive Plan and after a public hearing, approve or disapprove amendment within 60 days.
- Applicant may appeal decision to Board of Supervisors.
- Board of Supervisors may overrule Planning Commission on petition of applicant or on its own. Board must act within 60 days.

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Considering bullet point 3 on this last slide below, it is more than ironic that Sands Anderson is now defending the Board on this exact point by working very hard to try and turn a procedural challenge into a fairly debated zoning dispute. The professional advice publicly published by the Board's Counsel is at core of the Plaintiff's position.

## Land Use Litigation in Circuit Court

- Land use litigation, except on appeal from BZA, is almost always filed as a declaratory judgment action.
- Land use litigation is going to happen because you are a decision-maker in a political environment on issues important to people. Cannot make everyone happy.
- Courts will generally defer on your legislative land use decisions on substantive challenges, but NOT on procedural challenges. Follow statutes strictly!
- There are always steps that can be taken to avoid litigation or make it more likely you will prevail if sued. Consult your experienced local government land use attorney early and often.

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As demonstrated below, based on existing and future land uses in the Ebony community, and not following the Comprehensive Plan Enforcement and Amendment Processes to ensure all Board decisions are aligned, it was unreasonable for the Board to approved PAR5's rezoning application in support of building a Dollar General. It follows that the Board is not entitled to the entry of summary judgment in its favor.

## **FACTUAL ISSUES**

### **I. CLAIMS REMAINING AFTER DEMURRER RULINGS**

This Court's letter ruling dated July 30, 2021, overruled the Board's Demurrer "regarding the count of arbitrary and capriciousness based on (i) alleged unalignment with the Comprehensive Plan and (ii) on the Board's alleged failure to consider [Virginia Code] §§ 15.2-2283 and -2284" prior to granting the subject Rezoning Application. A copy of this letter ruling is attached hereto as Exhibit A.

1. **Unalignment with Comprehensive Plan.** The Court's letter ruling states: "Petitioners' pleadings provide facts supporting its [sic] allegations that deviating from the Comprehensive Plan was unreasonable and sufficient to overrule [the Board's] Demurrer." (Exhibit A, Letter Ruling, p. 4.)

2. **Failure to Consider Virginia Code §§ 15.2-2283 and -2284.** The Court's letter ruling provides: "Petitioners allege that the Board failed to consider certain statutory factors. Petitioners provide the requisite code section and provides [sic] facts that support the claim that the factors were not considered. Such pleadings fulfill the Court's requirement that Petitioners 'produce evidence of unreasonableness.' As such, Petitioners may base their claim on a purported failure to consider such factors." (Exhibit A, p. 4.)

## II. RESPONSE TO BOARD'S LIST OF UNDISPUTED MATERIAL FACTS

Paragraph 38 of the Board's Brief sets forth a list of allegedly undisputed material facts pertaining to Petitioners' two claims outlined above. Each material fact the Board has listed in the summary is recited below, followed by Petitioners' response. Responses to each of 1 – 37 Undisputed Material Fact is attached as an Addendum to this response.

**38.1** "There is significant business and commercial type activity occurring in the general vicinity of the Rezoned Property. This includes the Ebony General Store, the Race-In, the Carroll Family Logging Company, and Homestead Antiques, and the Ebony Post Office."

### RESPONSE: Disputed.

The operations of the Ebony General Store, Race-In, Carroll Family Logging Company, Homestead Antiques, and Ebony Post Office do not constitute "significant" business and commercial activity occurring in the general vicinity of the Subject Property. "'Significant' is defined as 'having or likely to have influence or effect; deserving to be considered; important, weighty, notable.'" *Martin v. Martin*, 27 Va. App. 745, 755, 501 S.E.2d 450, 455 (1998) (quoting Webster's Third New International Dictionary, 2116 (1981)); *see also David v. David*, 64 Va. App. 216, 222, 767 S.E.2d 241, 244 (2015). No "weighty" or "notable" level of business and commercial activity is occurring in the general vicinity of the proposed Dollar General store. The trend in that area is preservation of the rural, farming lifestyle and historic integrity of the community.

The rural nature of the area in question is clearly depicted in the photograph attached as Exhibit P to the Amended Petition and in the photo displayed below:





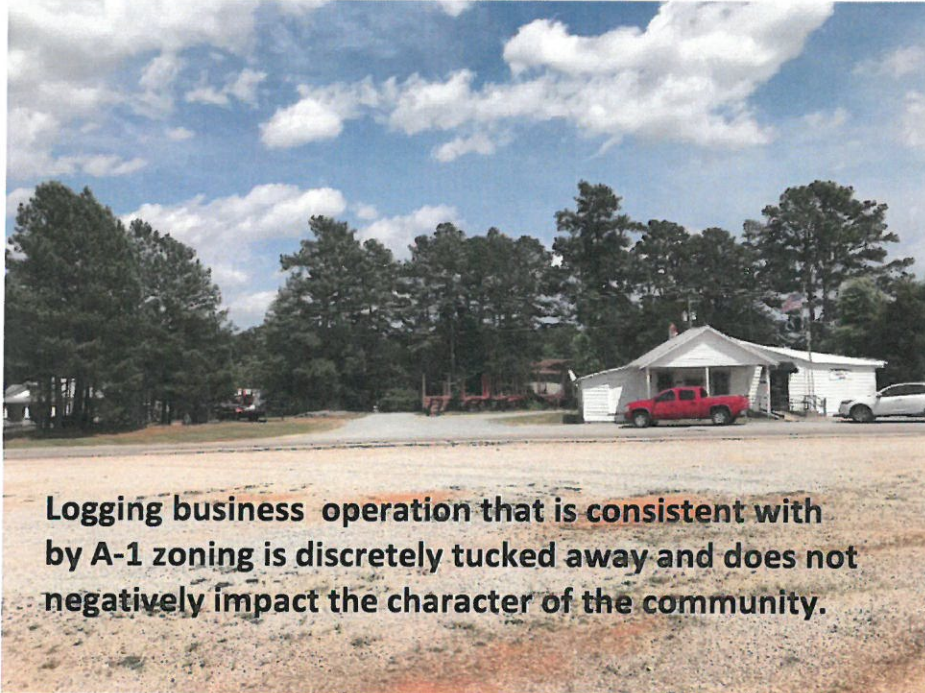
***Ebony, VA Location Subject of 20-073 and 20-458 Appeals***

*In both cases, the appeal is to revert spot zoning B-1 Business back to A-1 Agriculture to protect and preserve the character, authenticity, integrity of this community, and harmonious coexistence with family, church, and farming operations. It is also to properly align with the current Comprehensive Plan and its proper enforcement which calls for carefully managed commercialization location to preserve the authentic rural communities like Ebony and scenic landscapes that are strategic features for the County.*

**NOTE:** There are already 3 Dollar General's within 6.5 miles (Gasburg) and 10 miles (Bracey, Brodnax) of this location; a Family Dollar, Food Lion, DrugCo, and ACE Hardware within 6.5 miles.

Photographs of the premises of some of the other Ebony operations identified by the Board and other impacted neighboring family, church, and farming operations are depicted below:

**Carroll Family Logging Company and Current Post Office:**



**Logging business operation that is consistent with by A-1 zoning is discretely tucked away and does not negatively impact the character of the community.**

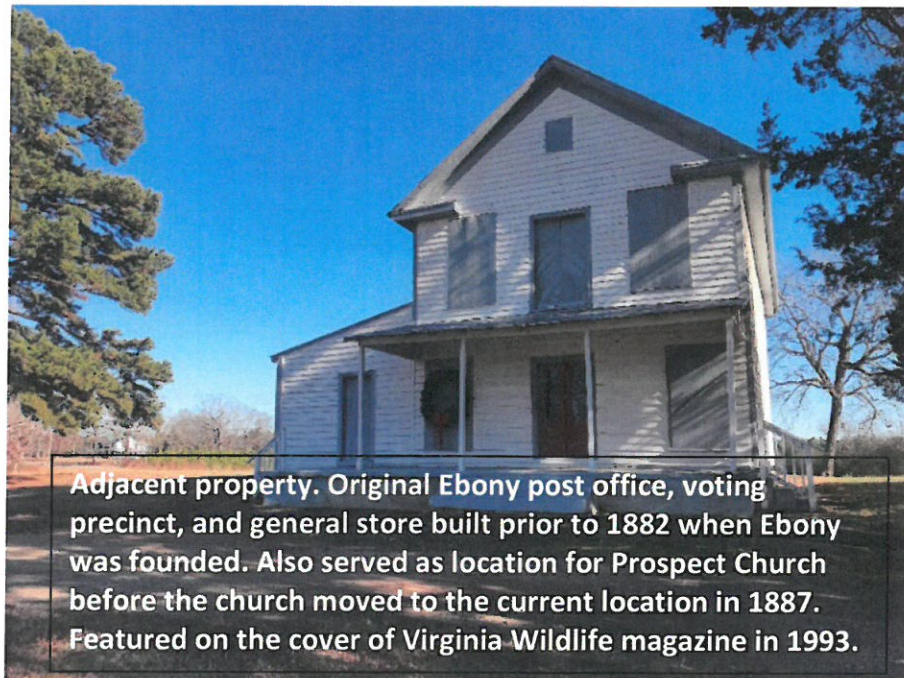


**Carroll Family Homes Adjacent to Logging Business**

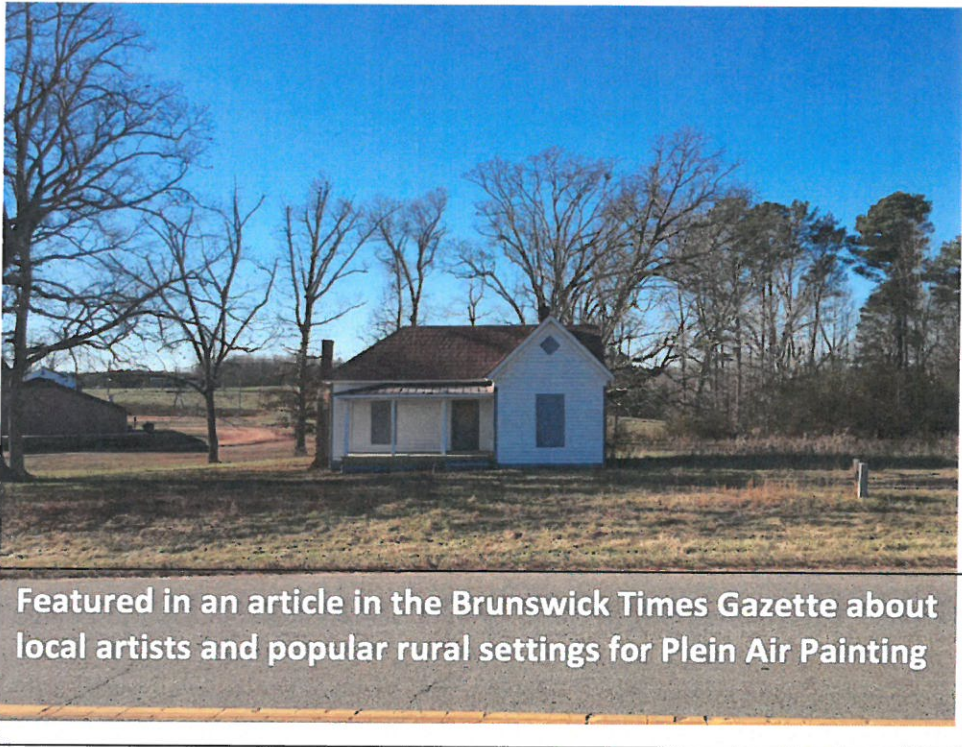
**Homestead Antiques:**



**Original Ebony Post Office, Tillman Poling Precinct, General Store:**

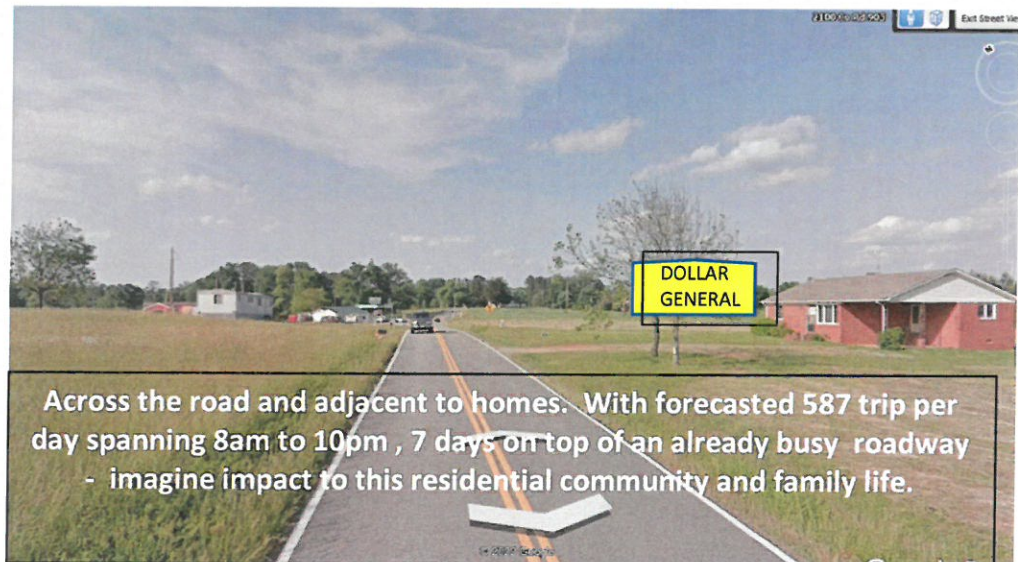
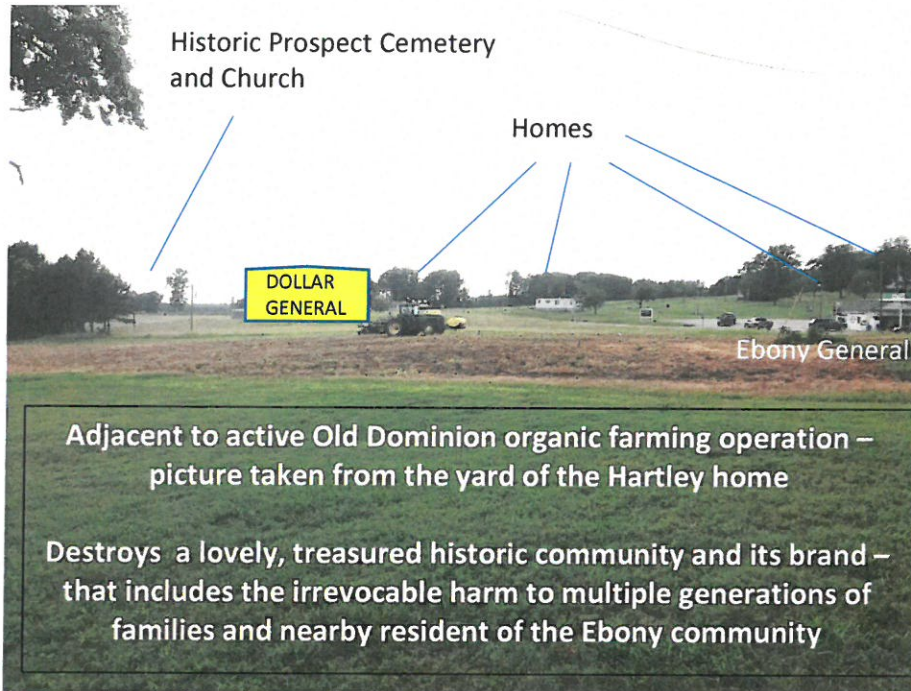


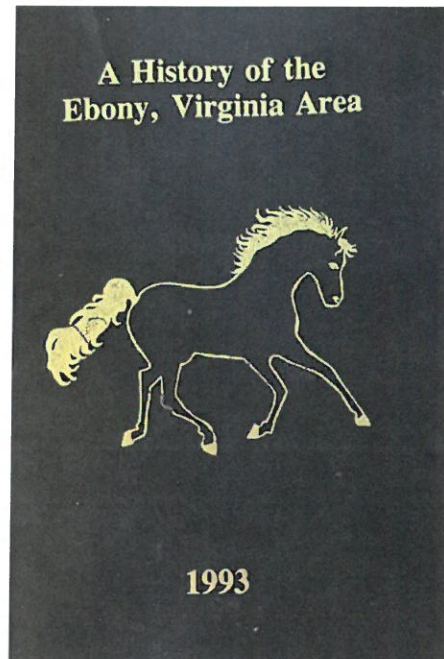
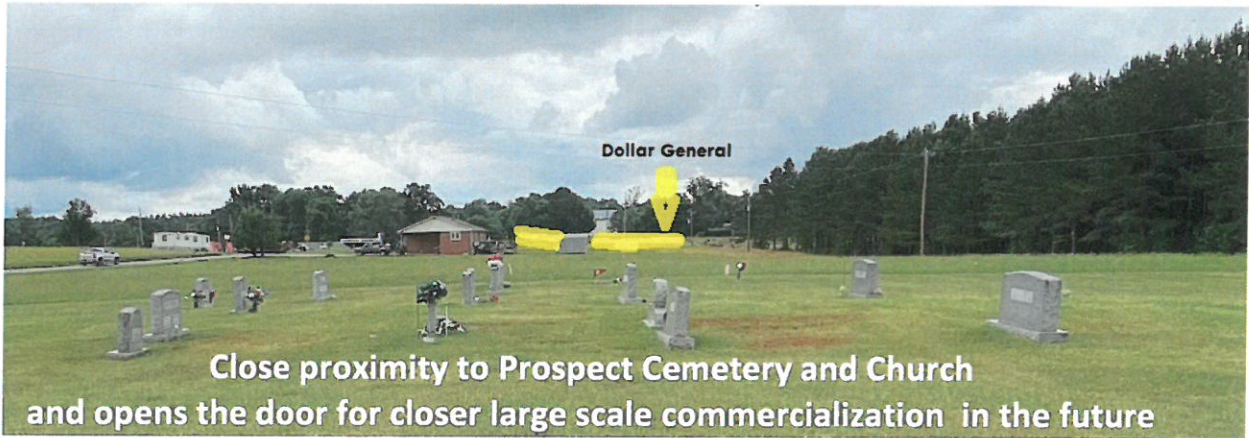
**Hartley Property That is Subject of Rezoning Appeal 20-458**



**Impacted areas where the proposed Dollar General store would be built:**







*The real treasure of the Ebony community is perhaps captured best in this book that was written by founding families who established Ebony and its legacy. The content was created from 1987 – 1992 and was published in 1993 – and reprinted in 2021. There is a special message captured in both the Preface and Epilog that encourages future generations to preserve the best of the past while choosing the best for the future. Efforts to save Ebony from a level of commercialization that will effectively destroy a special place and its authenticity that have been intentionally preserved since before 1882 is exactly aligned with intended land use management practices evidenced in the Brunswick County's Comprehensive Plan and Zoning Ordinances as well as Virginia statutes.*

Further, the Ebony General Store and Race-In, while existing many years prior to zoning, set the example and meet the spirit of small crossroad country stores (“rural retail”) that may permissibly operate under the Brunswick County Zoning Ordinance in an Agricultural A-1 district through proper application of Conditional Use Permits. Brunswick County Code, App’x B, Zoning Ordinance (“Zoning Ordinance”), at Articles 4, 4-1-18. A country general store is the only type of retail business that is authorized to operate within an Agricultural A-1 district under the Zoning Ordinance. Zoning Ordinance, at Articles 4, 4-1-18. A “country general store” is defined as a “single store, the ground floor area of which is 4,000 square feet or less and which offers for sale, primarily, most of the following articles: bread, milk, cheese, candy, papers and magazines, and general hardware articles.” Zoning Ordinance, at Article 2-1. Homestead Antiques, with its current *restricted* B-1 zoning, is largely equivalent to A-1 Conditional Use.

Naturally aligned with the intent of the A-1 Zoning Ordinance, the operations of the Ebony General Store, Race-In, Homestead Antiques, and Carroll Logging are in harmony with the agricultural and rural residential nature of the Ebony community. Contrary to the Board’s assertions, they do not rise to the level of significant business or commercial activity.

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**38.2** “In addition to functioning as general stores, Ebony General and the Race-In provide gas station service.”

**RESPONSE: Undisputed (but irrelevant with respect to reasonableness)**

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**38.3** “A portion of Petitioner Hartley’s property was in the past also rezoned from A-1 to B-1, at Petitioner Hartley’s request, for a boat business and such rezoning ‘might

have been a reasonable decision’ and ‘on its face may have complied with the County Zoning Ordinance and Virginia Code §§ 15.2-2283 and -2284.’”

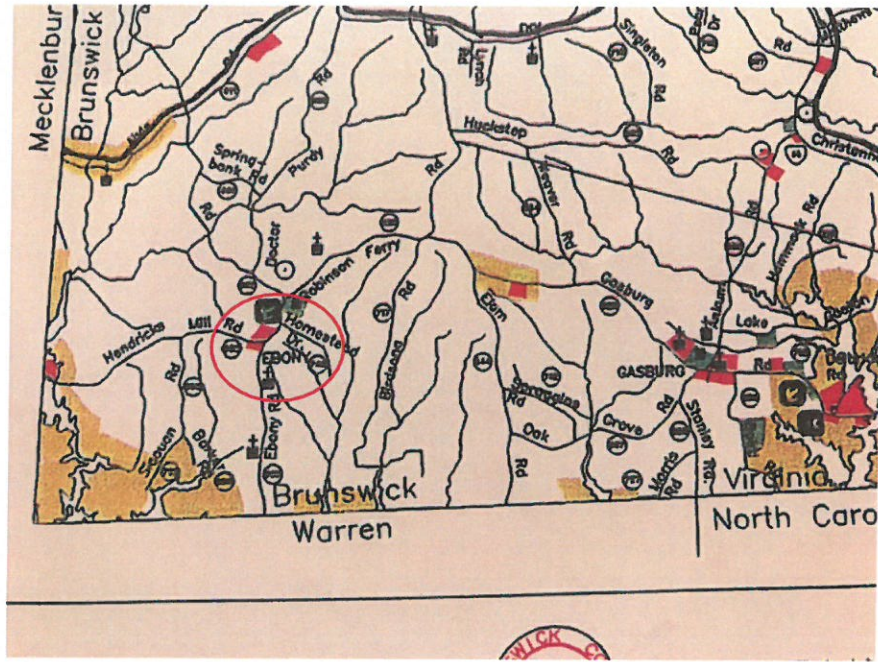
**RESPONSE: Disputed as deliberately misleading and suggestive of incorrect implications.**

The Board’s undisputed fact No. 38.3 contains two separate statements, both of which are deliberately misleading and suggestive of incorrect implications. The first statement concerns the Board’s 2003 rezoning of a portion of Hartley’s property, which is the subject of the companion case bearing Docket No. CL20000458-00 (the “458 Case”). The second statement quotes a portion of Petitioners’ Response No. 15 to the Board’s Requests for Admission.

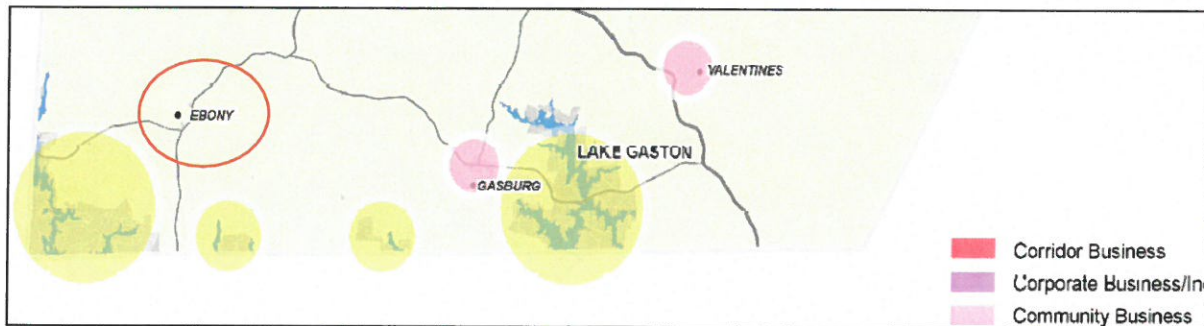
With regard to the first statement, Hartley sought rezoning of a portion of her property in 2003 under the express direction of the Planning Commission. Petition in 458 Case, at ¶ 8. The Planning Commission wrongly informed Hartley that she needed to apply for a rezoning from Agricultural A-1 to Business B-1 in order to obtain approval for a location to unload and store any inventory needed to support an electric boat business located in North Carolina. Petitioner’s Answers to Interrogatories in 458 Case No. 14. In the application, Hartley described exactly the limited and only use intended. *See id.* Hartley had no opinion about the zoning other than following the guidance received from the Planning Commission, and she did not intend or request for her property to be classified as open-ended and unrestricted Business zoning. *Id.* It is misleading for the Board to suggest otherwise. Moreover, the Board is well-aware that the anticipated business use of Hartley’s property never materialized, and that the property has at all times remained in its original, undeveloped state. Petition in 458 Case, at ¶ 8. All of this is a moot point, because the decision made in 2003 was relative to the then-current version of the Comprehensive Plan. The 2020 rezoning decision for Dollar General must align with the 2017



version of the Comprehensive Plan and it does not. The 2017 revision was updated to remove business/commercial use from the subject Ebony location:



*Future Land Use from the 1997-98 Comprehensive Plan – Vision 2015*



*Future Land Use from the Current Comprehensive Plan – Vision 2037*

With regard to the second statement made in the Board’s No. 38.3, it is irrelevant whether the rezoning of the portion of Hartley’s property in question “might have been consistent” back in 2003 with the factors listed Virginia Code §§ 15.2-2283 and -2284. There is no evidence that the

Board considered those statutory factors prior to rezoning the property in question to unrestricted Business B-1 in 2003 or in denying Hartley's 2020 request for a zoning reversion back to Agricultural A-1.

More importantly, as stated throughout this Brief, there is no evidence that the Board complied with its duty to consider the factors set forth in Virginia Code §§ 15.2-2283 and -2284 prior to granting the rezoning at issue in this case, to wit, Par 5's Rezoning Application for the construction of a 9,100 square foot Dollar General store at the proposed Ebony location.

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**38.4** "The portion of Hartley's property that was rezoned from A-1 to B-1 for the boat business is larger in size than the property rezoned from A-1 to B-1 for the proposed Dollar General store (approximately 3.5 acres versus approximately 2 acres)."

**RESPONSE: Disputed as deliberately misleading and suggestive of incorrect implications.**

The Board's undisputed fact No. 38.4 is deliberately misleading and suggestive of incorrect implications. The size of the 2003 rezoned portion of Hartley's property was determined at the discretion of the Planning Commission and the Board. See Petition in 458 Case, at ¶ 8. Hartley simply followed the directives of the Planning Commission in filling out her 2003 rezoning application. Petitioner's Answers to Interrogatories in 458 Case, No. 14. She never intended to obtain permission to conduct unrestricted Business B-1 commercial operations on her property. *Id.*

Further, the parent parcel that contained the proposed Dollar General site is comprised of 8.36 acres. (See Land Use Amendment Application 19-032.) Based on a shared conversation between Hartley and landowner, and input from others, Petitioners have reason to believe that the owner of this large parent parcel, Jerry Jones, intends to bootstrap the Business B-1 zoning for the

proposed Dollar General store to obtain the rezoning of the remainder of his property from Agricultural A-1 to Business B-1. It is also submitted that the Board is well aware of Mr. Jones's commercialization plans. Thus, it is disingenuous at best for the Board to suggest that Hartley's undeveloped property somehow provides a valid basis for the rezoning of the property at issue in this case to Business B-1 to allow for the construction of a 9,100 square foot Dollar General store and what could come next.

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**38.5** "The portion of Hartley's property that was rezoned from A-1 to B-1 for the boat business is in the general vicinity, approximately 100 yards, from the proposed Dollar General store property."

**RESPONSE: Disputed as deliberately misleading and suggestive of incorrect implications.**

For the reasons set forth in response to the Board's undisputed fact No. 38.4, its undisputed fact No. 38.5 is also subject to dispute as deliberately misleading and suggestive of incorrect implications. There is simply no legitimate reason for the Board to bootstrap the improper 2003 rezoning of Hartley's property as somehow providing a valid basis for the Board's rezoning of the property at issue in this case to authorize the construction of a 9,100 square foot Dollar General store. This is a moot point, because the decision made in 2003 was relative to the then-current version of the Comprehensive Plan. The 2020 rezoning decision for Dollar General must align with the 2017 version of the Comprehensive Plan land use for the subject area and it does not.

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**38.6** "The Ebony area is an attraction for tourism-related business that the Comp. Plan 'defines as a strategic direction for economic development' and the Ebony area currently sees increased auto traffic in this regard during the later spring, summer and fall months."

**RESPONSE: Disputed as an improper characterization of the Comprehensive Plan and as suggestive of incorrect implications arising from traffic flows.**

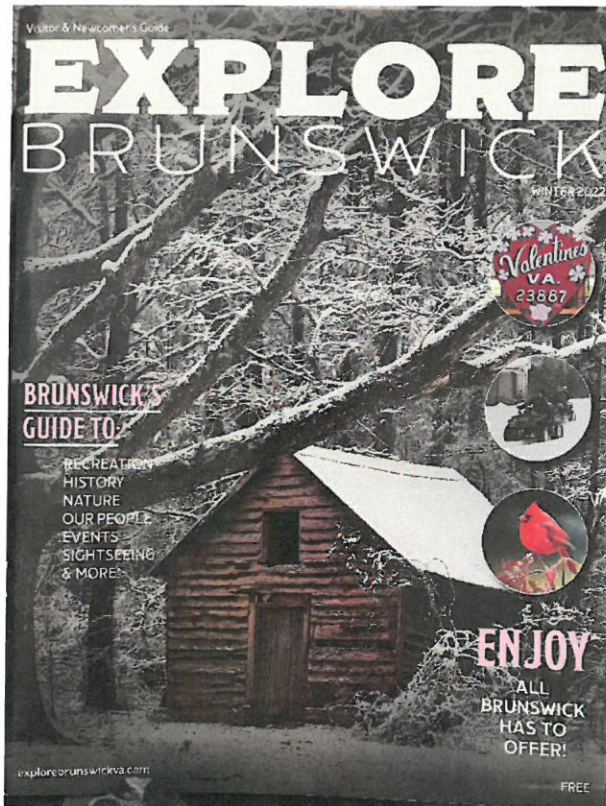
The Board's undisputed fact No. 38.6 contains two parts, both of which are flawed. First, the Board improperly characterizes the language in the Comprehensive Plan pertaining to tourism-related business. Second, the Board's statement is deliberately suggestive of incorrect implications arising from traffic flows.

With regard to the first fact statement, the Comprehensive Plan makes clear that Ebony's "tourism-related business" involves outdoor recreational activities for which the natural scenic beauty of the area acts as a magnet. Comprehensive Plan, at p. 74. The installation of a 9,100 square foot Dollar General store at the proposed Ebony location will severely undercut this very purpose. The current Comprehensive Plan land use does not designate the subject Ebony area for commercialization in order to accomplish this vision for the area and contribution as an attraction for tourism.

As stated in the Comprehensive Plan: "[T]he natural environment can be a primary draw for visitors looking for recreation and undeveloped, scenic landscapes." *Id.* at p. 79. Toward this end, the Comprehensive Plan states that "[d]eveloping outdoor recreation attractions and marketing of the natural assets of Brunswick County are key economic strategies for both the County and the Commonwealth of Virginia." *Id.* at p. 42. The tourism that these outdoor activities and natural resources attract in the Ebony region function as "an economic engine for Brunswick County." *Id.* at p. 75.

The Comprehensive Plan also recognizes that "[f]rom a tourism perspective visitors want to experience the 'authentic' local culture of a destination, such as art, music, history, local crafts, traditions, local food, architecture, religion, and distinctive leisure activities. The cultural, heritage, and natural assets of Brunswick County make it very attractive for tourism." *Id.* at p. 75.

To promote tourism, rural communities such as Ebony should take advantage of their natural assets, which include peaceful country landscapes, farms, and historic buildings. *Id.* In fact, the Winter Edition of Explore Brunswick perfectly expresses the Brunswick County brand being promoted in the Comprehensive Plan:



To showcase these natural assets, Ebony and other rural communities should take measures such as “proactively addressing light pollution and limiting the intrusion of artificial light to protect the ‘dark sky’ ambience of the community.” Comprehensive Plan, at p. 79. Notably, the plans for the proposed Dollar General store include the corporation’s standard lighting, which is bright 24-hour lighting easily visible from all directions from a long distance away. *See Exhibits D and Q to Amended Petition.* Such lighting contravenes the directive in the Comprehensive Plan that Ebony’s natural outdoor assets should be showcased by keeping artificial light to a minimum, particularly at night. *See Comprehensive Plan, at p. 79.*

In addition, the Comprehensive Plan calls for the Board to protect and enhance the natural features that promote recreational tourism by preserving the scenic value of picturesque rural areas such as Ebony. *Id.* at pp. 42, 74, 75, 79. This picturesque landscape will be ruined by the proposed construction of a massive, box-store Dollar General in the heart of Ebony. This eyesore will significantly detract from the tourism-related business and economic development advocated throughout the Comprehensive Plan. In other words, allowing incompatible commercialization that requires Business B-1 zoning like the proposed Dollar General store destroys the authentic rural and tranquil setting whose value and strategic goals are to be protected, as stated throughout the Comprehensive Plan.

With regard to the second part of the Board’s undisputed fact No. 38.6, the Board wrongly implies that the increased traffic flows that arise from recreation-based, outdoor tourism somehow support the construction and operation of a Dollar General store in Ebony. In actual fact, the opposite is true. As explained throughout this Brief, the skewed intersection across from the proposed Dollar General store has created an existing traffic hazard. This hazardous condition will be exacerbated by the additional stop-and-start traffic that would be generated by the proposed retail store.

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**38.7** “The proposed development of the Rezoned Property meets Virginia Department of Transportation access management and sight distance regulations.”

**RESPONSE: Disputed.**

Notwithstanding the letters from the Virginia Department of Transportation (“VDOT”) referenced by the Board, Petitioners have ascertained as a fact that, when measured from vantage

point of driver seated in car, the 500-foot site distance from the south on State Road 903 has a knoll that blocks the 500 ft clearance. Amended Petition, at ¶ 62(b).

This obstruction is depicted in the photograph below:



In addition, prior to granting Par 5's Rezoning Application, the Board failed to complete traffic counts during peak seasonal traffic and did not undertake the Traffic Studies recommended by VDOT guidelines for extensive projects like the proposed Dollar General store. The VDOT Guidelines may be accessed online through the following link:

[http://www.virginiadot.org/projects/resources/chapter527/Administrative\\_Guidelines\\_TIA\\_Regs\\_7.2012.pdf](http://www.virginiadot.org/projects/resources/chapter527/Administrative_Guidelines_TIA_Regs_7.2012.pdf)

A traffic engineer who has been involved in Dollar General projects informed Petitioners that he was unaware of any other Dollar General project that did not include a Traffic Study. In addition, historic challenges have been made concerning the safety of the intersection of roads at

the impacted corner and a decision was made NOT to reengineer the road at that time. The safety issues did not disappear and have been exacerbated by significant increase in seasonal traffic over the years.

VDOT's letter dated November 19, 2019, also states: "Entrance geometrics and drainage will be addressed during the site plan review stage." (Exhibit C) Thus, VDOT's own review of the proposed development of the subject property is incomplete.

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**38.8** "The Comp. Plan speaks approvingly of 'new business investment,' 'business development,' providing 'employment and jobs,' 'expanding commercial small business and improved shopping opportunities,' providing 'grocery, post office, and convenience stores in the unincorporated communities' of the County."

**RESPONSE: Disputed as incomplete and misleading and as an improper characterization of the Comprehensive Plan.**

The Board's quoted language in undisputed fact No. 38.8 is incomplete and misleading, and it presents an improper characterization of the Comprehensive Plan. As discussed above, business development and economic growth within Brunswick County must be consistent with the land use provisions designated for a particular area of the County.

In this regard, the Comprehensive Plan contains specific sections addressing existing and future land uses for each area of the Brunswick County along with corresponding maps. Comprehensive Plan, at pp. 87-92. The Comprehensive Plan also contains a Development Opportunities Map. Comprehensive Plan, at p. 95. When making specific zoning and land use decisions, the Board must act in accordance with these Plan provisions and maps. *See* Virginia Code §§ 15.2-2223, -2229; *Wendy's of W. Va.*, 252 Va. at 18, 471 S.E.2d at 473; *Hill*, 56 Va. Cir. at 557, 2000 Va. Cir. LEXIS 620, at \*10.



For the reasons set forth in response to undisputed fact No. 38.6, above, the Comprehensive Plan, viewed as a whole, advocates the use of Ebony's natural, scenic beauty to function as a magnet for tourism and economic development. Comprehensive Plan, at pp. 42, 74, 75, 79. To serve this purpose, Ebony's unspoiled landscapes must remain intact. *See id.* This goal will be severely undercut, if not ruined outright, by the construction of a 9,100 Dollar General retail box store at the proposed Ebony location.

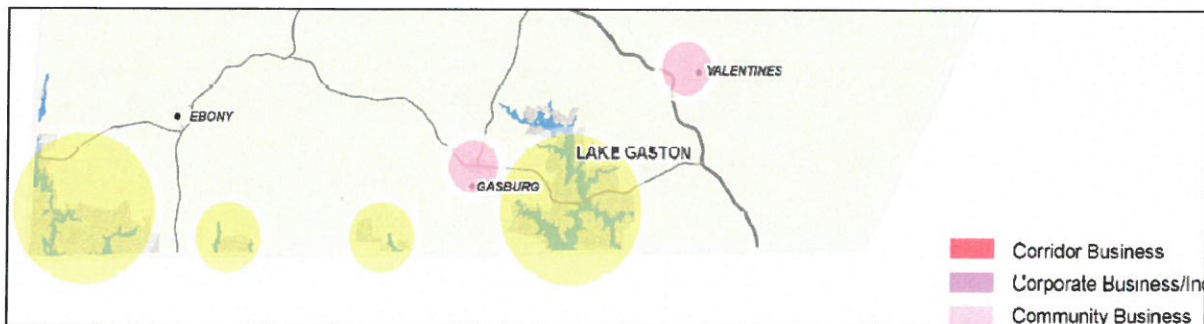
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38.9 "The Comp. Plan provides that Ebony is a general 'growth area' that 'continue[s] to represent good direction for land development in the future.'"

**RESPONSE: Disputed as deliberately misleading and incomplete.**

The Comprehensive Plan expressly depicts Ebony as an Agricultural A-1 area that is "expected to remain in agricultural and low-density rural residential through the year 2037. Comprehensive Plan, at pp. 90, 91. However, this does not preclude "growth" by a Conditional Use Permit. By controlling the nature of business development in rural communities with a proper Conditional Use Permit, it is possible to accomplish the vision set forth in the plan.

The relevant portion of the Future Land Use Map covering Ebony and contained in the Comprehensive Plan is illustrated below:



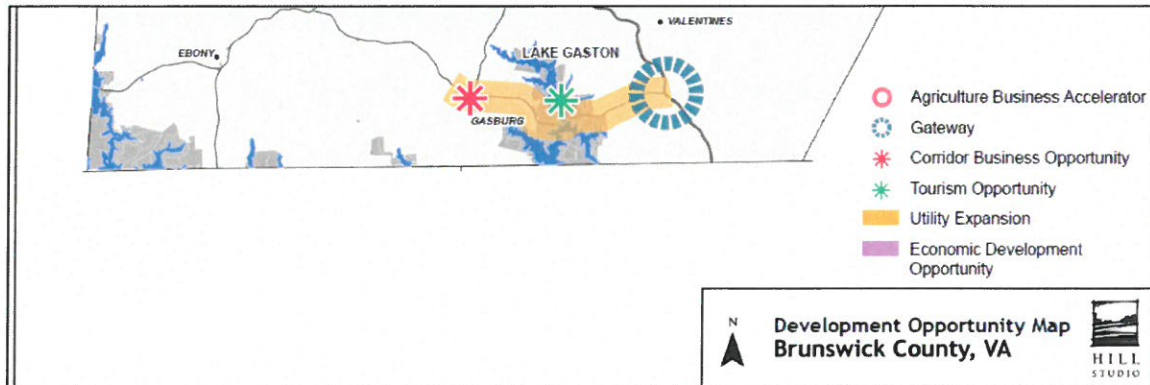
Comprehensive Plan, at p. 91. As this illustration reflects, Ebony is not classified as being in any sort of business location for future land use purposes.

The Comprehensive Plan describes future land uses in areas zoned Agricultural A-1, which includes Ebony, as follows:

Agricultural, Forestry, Rural Residential - This land use category provides for large size lots and farms used for agriculture, forestry, and very low density residential development in rural areas without supporting public infrastructure. Typical land uses may include commercial and private farms, single-family homes, and small crossroads commercial developments (by special permit) that serve the surrounding rural community (e.g., general store, post office). Lot sizes are typically large, usually five acres or more, but smaller lots may exist.

Comprehensive Plan, at p. 92.

Similarly, the Development Opportunities Map contained in the Comprehensive Plan does not designate Ebony as a location for business development:



Comprehensive Plan, at p. 95. This means that Ebony should maintain its rural, uncommercialized stature.

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**38.10** “The percentage of people living below poverty level in the County in 2015 was 23.5%, described as ‘particularly high.’”

**RESPONSE: Undisputed (but irrelevant with respect to reasonableness).**

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**38.11** “Over one half (50.5%) of persons in Brunswick County who employed [sic] in 2015 worked outside of the County.”

**RESPONSE: Undisputed (but irrelevant with respect to reasonableness).**

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**38.12** “County citizens who submitted input into producing the Comp. Plan rated the County’s business development record as ‘poor’ and were in favor of expanding business and attracting new employers.”

**RESPONSE: Disputed as incomplete and deliberately misleading.**

Although the Comprehensive Plan contains the statement quoted in the Board’s undisputed fact No. 38.12, this language is but one of several paragraphs covering various topics of interest mentioned by Brunswick County residents. The same page of the Comprehensive Plan goes on to state:

With respect to cultural and natural resources, environmental protection of water quality and features was a priority, as well as promoting the outdoor recreation for tourism. **Citizens noted that the rural landscape character and the heritage resources contribute to the special qualities of the County (for both residents and visitors) and that conservation and preservation are important.**

With respect to land use and development, expanding commercial and business areas was a priority, as well as redeveloping deteriorated areas and revitalizing downtowns. **Protecting environmental water quality and the rural character of the County (farms, forests, and open spaces) were important priorities, too.**

Comprehensive Plan, at p. 8.

As these additional paragraphs show, Brunswick County citizens do not value economic or business development in any haphazard location or manner. Rather, local residents recognize the importance of preserving the County’s “special qualities”, including the preservation of its

“rural landscape character and . . . heritage resources”, including “farms, forests, and open spaces[.]” *Id.*

## **LEGAL ANALYSIS**

### **I. STANDARD OF REVIEW**

If the Board’s legislative action “is undertaken in violation of an existing ordinance,” then the action is by definition arbitrary and capricious and, therefore, void. *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557 (quoting *Renkey*, 272 Va. at 376, 634 S.E.2d at 356.) It is only where the Board’s action is shown to be in conformity with existing Virginia state and local Brunswick County law that the Board may be granted summary judgment upon a showing of “some evidence of reasonableness” that is “sufficient to make the question fairly debatable[.]” *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557 (internal quotation marks omitted). A question is fairly debatable “when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.” *Id.* (internal quotation marks omitted).

### **II. THE BOARD’S FAILURE TO PROPERLY CONSIDER THE FACTORS SET FORTH IN VIRGINIA CODE §§ 15.2-2283 AND -2284 MANDATES THE CONCLUSION THAT THE REZONING DECISION IS INVALID**

Virginia Code §§ 15.2-2283 and -2284 identify several factors that the Board was required to consider and duly account for upon determining whether to grant Par 5’s Rezoning Application to authorize the construction and operation of a 9,100 square foot Dollar General store. In this regard, Virginia Code § 15.2-2283 states in pertinent part:

Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.2-2200. To these ends, such ordinances shall be designed to give reasonable consideration to each of the following purposes, where applicable: (i) to provide for adequate light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime and other dangers; (ii) to reduce or prevent congestion in the public streets; (iii) to facilitate the creation of a convenient, attractive and harmonious community; . . . (v) to protect against destruction of or encroachment upon historic areas[.]

Virginia Code § 15.2-2284, in turn, provides:

Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestal land, the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the locality.

Paragraph 62 of Petitioners' Amended Petition alleges that prior to granting Par 5's Rezoning Application, the Board failed to duly consider the required factors set forth in Virginia Code §§ 15.2-2283 and -2284 in the following respects:

a. Provide for adequate light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime and other dangers, as the store's location presents significant traffic hazards; the store's septic system would be located just feet from Hartley's active organic farming operation; the close proximity of the store to the Church and Cemetery poses threats of crime and vandalism to these historic and relatively secluded properties, as well as to all nearby residences; and the store would subject neighboring properties to noise, disturbances, bright 24-hour lighting, and garbage odors, and would result in the degradation in the value of the landowners' properties and will reduce the marketability of those lands;

b. Reduce or prevent congestion in the public streets, as the three roads near the subject property converge at a skewed "T" intersection and the proposed Dollar General store would substantially increase traffic congestion at the already-complicated intersection, and would thereby significantly compromise motorists' safety, particularly at peak times; and VDOT requirements calling for a 500 foot line-of-sight at 3.5 feet from ground level at the entrance to the proposed Dollar General store were not met;

c. Facilitate the creation of a convenient, attractive and harmonious community, as the proposed Dollar General store would subject Ebony landowners and other residents to undue noise, disturbances, bright 24-hour lighting, and garbage odors, and would result in the degradation in the value of all parcels of real property and would reduce the marketability of those lands; and the store would detract from the picturesque quality of the Ebony area in contravention of the Board's obligation to maintain the area's natural beauty in order to conform with the underlying purpose of the Scenic Highway Act and the corollary regulations;

d. Protect against destruction of or encroachment upon historic areas, as the proposed store lies near the center of Ebony's historic district and is directly adjacent to the Church and the Cemetery; and Dollar General is a modern-day, corporate giant, and the sheer size of the store and its parking lot would significantly, if not wholly, detract from the peaceful, rural setting and historic atmosphere of bygone times that the adjoining and neighboring residential properties, including the Church and the Cemetery, provide; and

e. Consider the growth trends and future needs of the community, as it overrode the express recommendation of Vice Chair and home supervisor, John Zubrod, that the Rezoning Application be denied and also ignored the overwhelming opposition to the proposed Dollar General store voiced by Ebony landowners and residents and voted to grant the rezoning; failed to preserve rural heritage as called for in the Comprehensive Plan; failed to properly account for the fact that Ebony serves as a magnet for tourism and promotes the County's economy due to the outdoor recreational amenities and rural/cultural assets it presents; and failed to take into proper account the negative impact that the placement of an unsightly Dollar General store and associated traffic impacts in the midst of this quaint country setting and local charm that is so attractive to tourists would have on the County's economy and VA tourism investments.

In *Byrum v. Bd. of Supervisors*, 217 Va. 37, 42, 225 S.E.2d 369, 373 (1976), the Virginia Supreme Court recognized that a board of supervisors must act in accordance with the Virginia Code statutes pertaining to zoning:

In the instant case the Orange County Board of Supervisors is not only prohibited from acting in an unreasonable, arbitrary or capricious manner, but it is also controlled by those provisions of the Code of Virginia which authorize it to enact and administer zoning ordinances. These sections are replete with provisions outlining the purpose of zoning ordinances and matters to be considered in enacting and administering them.

This principle accords with the established law that the Board's legislative action must conform with existing state and local laws or be stricken as arbitrary and capricious. *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557; *Renkey*, 272 Va. at 376, 634 S.E.2d at 356.

If a board of supervisors takes “no action at all to comply with § 15.2-2283”, then the zoning ordinance enacted by the board is by definition invalid. *Nat’l Tr. for Historic Pres. v. Orange Cty. Bd. of Supervisors*, 80 Va. Cir. 321, 330-31, 2010 Va. Cir. LEXIS 177, at \*18-19 (Orange County 2010); see *Patrick v. McHale*, 54 Va. Cir. 67, 68, 2000 Va. Cir. LEXIS 366, at \*4 (Chesterfield County 2000) (“§ 15.2-2283 of the Code of Virginia **requires** the Board to consider the impact of a re-zoning request on health safety and the general welfare of the public”) (emphasis added). In such instances, the Board’s action must be stricken as arbitrary and capricious. *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557; *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Byrum*, 217 Va. at 42, 225 S.E.2d at 373.

Further, Virginia Code § 15.2-2284 requires that zoning ordinances and districts “be drawn and applied with reasonable consideration for the existing use and character of property[.]” The Board is required to give due consideration to this factor when making zoning decisions. *Bd. of Sup’rs of Fairfax Cty. v. Miller & Smith, Inc.*, 242 Va. 382, 384, 410 S.E.2d 648, 650 (1991). Note this says “existing use – it does NOT say “existing zoning”. Use and zoning are not synonymous.

In this case, there is no evidence that the Board took any action to comply with the requirements of Virginia Code §§ 15.2-2283 and -2284 prior to granting Par 5’s Rezoning Application. The Board did not take into consideration or debate the statutory factors outlined above before it authorized the construction and operation of 9,100 square foot Dollar General box store in the proposed Ebony location. This failure mandates the conclusion that the Board’s rezoning decision is invalid. See *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557; *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650; *Byrum*, 217 Va. at 42, 225 S.E.2d at 373; *Nat’l Tr. for Historic Pres.*, 80 Va. Cir. at 330-31, 2010 Va. Cir.

LEXIS 177, at \*18-19; *Patrick*, 54 Va. Cir. at 68, 2000 Va. Cir. LEXIS 366, at \*4. It follows as a matter of course that the Board is not entitled to the entry of summary judgment in its favor.

This conclusion holds true even if the Court should find that the Board undertook some minimal action under Virginia Code §§ 15.2-2283 and -2284. In *Nat'l Tr. for Historic Pres.*, the plaintiff argued that even if the board of supervisors took some action under § 15.2-2283, the board's rezoning decision was still arbitrary and capricious because the board's action was entirely inadequate to comply with the statute:

Third, if the court finds that the county actually did something under § 15.2-2283, the plaintiffs then claim that what little the board included in the ordinance is woefully inadequate under the statute. Therefore, even if the provisions submitted to the court were actually promulgated based on § 15.2-2283, they do not provide adequate protection against the destruction or encroachment of historic areas. Since they were not sufficient to meet the requirements of the statute when they were passed, the provisions are unreasonable.

*Nat'l Tr. for Historic Pres.*, 80 Va. Cir. at 330, 2010 Va. Cir. LEXIS 177, at \*19. The court found that “whether the board did or did not act under § 15.2-2283 is a disputed issue.” *Id.* at 331, 2010 Va. Cir. LEXIS 177, at \*21. “

Even if this Court should find that Board here took some action under Virginia Code §§ 15.2-2283 and -2284, a material dispute of fact would still exist with regard to whether the action was sufficient to comply with the statutory requirements. *See id.* Hence, the Board's motion for summary judgment must be denied in any event.

### **III. THE BOARD'S GRANT OF PAR 5'S REZONING APPLICATION IS UNDISPUTABLY INCONSISTENT WITH THE FACTORS SET FORTH IN VIRGINIA CODE §§ 15.2-2283 AND -2284**

In considering Par 5's Rezoning Application, the Board was required to implement the public policies articulated by the governing Virginia statutes into the new zoning ordinance. Under



Virginia law, a locality is to achieve the specific policies set forth in Virginia Code §§ 15.2-2283 and -2284 through the zoning ordinance and land use regulations it passes:

Through its zoning ordinance and land use regulations, Roanoke seeks to implement its comprehensive plan and promote the general welfare, and to achieve a number of specific purposes: providing adequate light and air, reducing or preventing traffic congestion, preventing overcrowding, protecting and enhancing the character and stability of existing neighborhoods, protecting against destruction of or encroachment upon historic areas which contribute to the character of the city, facilitating the creation of a convenient, harmonious and attractive community, protecting the natural beauty and special features of the city and the surrounding region, and promoting economic development. Roanoke City Code § 36.1-1; *see* Virginia Code § 15.2-2283.

*McGhee v. Bd. of Zoning Appeals of Roanoke*, 57 Va. Cir. 47, 60-61, 2001 Va. Cir. LEXIS 150, at \*29-30 (City of Roanoke 2001).

As explained in Legal Argument Part II, above, Paragraph 62 of the Amended Petition details the ways in which the Board's grant of Par 5's Rezoning Application to authorize the construction and operation of a massive Dollar General store was inconsistent with the factors listed in Virginia Code §§ 15.2-2283 and -2284. For all the reasons detailed throughout this Brief, the undisputed fact statements the Board makes in its Brief are wholly insufficient to render these issues debatable. Thus, the Board is not entitled to the entry of summary judgment in its favor. *See Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557

Moreover, Virginia Code § 15.2-2284 provides in part that “[z]oning ordinances . . . shall be drawn . . . with reasonable consideration for the existing use . . . of property . . . .” Under this statute, “the failure of the Board to give ‘reasonable consideration’ to the existing use of property when enacting a zoning ordinance would doom that ordinance.” *Cooper v. Bd. of Supervisors*, 103 Va. Cir. 126, 129, 2019 Va. LEXIS 465, at \*7 (Fairfax County 2019); *see also Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650.

This is exactly what occurred here. The Board did not give reasonable consideration to the existing and future land uses in the Ebony community prior to granting Par 5's Rezoning Application. These existing and future land uses demonstrate that the Board's decision to allow the construction and operation of a 9,100 square foot Dollar General store in the proposed Ebony location was unreasonable.

The Future Land Use Map for Brunswick County is contained in the Comprehensive Plan. As discussed above, the Map clearly shows that Ebony is not classified as being in any sort of business location or development for future land use purposes. Comprehensive Plan, at p. 91. Similarly, the Development Opportunities Map contained in the Comprehensive Plan does not designate Ebony as a location for business development. *Id.* at p. 95. Instead, Ebony is forecasted to remain as an Agricultural A-1 district through 2037. *Id.* at pp. 90, 91.

In cases "where property owners have a reasonable expectation that they may rely on existing zoning, an abrupt unanticipated zoning change shall not be thrust upon them. This is consistent with the idea that zoning changes should evolve in a fashion that is reasonably foreseeable under the scheme of zoning." *Heflin v. Caroline Cty.*, 83 Va. Cir. 507, 515, 2010 Va. Cir. LEXIS 320, at \*10 (Caroline County Cir. Ct. 2010). The Board's grant of Par 5's Rezoning Application was achieved in contravention to these established principles. It is beyond debate that the Board's decision at issue in this case was unreasonable; therefore, it is not entitled to the entry of summary judgment in its favor. *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557.

**IV. THE BOARD IS NOT ENTITLED TO THE ENTRY OF SUMMARY JUDGMENT ON PETITIONERS' CLAIM THAT THE BOARD'S GRANT OF PAR 5'S REZONING APPLICATION DID NOT ALIGN WITH THE COMPREHENSIVE PLAN**

Contrary to the Board's assertions, insufficient evidence of reasonableness exists in the legislative record to make the question fairly debatable as to whether the Board legitimately voted to grant Par 5's Rezoning Application to allow for the construction and operation of a 9,100 square foot Dollar General store. *See Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557. As explained above, for purposes of this analysis, "reasonable" means "not debatable." *See id.*

By statute, the Comprehensive Plan is **both** a guide intended to be used as a blueprint for making more detailed decisions to prevent prejudicial decision-making **and** a control over land use features. Virginia Code §§ 15.2-2223 and -2232.

Virginia Code § 15.2-2223 states, in pertinent part:

The comprehensive plan shall be made with the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities.

The comprehensive plan shall be general in nature, in that it shall designate the general or approximate location, character, and extent of each feature, including any road improvement and any transportation improvement, shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.

Further, Virginia Code § 15.2-2232 provides, in relevant part: "Whenever a local planning commission recommends a comprehensive plan or part thereof for the locality and such plan has been approved and adopted by the governing body, **it shall control** the general or approximate location, character and extent of each feature shown on the plan." (emphasis added).

Further, under established Virginia law, the Comprehensive Plan must be viewed as a whole in order to determine whether a particular feature is substantially in accord with it. Virginia Code § 15.2-2232; *Bd. of Supervisors of Loudoun Cty. v. Town of Purcellville*, 276 Va. 419, 440,

666 S.E.2d 512, 523 (2008). The Board cannot cherry-pick certain sentences from the Comprehensive Plan and use them in isolation to establish the “reasonableness” of its actions.

The comprehensive plan “identifies those areas planned for future growth and the anticipated land use associated with such growth.” *Helmick Family Farm*, 297 Va. at 793, 832 S.E.2d at 9. Viewed in its entirety, the Comprehensive Plan clearly establishes that the entire Ebony community is to retain its Agricultural A-1 setting through 2037. The Comprehensive Plan provides that Ebony is expected to remain in agricultural and low-density rural residential through that time. *See* Comprehensive Plan, at pp. 90-91. The Board’s approval of the Par 5’s Rezoning Application for the proposed Dollar General store is not aligned with the current Comprehensive Plan Future Land Uses for Brunswick County and the legislative intent of Virginia zoning statutes “that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds.” Virginia Code § 15.2-2200. Thus, the Board’s decision was arbitrary, capricious, and unreasonable.

Moreover, the Comprehensive Plan describes future land uses in areas zoned Agricultural A-1, which includes Ebony, as follows:

Agricultural, Forestry, Rural Residential - This land use category provides for large size lots and farms used for agriculture, forestry, and very low density residential development in rural areas without supporting public infrastructure. Typical land uses may include commercial and private farms, single-family homes, and **small crossroads commercial developments (by special permit) that serve the surrounding rural community (e.g., general store, post office)**. Lot sizes are typically large, usually five acres or more, but smaller lots may exist.

....

Community Business - This land use category provides for small business development in key crossroad locations to serve the surrounding community. The commercial use(s) may be in existing commercial buildings or in new buildings **of 5,000 square feet or less**. Typical land uses may include grocery store, convenience store, gas station, or medical office. Many of these crossroad locations are zoned for agriculture or rural residential uses.

Comprehensive Plan, at p. 92 (emphasis added).

Under the Zoning Ordinance, the proposed Dollar General store is too large to be constructed or operated by way of a Conditional Use Permit. Zoning Ordinance, at Articles 2-1, 4, 4-1-18. Therefore, the proposed Dollar General store does not meet the criteria for a “small crossroads community development” allowed for by the Comprehensive Plan in the Agricultural A-1 areas. Comprehensive Plan, at p. 92.

Similarly, under the plain language of the Comprehensive Plan, a retail store placed in an area for small business development is to be limited in size to 5,000 square feet or less. The proposed Dollar General store is almost double this maximum size limit. *See* Exhibit D and Exhibit E to Amended Petition. Hence, its construction is not permitted under the “Community Business” section of the Comprehensive Plan. Comprehensive Plan, at p. 92.

Importantly, the Comprehensive Plan makes clear that Ebony is to function as an “economic engine for Brunswick County” by serving as a magnet for tourism involving outdoor recreational activities. Comprehensive Plan, at pp. 74-79. It is axiomatic that the natural scenic beauty of the area must be preserved in order for this goal to be achieved. *See id.* However, the installation of a massive Dollar General store at the proposed Ebony location will create an eyesore that will severely undercut this very purpose.

As stated in the Comprehensive Plan: “[T]he natural environment can be a primary draw for visitors looking for recreation and undeveloped, scenic landscapes.” *Id.* at p. 79. Toward this end, the Comprehensive Plan states that “[d]eveloping outdoor recreation attractions and marketing of the natural assets of Brunswick County are key economic strategies for both the County and the Commonwealth of Virginia.” *Id.* at p. 42. The tourism that these outdoor activities

and natural resources attract in the Ebony region function as “an economic engine for Brunswick County.” *Id.* at p. 75.

The Comprehensive Plan also recognizes that “[f]rom a tourism perspective visitors want to experience the ‘authentic’ local culture of a destination, such as art, music, history, local crafts, traditions, local food, architecture, religion, and distinctive leisure activities. The cultural, heritage, and natural assets of Brunswick County make it very attractive for tourism.” *Id.* at p. 75. To promote tourism, rural communities such as Ebony should take advantage of their natural assets, which include peaceful country landscapes, farms, and historic buildings. *Id.* To showcase these natural assets, Ebony and other rural communities should take measures such as “proactively addressing light pollution and limiting the intrusion of artificial light to protect the ‘dark sky’ ambience of the community.” *Id.* at p. 79.

The plans for the proposed Dollar General store include Dollar General’s standard lighting, which is bright 24-hour lighting that is easily visible from all directions from a great distance. *See* Exhibits D and Q to Amended Petition. Such lighting contravenes the directive in the Comprehensive Plan that Ebony’s natural outdoor assets should be showcased by keeping artificial light to a minimum, particularly at night to protect the “dark sky” ambience of the community. *See* Comprehensive Plan, at p. 79.

The Comprehensive Plan calls for the Board to protect and enhance the natural features that promote recreational tourism by preserving the scenic value of picturesque rural areas such as Ebony. *Id.* at pp. 42, 74, 75, 79. This picturesque landscape will be ruined by the proposed construction of 9,100 square foot Dollar General at the proposed Ebony location. This eyesore will significantly detract from the tourism-related business and economic development advocated throughout the Comprehensive Plan.

Clearly, the Comprehensive Plan does not contemplate land in the vicinity of the proposed Ebony Dollar General store to be appropriate for commercial development. These specific provisions of the Comprehensive Plan that are unique to the Ebony area take precedence over the more general language on which the Board incorrectly relies. *See U.S. ex rel. Chapman v. Fed. Power Comm'n*, 191 F.2d 796, 802 (4th Cir. 1951), *aff'd*, 345 U.S. 153, 73 S. Ct. 609, 97 L. Ed. 918 (1953) (coverage of properties in a specific paragraph of legislation “withdraws them from the general provision under the well settled rule that general language of a statute will not be held to apply to a matter specifically dealt with”); *Condo. Services, Inc. v. First Owners’ Ass’n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 573, 709 S.E.2d 163, 170 (2011) (“a specific provision of a contract governs over one that is more general in nature”).

For all the reasons described above, the allegations contained in the Board’s statement of “undisputed” facts are entirely insufficient to render “debatable” the question as to whether the Board’s grant of Par 5’s Rezoning Application aligns with the Comprehensive Plan. Viewing the Plan in its entirety, it is evident that the Board’s decision is contrary to and, indeed, undercuts the goals of the Plan in preserving special rural resources and landscapes and thereby promoting tourism and economic growth in Brunswick County. Accordingly, the Board has failed to meet the requisite standard to be entitled to the entry of summary judgment in its favor, and its motion should be denied. *See Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557.

**THIS IS IN FACT A PROCEDURAL CHALLENGE,**

**AND PERHAPS ONE OF FIRST IMPRESSION!**

As much as the Board’s Counsel tries to make this a typical zoning land use challenge dispute that fits their “fairly debatable and reasonableness” narrative. It is NOT. This case at its

foundational level is about the flawed use of the Comprehensive Plan and Amendment Process, and flawed enforcement of land use Statutes (Procedural Challenge).

In this case, because business development specifically in the Ebony community is not indicated in the Future Land Uses (maps) where the prosed Dollar General is located, the rezoning application should have been denied in conformance with the approved Comprehensive Plan. Not following the process to use the land use governance tools and statutes properly make the resulting decision arbitrary and capricious. The Board's Counsel, Sands Anderson, in their publication "Land Use Regulations From The Perspective of Four Professionals" lays this distinction out perfectly and specifically advises that if sued, "Courts will usually defer on substantive land use challenges but NOT on Procedural Challenges".

Perhaps this is a case of First Impression since there is essentially no case law that offers legal precedent on treatment of Procedural Challenges where the Comprehensive Plan and Statutes are not properly enforced and consequences are exactly the opposite of what land use management is all about: use of comprehensive plan, amendment process to add features of a plan, intent of Zoning Ordinances, impact analysis (15.2283-2284); Virginia Code § 15.2-2200. If states are mandated to create and maintain Comprehensive Plans at great expense, should they not be enforced as intended by statute?

### **CONCLUSION**

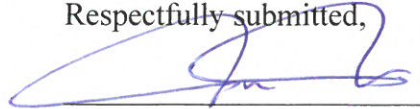
In light of the facts that the Board did not properly align their vote with the Comprehensive Plan and Amendment Process and did not apply statutes as legally mandated,. the Boards "Fairly Debatable and Reasonableness" test is not relevant. This case is a matter of Arbitrary, Capricious, and Unreasonable Thus, the Board's motion for summary judgment should be denied in its entirety.



Dated:

July 1, 2022

Respectfully submitted,



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## ADDENDUM

Whereas Section II of this Brief addresses the summarized list of undisputed facts in Section II Undisputed Material Facts - No 38 of Respondent's Brief in Support of Motion For Summary Judgment, this ADDENDUM contains a responses to each item 1 – 37. Naturally, there will be repeated content. If there is an advertent conflict in responses between the 2 sections, Section II in the main body prevails.

➤ **1 - 3: Response: Not evidence of reasonableness** We cannot get to a fairly debated, reasonableness baseline for a zoning decision if foundational Land Use Management approach and statutes are not being followed. Evidence of this deficit is also in the Legislative Record. Our case is about proper Land Use Management defined by Virginia Statutes and County's Zoning Ordinances - and not just another disputed zoning decision. In the words from Sands Anderson, we are talking about bullet #3 in their training slide:

### **Land Use Litigation in Circuit Court**

- Land use litigation, except on appeal from BZA, is almost always filed as a declaratory judgment action.
- Land use litigation is going to happen because you are a decision-maker in a political environment on issues important to people. Cannot make everyone happy.
- Courts will generally defer on your legislative land use decisions on substantive challenges, but NOT on procedural challenges. Follow statutes strictly!
- There are always steps that can be taken to avoid litigation or make it more likely you will prevail if sued. Consult your experienced local government land use attorney early and often.

**SANDS  
ANDERSON**

Ironically Sand Anderson is now defending the County's zoning decision against Procedural Challenges that survived Demurrer -- the exact scenario their training slide says to avoid.

The primary issue is the role of the Comprehensive Plan and what it means to use it as a guide and a control for development as stipulated in the statutes. Our claims that survived Demurrer allege that the County decision to approve B-1 rezoning in Ebony did not align sufficiently with

the Comprehensive Plan and did properly consider 15.2283-2284 to avoid a decision with negative side effects.

Zoning decisions must conform to the land use framework described in the Plan. Previous zoning decisions do not relieve the Board of enforcing the land use guidance and framework of the current Comprehensive Plan – which is their whole case. The Amendment process is to be followed to add or change feature of the Plan and ensure the Board’s decisions always reflect the enforcement of the Plan.

➤ **4:** See response 38.3 in Section II RESPONSE TO BOARD’S LIST OF UNDISPUTED MATERIAL FACTS

➤ **5: Disputed as the term “Business Intersection” is misleading.** Respondent’s term “Business Intersection” suggests that one use dominates all other uses and misrepresents the significance of the location, the harmonious mixture of land uses and residents, and even the value to the County’s pursuit of tourism that is dependent on having places like Ebony still unspoiled that are highly valued across the country as shown in these aerial views:





Driving east on 903 (Hendricks Mill Road) from Bracey/I-85, this intersection serves as an attractive and welcoming gateway to the beauty of Brunswick County’s best example of a historic and authentic country community, in a tranquil, picturesque setting with character and local charm that Brunswick County claims repeatedly to protect and encourage in its Comprehensive Plan.

Specifically, the future land use map in the Comp Plan 2037 adopted in 2017 removed previous B-1 Business designations on the west side of the intersection and leaves Ebony as an A-1 district without business corridor or community business designation. See maps in Response No. 36.6.

The A-1 Zoning Ordinance provides uses by right or a Conditional Use Permit to preserve and protect the integrity of this rural communities by ensuring control over business development – to prevent incompatible and destructive commercialization. The A-1 Zoning Ordinances further emphasizes that a Conditional Use Permit is designed specifically to protect the character of communities and do no harm.

This location, where 3 roads intersect and already a safety hazard especially with seasonal increase in traffic — Hendricks Mill, Ebony Rd, and Robinson Ferry — encompasses the following juxtaposition of land uses: the preserved historic Ebony Post Office and general store built prior to 1882, two long-standing locally-owned and operated country convenience stores with gas pumps that all coexist in harmony with neighboring properties which include occupied

residences, scenic open fields, preserved former residence and green space, active organic farming operations, hay fields, and two historic and preserved homesteads. This is all in close proximity to the historic Prospect Church and Cemetery.

Calling it a “Business Intersection” is a gross misrepresentation and disingenuous. Adding a 9100 sq foot Dollar General chain store with a business plan that anticipates 587 trips per day in this location masquerading as a “general store” comparable to Ebony General and Race-In is ludicrous. It is unreasonable, destructive, and certainly inconsistent with the direction in the Comp Plan “Future Land Uses” that by statute “shall control” land use features in its role as a guide and framework for making land use decisions. Allowing this over-commercialization would completely destroy the identity of this rare and treasured rural community that has been intentionally preserved by care of local landowners and community pride – revered by locals and visitors alike. Such a move would also create safety concerns for nearby home and family life.

**Footnote 1: Disputed.** If a Conditional Use Permit does not exist, it must be created, with public input, and approved by the Board of Supervisors – like the current standard practice has been ever since appeal cases 20-073 and 20-458 cases were filed – instead of ignoring the land use guidance in the Comprehensive Plan and indiscriminately spot zoning A-1 property to B-1.

➤ **6: Disputed as misleading.** Intent is documented in the Application itself and also described in RFA 6 and 8. The application resulted in a B-1 approval of the specific use requested (Exhibit B). The prospective use of the property that never materialized was anticipating a need for a location to receive, assemble boats and store a small quantity of electric boats in support of the business location in NC as described in the application. The inventory would always remain small because the boats are ordered with personalized features. There was never a planned retail business in this location. The retail operation with showroom was always planned to be at Lake Gaston as evidenced by this lease agreement.

<b>NORTH CAROLINA COMMERCIAL LEASE</b>	
<p>This lease agreement is entered into on this the <u>29<sup>th</sup></u> day of <u>October</u>, 20<u>02</u>, by and between: <u>Dockside Adventures</u>, (hereinafter called "LESSOR"), whether one or more, and <u>Four Seasons Electric Boat Company, LLC</u> (hereinafter called "LESSEE"), whether one or more. For valuable consideration, the receipt and sufficiency of which is hereby acknowledged, LESSOR and LESSEE do hereby covenant, contract and agree as follows:</p>	
<p><b>1. PREMISES AND Term:</b> LESSOR, hereby leases to LESSEE for the term commencing on the <u>1st day of November, 2002</u> and ending on the <u>30th day of October 2005</u>, (the "TERM") the following described premises, located in Warren County, North Carolina:</p> <ul style="list-style-type: none"> <li>1) 900 sq ft building (designated as building C in Exhibit C with floor plan shown in Exhibit D) located at 1 River Road, Littleton NC 27850</li> <li>2) A 16 ft wide cement slab adjacent to the stated building to be added as shown in Exhibit D</li> <li>3) Use of 2 slips at the pier with the option to lease additional slips as needed and available</li> </ul>	<p>to pay Rent without Discount Applied for the first term and for subsequent Renewal Term, LESSEE may elect to pay in 12 monthly installments in the amount of 1/12 the annual amount. Any payment by LESSEE or acceptance by LESSOR of a lesser amount than shall be due from LESSEE to LESSOR shall be treated as payment on account. The acceptance by LESSOR of a check for a lesser amount with an endorsement or statement thereon, or upon any letter accompanying such check, that such lesser amount is payment in full, shall be given no effect, and LESSOR may accept such check without prejudice to any other rights or remedies which LESSOR may have against LESSEE.</p>

➤ **7: Dispute this is a material fact.** Irrelevant. Also any B-1 zoning decisions made in the past with an older version of the Comp Plan do not pre-empt requirement by statute that the current Comp Plan "Future Land Uses for Brunswick County" be used for new applications and proposed use when deciding whether a rezoning or specific business is legal.

➤ **8: Dispute.** The aerial views referenced (and included in Response #5 shows much more: where 3 roads intersect — Hendricks Mill, Ebony Rd, and Robinson Ferry — and encompasses the following juxtaposition of land uses all protected by A-1 District Zoning Ordinances: the preserved historic Ebony Post Office and general store built prior to 1882, two long-standing locally-owned and operated country convenience stores with gas pumps (Ebony General and Race-In) that all coexist in harmony with neighboring properties which include occupied residences, scenic open fields, preserved former residence and green space, active organic farming operations, hay fields, and two occupied historic homesteads. This is all in close proximity to the historic Prospect Cemetery and Church. A rare scenic location in Brunswick County that reflects preservation of an authentic rural community that has not been ruined with

destructive commercialization that is a strategic goal of the Comprehensive Plan – Preserving Heritage and scenic, rural landscapes.

- **9: Undisputed.** However stating services covered by Ebony General, is not evidence of reasonableness to allow a B-1 level business into the community that will destroy the integrity of the community, do harm to family life, is anti-tourism, puts existing local businesses at risk, and violates Virginia Code § 15.2-2200 (Declaration of Legislative Intent) that ends with “... that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds.” In fact the decision being appealed is about as unreasonable as you can get.
- **10: Undisputed.** However stating services covered by Ebony General, is not evidence of reasonableness to allow a B-1 level business into the community that will destroy the integrity of the community, do harm to family life, is anti-tourism, puts existing local businesses at risk, and violates Virginia Code § 15.2-2200 (Declaration of Legislative Intent) that ends with “... that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds.” In fact the decision being appealed is about as unreasonable as you can get.
- **11: Disputed and not evidence of reasonableness.** In fact it is the opposite. Exhibit P to Amended Petition shows the inconsistent and ambiguous approach to land use management and zoning in the Ebony Community since it was first implemented in the early 1990’s. Using historic zoning decisions – right or wrong – does not pre-empt statutory requirement to follow the *current* Comprehensive Plan in substantial accord when making zoning decision.
- **12: Not evidences of reasonableness.** Any purported evidence of reasonableness is simply NOT. It is not reasonable to allow a B-1 level business into the community that will destroy the integrity and character of the community, do harm to family life, is anti-tourism, puts existing local businesses at risk, and violates Virginia Code § 15.2-2200 (Declaration of Legislative Intent) that ends with “... that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds.” In fact the decision being appealed is about as unreasonable as you can get.
- **13. Dispute.** The proposed site plan for Dollar General is 9100 SQ and 70’ by 130’ is substantially larger than Ebony General (40’ x 40’ or 1600 sf) , Race In (80’ x 56’ or 4480 sf), and the mobile home (12’ x 50’ or 600 sf), and the house on the right is 30’ x 40’ or 1200 sf.

➤ **14: Undisputed by not evidence of reasonableness.** It is not reasonable to allow an unneeded, over-sized B-1 level business into the community that will generate substantial increase in daily traffic to an already unsafe traffic location, destroy the integrity and character of the community, do harm to family life, is anti-tourism, puts existing local businesses at risk, and violates Virginia Code § 15.2-2200 (Declaration of Legislative Intent) that ends with "... that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds." In fact the decision being appealed is about as unreasonable as you can get.

➤ **15 - 28: Dispute.** Not evidence of reasonable for this specific zoning decision to allow Dollar General in the Ebony. Simply quoting selected verbiage from the Comprehensive Plan that are a consideration for the County as a whole does not constitute a material fact. The issue at hand is land use management **specific to the Ebony location**, alignment with the future land use map of the *current* Comprehensive Plan, ensuring a proposed solution does not damage the character of the community and does not negatively impact other important goals in the Comp Plan; and per Virginia Code § 15.2-2200 (Declaration of Legislative Intent) "...that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds."

➤ **29: Dispute.** County Zoning is not authorized to add new *features* to the Comprehensive Plan. If the general location on the Comprehensive Plan does not designate a commercialization feature, County Zoning does not have the authority to approve B-1 zoning. A new feature only gets added to the Comprehensive Plan by the Amendment process.

➤ **30: Dispute.** Not evidence of reasonableness as this is not simply a popularity contest especially when there is significant opposition. Laws that transcend public opinion are to be followed.

➤ **31-32: Dispute.** While VDOT issued letters dated 11/7/2019 and 11/19/19 to this effect, we know for a fact that when measured from vantage point of driver seated in car the 500-foot site distance from the south on 903 has a knoll that blocks the 500 ft clearance. The 11/19/19 letter also states "Entrance geometrics and drainage will be addressed during the site plan review stage."

In addition, traffic counts used were not completed during peak seasonal traffic and Traffic Studies recommended by the state VDOT guidelines for more extensive projects like Dollar



General were deemed unnecessary. In reaching out to a traffic engineer who has been involved in Dollar General projects, he commented that he did not know of a Dollar General project that did not include a Traffic Study. There are already challenges with the safety of the intersection of roads at the impacted corner.

➤ **33: Dispute.** Not evidence of reasonableness as prior rezoning decisions for whatever reason do not pre-empt requirement by statute that the *current* Comp Plan including the “Future Land Uses for Brunswick County” be used for new applications and proposed use when deciding whether a rezoning for specific business is legal.

➤ **34: Dispute.** Not evidence of reasonableness as this is not a popularity contest especially when there is significant opposition. Laws that transcend public opinion are to be followed. Admitting that Economic Development is one the Comp Plan among other does not mean it is reasonable to approve the B-1 rezoning at the Ebony location to support a business such as Dollar General that will essentially destroy the community and violate Land Use Management statutes. Looks for other location that are a fit for the business.

➤ **35: Dispute** and not evidence of reasonableness. The Comp Plan does not suggest that a level of commercial development like Dollar General is promoted for “crossroad communities”. The Plan specifically mentions that these are typically unincorporated areas without infrastructure in A-1 districts. The Comp Plan suggests a Community Business usage classification for A-1 rural retail limited to 5000 square feet. Dollar General does not comply. The only legal route was to suggest a Conditional Use Permit with restrictions that limited the size and scope of the business as well as design feature to ensure it is a fit for the community.

➤ **36 - 37:** Mrs. Hartley’s rezoning decision from 19 years ago is largely irrelevant. The significant point is that the use of the property never changed from A-1 compatibility as it had been during that period of time. Prior rezoning decisions do not pre-empt the statutory requirement to enforce the *current* Comprehensive Plan when making new zoning decisions.

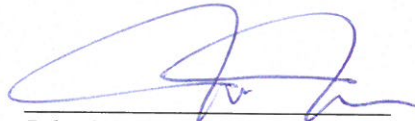
**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of July, 2022, a true and correct copy of the foregoing Petitioner's Brief in Opposition to Motion for Summary Judgment of Board of Supervisors of Brunswick County, Virginia was served via email and United States mail, first-class postage prepaid, in an enveloped properly addressed to the following:

Andrew McRoberts, Esq.  
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pjacobson@sandsanderson.com

Counsel for Respondent



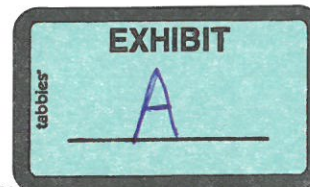
John M. Janson, Esquire

W. EDWARD TOMKO, III, CHIEF JUDGE  
W. ALLAN SHARRETT, JUDGE  
CARSON E. SAUNDERS, JR., JUDGE  
ROBERT G. O'HARA, JR., RETIRED JUDGE  
337 SOUTH MAIN STREET  
EMPORIA, VIRGINIA 23847  
(434)348-4222

## SIXTH JUDICIAL CIRCUIT



COMMONWEALTH OF VIRGINIA

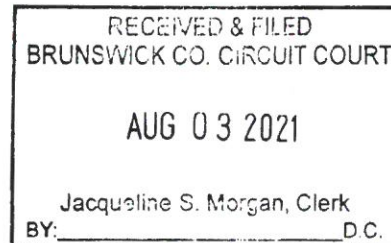


CIRCUIT COURT OF CITY OF HOPEWELL  
CIRCUIT COURT OF BRUNSWICK COUNTY  
CIRCUIT COURT OF GREENSVILLE COUNTY/CITY OF EMPORIA  
CIRCUIT COURT OF PRINCE GEORGE COUNTY  
CIRCUIT COURT OF SURRY COUNTY  
CIRCUIT COURT OF SUSSEX COUNTY

July 30, 2021

John M. Janson, Esquire  
830 West High Street  
South Hill, VA 23970

Andrew R. McRoberts, Esquire  
SANDS ANDERSON, P.C.  
Post Office Box 1998  
Richmond, VA 23218-1998



Re: Hartley v. Board of Supervisors  
Brunswick County Circuit Court  
Case No.: CL20-73

Dear Counsel:

The issue before this Court is Respondent's Demurrer filed in response to Petitioner's Amended Petition.

### FACTS

On January 29, 2020, the Brunswick County Board of Supervisors (the Board) zoned a parcel of land (the Parcel) in Brunswick County (the County) Business (B-1) from Agricultural (A-1).<sup>1</sup> Petitioners own tracts of land directly adjacent to the Parcel.<sup>2</sup>

### DISCUSSION

#### Standard of Review

"[A] demurrer has one purpose – to determine whether a complaint states a cause of action upon which the requested relief may be granted."<sup>3</sup> "Thus, unlike a motion for

<sup>1</sup> Demurrer ¶ 2.

<sup>2</sup> Amended Petition ¶ 1.

<sup>3</sup> *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 145 (2013).

summary judgment, a demurrer 'does not allow the court to evaluate and decide the merits of a claim.'"<sup>4</sup> A demurrer assumes the truth of all properly pleaded material facts. "Under this rule, the facts admitted are: '(1) facts expressly alleged, (2) facts which are by fair intendment implied alleged, and (3) facts which may be fairly and justly inferred from the facts alleged.'"<sup>5</sup> "On demurrer, a court may examine not only the substantive allegations of the pleading attached but also any accompanying exhibit mentioned in the pleading."<sup>6</sup>

Additionally, this action is brought pursuant to Virginia Code § 15.2-2285 and thus, relates to a zoning ordinance. In reviewing such actions, the Court must consider that a

[z]oning action is legislative action, and, therefore, it is presumed reasonable. When zoning action is challenged, the burden is on the challenger to produce evidence of unreasonableness sufficient to overcome the presumptive reasonableness of the action. Unless thus overcome, the presumption alone is adequate to sustain the validity of the action. In any event, the ultimate inquiry in a zoning case is whether the matter in issue is fairly debatable; if it is, the zoning action must be sustained.<sup>7</sup>

However, because this Court writes in response to a demurrer, the Court only considers whether the Petitioners "produce evidence of unreasonableness sufficient to overcome the presumptive reasonableness of the action."

Petitioners' only claims are that the Board's zoning action was arbitrary and capricious<sup>8</sup> and that the zoning decision was an ultra vires act by the Board.<sup>9</sup>

#### Scenic Byway (¶ 17-21)

The Court finds that the Parcel's location next to a Virginia Scenic Byway bears no relation to the reasonableness of the rezoning decision. As such, the Petitioners' contentions related to the nearby roadways' particular designation may not serve as a basis for concluding the Board's decision was unreasonable.

#### October Application (¶ 22-28)

Petitioners' contention that the rezoning application should have been for an A-1 conditional use permit rather than the requested B-1 zoning does not bear any relation to

<sup>4</sup> *Id.*, 143 (citing *Fun v. Virginia Military Inst.*, 245 Va. 249, 252 (1993)).

<sup>5</sup> *Bowman v. State Bank of Keysville*, 229 Va. 534, 536 (1985) (citing *Ames v. Am. Nat'l Bank*, 163 Va. 1, 37 (1934)).

<sup>6</sup> *CaterCorp, Inc. v. Catering Concepts, Inc.* 246 Va. 22, 24 (1993).

<sup>7</sup> *Loudoun County v. Lerner*, 221 Va. 30, 34, 267 S.E.2d 100, 102-03 (1980); *Fairfax County v. Snell Corp.*, 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

<sup>8</sup> Amended Petition Claims ¶ 1-5.

<sup>9</sup> Amended Petition Claims ¶ 6-20.

whether the Board's decision was arbitrary or capricious. Even if Petitioners are able to prove there is a *more* appropriate option (i.e., A-1 conditional use permit), such an option does not preclude a B-1 zoning as being *appropriate*. Thus, the Petitioners' claim may not serve as a basis for its cause of action.

#### Public Hearings (§ 29-43)

Petitioners' arguments exploring the events at the public hearings essentially rest on the Board's failure to ensure the rezoning is in substantial compliance with the Comprehensive Plan. Alignment with the Comprehensive Plan is addressed in a subsequent section. Petitioner has failed to allege any facts as to how the Respondent failed to comply with notice and hearing requirements.

#### Subdivision Ordinance (§ 44-48)

Petitioners' contend that the County's Subdivision Ordinance was not properly followed. Such an argument bears no relation to the zoning decision by the Board. Petitioners fail to provide the particular section of the ordinance that was allegedly violated or facts about how the violation relates to the Board's decision. Petitioners highlight no law, guidance, or any authority that the Board's zoning decisions must consider compliance with the Subdivision Ordinance. Instead, it seems compliance with the Subdivision Ordinance is only necessary before actual development takes place.<sup>10</sup> Thus, alleged noncompliance with the Subdivision Ordinance may not serve as the basis for a claim of arbitrary and capriciousness.

#### Noncompliance With § 15.2-2232 (§ 49-52)

Petitioners' argument that the Board's actions did not comply with notice and hearing requirements fails. Petitioners fail to include which particular notice and hearing requirement was not complied with or any facts that support such a contention. Petitioners claim that § 15.2-2232's notice requirements apply in these circumstances; such a claim is baseless. It is clear the sorts of development that the notice requirement of the statute apply to are a "street or connection to an existing street, park or other public area, public building or public structure, public utility facility or public service corporation facility other than a railroad facility or an underground natural gas or underground electric distribution facility of a public utility . . . ."<sup>11</sup> Thus, alleged noncompliance with § 15.2-2232 may not serve as a basis for the current claim.

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<sup>10</sup> See Subdivision Ordinance at § 7-2-3 "No permit shall be issued . . . for the construction of any building, structure, or improvement requiring a permit upon any land for which an approval pursuant to this chapter is required, unless and until the person seeking the permit complies with the requirements of this chapter . . . ."

<sup>11</sup> Va. Code § 15.2-2232(A).

### VDOT Guidelines (¶ 53-61)

Petitioners' claim that the Board had a duty to conform with VDOT guidelines fails. Petitioners fail to cite to any source that would make such consideration required. In support of their claim that some formal traffic study must occur, Petitioners point to recommendation made by VDOT in a policy guidelines statement;<sup>12</sup> the Court is not required to give any weight to such authority. As such, alleged failure to properly analyze traffic patterns may not serve as the basis for the current claim of arbitrary and capriciousness. Petitioner acknowledges that the local VDOT office stated that a traffic study was not required though arguing that that too violated VDOT guidelines. VDOT did, by letter dated November 21, 2019, notify that "At this time we have completed our review and find the entrance location meeting access management regulations."

### Noncompliance with §§ 15.2-2283 and -2284 (¶ 62)

Petitioners allege that the Board failed to consider certain statutory factors. Petitioners provide the requisite code section and provides facts that support the claim that the factors were not considered. Such pleadings fulfill the Court's requirement that Petitioners "produce evidence of unreasonableness." As such, Petitioners may base their claim on a purported failure to consider such statutory factors.

### Alignment with Vision Statement/Comprehensive Plan (¶ 11-16, 63-73)

Petitioners contend that the Parcel being zoned B-1, rather than A-1 as the Comprehensive Plan calls for, demonstrates unreasonableness.<sup>13</sup> The Court recognizes that "statutes do not make the comprehensive plan a zoning ordinance but only a comprehensive *guideline* for zoning ordinances"<sup>14</sup> and that "a comprehensive plan . . . is merely a guide for development, rather than an instrument of land use control."<sup>15</sup> However, Petitioners' pleadings provide facts supporting its allegations that deviating from the Comprehensive Plan was unreasonable and sufficient to overrule Respondent's Demurrer.

### Violation of Zoning Ordinances (¶ 74-84)

Petitioners' claim that the Board may not rezone a property from A-1 to B-1.<sup>16</sup> Petitioners fail to provide the precise authority on which to base this claim. Because Petitioners' claim that the Board violated the County's zoning ordinance is wholly without support, it may not serve as a basis for this claim.

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<sup>12</sup> Amended Petition ¶ 54.

<sup>13</sup> Amended Petition ¶¶ 11-16, 63-73.

<sup>14</sup> *Board of Sup'rs of Fairfax County v. Snell Const. Corp.*, 214 Va. 655, 660 (1974) (emphasis added).

<sup>15</sup> *Board of Sup'rs of Fairfax County v. Williams*, 216 Va. 49, 59-60 (1975).

<sup>16</sup> Amended Petition ¶ 81.

### Spot Zoning (§ 84)

Petitioners' argument that the Board's action constitutes illegal spot zoning is without merit. "Illegal spot zoning occurs when the purpose of a zoning ordinance or rezoning amendment is solely to serve the private interests of one or more landowners, rather than to further a locality's welfare as part of an overall zoning plan that may include a concurrent benefit to private interests."<sup>17</sup> Not only do Petitioners fail to provide any facts in support of this claim, but, on its face, such a claim fails. Petitioners admit that Respondent is attempting to build a Dollar General.<sup>18</sup> This Court cannot contemplate a way for a retail establishment to survive without serving a "locality's welfare" in some way.

### Consequences of Board's Decision (§ 85-96)

Petitioners provide several negative consequences of the Board's decision. However, these consequences are wholly speculative; mere speculation is not a sufficient basis for sustaining a cause of action.

### Arbitrary and Capricious Legislative Act

Per the foregoing, the Court finds that Petitioners' claim survives Respondent's Demurrer on the basis that the Board's decision allegedly does not substantially align with the Comprehensive Plan and on the Board's alleged failure to consider §§ 15.2-2283 and -2284.

### Ultra Vires Act

The Rules of the Supreme Court of Virginia state that if a motion to amend "is granted, the amended pleading accompanying the motion will be deemed filed in the clerk's office as of the date of the court's order permitting such amendment." The Supreme Court has expanded on the implications of this rule.

If the amendment sets up no new cause of action or claim, and makes no new demands, but simply varies and expands the original cause of action, the amendment relates back to the commencement of the action and stops the running of the statute as of that date; but an amendment which introduces a new or different cause of action, or makes a new or different

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<sup>17</sup> *Riverview Farm Associates Virginia General Partnership v. Board of Sup'rs of Charles City County, et al.*, 259 Va. 419, 429 (2000).

<sup>18</sup> Amended Petition ¶ 16.

demand, does not relate back and the statute continues to run till the date of amendment.<sup>19</sup>

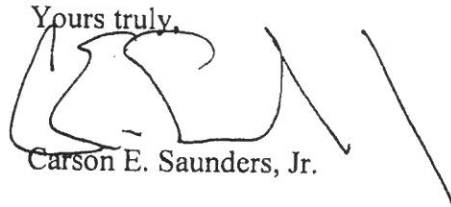
In the present case, the Court finds this claim does more than expand on the original cause of action and, instead, is a new or different cause of action. The original action questions the reasoning behind the Board's decision while this new action relates to the Board's authority to take the action. Thus, pursuant to § 15.2-2285's requirement that an action must be brought within thirty (30) days and the fact that it was not brought until after the thirty (30) day period had passed, Respondent's Demurrer is sustained in relation to this cause of action.

### CONCLUSION

Respondent's Demurrer is (1) overruled regarding the count of arbitrary and capriciousness based on (i) alleged unalignment with the Comprehensive Plan and (ii) on the Board's alleged failure to consider §§ 15.2-2283 and -2284, (2) sustained regarding the count of arbitrary and capriciousness founded on all other bases, and (3) sustained on the count of the Board's decision being an ultra vires act. The Court's decision is final without leave to amend.

Counsel for the Respondent will please prepare and circulate an order reflecting the opinion of the Court. The Court asks that Counsel for the Respondent include in its Order the Court's denial of Petitioner's Motion to Continue the hearing on May 3, 2021 and to grant the Motion Craving Oyer. The Court thanks both counsel for their able representation of their respective interests.

Yours truly,



Carson E. Saunders, Jr.

CES, Jr./sh

✓ Cc: The Honorable Jacqueline S. Morgan, Clerk

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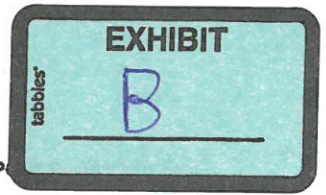
<sup>19</sup> *Neff v. Garrard*, 216 Va. 496, 498 (1975).





# County of Brunswick

OFFICE OF THE PLANNING DIRECTOR



P  
LAWRENCEVILLE, VA 23868  
PHONE - (434) 848-3107  
FAX - (434) 848-0424

February 21, 2003

Anne L. Hartley  
104 Clark Lake Road  
Durham, North Carolina 27707

**Re: Rezoning Case #02-048**

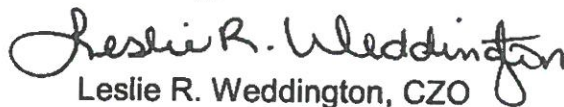
Dear Mrs. Hartley:

This letter is to advise you that on February 18, 2003, the Brunswick County Board of Supervisors approved Rezoning Case #02-048 to rezone a 4.00 acre parcel from Agricultural (A-1) to Business (B-1) to operate and maintain a boat business. The subject property is located on the west side of Robinson Ferry Road (Route 626), approximately 50 feet northeast of the intersection of Robinson Ferry Road with Hendricks Mill Road (Route 903), also known as a portion of Tax Map Parcel #98-38.

Prior to any construction on the subject properties, you must obtain the approval of a zoning and building permit.

Should you have any questions, or if I may be of additional assistance, please do not hesitate to contact me at (434) 848-0882.

Sincerely,

  
Leslie R. Weddington, CZO  
Director of Planning

/dpw



# COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION  
RICHMOND DISTRICT  
2430 Pine Forest Drive  
COLONIAL HEIGHTS, VA 23834  
www.VDOT.Virginia.gov

Stephen C. Brich, P.E.  
COMMISSIONER

November 21, 2019

Dawn P. Washburn  
Planner  
County of Brunswick  
228 N. Main St., Basement  
P.O. Box 399  
Lawrenceville, VA 23868

(Sent Via E-mail)

**SUBJECT: Par 5 Development Group, LLC. Case #19-032 (Dollar General)  
Rte. 903, Ebony Rd.  
Brunswick County  
Rezoning Review Revised Sketch 11-19-19**

Dear Mr. Carroll:

The Virginia Department of Transportation, Southern Region Land Development Office has reviewed the subject revised sketch received on November 19, 2019 by email at the South Hill office. At this time we have completed our review and find the entrance location meeting access managemet regulations.

Entrance geometrics and drainage will be address during the site plan review stage.

If you have any questions in the meantime please feel free to contact me at 434-774-2310 or by email, [todd.cage@vdot.virginia.gov](mailto:todd.cage@vdot.virginia.gov).

Sincerely,

**C. Todd Cage**

Land Development Engineer  
Southern Region Land Development  
Richmond District

CC: Paul Hinson, P.E., LEED AP, VDOT Southern Region Area Land Use Engineer  
John Legg, VDOT Southern Region Permits/Subdivision Specialist Sr.  
Dawn Washburn, Brunswick County Planner  
Tommy Johnson, VDOT South Hill Residency Administrator

WE KEEP VIRGINIA MOVING