In the

Court of Appeals of Virginia

Record No.: 1298-22-2

ANNE EDWARDS HARTLEY, et al.,

Appellants,

v.

BOARD OF SUPERVISORS OF BRUNSWICK COUNTY, VIRGINIA,

Appellee.

APPELLANTS' OPENING BRIEF

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NATURE OF THE CASE AND PROCEEDINGS BELOW

This appeal is from a decision by the Board of Supervisors for Brunswick County, Virginia (the "Board") to grant a Rezoning Application filed by Par 5 Development Group, LLC ("Par 5") to up-zone 2.04 acres of scenic rural property in the Ebony area of Brunswick County directly from A-1 Agricultural to unrestricted B-1 Business. The Board granted the up-zoning to authorize the construction of a 9,100-square-foot Dollar General box store in the heart of Ebony – an A-1 rural, historic community established in 1882. The Brunswick County Zoning Ordinance, Brunswick County Code, App'x B - Zoning ("Zoning Ordinance")[1] expressly provides that business development within an A-1 Agricultural District is to be conducted only through the use of a conditional use permit. (R.[2] 1243, 1252, 1257-1258.) Moreover, Zoning Ordinance Articles 2-1, 4, and 4-1-18 prohibit the issuance of a conditional use permit for a proposed business over 4,000 square feet in size. (R. 496, 504-505.) The retail floor space of the proposed Dollar General store is almost twice this maximum size. (R. 243.)

Importantly, this is NOT a typical rezoning dispute that has been fairly debated. This is about illegal procedures, circumvented process, legal chicanery, and attempts to use prior zoning decisions to defend a future zoning decision

[1] The Zoning Ordinance is reprinted on pages 477-582 of the electronic record that has been filed with this Court.

[2] In accordance with Va. Sup. Ct. R. 5A-19(f), "R." followed by a number refers to the electronic record that has been filed with this Court.

whose consequences are devastating and not in substantial accord with the Comprehensive Plan – exactly what properly enforced planning and zoning management is designed to prevent. Appellants appeal from the Brunswick County Circuit Court's orders that (1) partially granted the Board's Demurrer and (2) later granted summary judgment in the Board's favor.

On January 29, 2020, the Board by a 3-2 vote approved Par 5's Rezoning Application. (R. 3, 1246.) Appellants are owners of real property directly adjacent to the proposed Dollar General site. (R. 2, 1236.) On February 28, 2020, Appellants filed a Petition under Virginia Code § 15.2-2285(F) alleging that the Board's decision was arbitrary and capricious. (R. 1-6.) Appellants filed an Amended Petition with leave of court on October 14, 2020. (R. 1235-1268.)

On November 9, 2020, the Board filed a Motion Craving Oyer of Legislative Record and a Demurrer to the Amended Petition. (R. 1272-1301). Appellants filed a Response in Opposition to the Demurrer on December 28, 2020. (R. 1310-1357). On May 3, 2021, the trial court held a hearing on the Board's Demurrer. (R. Addendum Transcript ("R. Add. Tr.")[3] 1-62.)

On July 30, 2021, the trial court issued a letter ruling that partially granted and partially overruled the Board's Demurrer. (R. 1466-1471.) Specifically, the

[3] References to "R. Add. Tr." are to the hearing transcripts that were added as one of multiple Addendum files that the circuit court clerk added to the electronic record after the original electronic record was submitted and filed.

court granted the Demurrer with respect to Appellants' claims that the Board acted arbitrarily and capriciously in failing to follow the Brunswick County Subdivision Ordinance, Brunswick County Code, App'x A - Subdivisions ("Subdivision Ordinance")[4], failing to conform to Virginia Department of Transportation ("VDOT") Guidelines, and violating the Zoning Ordinance. (R. 1468-1469). However, the trial court overruled the Demurrer as to Appellants' claims that the Board failed to consider the required statutory factors set forth in Virginia Code §§ 15.2-2283 and -2284 prior to granting Par 5's Rezoning Application and that the Board's decision did not align with the County's Comprehensive Plan. (R. 1469-1470.) Thus, the trial court allowed the count of arbitrary and capricious legislative action to go forward on these two bases. (R. 1471.)

A formal Order was entered on October 26, 2021. (R. 1489-1491.) On November 14, 2021, the Board filed its Answer to Amended Petition. (R. 1493-1500).

On March 15, 2022, the Board filed a Notice of Hearing for June 3, 2022, on its previously filed Motion to Consolidate Case, Schedule Trial, and Resolve Outstanding Matters at a Pretrial Scheduling Conference. (R. 1523.) The Board also requested a hearing on a Motion for Summary Judgment that was yet "to be filed[.]" (R. 1523.)

[4] The Subdivision Ordinance is reprinted on pages 456-476 of the electronic record.

Although the trial court had not entered any scheduling order, the Board propounded Requests for Admission to Appellants on March 22, 2022, and Interrogatories, and Requests for Production of Documents on March 29, 2022. (R. 1639.) On April 15, 2022, Appellants filed their Responses to the Board's Request for Admissions, which noted certain objections to the Board's statements. (R. 1530-1541.) On May 5, 2022, Appellants filed their Response to the Board's Interrogatories and Request for Production of Documents, which again noted certain objections. (R. 1542-1637.)

On May 9, 2022, the Board filed a Motion for Summary Judgment. (R. 1638-1661). This motion was filed only 25 days prior to the hearing date that the Board previously scheduled with the trial court. (R. 1523.)

On May 23, 2022, Appellants filed a Motion for Stay of [the Board's] Summary Judgment Proceedings. (R. 1746-1759.) On the same date, Appellants also filed a Motion for Protective Order and for an Order Sequencing Discovery. (R. 1868-1877).

On June 3, 2022, the trial court held a hearing on the various motions. (R. Add. Tr. 63-161.) During the hearing, the court denied Appellants' motion for a stay. (R. Add. Tr. 104.) The court also reserved any ruling on the Board's summary judgment motion and authorized the parties to submit briefs on this matter. (R. Add. Tr. 132-134, 146-147.)

On June 21, 2022, the Board filed its Brief in Support of Motion for Summary Judgment. (R. 1897-1931.) On July 1, 2022, Appellants filed their Brief in Opposition. (R. 1933-2009).

On July 27, 2022, the trial court issued a letter ruling that granted summary judgment in the Board's favor. (R. 2021-2026.) In so doing, the court concluded that the Board "presented sufficient evidence to establish reasonableness" and, therefore, that it was entitled to summary judgment. (R. 2026). Final judgment was entered on August 18, 2022. (R. 2027). On August 26, 2022, Appellants timely filed their Notice of Appeal. (R. 2027-2030).

APPELLANTS' ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that the Board established that the reasonableness of its decision to grant the business developer's application to directly rezone the subject property from A-1 Agricultural to B-1 Business was fairly debatable when the evidence showed that the Board failed to comply with its statutory obligation under Virginia Code § 15.2-2232 to follow the Brunswick County Comprehensive Plan then in effect. (Preserved at R. 1933-1939, 1964-1972; R. Add. Tr. 102-103, 118, 126-129, 131-133, 142-143.)

2. Due to the timing of the Board's motion for summary judgment, the trial court erred in denying Appellants' motion for a stay and allowing the hearing on the Board's motion to proceed on June 3, 2022. (Preserved at R. Add. Tr. 96-98, 104.)

3. The trial court erred in allowing the hearing on the Board's motion for summary judgment to proceed on June 3, 2022, because the motion was made at the opening of fact discovery, before the trial entered any pretrial scheduling order, and before Appellants had an adequate opportunity to conduct pretrial discovery on the Board or on nonparties with knowledge of the underlying facts. (Preserved at R. Add. Tr. 98-99, 104.)

4. The trial court erred in granting the Board's motion for summary judgment because the court failed to apply the correct standard of review under *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 740 S.E.2d 548 (2013). Under *Newberry Station*, summary judgment could not have been properly entered in the Board's favor, as the record evidence showed that the Board wholly failed to meet the requirements of Virginia Code §§ 15.2-2283 and -2284 prior to granting the business developer's rezoning application and, therefore, the Board's action was by definition arbitrary and capricious, not fairly debatable, and void. (Preserved at R. 1933-1934, 1939, 1964-1965, 1971-1972; R. Add. Tr. 102-103, 118, 126-129, 131-133, 142-143.)

5. In granting the Board's motion for summary judgment, the trial court erred in rejecting Appellants' contention that the Board's decision to grant the business developer's rezoning application was arbitrary and capricious on the grounds that the Board's failed to follow the Brunswick County Comprehensive Plan last revised in 2017 and did not utilize the correct process to amend the Plan. (Preserved at R. 1971-1972; R. Add. Tr. 102-103, 131-133, 142-143.)

6. In its interlocutory order that partially granted and partially denied the Board's demurrer, the trial court erred in ordering the dismissal of the procedural claims made in the Amended Petition, including the claims that (a) the Board failed to conform with applicable Virginia Department of Transportation guidelines and conduct a proper traffic study prior to granting the developer's rezoning application; (b) the developer failed to subdivide the subject property prior to its submission of the rezoning application, as required by the Brunswick County Subdivision Ordinance, Brunswick County Code, App'x A – Subdivisions, §§ 2-32, 4-4, and 7-2-3; and (c) the Board exceeded its authority under the Brunswick County Zoning Ordinance, Brunswick County Code, App'x B – Zoning, Articles 2-1, 4, 4-1-18, 9, 9-1-1, in approving the direct rezoning of the subject property from A-1 Agricultural to B-1 Business. (Preserved at R. 1947, 1954-1955, 1961; R. Add. Tr. 8-9, 14-15, 38, 42-46, 102.)

STATEMENT OF FACTS

The Ebony area of Brunswick County is a historic and scenic rural residential and agricultural community that has always included small-scale, locally owned and operated general stores that are compatible with neighboring residences and farmland. (R. 1237.) The County's Comprehensive Plan (last updated in 2017) designates the entire Ebony community as an A-1 Agricultural District through the year 2037 and further contains no designation for Ebony to be considered as a growth area for future commercial development that exceeds what could be accommodated with a Conditional Use Permit. (R. 1239; R. Add. Exhibits[5] 98-99.)

On October 7, 2019, Par 5 submitted a Rezoning Application requesting that the Board up-zone a 2.04-acre portion of an 8.36-acre tract owned by Michael and Susan Royster Jones (the "Joneses") directly from A-1 Agricultural to B-1 Business. (R. 237-242, 1242.) The up-zoning was intended to accommodate the construction of a 9,100-square-foot Dollar General retail store possessing 7,422-square-feet of retail floor space and a minimum of 37 parking spaces, anticipating an increase in traffic to the area in the amount of 587 trips per day. (R. 237-243, 1242.) The store's proposed design is a standard fare industrial-looking metal box

[5] References to "R. Add. Exhibits" are to the Exhibits that were added as one of multiple Addendum files that the circuit court clerk added to the electronic record after the original electronic record was submitted and filed.

building that would visually decimate and dominate the look and feel of the historic rural community. (R. 7-24, 164-171, 264-270, 724-725, 727-732, 814-822, 1243.)

Prior to submitting the Rezoning Application, neither Par 5 nor the Joneses subdivided the portion of the parcel to be up-zoned. (R. 460-463, 1247-1248.) This inaction should have resulted in the Planning Commission and Board's rejection of the Application for failure to comply with Sections 2-32 and 4-4 of the Brunswick County Subdivision Ordinance. (R. 460-463, 1247-1248.)

Even so, on December 10, 2019, the Planning Commission recommended approval of Par 5's Rezoning Application. Prior to issuing this recommendation, the Planning Commission did not make the determination that the proposed Dollar General store was substantially in accord with the Comprehensive Plan. (R. 666, 754-757, 1244-1245.) Indeed, George Morrison, the Planning Director, stated to Commission members that the Comprehensive Plan was a suggestion, had no binding effects, and that the County could ultimately do as it liked with the subject land. (R. 247-248, 1245.) However, Virginia Code § 15.2-2232 requires that the Planning Commission find that a proposed development is substantially in accord with the current Comprehensive Plan prior to voting to approve such application.

On January 29, 2020, the Board by a 3-2 vote approved Par 5's Rezoning Application. (R. 667, 1246.) When considering the Application, the Board did

not follow VDOT Guidelines or conduct any Traffic Impact Analysis even though it knew of the hazardous nature of the skewed T-intersection located near the proposed entrance to the Dollar General store. (R. 7-24, 264-265, 1250-1251.)

In addition, there is no evidence in the record that the Board considered the required factors set out in Virginia Code §§ 15.2-2283 and -2284 prior to approving Par 5's Rezoning Application. (R. 257-260, 664-681, 1253-1254.) These statutes mandate that the Board analyze whether a proposed development would (1) provide for adequate light, air, convenience of access, and safety from dangers; (2) reduce or prevent congestion in the public streets; (3) facilitate the creation of a convenient, attractive, and harmonious community; (4) protect against destruction of or encroachment upon historic areas; and (5) be consistent with the growth trends and future needs of the community. (R. 1253-1254.)

The Board's decision also failed to align with the Comprehensive Plan. The Comprehensive Plan calls for scenic rural areas, including Ebony, to serve as economic engines for the County by acting as magnets for tourism in the form of outdoor recreation. (R. 1254-1256; R. Add. Exhibits 50, 82-83, 87.) The Plan does not intend or allow for economic development to be approached in a vacuum but rather in a thoughtful manner that does not undermine other features contained within the Plan. (R. 1254-1256; R. Add. Exhibits 50, 69-100.) The permanent

eyesore and unsafe traffic magnet that will be created by the proposed Dollar General box store would significantly undermine this directive. In addition, the construction of such a large retail store would violate the requirements contained in the Zoning Ordinance Articles 2-1, 4, and 4-1-18. (R. 496, 504-505.)

ARGUMENT

I. THE REASONABLENESS OF THE BOARD'S DECISION TO GRANT PAR 5'S REZONING APPLICATION WAS NOT FAIRLY DEBATABLE BECAUSE THE EVIDENCE SHOWED THAT THE BOARD FAILED TO COMPLY WITH ITS STATUTORY OBLIGATION TO FOLLOW THE COMPREHENSIVE PLAN (ASSIGNMENT OF ERROR NO. 1)

A. Standard of Review

The Board's decision to grant Par 5's Rezoning Application was a legislative action that is presumed to be reasonable "if the matter in issue is fairly debatable." *Bd. of Supervisors v. Robertson*, 266 Va. 525, 532, 587 S.E.2d 570, 575 (2003) (internal quotation marks omitted); *see also Town of Leesburg v. Giordano*, 280 Va. 597, 606, 701 S.E.2d 783, 788 (2010). "An issue is *fairly* debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Robertson*, 266 Va. at 532, 587 S.E.2d at 575 (internal quotation marks omitted); *see also Giordano*, 280 Va. at 606, 701 S.E.2d at 788.

Under these principles, the Virginia Supreme Court has established the standard "for determining whether the presumption of reasonableness in a particular case should prevail or is overcome." *Giordano*, 280 Va. at 606, 701 S.E.2d at 788. This standard is:

> Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the [legislative action] must be sustained. If not, the evidence of unreasonableness defeats the presumption of reasonableness and the [legislative action] cannot be sustained.

Bd. of Supervisors v. Snell Constr. Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974) (internal quotation marks omitted); *see also Giordano*, 280 Va. at 606, 701 S.E.2d at 788; *Robertson*, 266 Va. at 533, 587 S.E.2d at 575.

B. Principles of Law and Authorities

In this case, the record contains insufficient evidence to render the reasonableness of the Board's decision fairly debatable. The trial court's basis for granting summary judgment in the Board's favor was its incorrect determination that under Virginia case law, the Comprehensive Plan "is merely a guide, and the Board is not obligated to comply with it. The board can certainly consider the Plan in its decision making, but it is not bound by it." (R. 2024.) Based on this incorrect interpretation of Virginia law, the trial court concluded that the Board's decision was reasonable even if the Board acted in complete disregard of the Plan. (*Id.*)

Although some Virginia cases do generally state that the Comprehensive Plan is a guide to development, the language of the governing state statutes is nevertheless controlling. *Stafford Cty. v. D.R. Horton, Inc*., 299 Va. 567, 570, 856 S.E.2d 197, 199 (2021); *see Akers v. Commonwealth*, 298 Va. 448, 453, 839 S.E.2d 902, 906 (2020) ("The specific and plain language of the statute . . . controls"); *Commonwealth ex rel. State Water Control Bd. v. Appalachian Power Co*., 9 Va. App. 254, 259 n.3, 386 S.E.2d 633, 636 (1989) ("Where the statutory language is clear and unambiguous, the plain meaning of the statute will control).

In this regard, Virginia Code § 15.2-2229 provides that zoning cases are to be decided based on the appropriateness of the proposed use within the general area of the Comprehensive Plan feature and that due process is required for any zoning amendment. Further, Virginia Code § 15.2-2232(A) clearly and unambiguously provides that a county's "comprehensive plan **shall control** the general or approximate location, character and extent of each feature shown on the plan" (emphasis added).

"Properly understood, a 'shall' command in a statute always means 'shall,' not 'may.' No litigant or court should willfully disregard such a legislative command." *Rickman v. Commonwealth*, 294 Va. 531, 537, 808 S.E.2d 395, 398 (2017).

Pursuant to Virginia Code § 15.2-2232(A), a "developer seeking to build a 'feature' not shown on the comprehensive plan must petition the planning

commission for approval. . . . The Planning Commission must then determine whether the request for extension of this feature is 'substantially in accord' with the comprehensive plan." *D.R. Horton*, 299 Va. at 570, 856 S.E.2d at 199 (quoting Va. Code Ann. § 15.2-2232(A)). Thus, in reviewing a rezoning application for a new business development such as the proposed Dollar General store, "the Planning Commission and Board must determine whether there is substantial evidence of the proposed facility's compliance with the Comprehensive Plan." *Cellco P'ship v. Bd. of Supervisors of Fairfax Cty*., 140 F. Supp. 3d 548, 565 (E.D. Va. 2015). "If conformity is lacking, the Board of Supervisors must amend the Plan, following public hearings and recommendation from the Planning Commission." *Christ Coll., Inc. v. Bd. of Supervisors*, No. 90-2406, 1991 U.S. App. LEXIS 21680, at *21 (4th Cir. Sept. 13, 1991).

"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 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* Va. Code Ann. §§ 15.2-2229, 15.2-2232; *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* Va. Code Ann. § 15.2-2229.

In this case, the trial court overlooked the mandatory requirements of Virginia Code §§ 15.2-2229 and -2232(A) and wrongly concluded that the Board was free to ignore the terms of the Comprehensive Plan when it decided to authorize the up-zoning required to support the construction of a massive Dollar General store in the proposed Ebony location. Virginia Code § 15.2-2232(A) clearly required that the Board and Planning Commission ensure that the proposed retail store was substantially in accord with the character and extent of the features shown in the Comprehensive Plan for the Ebony community before approving the proposed up-zoning. *See D.R. Horton*, 299 Va. at 570, 856 S.E.2d at 199. The trial court wrongly assumed that the Board's decision was reasonable. Instead, it should have required the Board to show that the construction of the proposed Dollar General store in Ebony substantially accorded with the Comprehensive Plan.

As discussed throughout this Brief, the proposed Dollar General store utterly fails to meet this test. The construction of a 9,100-square-foot Dollar General store in the proposed Ebony location wholly fails to accord with the "general or approximate location, character and extent of each feature shown" on the Comprehensive Plan, as required by Virginia Code § 15.2-2232(A). In addition, the Board utterly failed to comply with its mandatory duty under Virginia Code

§ 15.2-2229 to decide Par 5's Rezoning Application based on the appropriateness of operating a massive retail box store in the heart of Ebony's scenic and historic community and near an already-hazardous and confusing intersection that would generate a substantial increase in traffic (projected 578 trips per day). This failure likewise constitutes a breach of the Board's mandatory statutory obligation. *See Rickman*, 294 Va. at 537, 808 S.E.2d at 398; *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. Accordingly, it should be concluded that the trial court's grant of summary judgment in the Board's favor lacks legal basis and must be reversed. It follows that the trial court's grant of summary judgment in the Board's favor lacks legal basis and must be reversed.

II. DUE TO THE TIMING OF THE BOARD'S MOTION FOR SUMMARY JUDGMENT, APPELLANTS WERE ENTITLED TO THE ISSUANCE OF A STAY OF THE SCHEDULED HEARING ON THE MOTION (ASSIGNMENT OF ERROR NO. 2)

A. Standard of Review

The trial court's grant or refusal of a continuance is reviewed for an abuse of discretion resulting in prejudice to the moving party. *Haugen v. Shenandoah Valley Dep't of Soc. Servs.*, 274 Va. 27, 34, 645 S.E.2d 261, 265 (2007). The "three principal ways by which a court abuses its discretion" are: "when a relevant

factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Lawlor v. Commonwealth*, 285 Va. 187, 213, 738 S.E.2d 847, 861 (2013), *cert. denied*, 571 U.S. 953, 134 S. Ct. 427 (2013).

B. Principles of Law and Authorities

The trial court abused its discretion in denying Appellants' motion for a stay of the scheduled June 3, 2022, hearing on the Board's motion for summary judgment. The Board scheduled the hearing after it had filed various pretrial motions, including a motion to consolidate the present action with the companion appeal (Record No. 1303-22-2), but well **before** it filed any motion for summary judgment. (R. 1523.) Its actual motion for summary judgment was not filed until May 9, 2022, which was only 25 days prior to the scheduled hearing of June 3, 2022. (R. 1638-1661.) The timing of the filing did not allow Appellants the time mandated by Virginia Supreme Court Rules to prepare and file any response in opposition.

In this regard, Virginia Supreme Court Rule 3:8(b) provides that a party must file a response to an opponent's motion within 21 days after the motion is electronically transmitted to his/her counsel. Virginia Supreme Court Rule 4:15(c)

further requires that a response to a motion must be filed at least seven days prior to the hearing date on the motion. By necessary implication, these Rules require that the underlying motion must be filed at least 28 days prior to the scheduled hearing date so to allow the opposing party sufficient time under the Rules to prepare and file his/her response in opposition.

It is beyond dispute that the Board failed to file its summary judgment motion 28 days or more prior to the scheduled hearing date of June 3, 2022. (R. 1523, 1638-1661.) The late filing of the Board's motion had the practical effect of cutting short Appellants' allotted time under Virginia Supreme Court Rules 3:8(b) and 4:15(c) to prepare and file any response in opposition.

Clearly, the Board's motion for summary judgment was filed too close in time to the scheduled hearing date to give fair notice to Appellants. *See* Va. Sup. Ct. R. 3:8(b), 4:15(c). As a matter of fundamental fairness, the trial court should have granted Appellants' motion and issued a stay of the hearing.

This is particularly true given the fact that the Board filed its motion for summary judgment only four days after Appellants filed lengthy responses to the Board's Interrogatories and Request for Production of Documents and three weeks after Appellants submitted detailed responses to the Board's Request for Admissions. (R. 1530-1637.) The preparation of these responses was time intensive. Appellants' counsel is a solo practitioner, and the Board's counsel is a large law firm. The timing

of the Board's summary judgment motion suggests that the Board's law firm was intentionally bombarding Appellants' solo counsel with filings as to which counsel was not granted the necessary time to prepare a full response.

By failing to give due credence to the terms of Virginia Supreme Court Rules 3:8(b) and 4:15(c) and Appellants' fundamental right to the full amount of preparation time allowed by those Rules, the trial court committed a "clear error of judgment." *Haugen*, 274 Va. at 34, 645 S.E.2d at 265. This constitutes an abuse of discretion which mandates the reversal of the court's summary judgment order. *See id.*

III. THE TRIAL COURT PREMATURELY GRANTED THE BOARD'S MOTION FOR SUMMARY JUDGMENT AT THE OPENING OF FACT DISCOVERY, BEFORE ANY SCHEDULING ORDER WAS ENTERED, AND BEFORE APPELLANTS HAD AN ADEQUATE OPPORTUNITY TO CONDUCT PRETRIAL DISCOVERY (ASSIGNMENT OF ERROR NO. 3)

A. Standard of Review

See Point II(A), *supra.* Further, in considering a motion for summary judgment, the trial and appellate courts "must adopt those inferences from the facts that are most favorable to the nonmoving party, unless such inferences are strained, forced, or contrary to reason." *Renner v. Stafford*, 245 Va. 351, 353, 429 S.E.2d 218, 220 (1993). Even so, "summary judgment is a drastic remedy, available only when there are no material facts genuinely in dispute." *Fultz v. Delhaize Am., Inc*.,

278 Va. 84, 88, 677 S.E.2d 272, 274 (2009); *see also* Va. Sup. Ct. R. 3:20. The trial court may not "incorrectly . . . short-circuit[ ] litigation pretrial and . . . decide[ ] the dispute without permitting the parties to reach a trial on the merits." *Fultz*, 278 Va. at 88, 677 S.E.2d at 274.

A trial court's entry of summary judgment is premature and improper when it deprives a plaintiff of the opportunity to fully develop his/her theory of the case. *Renner*, 245 Va. at 355, 429 S.E.2d at 221. At a minimum, a plaintiff must be afforded a full opportunity to complete the discovery necessary to enable him/her to prove his/her claim. *Id.*

B. Principles of Law and Authorities

The trial court granted the Board's motion for summary judgment before any pretrial scheduling order had been entered or any discovery deadlines established, and before Appellants were able to schedule any depositions. Under the circumstances, Appellants were not granted an adequate opportunity to obtain the necessary pretrial discovery that would have further substantiated their claim that the Board's up-zoning decision was arbitrary and capricious. Consequently, it should be concluded that the trial court's entry of summary judgment in the Board's favor was premature and should be reversed. Va. Sup. Ct. R. 3:20; *see Slone*, 249 Va. at 522, 457 S.E.2d at 52; *Renner*, 245 Va. at 355, 429 S.E.2d at 221.

By letter ruling dated July 30, 2021, the trial court concluded that Appellants had stated a viable count against the Board for arbitrary and capricious action based on the Board's alleged failure to (i) align with the Comprehensive Plan and (ii) consider [Virginia Code] §§ 15.2-2283 and -2284" prior to granting Par 5's Rezoning Application. (R. 1469.) Appellants intended to seek factual discovery on these issues from appropriate Brunswick County authorities, representatives, and employees, including members of the Board and Planning Commission, and nonparties with personal knowledge. (R. 1750.)

For example, Appellants were in possession of evidence showing that prior to the Planning Commission's vote to recommend that the Board approve Par 5's Rezoning Application, Planning Director George Morrison wrongly informed the Commission that the County was not obligated to follow the Comprehensive Plan in making rezoning decisions. (R. 247-248, 1245.) Appellants intended to seek factual discovery from appropriate persons with knowledge concerning the effect that this incorrect and misleading statement had on the members of the Commission and Board. (R. 1750-1751.) Further, Appellants intended to seek expert discovery on the issue of causation. (R. 1751.) Appellants were denied the opportunity to conduct such pretrial discovery by the trial court's premature entry of summary judgment in the Board's favor.

As another example, Appellants learned that after they filed their Petition in this case, the Board or Planning Commission improperly and retroactively altered the County's 2022 zoning map the old store" (tax map 98-38A) that was a portion of Appellant Anne Hartley's ("Hartley") property in 1995 when a rezoning effort was initiated and abandoned. (R. 1751.) Although the property was never formally rezoned from A-1 Agricultural to B-1 Business, the zoning map was altered in 2022 to wrongly reflect that such a rezoning occurred. (R. 1751.) Appellants also learned that the current owner of the property was never informed by any member of the Board or Planning Commission of the 2022 changes made to the zoning map. (R. 1751.)

Appellants intended to seek factual discovery from appropriate persons with knowledge to gain further information and details concerning the improper retroactive change to the 2022 zoning map that was effectuated by the Board or Planning Commission. (R. 1751-1752.) In addition, Appellants intended to seek discovery from experts concerning the legal meaning and effect of the wrongful retroactive alterations to the zoning map. (R. 1752.)

Notably, Brunswick County authorities, representatives, and employees, including members of the Board and Planning Commission, are the only persons with full knowledge and control of evidence concerning the steps, if any, the Board undertook to comply with the requirements of Virginia Code §§ 15.2-2283 and -2284

prior to making the decision to grant Par 5's Rezoning Application. (R. 1754.) Appellants required discovery from such County personnel in order to learn the true extent, if any, to which the Board considered the statutory factors of consideration prior to authorizing the up-zoning. (R. 1754.) Appellants were denied the opportunity to obtain the needed discovery by the trial court's premature issuance of summary judgment in the Board's favor.

Clearly, the Board's motion for summary judgment was filed before Appellants had an adequate opportunity to obtain the pretrial discovery they needed to substantiate their claims. (R. 1747-1749, 1872.) The factual and expert discovery Appellants intended to seek would have shown the existence of material facts that are genuinely in dispute in this case. (R. 1757.) The trial court should have granted Appellants a stay in order to provide them with a fair opportunity to obtain the necessary pretrial discovery to support their actionable claims. (R. 1469, 1754.)

Moreover, in their Motion for Protective Order and for an Order Sequencing Discovery, Appellants requested that expert discovery be sequenced after fact discovery. (R. 1873-1874.) Because Appellants had not yet engaged in nonexpert fact discovery at the time the court granted summary judgment, expert discovery had not yet opened.

In light of the complete and dispositive relief the trial court issued to the Board in granting summary judgment and the substantial fact and expert discovery

that was still to be completed, the trial court should have issued a stay of proceedings on the Board's motion for summary judgment so that the parties could have completed fact discovery in this matter and to permit sufficient time for Appellants to secure expert testimony. The trial court's entry of summary judgment in the Board's favor was premature and improper because it unfairly deprived Appellants of the opportunity to fully develop their theory of the case. *See Renner*, 245 Va. at 355, 429 S.E.2d at 221. This constitutes an abuse of discretion mandating reversal. *Haugen*, 274 Va. at 34, 645 S.E.2d at 265.

IV. SUMMARY JUDGMENT COULD NOT HAVE BEEN PROPERLY ENTERED IN THE BOARD'S FAVOR BECAUSE THE EVIDENCE SHOWED THAT THE BOARD WHOLLY FAILED TO MEET THE REQUIREMENTS OF VIRGINIA CODE §§ 15.2-2283 AND -2284 AND, THEREFORE, THE GRANT OF PAR 5'S REZONING APPLICATION WAS BY DEFINITION ARBITRARY AND CAPRICIOUS (ASSIGNMENT OF ERROR NO. 4)

A. Standard of Review

See Point I(A), *supra*. Further, the Virginia Supreme Court has established 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 Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 621, 740 S.E.2d 548, 557

(2013) (quoting *Renkey v. County Bd. of Arlington County*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006)). In other words, if a board did not comply with all directives and procedures mandated by Virginia statutes and local ordinances, its rezoning decision must be stricken as void. *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557; *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank v. Martin*, 238 Va. 232, 236, 383 S.E.2d 714, 716 (1989).

Moreover, a trial court's factual findings are not binding on the appellate court if "they are plainly wrong or unsupported by the evidence." *Pyramid Dev. v. D&J Assocs*., 262 Va. 750, 753, 553 S.E.2d 725, 727 (2001); *see also Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 284 Va. 382, 394, 732 S.E.2d 676, 682 (2012).

B. Principles of Law and Authorities

Under *Newberry Station*, a prerequisite to a finding that the Board legitimately exercised its legislative powers here is that the Board must have complied with all directives and procedures mandated by Virginia statutes and Brunswick County ordinances prior to granting the up-zoning to allow construction of the proposed Dollar General store. *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557; *see also Renkey*, 272 Va. at 376, 634 S.E.2d at 356. In this regard, Virginia Code §§ 15.2-2283 and -2284 set forth several factors that the Board was required to consider prior to granting Par 5's Rezoning Application. However, the

record is devoid of evidence that the Board fulfilled these requirements prior to approving the up-zoning. (R. 257-260, 664-681, 1253-1254.)

Section 2283 provides, in relevant 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 . . .; (vi) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, impounding structure failure, panic or other dangers; . . . (viii) to provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment . . . .

Va. Code Ann. § 15.2-2283.

Section 15.2-2284 concerns the drawing and applying of zoning ordinances and districts:

> 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.

Va. Code Ann. § 15.2-2284.

These statutes "set out the purpose of the zoning ordinances and a number of factors which a zoning authority **must consider** when taking zoning actions." *Bd. of Sup'rs of Fairfax Cty. v. Miller & Smith, Inc*., 242 Va. 382, 384, 410 S.E.2d 648, 650 (1991) (emphasis added; discussing prior versions of the statutes). If a board of supervisors takes "no action at all to comply with § 15.2-2283", then the resulting change in zoning 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, 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.

In this case, the trial court summarily found that the Board did, in fact, consider the numerous factors required by Virginia Code §§ 15.2-2283 and -2284 prior to authorizing the up-zoning for the construction of a 9,100-square-foot

Dollar General store at the proposed Ebony location. (R. 2013.) Tellingly, however, the trial court cited no actual evidence or authority to support this finding. (R. 2013.) This was because no such evidence exists in the record. (R. 257-260, 664-681, 1253-1254.)

The clearly erroneous nature of the trial court's factual finding is underscored by the substantial amount of evidence that Appellants submitted to show that the factors set forth in Virginia Code §§ 15.2-2283 and -2284 weigh strongly against the construction of the proposed Dollar General store. To begin with, Paragraph 62 of the Amended Petition alleges:

> Prior to granting Par 5's rezoning application, the Board failed to consider and duly account for the required factors set forth in Virginia Code §§ 15.2-2283 and -2284 in that the rezoning of the subject property fails to:
>
> 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.

(R. 1253-1254.)

In addition, in opposing the Board's motion for summary judgment, Appellants presented the following factual evidence:

- Appellants submitted to the trial court several pages of photographs that depicted the rural and non-commerciaized nature of the Ebony area in which the proposed Dollar General store would be located. (R. 1940-1946.)

- Appellants submitted that two other small businesses in the area – the Ebony General Store and Race-In -- set the example and meet the spirit of small crossroad country stores ("rural retail") that may permissibly operate under Articles 4 and 4-1-18 of the Zoning Ordinance in an A-1 Agricultural district through the proper application of conditional use permits. (R. 496, 504-505, 1947.) A country general store is the only type of retail business that is authorized to operate within an A-1 Agricultural district under Zoning Ordinance Articles 4, 4-1-18. (R. 496, 504-505, 1947.) A "country general store" is defined in Zoning Ordinance Article 2-1 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." (R. 505.) Zoning Ordinance Article 2-1 clearly states that the fact a store sells gas as a secondary use does not denigrate its status as a country general store. (R. 496.)

- Appellants submitted that Homestead Antiques, another small Ebony business, operates under a *restricted* B-1 Business zoning classification. (R. 496.)

- Appellants submitted that although a restricted B-1 Business zoning classification is not recognized by the Zoning Ordinance, the operation of Homestead Antiques is largely equivalent to a conditional use permit issued in an A-1 Agricultural district. (R. 496, 1947.)

- A portion of Hartley's property adjacent to the proposed Dollar General site was mistakenly and incorrectly zoned as unrestricted B-1 Business in 2003. This improper rezoning occurred as a result of a good faith mistake wherein Hartley followed the Planning Commission's wrongful directive that she needed to apply for B-1 Business rezoning for a proposed limited business usage. (R. 1948-1950.) Hartley never intended to obtain permission from the Board to conduct unrestricted B-1 Business commercial operations on her property. (R. 1948-1950.)

- The Joneses have indicated they intend to bootstrap the B-1 Business up-zoning for the proposed Dollar General store to obtain the up-zoning of the remainder of his 8.36-acre parcel from A-1 Agricultural to B-1 Business and to commercialize the entire parcel. (R. 1950-1951.)

- The Comprehensive Plan clearly provides that Ebony's "tourism-related business" involves outdoor recreational activities for which the natural scenic beauty of the area acts as a magnet, and the installation of a 9,100-square-foot Dollar General store at the proposed Ebony location will severely undercut this very purpose. (R. 1952; R. Add. Exhibits 82.) The Comprehensive Plan does

not designate the subject Ebony area for commercialization in order to accomplish the Plan's vision for the area and its contribution to Brunswick County as an attraction for tourism. (R. 1952; R. Add. Exhibits 82.)

- To serve the purpose set forth in the Comprehensive Plan that Ebony is to function as a tourist magnet through its natural, scenic beauty, Ebony's unspoiled landscapes must retain intact. (R. 1957; R. Add. Exhibits 50, 82, 83, 87.) This goal will be severely undercut, if not ruined outright, by the construction of the proposed Dollar General store. (R. 1957.)

- The Comprehensive Plan does not classify Ebony as being in any sort of business corridor location for future land use purposes. (R. 1958; R. Add. Exhibits 99-100.)

- The Development Opportunities Map contained in the Comprehensive Plan does not designate Ebony as a location for business development. (R. 1958; R. Add. Exhibits 103.)

- The language of the Comprehensive Plan reflects that 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." (R. 1959-1960; R. Exhibits 16.)

- The skewed intersection across from the proposed Dollar General store has created an existing traffic hazard. (R. 1954.)

- This hazardous condition will be exacerbated by the additional stop-and-start traffic that would be generated by the proposed Dollar General store (proposed 587 trips per day). (R. 1954.)

- When measured from the vantage point of a driver seated in car, the 500-foot site distance from the south on State Road 903 has a knoll that blocks the required 500 foot clearance. (R. 1955.) This obstruction is depicted in a photograph that Appellants submitted to the trial court. (R. 1955.)

- 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. (R. 1955.)

- A traffic engineer involved in Dollar General projects informed Appellants that he was unaware of any other Dollar General project that did not include a Traffic study. (R. 1955.)

- 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. (R. 1955-1956.) The safety issues did not disappear and have been exacerbated by significant increase in seasonal traffic over the years. (R. 1955-1956.)

- VDOT's letter dated November 19, 2019, states: "Entrance geometrics and drainage will be addressed during the site plan review stage." (R. 1956, 1990.) Thus, VDOT's own review of the proposed development of the subject property is incomplete. (R. 1956, 1990.)

The trial court ignored the foregoing evidence and instead summarily found – without any supporting evidence – that the Board did somehow take the statutory factors set forth in Virginia Code §§ 15.2-2283 and -2284 into account prior to granting Part 5's Rezoning Application. However, there is **no evidence** in the legislative proceedings documented by the record that the Board did, in fact, undertake such an inquiry. (R. 257-260, 664-681, 1253-1254.) Because the trial court's factual finding was "plainly wrong or unsupported by the evidence", it cannot stand. *Pyramid Dev.*, 262 Va. at 753, 553 S.E.2d at 727; *see also Preferred Sys. Sols.*, 284 Va. at 394, 732 S.E.2d at 682.

As the above analysis shows, the Board utterly failed to comply with its statutory duty to consider the required factors listed in Virginia Code §§ 15.2-2283 and -2284 prior to issuing a decision on Par 5's Rezoning Application. This failure to comply with statutory duty renders the Board's decision arbitrary and capricious and, therefore, void. *See 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. It follows as a matter of course that the Board was 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 should have been denied in any event. The action should, therefore, be reinstated.

V. THE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY BECAUSE IT FAILED TO FOLLOW THE COMPREHENSIVE PLAN WHEN IT GRANTED PAR 5'S REZONING APPLICATION (ASSIGNMENT OF ERROR #5)

A. Standard of Review

See Point I(A), *supra.*

B. Principles of Law and Authorities

The trial court incorrectly determined that some evidence of reasonableness existed to support the Board's grant of Par 5's Rezoning Application because a few isolated statements in the Comprehensive Plan supported economic development in Brunswick County in the form of a retail business. (R. 2024-2026.) In making this determination, the court overlooked the fundamental principle that 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 and the court could not legitimately rely on certain isolated sentences from the Plan to support the up-zoning to allow the construction of the proposed Dollar General store.

Viewed in its entirety, the Comprehensive Plan clearly establishes that the entire Ebony community is to retain its A-1 Agricultural classification through the year 2037. The Plan provides that Ebony is expected to retain its status as an

agricultural and low-density rural residential district throughout that time. (R. Add. Exhibits 98-99.) The Comprehensive Plan also shows that Ebony is inappropriate for commercialization due to its insufficient infrastructure and significant roadway congestion and safety issues, as well as the need to preserve Ebony's heritage and value as a bucolic and scenic historic area. (R. 1238-1239, 1246, 1251-1252, 1254-1267; R. Add. Exhibits 50, 82-83, 95, 98-99.)

Further, Ebony is not located in a commercial corridor. (R. 1238-1239, 1246, 1251-1252, 1254-1267; R. Add. Exhibits 50, 82-83, 95, 98-99.) Indeed, when the version of the Comprehensive Plan now in effect was created by the professional consultant hired by the Brunswick County, that consultant intentionally removed Ebony from any business designations. (R. 1239-1240, 1251-1252.) This was done in recognition of the fact that Ebony's existing infrastructure, landscape, traffic patterns, and local land uses render the community fit for only agricultural designations and businesses that do no harm and are controlled by a Conditional Use Permit. (R. 1239-1240, 1251-1252.)

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.

(R. Add. Exhibits 100) (emphasis added).

Under Zoning Ordinance Articles 2-1, 4, and 4-1-18, the proposed Dollar General store is too large to be constructed or operated by way of a conditional use permit. (R. 496, 504-505.) 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 A-1 Agricultural areas. (R. Add. Exhibits 100.)

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. (R. Add. Exhibits 100.) The proposed Dollar General store is almost double this maximum size limit. (R. 243.) Hence, its construction is not permitted under the "Community Business" section of the Comprehensive Plan. (R. Add. Exhibits 100.)

Further, the trial court's reliance on certain statements in the Comprehensive Plan identifying "economic and business development and the creation of jobs as primary goals for the development of the county" is unavailing. (R. 2024.) The

language of the Plan clearly shows that the way in which Ebony is to function as an "economic engine for Brunswick County" is by serving as a magnet for tourism involving outdoor recreational activities and its appeal as an authentic countryside community. (R. Add. Exhibits 50, 82-87.) It is axiomatic that the natural scenic beauty of the area must be preserved in order for this goal to be achieved. (R. Add. Exhibits 50, 82-87.) As stated in the Comprehensive Plan: "[T]he natural environment can be a primary draw for visitors looking for recreation and undeveloped, scenic landscapes." (R. Add. Exhibits 87.) This purpose will be seriously undermined by the placement of an eyesore in the form of the massive Dollar General store at the proposed Ebony location.

Indeed, the Comprehensive Plan specifically recognizes that to promote tourism, rural communities such as Ebony should take advantage of their natural assets, which include peaceful country landscapes, farms, and historic buildings. (R. Add. Exhibits 50, 87.) 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." (R. Add. Exhibits 87.)

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. (R. 237-243.) 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. (R. Add. Exhibits 87.)

Viewing the Comprehensive Plan in its entirety, it is evident that the Board's decision to authorize the construction of the proposed Dollar General box store was 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. The Board's approval of Par 5's Rezoning Application did not align with the Comprehensive Plan's Future Land Uses for Brunswick County. Similarly, the Board's action is contrary to 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. *See Giordano*, 280 Va. at 606, 701 S.E.2d at 788; *Robertson*, 266 Va. at 532, 587 S.E.2d at 575.

As the above analysis shows, the trial court erred in concluding that the requisite standard was met for the Board to be entitled to the entry of summary judgment in its favor. *See Purcellville*, 276 Va. at 440, 666 S.E.2d at 523; *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557. The judgment should be reversed, and Appellants should be permitted to move forward to a trial on the merits.

VI. THE TRIAL COURT ERRED IN PARTIALLY GRANTING THE BOARD'S DEMURRER AND DISMISSING APPELLANTS' PROCEDURAL CHALLENGES (ASSIGMENT OF ERROR #6)

A. Standard of Review

The appellate court's review of a trial court's grant (or partial grant) of a demurrer is de novo. *La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC*, 294 Va. 243, 255, 805 S.E.2d 399, 405 (2017). A demurrer should be sustained only if the factual allegations of the petition are insufficient to state a cause of action. *Id.*

B. Principles of Law and Authorities

1. The Board Failed to Follow VDOT Guidelines

When the trial court partially granted the Board's Demurrer, it rejected Appellants' objection that the Board failed to follow VDOT Guidelines[6] and conduct a Traffic Impact Analysis because "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." (R. 1469.)

[6] As noted in the Amended Petition, VDOT Traffic Impact Analysis Regulations Administrative Guidelines may be accessed through the following internet link: https://www.virginiadot.org/projects/resources/TIA_Administrative_Guidelines.pdf (R. 1250.)

Virginia Code § 15.2-2283 mandates that the Board consider whether the proposed rezoning will meet the desired goal of "reduc[ing] or prevent[ing] congestion in the public streets[.]" *See Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650. The trial court's finding that the negative impact the proposed Dollar General store would have on traffic congestion was irrelevant is contrary to law and cannot stand.

Further, the allegations of the Amended Petition sufficiently state a claim of arbitrary and capricious legislative action on this basis. Virginia Code § 15.2-2222.1 and Traffic Impact Analysis Regulations, 24 Va. Admin. Code § 30-155-40, require localities to submit to VDOT an application that includes a Traffic Study and Impact Analysis for any rezoning proposal that will substantially affect transportation on state highways. The allegations of the Amended Petition state facts showing that traffic congestion and hazards will significantly increase near the already dangerous and confusing skewed T-intersection across from the entrance to the proposed Dollar General store. (R. 1238, 1240-1242, 1250-1253.)

Page 51 of the VDOT Guidelines specifically states that "when dealing with a development that mostly generates summer trips, summer traffic counts should be used." (R. 190, 1250-1251.) This was never done. (R. 190, 1250-1251.) Instead, the local VDOT representative conducted a traffic count only in the fall,

during a typically slow time of the year. (R. 1250-1251.) The Board did not obtain or even ask for a proper traffic study to be performed prior to making its decision to grant Par 5's Rezoning Application. (R. 1250-1251.)

The Amended Petition also alleges that in contravention to standing VDOT requirements, the required 500-foot line-of-sight at 3.5 feet from ground level entrance to the proposed Dollar General store was not met. (R. 1251.) Further, the Amended Petition alleges that within the immediate vicinity to the proposed Dollar General site, "numerous crashes were reported to VDOT within the past five years, including crashes resulting in personal injuries. Most crashes occurred during the summer months and during the PM peak periods when the traffic generated by the proposed Dollar General store would be the greatest." (R. 1251.)

The construction of the proposed Dollar General store would clearly increase the already hazardous traffic conditions existing around the site. The store would cause a substantial increase in traffic congestion at the already-complicated intersection and would thereby significantly compromise the safety of motorists, bicyclists, and pedestrians, particularly at peak times.

Under the circumstances, the Board failed to comply with its duty to perform or commission the performance of a Traffic Study and Impact Analysis, as described in VDOT Guidelines, prior to making any decision on Par 5's Rezoning Application. (R. 189-190, 1250.) The Amended Petition sufficiently states a claim

for arbitrary and capricious legislative action on this basis, and the Demurrer should have been overruled. *See La Bella Dona*, 294 Va. at 255, 805 S.E.2d at 405.

2. The Board Failed to Follow the Subdivision Ordinance

In partially granting the Board's Demurrer, the trial court rejected Appellants' contention that the Board failed to follow the Subdivision Ordinance on the grounds that "[s]uch an argument bears no relation to the zoning decision by the Board." (R. 1468.) Citing Subdivision Ordinance § 7-2-3, the court stated: "[I]t seems compliance with the Subdivision Ordinance is only necessary before actual development takes place. Thus, alleged noncompliance with the Subdivision Ordinance may not serve as the basis for a claim of arbitrary and capriciousness." (R. 1468) (footnote omitted). The trial court's finding does not withstand scrutiny.

Subdivision Ordinance §§ 2-32 and 4-4 require that a subdivision application be made to formally subdivide a parcel whenever said parcel is divided into three or more lots or parcels, either concurrently or cumulatively. (R. 460-461, 462-463.) Here, the Amended Petition alleges that no subdivision application was tendered by Par 5 or the Joneses prior to the submission of the Rezoning

Application despite the fact that the parcel was divided into far more than three lots or parcels. (R. 1247-1248.)

The Amended Petition further alleges that the failure by Par 5 and the Joneses to subdivide the 2.04 acres from the main parcel rendered Par 5's Rezoning Application a nullity, as the Application requested the rezoning of a parcel that did not legally exist. (R. 1248.) Pursuant to Subdivision Ordinance § 7-2-3, the Board is charged with the legal duty to ensure compliance with the Ordinance. (R. 476.) Given the fact that no subdivision application was submitted on the subject 2.04-acre tract in conjunction with Par 5's Rezoning Application, the application was facially deficient, and the Planning Commission and Board had a legal duty under the Subdivision Ordinance to deny it. The Board, therefore, violated its own Subdivision Ordinance when it granted Par 5's Rezoning Application.

The Virginia Supreme Court has unequivocally stated that a board of supervisors "cannot waive a provision of a subdivision ordinance." *Bd. of Supervisors of Culpeper Cty. v. Greengael, L.L.C.*, 271 Va. 266, 281, 626 S.E.2d 357, 365 (2006), *as revised* (May 26, 2006). Thus, the Board acted beyond the scope of its authority when it granted Par 5's Rezoning Application without requiring any formal subdivision of the 2.04 acres that were subject to the Rezoning Application either prior to or in conjunction with the rezoning. *Id.*; *see*

Subdivision Ordinance § 4-4 ("stating that "[n]o person shall subdivide any tract of land that is located within the county except in conformity with the provisions of this ordinance") (R. 462-463). The trial court erred in dismissing Appellants' claim for arbitrary and capricious action on this basis, and the claim should be reinstated. *See La Bella Dona*, 294 Va. at 255, 805 S.E.2d at 405.

3. The Board Exceeded Its Authority Under the Brunswick County Zoning Ordinance in Granting the Rezoning Application

In overruling Appellants' claim that the Board lacked the authority under the Zoning Ordinance to directly rezone a property from A-1 Agricultural to unrestricted B-1 Business, the trial court found that Appellants' claim was "wholly without support[.]" (R. 1469.) Because the Amended Petition properly stated a claim, the trial court's grant of the Board's Demurrer on this basis cannot be upheld. *See La Bella Dona*, 294 Va. at 255, 805 S.E.2d at 405.

The County's Zoning Ordinance, a copy of which was attached to the Amended Petition, generally governs local zoning matters. (R. 1257.) Paragraphs 74 through 84 of the Amended Petition alleged that the Zoning Ordinance does not authorize or permit the Board to rezone property that was originally zoned A-1 Agricultural directly to B-1 Business. (R. 1257-1259.) However, this is exactly what the Board impermissibly did when it granted Par 5's Rezoning Application. (R. 1258.)

In this regard, the entire Ebony community is zoned as an A-1 Agricultural district.[7] Article 4 of the Zoning Ordinance expressly states that in an A-1 Agricultural district, "[b]usiness development necessary to support agricultural or open space use is allowed **with conditional use permits**[8] to ensure the preservation of quality development." (emphasis added) (R. 504). The Amended

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[7] Article 4 of the Zoning Ordinance describes an A-1 Agricultural district as follows:

> *Statement of intent.* This district covers the unincorporated portions of the county primarily intended for agricultural and open space uses such as farms, forests, parks, and lakes. The district is established for the specific purpose of preserving the facilitating, existing and future farming operations, conservation of water and other natural resources, reducing soil erosion, protecting watersheds, and reducing hazards of flood and fire. At the same time, the district is intended to provide for rural residential development and to protect this environment where it occurs. Business development necessary to support agricultural or open space use is allowed with conditional use permits to ensure the preservation of quality development. Uses not consistence [sic] with the existing character of this district are not permitted.

(R. 504.)

[8] A conditional use permit is defined in Zoning Ordinance Article 2-1 as:

> A permit issued by the board of supervisors for a use allowed as a conditional use in a designated district after evaluation of the impact and compatibility of such use; said permit shall stipulate such conditions and restrictions, including any such conditions contained herein, as will insure the use being compatible with the neighborhood in which it is to be located; or, where that cannot be accomplished, shall deny the use as not in accord with adopted plans and policies or as being incompatible with existing uses or development permitted by right in the area.

(R. 494.)

Petition alleges that Zoning Ordinance Article 4 makes clear that no other type of business development is permitted within an A-1 Agricultural district. (R. 1257.)

Similarly, as alleged in the Amended Petition, Articles 2-1, 4, 4-1-18, 9, and 9-1-1 of the Zoning Ordinance do not authorize the rezoning of A-1 Agricultural property directly to B-1 Business[9] in order to allow a more expansive business use. (R. 490-505, 521, 1258.) Such an outcome would effectively overrule and nullify the entire purpose of the County's Zoning Ordinance. *See* ***Bd. of Cty. Sup'rs of Fairfax Cty. v. Carper***, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959) (explaining that the purpose of zoning is "to preserve the existing character of an area by excluding prejudicial uses, and to provide for the

[9] Zoning Ordinance Article 9 describes a Business (B-1) District is described as:

> *Statement of intent.* This district is established to provide areas dedicated primarily for retail business, professional services, and other activities generally associated with business transactions . . . . **The intent of this district is to promote centralization of services around incorporated areas of the county** to which the public requires frequent access. **Uses not consistent with the existing character of this district are not permitted**.

(emphasis added) (R. 521).

Under Article 9-1-1, the permissible uses of property zoned as B-1 Business include "[r]etail stores and shops." (R. 521.) Zoning Ordinance Article 2-1 defines retail stores and businesses as "[b]uildings for display and sale of merchandise at retail, but specifically exclusive of coal, wood, and lumberyards." (R. 501.) Generic or chain retail stores such as Dollar General fall into this category.

development of the several areas in a manner consistent with the uses for which they are suited").

The Amended Petition clearly alleges that, at most, the Zoning Ordinance conferred legal authority upon the Board to issue a conditional use permit on the property subject to Par 5's Rezoning Application. (R. 1257-1258.) A conditional use permit would allow a "country general store"[10] to be operated on the property. (R. 496, 504-505, 1257-1258.) However, in no event did the Zoning Ordinance permit the Board to rezone the subject A-1 Agricultural property in a manner that would allow the operation of a retail store of the size and magnitude of the proposed Dollar General store. (R. 490-505, 521, 1258-1259.) In other words, Appellants claimed in the Amended Petition that the Zoning Ordinance did not authorize the up-zoning of A-1 Agricultural property directly to B-1 Business property, as the Board impermissibly did here. (R. 1257-1259.)

It is axiomatic that a zoning ordinance is fully binding on a locality. *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 rezones a portion of a parcel of property "**without complying with the eligibility requirement set out in its own ordinance, its**

[10] A "country general store" is defined in Zoning Ordinance Article 2-1 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. Gasoline may also be offered for sale but only as a secondary activity[.]" (R. 496.)

action was arbitrary and capricious, and not fairly debatable, thereby rendering the rezoning void and of no effect." *Renkey*, 272 Va. at 376, 634 S.E.2d at 356 (emphasis added). This is true regardless of whether the rezoning decision is arguably consistent with the locality's comprehensive plan. *Bd. of Sup'rs of Fairfax Cty. v. Allman*, 215 Va. 434, 441, 211 S.E.2d 48, 52, *cert. denied*, 423 U.S. 940, 96 S. Ct. 300, 46 L. Ed. 2d 272 (1975).

As explained above, the Board utterly failed to comply with the eligibility requirements of its own Zoning Ordinance when it approved Par 5's Rezoning Application. Although Zoning Ordinance expressly provides that business development within an A-1 Agricultural District is to be conducted only through the use of a conditional use permit, Par 5 did not apply for nor did the Board grant a conditional use permit. (R. 1243, 1252, 1257-1258.) Moreover, Zoning Ordinance Articles 2-1, 4, and 4-1-18 prohibit the issuance of a conditional use permit for a proposed business over 4,000 square feet in size. (R. 496, 504-505.) The retail floor space of the proposed Dollar General store is almost twice this maximum size. (R. 243.)

No presumption of correctness applies to a "zoning administrator's action is to approve a use forbidden by the zoning ordinance." *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716. Rather, the administrator's action must be stricken as

void. *Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557; *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716.

As established by *Newberry Station* and *Renkey*, the Board's up-zoning was by definition "arbitrary and capricious, and not fairly debatable," which thereby rendered "the rezoning void and of no effect." *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *see also Newberry Station*, 285 Va. at 621, 740 S.E.2d at 557; *Hurt v. Caldwell*, 222 Va. 91, 97-98, 279 S.E.2d 138, 142 (1981) (ruling that building permit issued in violation of local ordinance was void and of no effect). Clearly, Appellants stated a viable cause of action, and the trial court erred in granting this portion of the Board's Demurrer. *See La Bella Dona*, 294 Va. at 255, 805 S.E.2d at 405. The claim should be reinstated in full.

CONCLUSION

For the foregoing reasons, the trial court's Orders that (1) partially granted the Board's Demurrer for failure to state a claim for arbitrary and capricious legislative action arising from the Board's failure to follow VDOT Guidelines, failure to follow the Subdivision Ordinance, and violation of the Zoning Ordinance, and (2) subsequently granted the Board's Motion for Summary Judgment in its entirety should be reversed. In addition, Appellants' Amended Petition should be reinstated, and the case remanded to the Brunswick County

Circuit Court with a directive that the action is to proceed with pretrial discovery followed by a trial of the merits.

Respectfully submitted,

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CERTIFICATE PURSUANT TO VA. SUP. CT. RULE 5A:20(h)

I hereby certify that:

(1) On this 10th day of January, 2023, the foregoing Appellants' Opening Brief was filed with the Clerk of the Court of Appeals of Virginia and a true copy was served by email to:

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(2) Appellants do *not* desire to waive oral argument; and

(3) The Opening Brief of Appellants contains 12,246 words, excluding the cover page, table of contents, table of authorities, signature blocks, and this Certificate, and does not exceed the greater of 12,300 words or 50 pages.

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