VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BRUNSWICK

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

PETITIONERS' RESPONSE IN OPPOSITION TO DEMURRER OF SUPERVISORS OF BRUNSWICK COUNTY, VIRGINIA

COME NOW Petitioners Anne Edwards Hartley ("Hartley") and the Prospect Cemetery Association (the "Cemetery"), by counsel, and hereby submit their Response in Opposition to the Demurrer of Supervisors of Brunswick County, Virginia (the "Board").

INTRODUCTION

In this case, the Board granted Par 5's application to rezone a portion of property located in historic and scenic Ebony directly from A-1 (Agricultural) to B-1 (Business) for the purpose of installing a massive Dollar General box store. Although the Board's Demurrer repeatedly mischaracterizes the Board's action as a reasonable legislative decision, a proper examination of the facts and governing law reveals that the Board lacked the legal authority to rezone the property in the manner it did and that the Board's decision was unreasonable. This is not merely a disagreement with the decision. It is only when a board of supervisors correctly adheres to all procedural requirements imposed by law that its rezoning decision is entitled to a presumption of

reasonableness. Petitioners affirm these facts as probative evidence that the Demurrer must not be sustained:

- The Board violated the Brunswick County Zoning Ordinance (Brunswick County Code, Appendix ("App'x) B). The Zoning Ordinance did not authorize or permit the Board to unconditionally rezone the subject property directly from A-1 (Agricultural) to B-1 (Business).
- The Board violated the Brunswick County Subdivision Ordinance (Brunswick County Code, App'x A). The landowners failed to formally subdivide the property subject to Par 5's Rezoning Application from the larger parcel in conjunction with the Rezoning Application. Hence the "parcel" subject to Par 5's Rezoning Application does not exist.
- The Board and its Planning Commission failed to follow the required procedures in considering and then granting Par 5's Rezoning Application.
- The Board exceeded the scope of its legislative authority by unconditionally rezoning the property in a manner that exceeded the rezoning requested in Par 5's Rezoning Application.
- The Board's decision reflects that the Board chose to ignore or otherwise failed to take into proper account the required factors set forth in Virginia Code §§ 15.2-2283 and -2284 prior to rezoning the subject property.
- The Board's decision violated the fundamental tenets and purpose of the Brunswick County Comprehensive Plan and the Board's own Vision Statement.
- The Board's decision is based an ongoing false narrative about prior B-1 related rezoning in Ebony promoted within the Planning Department's Staff Analysis and

the County's zoning map that is being used to justify the PAR 5 application approval.

The Board's Demurrer does not overcome the fundamental defects in the Board's decision-making process that are raised by the allegations of the Amended Petition. Although Demurrer attempts to characterize Petitioners' objections to the rezoning as merely "political" in nature, the reality is that the Board failed to comply with governing state and county laws when it impermissibly voted to alter the entire landscape of the authentically rural and historic Ebony community by authorizing the erection and operation of an oversized Dollar General retail store in the subject location.

STANDARD OF REVIEW

Because a demurrer "tests the legal sufficiency of facts alleged in pleadings, not the strength of proof", all facts properly pleaded in the Amended Petition "and all reasonable and fair inferences that may be drawn from those facts" must be accepted as true. *Glazebrook v. Bd. of Sup'rs of Spotsylvania County*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). To withstand a demurrer in a rezoning case, the petitioners must "allege facts which, if true, would be probative evidence" that the Board's decision was unreasonable. *Helmick v. Town of Warrenton ("Helmick I")*, 254 Va. 225, 230, 492 S.E.2d 113, 115 (1997). "If such allegations were made, the demurrer cannot be sustained[.]" *Id.*

ARGUMENT

The Board Demurrer generally misapprehends Petitioners' objections to the Board's grant of Par 5's Rezoning Application. The Board repeatedly insists that the rezoning was a legislative act that is not subject to second guessing by either Petitioners or the Court. However, a prerequisite to a finding that the Board legitimately exercised its legislative powers in a rezoning case is that the Board must first have complied with all directives and procedures mandated by Virginia statutes, regulations and case law, as well as with the Brunswick County Zoning and Subdivision Ordinances.

"A zoning ordinance which does not meet procedural requirements is void ab initio." *Town of Madison v. Ford*, 40 Va. Cir. 423, 1996 WL 33474877, at *2 (Madison County Oct. 25, 1996); *see Town of Vinton v. Falcun Corp.*, 226 Va. 62, 67, 306 S.E.2d 867, 870 (1983) (nullifying zoning ordinance enacted without compliance with statutory notice requirements). Similarly, if a board of supervisors rezones property in a manner that fails to comply with its governing zoning ordinance, the board's action is necessarily arbitrary and capricious, and not fairly debatable, and its rezoning decision void. *Renkey v. Cty. Bd. of Arlington Cty.*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006); *Crestar Bank v. Martin*, 238 Va. 232, 236, 383 S.E.2d 714, 716 (1989).

It is only when a board of supervisors correctly adheres to all procedural requirements imposed by law that its rezoning decision is entitled to a presumption of reasonableness. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716; *Falcun Corp.*, 226 Va. at 67, 306 S.E.2d at 870; *Ford*, 1996 WL 33474877, at *2. In this case, the Board failed to meet the procedural preconditions that would give rise to a presumption of reasonableness.

In addition, it is important to recognize that Virginia follows "the Dillon Rule of strict construction concerning the powers of local governing bodies." *Commonwealth v. County Bd. of Arlington County*, 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977); *see also Bd. of Zoning Appeals of Fairfax Cty. v. Bd. of Sup'rs of Fairfax Cty.*, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008); *City of Richmond v. Confrere Club of Richmond, Virginia, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990). Under the Dillon Rule, "the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication." *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40. Further, "[i]f there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body." *Confrere Club*, 239 at 79-80, 387 S.E.2d at 473.

The Dillon Rule is "a rule of general applicability that defines and invalidates all ultra vires acts of local governing bodies." *W.M. Schlosser Co., Inc. v. Sch. Bd. of Fairfax County, Va.*, 980 F.2d 253, 259 (4th Cir. 1992), *cert. denied*, 508 U.S. 909, 113 S. Ct. 2340, 124 L. Ed 2d 251 (1993). Where, as here, a board of supervisors exceeds the legal authority conferred upon it by governing statutes and regulations, the board's actions are ultra vires and, therefore, null and void. *See id.*; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666 S.E.2d at 317; *Confrere Club*, 239 at 80, 387 S.E.2d at 473.

The Amended Petition clearly identifies several specific ways in which the Board failed to adhere to the procedures required by governing Virginia statutes and County ordinances when it considered and ultimately granted Par 5's Rezoning Application. The Demurrer is fatally flawed in that it does not rebut or, in many cases, even address these many procedural violations. The Board's errors in its treatment of Par 5's Rezoning Application are of such magnitude that its decision to grant the Application must be reversed and rescinded as both arbitrary and capricious

and ultra vires. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666 S.E.2d at 317; *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *Falcun Corp.*, 226 Va. at 67, 306 S.E.2d at 870; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40; *Ford*, 1996 WL 33474877, at *2.

A. The Board Violated Its Own Zoning Ordinance (Demurrer ¶¶ 73-79)

The Demurrer utterly fails to address the actual allegations of the Amended Petition concerning the Board's violation of its own Zoning Ordinance. Instead, it frivolously and falsely claims that Petitioners "seem to contend that once an area has been zoned it can never be changed." (Demurrer, at ¶ 73.) The Amended Petition makes no such ridiculous assertion.

Rather, the Amended Petition clearly states 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).** (Amended Petition, at ¶¶ 74-82.) *See* Zoning Ordinance[1], Brunswick County Code, App'x B, at Articles 2-1, 4, 4-1-18, 9, 9-1-1. **Yet this is exactly what the Board impermissibly did here when it granted Par 5's Rezoning Application.** (Amended Petition, at ¶ 82.)

In this regard, it is undisputed that the entire Ebony community is zoned as an A-1 (Agricultural) district.[2] Article 4 of the Zoning Ordinance expressly states that in an A-1

[1] A copy of the Brunswick County Zoning Ordinance is attached to the Amended Petition as Exhibit N.

[2] The Zoning Ordinance describes an Agricultural (A-1) District as follows:

(Agricultural) district, "[b]usiness development necessary to support agricultural or open space use is allowed **with conditional use permits**[3] to ensure the preservation of quality development." (emphasis added.) The Zoning Ordinance does not permit any other type of business development within an A-1 (Agricultural) district. Zoning Ordinance, Brunswick County Code, App'x B, at Article 4.

Similarly, the Zoning Ordinance does not authorize the rezoning of A-1 (Agricultural) property directly to B-1 (Business)[4] property in order to allow a more expansive business use.

> *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.

Zoning Ordinance, Brunswick County Code, App'x B, at Article 4.

[3] A conditional use permit is defined 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.

Zoning Ordinance, Brunswick County Code, App'x B, at Article 2-1.

[4] The Zoning Ordinance 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

See Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4, 4-1-18, 9, 9-1-1. 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 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. A conditional use permit would allow a "country general store"[5] to be operated on the property. (Amended Petition, at ¶¶ 78-82.) *See* Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4, 4-1-18. **However, in no event does 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.** (Amended Petition, at ¶¶ 81-83.) *See* Zoning Ordinance, Brunswick

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> access. **Uses not consistent with the existing character of this district are not permitted.**

Zoning Ordinance, Brunswick County Code, App'x B, at Article 9 (emphasis added).

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

[5] 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, Brunswick County Code, App'x B, at Article 2-1.

County Code, App'x B, at Articles 2-1, 4, 4-1-18, 9, 9-1-1. In other words, the Zoning Ordinance does not authorize the Board to rezone A-1 (Agricultural) property directly to B-1 (Business) property, as the Board impermissibly did here.

Tellingly, the Board's Demurrer does not address this point. The absence of any rebuttal argument by the Board implicitly shows that Petitioners have stated a cognizable cause of action against the Board.

In this regard, it is axiomatic that a zoning ordinance is fully binding on a locality. *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 action was arbitrary and capricious, and not fairly debatable, thereby rendering the rezoning void and of no effect**." *Id.* (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. The Zoning Ordinance expressly provides that business development within an Agricultural (A-1) District is to be conducted only through the use of a conditional use permit. Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4. However, Par 5 did not apply for nor did the Board grant a conditional use permit here.[6] (Amended Petition, at ¶¶ 28, 61, 77-82.)

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[6] The Demurrer attempts to divert the Court's attention from this point by incorrectly alleging that Petitioners were unlawfully imposing a requirement on the rezoning applicant to submit or the Board to consider "a specific type of land use application." (Demurrer, at ¶ 31.) This is simply untrue. The Amended Petition correctly points out that, under the express terms of the Zoning Ordinance, an application for a conditional use permit was the sole type of rezoning that the Board

Moreover, the Zoning Ordinance prohibits the issuance of a conditional use permit for a proposed business over 4,000 square feet in size. Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4, 4-1-18. The Dollar General store proposed by Par 5's Rezoning Application far exceeds this maximum size. Thus, the Board acted in violation of its own Zoning Ordinance when it approved Par 5's Rezoning Application.

As established by *Renkey*, the Board's action 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 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). A local official cannot authorize a violation of a zoning ordinance. *Segaloff v. City of Newport News*, 209 Va. 259, 262, 163 S.E.2d 135, 137 (1968).

In *Foster v. Geller*, 248 Va. 563, 449 S.E.2d 802 (1994), the local zoning ordinance stated that a special use permit was required for the development of substandard land. However, the planning director authorized construction on the lot without following the special permit procedure. The Virginia Supreme Court ruled that the statutorily mandated process "could not be circumvented simply by adhering to conditions prescribed by the [planning] director. The practical result of the director's decision was to alter the provisions of the Ordinance by imposing a new effective date for the special use permit requirement. Neither the BZA nor the director, however, possesses the power to amend or repeal portions of zoning ordinances." *Foster*, 248 Va. at 568, 449 S.E.2d at 806.

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had the legal right to grant with regard to the property subject to Par 5's Rezoning Application. (Amended Petition, at ¶¶ 75-82.)

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. *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716.

These fundamental principles are fully applicable to the present case. Par 5's proposed use of the subject property as a Dollar General store is a non-permitted use under the Zoning Ordinance. *See* Zoning Ordinance, Brunswick County Code, App'x B, Article 4. Because the proposed large-scale, retail operation is incompatible with existing uses and developments, the Zoning Ordinance mandated that the Board deny the Rezoning Application. *See id.* at Articles 2-1, 4, 4-1-18. Because the Board lacked the legal authority under the plain terms of the Zoning Ordinance to approve the Rezoning Application, the Board's approval of the Application was ultra vires and is null and void. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Foster*, 248 Va. at 568, 449 S.E.2d at 806; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716; *Hurt*, 222 Va. at 97, 279 S.E.2d at 142.

Clearly, Petitioners have a viable claim that the Board acted beyond the scope of its authority and, therefore, in a manner that was ultra vires when it approved Par 5's Rezoning Application. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666 S.E.2d at 317; *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *Falcun Corp.*, 226 Va. at 67, 306 S.E.2d at 870; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40; *Ford*, 1996 WL 33474877, at *2. Hence, the Demurrer is unmeritorious and should be denied.

B. The Board Violated Its Own Subdivision Ordinance (Demurrer ¶¶ 42-47)

The Board incorrectly contends that the Subdivision Ordinance[7] does not apply to Par 5's Rezoning Application. In so doing, the Board misconstrues the language of the Amended Petition.

Contrary to the Board's representations, the Amended Petition does not allege that the entire parcel of property (only a portion of which was subject to Par 5's Rezoning Application) has never been subdivided. Rather, the Amended Petition simply states that at the time the Board granted the Rezoning Application, the subject 2.04 acres had not been subdivided from the larger parcel. (Amended Petition, at ¶¶ 46-47.)

However, as the Amended Petition further states, the express terms of the Subdivision Ordinance required the landowners to formally subdivide the subject 2.04 acres from the main parcel. (Amended Petition, at ¶¶ 44-47.) *See* Subdivision Ordinance, Brunswick County Code, App'x A. This was so because a parcel must be formally subdivided whenever it has been divided into three or more tracts containing less than ten acres, and Brunswick County land records show that the parent parcel of the subject property has been divided into parcels of less than ten acres at least 24 times. (Amended Petition, at ¶¶ 45-46.) *See* Subdivision Ordinance, Brunswick County Code, App'x A, at §§ 2-32, 4-4.

The landowners' failure 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. (Amended Petition, at ¶ 48.) The Board was charged with the legal duty to ensure compliance with the Subdivision Ordinance. (Amended Petition, at ¶ 48.) *See* Subdivision Ordinance, Brunswick County Code, App'x A, at § 7-2-3. Given the fact that no subdivision

[7] A copy of the Subdivision Ordinance, Brunswick County Code, App'x A, is attached to the Amended Petition as Exhibit J.

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. (Amended Petition, at ¶ 48.) *See* Subdivision Ordinance, Brunswick County Code, App'x A, at § 7-2-3. 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). Under the Dillon Rule, this limitation must be strictly construed against the Board and imposes a cap on the Board's powers. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666 S.E.2d at 317; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40. Thus, the Board acted beyond the scope of its authority when it granted Par 5's Rezoning Application without requiring the landowners to formally subdivide the 2.04 acres that were subject to the Rezoning Application either prior to or in conjunction with the rezoning.

Notably, the Board cites no statute, regulation, case law, or any other legal authority to support its contrary position. This dearth of legal authority is reflective of the unmeritorious nature of the Board's argument. Indeed, the Board's position contravenes both the express terms of the County's Subdivision Ordinance -- which states that no one is exempt from its requirements -- and the Virginia Supreme Court's declaration that a board cannot waive a provision of a subdivision ordinance. (Amended Petition, at ¶ 45.) *See Greengael*, 271 Va. at 281, 626 S.E.2d at 365; *see also* Subdivision Ordinance, Brunswick County Code, App'x A, at § 4-4.

C. The Board and Planning Commission Did Not Follow the Proper Procedure When Considering the Rezoning (Demurrer ¶¶ 29-41, 48-60)

Contrary to the Board's representations, the Amended Petition does point to legally mandated procedures that the Planning Commission and Board failed to follow in approving Par 5's Rezoning Application. First, the Planning Commission and Board were legally required to deny Par 5's Rezoning Application outright because the Rezoning Application requested that the subject property be rezoned in a manner not permitted by the Zoning Ordinance. (Amended Petition, at ¶¶ 74-84.) Second, Planning Commission did not comply with the notice and hearing requirements set forth in Virginia Code § 15.2-2232. (Amended Petition, at ¶¶ 49-52.) Third, the Board impermissibly ignored VDOT Guidelines. (Amended Petition, at ¶¶ 54-61.) Fourth, the board either knowingly exceeded the scope of their legislative authority by unconditionally rezoning the un-subdivided subject property in a manner that did not place conditions on and therefore exceeded the rezoning requested in Par 5's rezoning application, or in the alternative the Board and its Planning Director misled the applicant and mis-represented the ordinance in an effort to unlawfully circumvent the existing legal restrictions controlling the rezoning of existing A-1 properties in Brunswick County. The Board and its Planning Director have a documented of this type of misleading activity. Fifth, the Board and its Planning Director unlawfully aided the applicant in to circumvent the legal restrictions applicable to the rezoning of A-1 (Agricultural) property in Brunswick County. (Amended Petition, at ¶¶ 28, 39-41, 48, 61, 74-84, 94 & Exhibit Q thereto.)

1. Par 5's Rezoning Application should have been denied outright as fatally flawed

As explained in the Amended Petition and in Argument Part A, *supra*, the Planning Commission and Board were legally obligated to deny Par 5's Rezoning Application from the outset because that Rezoning Application requested that the subject property be rezoned in a manner that is not permitted by the Zoning Ordinance. (Amended Petition, at ¶¶ 28, 74-82.) *See* Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4, 4-1-18, 9, 9-1-1. Par 5's Rezoning Application requested that the subject property, which was zoned A-1 (Agricultural), be directly rezoned as B-1 (Business). However, the Zoning Ordinance does not authorize or permit the direct rezoning of property from A-1 (Agricultural) to B-1 (Business). (Amended Petition, at ¶¶ 74-82.) *See* Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4, 4-1-18, 9, 9-1-1.

The Planning Commission and Board knew or should have known that the only type of rezoning that the Zoning Ordinance authorizes for the business use of property zoned A-1 (Agricultural) is a conditional use permit, which would allow the operation of a country general store not exceeding 4,000 square feet. (Amended Petition, at ¶¶ 28, 77-82.) *See* Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4, 4-1-18, 9, 9-1-1. Thus, the Planning Commission and Board knew or should have known that Par 5's Rezoning Application requested a change in zoning that they had no legal authority to approve. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716; *Falcun Corp.*, 226 Va. at 67, 306 S.E.2d at 870; *Ford*, 1996 WL 33474877, at *2. Hence, the Planning Commission and Board were required to reject the Rezoning Application at the outset, as alleged in ¶ 28 of the Amended Petition. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54,

666 S.E.2d at 317; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40.

In arguing otherwise, the Board misconstrues the language of the Amended Petition. The salient point is not the type of request that Par 5, as the applicant, submitted[8], but rather the type of rezoning that is authorized by the Virginia Code and the County's own Zoning Ordinance. Because the Board acted without legal authority in approving Par 5's Rezoning Application and rezoning the subject property directly from Agricultural (A-1) to Business (B-1), the Board's action is ultra vires, therefore, is a legal nullity. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Crestar Bank*, 238 Va. at 236, 383 S.E.2d at 716. Hence, Petitioners have stated a cognizable cause of action. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666 S.E.2d at 317; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40.

2. The Planning Commission did not comply with the notice and hearing requirements set forth in Virginia Code § 15.2-2232

In Virginia, "[t]he rezoning of property, no less than the establishment of its original zoning classification, is wholly legislative, requiring action in the form of an amendatory ordinance adopted by the one 'purely legislative body' that exists in the locality involved." *Laird v. City of Danville*, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983). "[A] rezoning or change in zoning occurs when the governing body by ordinance amends the property's zoning classification." *Luck Stone Corp. v. County of Loudoun,* 31 Va. Cir. 391, 1993 WL 946209, at *4 (Loudoun County Aug. 25, 1993).

[8] *See* n.7, *supra.*

To rezone or amend the subject parcel's zoning classification, the Board was required to adopt an amendatory ordinance. *Laird*, 225 Va. at 261, 302 S.E.2d at 24. The Zoning Ordinance provides that when a proposed amendment to the Ordinance is presented, "[t]he planning commission shall hold at least one public hearing on such proposed amendment after notice as required by law[.]" Zoning Ordinance, Brunswick County Code, App'x B, at Article 32-1-1.

The notice and hearing requirements on a proposed zoning amendment are set forth in Virginia Code § 15.2-2232. (Amended Petition, at ¶¶ 49-51.) As the Board acknowledges, this statute expressly provides that a planning commission "shall" hold a public hearing at the direction of the governing body, to wit, the local board of supervisors. (Demurrer, at ¶ 50.) Virginia Code § 15.2-2232.

"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). Thus, the statutory directive in Virginia Code § 15.2-2232 that the Planning Commission "shall" hold a public hearing at the Board's direction is mandatory in nature and, therefore, required compliance. *See id.* The Board's argument to the contrary should be disregarded as lacking in legal merit.

3. The Board Disregarded VDOT Guidelines

In arguing that its grant of Par 5's Rezoning Application was not arbitrary and capricious, the Board alleges that it did, in fact, consider VDOT's recommendations and the petitions and comments from concerned citizens. (Demurrer, at ¶¶ 55-56.) Petitioners submit that the documentary evidence filed as Exhibits to the Amended Petition and the additional evidence contained in the legislative record filed by the Board show otherwise.

As discussed in detail in the Amended Petition, the Board ignored VDOT's overarching Policy Guidelines.[9] (Amended Petition, at ¶¶ 54-61.) Instead, the Board claims to have relied on a letter from the local VDOT representative. (Demurrer, at ¶ 56 & COUNTY SDT 00023.) However, as the content of letter itself indicates, the local representative conducted only a cursory review of local traffic conditions. (*See* COUNTY SDT 00023.) The local representative failed to take into account the overarching VDOT Guidelines that he was duty-bound to enforce.

The Board and Planning Commission knew or should have known that the actions of the local VDOT representative were insufficient under the circumstances to address the serious risks to public health and safety posed by the skewed T-intersection and increased summer/tourist traffic at the proposed Dollar General site, as expressed by many advocates, local residents, local landowners, and Board Vice-Chair Zubrod. (Amended Petition, at ¶¶ 17-21, 35, 42, 43, 54-61 & Exhibit E, Exhibit I, & Exhibit L thereto.) Under the circumstances, the Board and Planning Commission had a legal duty to follow VDOT's Policy Guidelines and conduct a proper traffic study in order to fully and fairly ascertain whether the increased traffic that the proposed Dollar General would create at the site posed an undue risk to public health and safety. (Amended Petition, at 53-61.) *See County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40.

Specifically, VDOT Policy Guidelines[10] explain that:

> As part of a rezoning application, there are several analyses that should be undertaken to ensure that the proposed development is not only consistent with the surrounding land uses but can be supported by the adjacent roadway network. In order to answer these questions, local governments typically ask that a traffic study be performed to evaluate the existing and future traffic demands as well as assess potential roadway requirements. In fact, the VDOT manual

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[9] The VDOT Policy Guidelines may be accessed online via the following link:

http://www.virginiadot.org/projects/resources/chapter527/Administrative_Guidelines_TIA_Regs_7.2012.pdf

[10] *See* n.8, *supra.*

> clearly states that when there is seasonal traffic, a traffic study is required. VDOT's "Guidelines for Traffic Analysis" ("VDOT Guidelines") states that in conducting a VDOT Traffic Impact Analysis, specified methodology and assumptions are to be utilized. The section "Summary of the Methodology and Standard Assumptions for a VDOT Traffic Impact Analysis" states, in part: "Preparers shall collect traffic data in accordance with the identified study area. The count data shall include at a minimum, weekday 24-hour counts, and directional turning movement counts during AM and PM peak times of the day." VDOT Guidelines, at p. 51. It further states: "For some land use types, variations from the standard collection times and methodology may be necessary. For example, traffic information for most areas should be collected during "average" months and days (usually in the fall or spring), **but when dealing with a development that mostly generates summer trips, summer traffic counts should be used.**" *Id.* (emphasis added.)

(Amended Petition, at ¶ 54.)

In contravention of the VDOT Guidelines, the local VDOT representative did not perform any traffic count for the Ebony location during peak seasonal traffic but only in the fall, during a typically slow time of the year. (*Id.*) 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. (*Id.*)

Under the circumstances, the Board's action amounts to a deliberate disregard of governing regulations established by the Commonwealth of Virginia. Such disregard of governing law is both arbitrary and capricious by nature as well as ultra vires. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666 S.E.2d at 317; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40.

Moreover, it should be recalled that at the demurrer stage of the proceeding, all facts and inferences must be viewed in Petitioners' favor. *See Glazebrook*, 266 Va. at 554, 587 S.E.2d at 591; *Concerned Taxpayers of Brunswick Cty. v. Cty. of Brunswick*, 249 Va. 320, 327-28, 455 S.E.2d 712, 716 (1995). The Board's Demurrer cannot be sustained so long as Petitioners have alleged facts "which, if true, would be probative evidence" that the Board's decision was unreasonable. *Helmick I*, 254 Va. at 230, 492 S.E.2d at 115.

Petitioners have satisfied this burden here. In effect, the determination as to whether the Board's rezoning decision must be reversed as unreasonable presents issues of material fact that cannot be definitively resolved at the demurrer stage. *See Concerned Taxpayers of Brunswick Cty.*, 249 Va. at 327-28, 455 S.E.2d at 716.

4. The Board Exceeded the Scope of Its Legislative Authority by Unconditionally Rezoning the Subject Property in a Manner that Exceeded the Rezoning Requested in Par 5's Rezoning Application

According to the Board, Petitioners have no right to impose any restrictions on the Board's ability to consider and grant virtually any type of rezoning application that it wishes in the exercise of its legislative power. (Demurrer, at ¶ 31.) This includes the rezoning of the subject property in a manner that exceeds the type of rezoning requested in Par 5's Rezoning Application.

In actuality, the Board's exercise of its legislative authority is circumscribed by Virginia's Dillon Rule. The Dillon Rule acts as a limitation on the Board's discretionary authority to determine how land within Brunswick County should be used. Under the Dillon Rule, the Board has only those implied powers that are "fixed by statute and . . . conferred expressly or by necessary implication." *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40. Further, "[i]f there is any reasonable doubt whether legislative power exists, that doubt must be resolved against" the Board. *Confrere Club*, 239 at 79-80, 387 S.E.2d at 473.

The Board cites to no statute, regulation, ordinance, or case that law confers upon it the power to rezone property in a manner that exceeds that requested by the rezoning applicant. In the absence of such governing authority, it must be presumed that the Board lacks such power. *See id.* Hence, the Board's act of unconditionally rezoning the subject property for a use that is broader

than that requested in Par 5's Rezoning Application should be considered arbitrary and capricious and ultra vires and, therefore, void. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666 S.E.2d at 317; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40.

5. The Board and Its Planning Director Unlawfully Aided the Applicant to Circumvent the Legal Restrictions Applicable to the Rezoning of A-1 (Agricultural) Properties

As discussed throughout the Amended Petition and this Response, the Board and its Planning Director knew or should have known that the property subject to Par 5's Rezoning Petition could not be lawfully rezoned directly from Agricultural (A-1) to Business (B-1). Nevertheless, the Board and its Planning Director aided Par 5, the applicant, to request this unlawful method of rezoning. The Board and its Planning Director would have known and been influenced by (based on Par 5's actions in neighboring Halifax County) that Par 5 would simply "walk away" from the proposed location if the Board and Planning Director required the applicant to submit a rezoning application requesting a conditional use permit rather than a direct change in zoning classifications needed to support the Dollar General operation. (Amended Petition, at ¶ 94 & Exhibit Q thereto.)

In undertaking to assist Par 5 to circumvent the restrictions set forth in the Zoning Ordinance, the Board and its Planning Director exceeded the scope of the discretionary authority granted upon them by Virginia statutes, regulations, and case law and by the Brunswick County Zoning Ordinance. Such action is by definition void as both arbitrary and capricious and ultra vires. *See W.M. Schlosser*, 980 F.2d at 259; *Bd. of Sup'rs of Fairfax Cty.*, 276 Va. at 553-54, 666

S.E.2d at 317; *Confrere Club*, 239 at 80, 387 S.E.2d at 473; *County Bd. of Arlington County*, 217 Va. at 573, 232 S.E.2d at 40.

D. The Board Did Not Adhere to Virginia Code §§ 15.2-2283 and -2284 (Demurrer ¶¶ 61-68)

Once again, the Board misconstrues the allegations of the Amended Petition in an attempt to claim that its rezoning decision was not arbitrary and capricious, in violation of Virginia Code §§ 15.2-2283 and -2284. Contrary to the Board's suggestions, Petitioners have never contended that the Board was required to make specific factual findings with regard to each factor of consideration set forth in the referenced statutes. Rather, Petitioners maintain that if the Board had fulfilled its duty to consider the statutory factors, it would not have granted Par 5's Rezoning Petition.

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 . . . .

Virginia Code § 15.2-2283.

Virginia Code § 15.2-2284, in turn, 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.

These statutes set out "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 statutes). This is so because, as a matter of policy, zoning regulations "should be related to the character of the district which they affect; and should be designed to serve the welfare of those who own and occupy land in those districts." *Bd. of Cty. Sup'rs of Fairfax Cty. v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959); *see also Bd. of Sup'rs of Fairfax Cty. v. DeGroff Enterprises, Inc.*, 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973).

In this case, consideration of the required statutory factors unequivocally shows that the rezoning of the subject property from A-1 (Agricultural) to B-1 (Business) to allow for the operation of a Dollar General box store was improper and unreasonable. The change in zoning approved by the Board did not accord with the character of the district and neighborhood affected.

1. Adequate light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime and other dangers

The Exhibits to Amended Petition and the additional evidence contained in the legislative record filed by the Board show that the Board ignored the potential safety hazards, crime, and other dangers to the Ebony community posed by Dollar General store proposed by Par 5. As

discussed in the Amended Petition, the store's location would present significant traffic hazards with a new traffic magnet of 578 trips per day to an area that is already unsafe and gets congested, particularly in the summer and early fall seasons, due to the skewed T-intersection configuration across from the site and the proliferation of motorists driving to Lake Gaston. (Amended Petition, at ¶¶ 26, 27, 35, 40, 41, 54-61, 62(a), 88-96.) This danger is heightened by the fact that two of Ebony's main roads are classified as Virginia Byways, which invites additional roadway traffic through tourism (via automobile and bicycle). (Amended Petition, at ¶ 17 & Exhibit C thereto.) Tourists who are by nature unfamiliar with the local roadways would be placed at undue risk of injury as a result of the traffic hazards that would accompany the operation of the proposed Dollar General store.

In addition, the Dollar General's septic system would be located just feet from Petitioner Hartley's active organic farming operation. (*See* Amended Petition, at ¶¶ 27, 62(a) & Exhibit D thereto.) Clearly, the installation of the proposed septic system would pose a significant health and safety risk to the public and particularly to Hartley and those persons utilizing her land.

Further, the close proximity of the proposed Dollar General store to the adjoining Prospect United Methodist Church (the "Church") and the Prospect Cemetery poses threats of crime and vandalism to these historic and relatively secluded properties, as well as to all nearby residences. (Amended Petition, at ¶¶ 62(a), 91.) The proposed Dollar General store would also subject the neighboring properties to noise, disturbances, bright 24-hour lighting, and garbage odors. (Amended Petition, at ¶¶ 27, 62(a), 93, 94 & Exhibits D and Q thereto.) It would result in the degradation in the value of the landowners' properties and will reduce the marketability of those lands. (Amended Petition, at ¶¶ 62(a), 91.)

Petitioners allege that the Board was aware of these dangers but deliberately ignored them when it decided by a 3-2 vote to grant Par 5's Rezoning Application. (Amended Petition, at ¶¶ 42-43 & Exhibit I thereto.) This vote was accomplished in violation of the requirements of Virginia Code § 15-2-2283. *See Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650.

2. Reduce or prevent congestion in the public streets

The Amended Petition alleges that the operation of the Dollar General store proposed by Par 5 will exacerbate the already-hazardous conditions at the skewed T-intersection across from the site. (Amended Petition, at ¶¶ 17-21, 35, 54-61, 62(b), 91.) Petitioners allege that the Board was well-aware of the traffic and safety hazards posed by the proposed Dollar General store but deliberately chose to ignore them when it voted to grant Par 5's Rezoning Application. (Amended Petition, at ¶¶ 42-43 & Exhibit I thereto.) The Board's action was undertaken in violation of the requirements of Virginia Code § 15-2-2283. *See Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650.

3. Facilitate the creation of a convenient, attractive and harmonious community

As the Amended Petition alleges, Ebony is a rural, picturesque community whose history has been intentionally preserved. The proposed Dollar General store would subject Ebony landowners and other residents to undue noise, disturbances, bright 24-hour lighting, and garbage odors. (Amended Petition, at ¶¶ 27, 62(c), 93, 94 & Exhibits D and Q thereto.) It would result in the degradation in the value of all parcels of real property and will reduce the marketability of those lands. (Amended Petition, at ¶¶ 62(a), 91.)

Further, two of Ebony's main roads are designated Virginia Byways.[11] (Petition, at ¶ 17 & Exhibit C thereto.) The Scenic Highway Act defines Virginia Byway as "a highway, designated as such by the [CTB], having relatively high aesthetic or cultural value, leading to or within areas of historical, natural, or recreational significance." Virginia Code § 33.2-400.

The Virginia Code provides that "[i]n selecting a Virginia byway, the [CTB] and the Director of the Department of Conservation and Recreation shall give preference to corridors controlled by zoning or otherwise, so as to reasonably protect the aesthetic or cultural value of the highway." Virginia Code § 33.2-406. When the CTB voted to designate State Routes 626 and 903 in Ebony as Virginia Byways, the Comprehensive Plan provided for the entire Ebony community to be zoned as Agricultural (A-1) lands. Thus, at the time it designated these roads as Virginia Byways, the CTB recognized that the Ebony area had high aesthetic or cultural value due to its scenic rural landscapes, as viewed from the designated roadways. *See id.*

VDOT regulations governing Virginia's scenic highways and byways "establish the policies and procedures which the [CTB], the department, local governing bodies, and the Department of Conservation and Recreation will follow in adding or deleting a route from the lists of scenic highways or Virginia byways. The policy includes a list of criteria which proposed road segments must meet before they can be considered for addition. These include aesthetic, cultural and safety factors." 24 Va. Admin. Code 30-390-10.

To be considered for designation as a Virginia Byway, a road segment must substantially meet the following criteria:

The route provides important scenic values and experiences.

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[11] In addition, Ebony Rd (the continuation of State Route 903 from the intersection that would be in front of the proposed Dollar General location) has already been noted as a candidate for future Virginia Byway distinction.

There is a diversity of experiences, as in transition from one landscape scene to another.

The route links together or provides access to scenic, historic, recreational, cultural, natural and archeological elements.

The route bypasses major roads or provides opportunities to leave high-speed routes for variety and leisure in motoring.

Landscape control or management along the route is feasible.

The route allows for additional features that will enhance the motorist's experience and improve safety.

Local government(s) has/have initiated zoning or other land-use controls, so as to reasonably protect the aesthetic and cultural value of the highway.

These criteria are set forth on VDOT's website and may be accessed through the following internet link: http://www.virginiadot.org/programs/faq-byways.asp.

Because Hendricks Mill Road (portion of State Route 903) and Robinson Ferry Road (State Route 626), the roadways that converge at the skewed T-intersection across from the proposed Dollar General site, are designated Virginia Byways, the landscape surrounding the site has been deemed by state governmental agencies, including VDOT and the CTB, as having tremendous aesthetic and cultural value. The Board has an 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.

The Board abused its authority in approving Par 5's Rezoning Application to ultimately accommodate the erection of a massive Dollar General box store, with no consideration for the scenic byway designation. In contravention to the express purposes of the Scenic Highway Act, the rezoning will significantly detract from the existing beauty of the rural scenery, as viewed from the designated scenic byways, State Routes 626 and 903. This is particularly true given the fact that the Dollar General store will dominate the landscape, will increase traffic congestion at the

already-complicated, skewed T-intersection, and will thereby significantly compromise byway motorists' safety and their leisurely driving experiences.

Case law has established that the negative visual impact a proposed facility will have on a scenic byway provides a legitimate basis for a board of supervisors to deny a rezoning application. *T-Mobile Ne. LLC v. Fairfax Cty. Bd. of Sup'rs*, 759 F. Supp. 2d 756, 764-65 (E.D. Va. 2010), *aff'd*, 672 F.3d 259 (4th Cir. 2012). In fact, this recently occurred when the Mecklenburg County Board of Supervisors voted in April 2019 to deny a special use permit that would have allowed construction of a proposed solar farm (known as Lady Bug) on land abutting State Route 903, the same scenic byway that traverses through the intersection across from the proposed Dollar General site.

As a corollary matter, when determining whether to grant a rezoning application, a board of supervisors should take into "serious consideration" the "aesthetic concerns" raised by local residents about "the new adverse visual impact of the Proposed Facilities on the residential neighborhood[.]" *Id.* at 764-65; *see also AT & T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 315 (4th Cir. 1999). When local residents testify that the proposed structure would have a "negative impact on the aesthetics and overall integrity of the neighborhood" and "express[] their legitimate concern that the neighborhood would become less desirable with the [proposed structure] and that there would be a detrimental impact on local homeowners," substantial evidence exists that the board should deny the rezoning application. *AT & T Wireless PCS*, 172 F.3d at 315.

In the present case, Ebony advocates, residents and/or landowners overwhelmingly testified before both the Planning Commission and the Board that the proposed Dollar General store would have a major detrimental impact on the aesthetics of the neighborhood and would

essentially destroy Ebony's tranquil rural setting. (Amended Petition, at ¶¶ 35, 43 & Exhibits H and I thereto; *see also* Legislative Record filed by Board.) Notably, plans for the proposed Dollar General store call for the installation of a "standard lighting system." (Amended Petition, at ¶¶ 27, 93, 94 & Exhibits D and Q thereto.) The bright lights emanating from such a system will significantly erode the integrity of the rural Ebony neighborhood and will severely decrease nearby residents' enjoyment of their properties. *See AT & T Wireless PCS*, 172 F.3d at 315.

In granting Par 5's Rezoning Application, the Board ignored the extreme negative effect that the proposed Dollar General store would have upon the aesthetic quality of the landscape. This constitutes a violation of Virginia Code § 15.2-2283. *See Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650.

As explained by the Virginia Supreme Court:

> 'It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered . . . .It might be hard to prove that a city dump was hurtful to health, but plainly it should not be located in a residential district. The days of kitchen middens are gone.

W. Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 282-83, 192 S.E. 881, 885-86 (internal citation & quotation marks omitted), *appeal dismissed*, 302 U.S. 658, 58 S. Ct. 369 82 L. Ed. 508 (1937).

4. Protect against destruction of or encroachment upon historic areas

Pursuant to Virginia Code §§ 15.2-2283 and -2284, a rezoning must adequately protect against the destruction or encroachment of historic areas. *Nat'l Tr. for Historic Pres. in U.S. v. Bd. of Supervisors of Orange Cty.*, 80 Va. Cir. 321, 2010 WL 7375614, at *7 (Orange County Apr. 29, 2010). The Amended Petition clearly states that the rezoning of the subject property to allow the operation of a large Dollar General store will directly violate this directive. This applies to the original Ebony community that is a historic area as well as the historic Church and Cemetery, which are adjacent to the store's proposed location. (Amended Petition, at ¶¶ 8-21, 35, 39, 62(d), 66-70, 85-96.)

The allegations of the Amended Petition demonstrate that the Board failed to properly consider the negative impact that the proposed Dollar General store would have upon Ebony's historic properties. 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 properties, including the Church and Cemetery, provide.

5. The trends of growth or change, the current and future requirements of the community

In determining whether to grant Par 5's Rezoning Application, the Board was required to consider the growth trends and future needs of the Ebony community. *See* Virginia Code §§ 15.2-2283 and -2284; *Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650. However, the Board utterly failed to comply with this obligation. Instead, 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. (Amended Petition, at ¶¶ 37-43.)

A locality's comprehensive plan "identifies those areas planned for future growth and the anticipated land use associated with such growth." *Helmick Family Farm, LLC v. Comm'r of Highways ("Helmick II")*, 297 Va. 777, 793, 832 S.E.2d 1, 9 (2019). According to the Brunswick County Comprehensive Plan, Ebony is to remain as an A-1 (Agricultural) District, with no designation as a growth area for commercial development, through the year 2037. (Amended Petition, at ¶ 13 & Exhibit A thereto, at pp. 90-91.) This correlates with historic United States Census data[12], which shows a downward trend in the population of Brunswick County over the last 20-plus years.[13]

The proposed Dollar General store is completely inconsistent with Ebony's rural residential, agricultural classification in the Comprehensive Plan and the County's downward population trend. (Amended Petition, at ¶¶ 13-15.) The sheer size and scope of the proposed store shows that Par 5's Rezoning Application is not in harmony with the growth trends and future needs of the Ebony community. (Petition, at ¶¶ 8-96 & Exhibits A through Q thereto.)

The growth trends and future needs of the Ebony community dictate that, at most, small businesses akin to "country general stores" of 4,000 square feet or less should be permitted within that community. *See* Zoning Ordinance, Brunswick County Code, App'x B, at Articles 2-1, 4, 4-

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[12] Census data for Brunswick County, Virginia may be obtained online at the following link: https://www.census.gov/quickfacts/brunswickcountyvirginia

Virginia courts routinely take judicial notice of United States Census figures. *Shelton v. Sydnor*, 126 Va. 625, 638, 102 S.E. 83, 88 (1920); *Buck v. Commonwealth*, 16 Va. App. 551, 568, 432 S.E.2d 180, 190 (1993), *aff'd*, 247 Va. 449, 443 S.E.2d 414 (1994).

[13] The 2000 United States Census found that there were 18,219 residents of Brunswick County. The 2010 Census showed 17,434 residents. The population estimate for July 2019 was 16,231.

1-18. Such businesses may operate under the existing Agricultural (A-1) zoning with a conditional use permit. *Id.* at Articles 4, 4-1-18. Limiting the businesses permitted in Ebony in this manner would protect the integrity, character, and heritage of the rural Ebony community while at the same time promoting economic development in an appropriate way. There are already two such stores just across the road from the proposed Dollar General that serve the needs and trend of the community. Plus there are full service stores within 6.5 miles. Furthermore, the proliferation of Dollar stores nearby (including two existing Dollar General stores within 10 and 6.5 miles of proposed Ebony location) will not be served by increased customers. At best business may shift among the stores and would certainly damage the local stores already there.

The massive Dollar General store and traffic generation proposed by Par 5's Rezoning Application is clearly inconsistent with the growth trends and future needs of Ebony. The Board's haphazard and mismatched placement of this chain retail box store in the center of the scenic and historical Ebony community represents an improper attempt at economic development that fails to accord with the growth trends and future needs of the Ebony community in violation of Virginia Code §§ 15.2-2283 and -2284. *See Helmick II*, 297 Va. at 793, 832 S.E.2d at 9; *Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650.

Also relevant is that a false narrative continues to be promoted within Planning Department Staff Analysis report about prior B-1 related rezoning events and characterized as a so-called trend for development in the community to support granting PAR 5' application. The only trend in the Ebony community is controlled business development that preserves the character of the community – not harmful commercialization. The Planning Director as well as the Board have been made aware of this repeatedly.

E. The Board Disregarded the Comprehensive Plan and Vision Statement (Demurrer ¶¶ 69-72)

The Board incorrectly suggests that it was not required to consider the Comprehensive Plan and its own Vision Statement in determining whether to grant Par 5's Rezoning Application. However, Virginia Code § 15.2-2232(A) provides that the comprehensive plan "**shall control** the general or approximate location, character and extent of each feature shown on the plan." *Id.* at § 15.2-2232(A) (emphasis added). "Zoning ordinances and districts **shall be drawn and applied** with reasonable consideration for the existing use and character of property [and] the comprehensive plan[.]" *Id.* at § 15.2-2284.

Next, the Board wrongly asserts that it did not, in fact, ignore the tenets of the Comprehensive Plan and Vision Statement when it voted to grant Par 5's Rezoning Application. According to the Board's interpretation, even the slightest hint of favorable language in the Comprehensive Plan and Vision Statement is sufficient to render its decision reasonable as a matter of law. This represents a distorted and incorrect interpretation of both the Comprehensive Plan and Virginia law.

The Virginia Supreme Court has recognized that a rezoning decision that does not comply with the comprehensive plan is itself indicative that the decision was arbitrary and capricious. *Riverview Farm Associates Virginia General Partnership v. Board of Sup'rs of Charles City County*, 259 Va. 419, 428-29, 528 S.E.2d 99, 104 (2000). This is exactly what Petitioners have properly alleged in the Amended Petition. (Amended Petition, at ¶¶ 11-16, 53-61, 63-73.)

Although the Comprehensive Plan provides that Brunswick County generally encourages new business, the Plan does not provide for the erection of large commercial or retail buildings in any random or haphazard location. (*See* Amended Petition, at ¶ 40, 58 & Exhibit A thereto.)

Moreover, the Comprehensive Plan 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 scenic historic area. The County's position is that economic development precludes the need to protect the County's rural, agricultural heritage and does not need to consider location. This is precisely what land use management is intended to prevent. (Amended Petition, at ¶¶ 13-15, 40, 58, 65-73 & Exhibit A thereto, at pp. 90-91.)

In further contravention to the Board's suggestion, Ebony is not located in a commercial corridor. (*See id.*) Instead, the Comprehensive Plan depicts Ebony as an Agricultural (A-1) area that is expected to remain in agricultural and low-density rural residential through the year 2037. (*Id.*) Indeed, when 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. (Amended Petition, at ¶¶ 15, 58.) 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. (*Id.*)

The Comprehensive Plan describes future land uses in areas zoned A-1 (Agricultural), 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.

(Amended Petition, Exhibit A, at p. 92) (emphasis added).

Contrary to prior representations by the Planning Commission and the Board, the use of the word "may" in connection with a "community business" does not render the 5,000 square foot size limitation as purely optional. Under the canon of statutory construction known as "noscitur a sociis," "a word is known by the company it keeps. . . . [T]he meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context." *Brown v. Commonwealth*, 68 Va. App. 746, 792, 813 S.E.2d 557, 579 (2018) (internal quotation marks omitted). In addition, "'[w]here a sentence contains several antecedents and several consequents,' courts should 'read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.'" *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141, 200 L. Ed. 2d 433 (2018) (quoting 2A N. Singer & S. Singer, *Sutherland Statutes and Statutory Construction* § 47:26, p. 448 (rev. 7th ed. 2014)).

The interpretation of the word "may" that was advanced by the Planning Commission and the Board wrongly failed to utilize that word in a distributive fashion and apply it to the subject which, by context, it most properly related. *See id.* The word "may," as used in the Comprehensive Plan, clearly refers to the type of structure being used (*i.e.*, an existing building or new construction) and not to the 5,000 square foot maximum size limit for a community business. (Amended Petition, Exhibit A, at p. 92.)

In effect, plain language of the Comprehensive Plan provides that 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 phrase "may be in existing commercial buildings or in new buildings" utilizes "parallel terms describing the alternative" forms that a community business may take, to wit, an "existing commercial building" or a "new building." *Patterson v. Commonwealth*, 39 Va. App. 610, 618,

575 S.E.2d 583, 587 (2003). Further, "[t]he word 'or' is a disjunctive that provides an alternative." *Dollar Tree Stores, Inc. v. Tefft*, 69 Va. App. 15, 25, 813 S.E.2d 908, 913 (2018).

"[P]roper grammatical effect will [generally] be given to the arrangement of words in a sentence of a statute[.]" *Harris v. Commonwealth*, 142 Va. 620, 624, 128 S.E. 578, 579 (1925). Grammatically, the 5,000 square foot size restriction in the Comprehensive Plan is intended to refer to community businesses housed in either existing buildings or newly constructed buildings. *See Patterson*, 39 Va. App. at 618, 575 S.E.2d at 587. This language should not be twisted so as to reach the unnatural meaning that has been advanced by the Planning Commission and Board. *See Brown v. Commonwealth*, 68 Va. App. 746, 792-93, 813 S.E.2d 557, 579-80 (2018) ("The plain, obvious, and rational meaning of a statute is always preferred to any curious, narrow or strained construction") (internal quotation marks omitted).

Viewed as a whole, the subject matter and context of the paragraph describing a "community business" clearly demonstrates that the maximum size limit of 5,000 square feet was not intended to be purely optional, as the Planning Commission and the Board incorrectly found. The proposed Dollar General store does not qualify as a "community business" because it is almost twice the maximum permitted size for such a business. (*See* Amended Petition, Exhibit A, at p. 92, Exhibit D, and Exhibit E.) Thus, the Board's approval of Par 5's Rezoning Application was made in violation of the provisions of the Comprehensive Plan.

The Board's approval of Par 5's Rezoning Application also conflicts with Comprehensive Plan provisions that emphasize the importance of maintaining Ebony's rural and historical integrity. (Amended Petition, at ¶¶ 13-16, 40, 58, 65-73 & Exhibit A thereto.) These provisions set forth policies for the years 2017 through 2037 that "shall guide County growth, public investment and land use decisions." (Amended Petition, Exhibit A, at p. 2.) The Board is to

"[c]elebrate and protect the significant historic and cultural sites of Brunswick County" and "[p]reserve and protect the natural resources and scenic landscapes of Brunswick County." (*Id.* at p. 3.)

The Comprehensive Plan specifically states that "[t]ourism is a growing economic development industry in many communities, especially in scenic, rural regions that offer outdoor recreation amenities and cultural assets. . . . In the past decade, Brunswick County and the Southside Region have made great strides in investing and promoting tourism to attract visitors to the region." (*Id.* at p. 74.) Ebony is a part of the Southside Region. The Comprehensive Plan 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.)

In addition, the Comprehensive Plan states that "the natural environment can be a primary draw for visitors looking for recreation and undeveloped, scenic landscapes." 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 75.)

To promote tourism, it is essential that rural communities such as Ebony take advantage of their natural assets, which include peaceful country landscapes, farms, and historic buildings. (*See 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 very qualities that attract tourists to Ebony will be substantially compromised, if not destroyed, by the erection and operation of a Dollar General store that is completely disproportionate in size to neighboring residences and local stores. (Amended Petition, at ¶¶ 13-16, 40, 58, 65-73.) To accord with the Comprehensive Plan's directive to promote tourism by retaining Ebony's quaint rural charm and picturesque scenery, as well as to preserve the historic and cultural value of structures such as the preserved historic buildings and homesteads, and the adjacent Church and Cemetery, the Board was required to deny Par 5's Rezoning Application. (*Id.*)

This point is underscored by the fact that Hendricks Mill Road (State Route 903) and Robinson Ferry Road (State Route 626), the roadways that converge at the proposed Dollar General site, are designated Virginia Byways. (Amended Petition, at ¶ 17 & Exhibit C thereto.) Scenic byways in country settings such as Ebony are tourist magnets and, therefore, serve to bolster the local economy:

> Some of the best examples of efforts to identify and build on natural amenities are scenic byways using surrounding natural beauty, and existing roadways to create touristic drawing power. The establishment of a scenic byway creates its own set of motivations to protect and enhance the natural features comprising the scenic values: be it open spaces, picturesque landscapes, or historic buildings. The cumulative effect is that the activities contribute to increased stewardship and sustainability in the area.

Neil D. Hamilton, *Rural Lands and Rural Livelihoods: Using Land and Natural Resources to Revitalize Rural America*, 13 Drake J. Agric. L. 179, 195 (2008) (footnote omitted).

As discussed throughout this Response, the fact that State Routes 626 and 903 are designated Virginia Byways invites recreational tourism by way of both automobiles and bicycles. State Route 903 is in close proximity to U.S. Route 1, which is a designated U.S. National Bicycle

Route. (Amended Petition, Exhibit A, at p. 41.) The Comprehensive Plan recognizes that the attractiveness of Ebony's location serves to draw even more bicycling tourists to Ebony. (*Id.*)

In addition, the Comprehensive Plan states that the 2013 Virginia Outdoors Plan prepared by the Virginia Department of Conservation and Recreation recommends that southern Brunswick County, including Ebony, take additional steps to encourage bicycling throughout the area. (*Id.* at pp. 41-42.) Ebony and other southern Brunswick County communities should take necessary measures to convert additional old railways to bicycle trails and to "[i]mprov[e] safety for bicyclists along U.S. Bicycle Route 1[.]" (*Id.*) These measures will serve to further increase bicycling tourism and will thereby bolster the local economy. (*Id.*)

Similarly, 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. (*See id.* at pp. 42, 74, 75, 79.) In short, the Comprehensive Plan obligates the Board to take the steps necessary to protect and promote Ebony as an ideal location for tourists to safely participate in healthy outdoor activities, such as bicycling.

The Board wholly failed to comply with the foregoing obligations when it approved Par 5's Rezoning Application to allow the construction and operation of a Dollar General box store that will only serve to deter the tourism that the Comprehensive Plan attempts to promote. (Amended Petition, at ¶¶ 13-16, 40, 58, 65-73.) In addition, as discussed throughout this Response, the proposed Dollar General store would create significant traffic hazards. The proposed store would thereby significantly decrease the safety provided for bicyclists in Ebony -- a result that is directly contrary to the recommendations set forth by the Virginia Department of Conservation and Recreation and recognized as important by the Comprehensive Plan. (*See* Amended Petition, Exhibit A, at p. 42.)

A board's sudden rezoning of a parcel of land for a use that contravenes the comprehensive plan's description of the surrounding lands is by nature arbitrary and capricious. *Bd. of Supervisors of Fairfax Cty. v. Snell Const. Corp.*, 214 Va. 655, 658, 202 S.E.2d 889, 892 (1974). Such a decision also violates the mandatory provisions of Virginia Code §§ 15.2-2232(A) and 15.2-2284. Yet that is exactly what occurred here. Focusing solely on economic development while not supporting and being consistent with other aspects of the Comprehensive Plan does not constitute substantial alignment with the Comprehensive Plan that, by statute, must be used by the Board as a framework or guide. *See Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104.

Accordingly, it must be concluded that the Petition shows on its face that the Board's decision to grant Par 5's Rezoning Application was unreasonable and, therefore, that the Petitioners have stated a viable claim against the Board. *See id.* The Demurrer must, therefore, be denied. *See Helmick I*, 254 Va. at 230, 492 S.E.2d at 115.

In any event, the Zoning Ordinance and Subdivision Ordinance take precedence over the Comprehensive Plan. As the Virginia Supreme Court has noted, "a comprehensive or master plan does not have the status of a zoning ordinance. It is advisory only and serves as a guide to a zoning body." *Allman*, 215 Va. at 441, 211 S.E.2d at 52. A zoning ordinance and/or subdivision ordinance, in contrast, are fully binding on a locality. *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Greengael*, 271 Va. at 281, 626 S.E.2d at 365.

For the reasons described in the Amended Petition and in Argument Parts A and B, *supra*, the Board's grant of Par 5's Rezoning Application was accomplished in violation of its own Zoning Ordinance and Subdivision Ordinance. For these reasons alone, its decision is arbitrary and capricious and cannot be upheld as a matter of law. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Greengael*, 271 Va. at 281, 626 S.E.2d at 365.

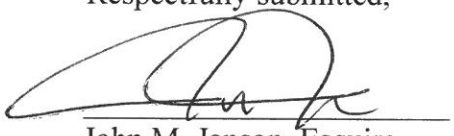
F. The Board's Objections to Counts I and II of the Amended Petition Are Not Factually or Legally Supportable

For the reasons described in Arguments Parts A through E, *supra*, Petitioners have alleged sufficient facts to state actionable claims against the Board. Specifically, Count I (arbitrary and capricious action) and Count II (ultra vires action) are well-supported by the factual allegations of the Complaint. The Board's Demurrer fails to show otherwise. The Board has violated its own ordinances. Accordingly, Petitioners' requests for relief should be granted to the extent that the Court deems appropriate.

CONCLUSION

For the foregoing reasons, the Board's Demurrer should be denied.

Respectfully submitted,



John M. Janson, Esquire
VSB #91236
830 West High Street
South Hill, VA 23970
Telephone: (434) 953-8794
Email: johnmjanson@gmail.com

Counsel for Petitioners

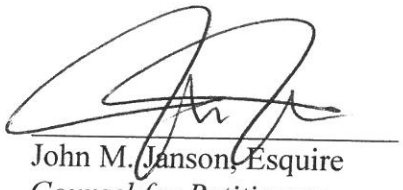
CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2020, a true and correct copy of the foregoing Petitioners' Response in Opposition to Demurrer 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.
Christopher Mackenzie
Sean M. Hutson
SANDS ANDERSON PC
1111 East Main Street, 23rd Floor
Post Office Box 1998
Richmond, VA 23218-1998
amcroberts@sandsanderson.com
cmackenzie@sandsanderson.com
shutson@sandsanderson.com

Paul C. Jacobson
SANDS ANDERSON PC
1005 Slater Rd., Suite 200
Durham, NC 27703
pjacobson@sandsanderson.com

Counsel for Respondent



John M. Janson, Esquire
Counsel for Petitioners

OFFICIAL RECEIPT
BRUNSWICK COUNTY CIRCUIT COURT
CIVIL

DATE : 12/18/2020 **TIME :** 12:40:19
RECEIPT # : 20000005096 **TRANSACTION # :** 20121800012
CASHIER : CCH **REGISTER # :** D480
CASE COMMENTS : HARTLEY, ANNE EDWARD v. BOARD OF SUPERVISORS OF
SUIT AMOUNT : $0.00
ACCOUNT OF : HARTLEY, ANNE EDWARD
PAID BY : HARTLEY, ANNE EDWARD
CASH : $24.00
DESCRIPTION 1 : PLAINTIFF: HARTLEY, ANNE EDWARD
2 : NO HEARING SCHEDULED

CASE # : 025CL2000045800

FILING TYPE : COM

PAYMENT : FULL PAYMENT

ACCOUNT CODE	DESCRIPTION	PAID
206	SHERIFF FEES	$24.00

TENDERED : $ 24.00
AMOUNT PAID : $ 24.00

PAYOR'S COPY

CLERK OF COURT : *JACQUELINE S. MORGAN*