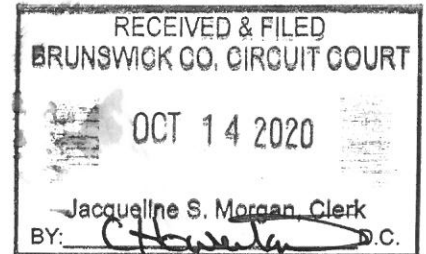


VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BRUNSWICK

ANNE EDWARD HARTLEY, et al.,)
)
 Petitioners,)
)
 v.)
)
 BOARD OF SUPERVISORS OF)
 BRUNSWICK COUNTY,)
 VIRGINIA,)
)
 Respondent.)

Case No. CL20000073-00



Serve:

Paul Jacobsen
 County Attorney
 1111 East Main Street
 Suite 2400
 Richmond, Va. 23219-0003

and,

George Morrison
 Planning Director
 228 North Main Street
 Lawrenceville, Va. 23868

AMENDED PETITION

Comes Now, Anne Edwards Hartley, and the Prospect Cemetery Association, hereinafter referred to as the Plaintiffs and bring this action against The Brunswick County Board of Supervisors, pursuant to Virginia Code Section 15.2-2285 to appeal the Defendant Board of Supervisors of Brunswick County's (the "Board") highly controversial 3-2 vote to rezone a 2.04 acre ± parcel (Being a portion of 8.36 acres, Tax Map 98-10 that is not yet subdivided) near the intersection of Hendrick's Mill Road and Ebony Road in a rural-residential-agricultural land use district of Brunswick County from A-1 (Agricultural) to B-1 (Business) to make it possible to

construct a 9,100 square foot Dollar General box store operation that is not justified and not a fit for the community. The Planning Commission and Board of Supervisors did not follow land use management practices and governing tools as dictated by Virginia State Code when making their decision, thereby rendering it null and void. Zoning ordinances for A-1 districts specifically state that business needs in A-1 districts are to be addressed with a Conditional Use Permits instead of rezoning to a different zoning classification (i.e. B-1 Business) in order to preserve and protect the character of the community and well-being of neighboring properties and all those impacted by proximity – ultimately preserving this important strategic land use asset for the County and the greater Commonwealth as prescribed in the Brunswick County Comprehensive Plan. Support of their Amended Petition follows:

THE PARTIES

1. Plaintiffs are currently, and at all relevant times, the owners of properties directly adjacent to the 8.36 acres which contains the now rezoned 2.04 acre ± parcel here in Brunswick County, Virginia. Said 2.04 acres of the larger tract did not, and to date still does not have a legal description or identity with unique tax map identifier because it was never properly platted or subdivided.

2. Plaintiff Anne Hartley (“Hartley”) is the owner of a historic family farm and home place situated in a bucolic setting on a parcel of approximately 69 acres with an active organic farming operation.

3. Plaintiff Prospect Cemetery Association is an unincorporated association that owns and oversees the Prospect Cemetery (neighboring property to the south), adjacent to the historic Prospect United Methodist Church (the “Church”). Hartley is Chair of the Prospect Cemetery Association, and the Association has voted to join this suit, as they have responsibility

for the protection of the historical landmarks and the preservation of their rural and serene setting.

4. Defendant Board of Supervisors of Brunswick County, Virginia (“the Board”) is the elected governing body of Brunswick County, Virginia.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the action in accordance with Virginia Code §§ 8.01-184, 15.2-2285(F), 17.1-500, and 17.1-513, as this Amended Petition seeks a declaratory judgment and other relief based on actions that took place in Brunswick County, Virginia, and contesting a rezoning decision of the Board.

6. This Petition to Appeal action followed the Board’s vote to grant Par 5’s rezoning application and was timely filed within the required 30-day timeframe.

7. Venue is proper in this Court pursuant to appropriate pursuant to Virginia Code §§ 8.01-185, 8.01-261, and 8.01-262, as all properties involved are located in Brunswick County, Virginia.

FACTS AND ALLEGATIONS

8. The Ebony area of Brunswick County, Virginia is a historic and scenic Rural Residential / Agricultural community that is renowned for rare authenticity, quaintness, and exemplifies local charm. Not only is it a special place for residents and a site of historic significance and preserved heritage for the county, it is a treasured destination for Lake Gaston communities and an attraction for the tourism-related business that the Brunswick County 2037 Comprehensive Plan (“Comprehensive Plan”) defines as a strategic direction for economic development. A copy of the plan is attached hereto as Exhibit A.

9. The property that is the subject of this action is located on the east side of Ebony Road (State Route 903), that converges at a 3-way intersection with Hendricks Mill Road (State Route 903) and Robinson Ferry Road (State Route 626). Across the road are the two existing local general stores, Ebony General and the 903 Race-In. (*Id.*)

10. The adjacent Prospect Cemetery and Prospect United Methodist Church are Historic landmarks and this Church is a cultural and historic anchor of the Ebony community since before its formal naming in 1882. There are numerous multi-generational local families interred here including Veterans from several wars as well as Virginia Senators. The Cemetery continues to be the final resting place of loved ones from both long-standing local families and new families who have come to the area in the 150 plus years since the Prospect Church and Cemetery were formed. Both are maintained with love and care and visited often by family members and others who come to pay respect in its sacred setting.

SUBSTANTIVE CONFLICT WITH COUNTY'S VISION AND COMPREHENSIVE PLAN

11. The Historic Ebony Community whose land use designated by the Board as "Agricultural-Forestry-Rural Residential" is the type of area referred to in the Board's "VISION FOR 2035" statement that is known for its "scenic rivers and lakes, serene rural landscapes and beautiful farmlands". A copy of this Vision Statement is attached hereto as Exhibit B.

12. The "2037 COMMUNITY VISION FOR BRUNSWICK COUNTY" in the Comprehensive Plan states that "Brunswick County will be recognized as an inviting community for young professionals, families, retirees, and visitors, all of whom cherish the community's heritage and history" and the statement goes on to list Brunswick's "scenic landscapes" and the importance of maintaining them.

13. The Comprehensive Plan, in place now for decades and last updated September 20, 2017, provides for nine zoning districts and designates Ebony as an Agricultural (A-1) District. (Exhibit A, at pp. 90-91.) The Comprehensive Plan contains current and future land use maps that clearly indicate that Ebony is to remain an A-1 (Agricultural), with no designation as a growth area for commercial development through the year 2037. (*Id.* at p. 91.) Community crossroad businesses permitted by A-1 Condition Use Permits are envisioned to be in buildings of 5,000 square feet or less and do not damage the character of the community. (*Id.* at p. 92.) On its cover the latest Comprehensive Plan states several items that are purportedly very important to the Board, one of those being “Preserved Heritage”.

14. The Comprehensive Plan states that through the year 2037, “[m]uch of Brunswick County is expected to remain in agriculture and low-density rural residential. Growth areas for commerce and industry are in strategic areas along the primary road corridors.” (*Id.* at p. 87.) The Ebony Community is not located in a business development or commercial corridor and is not identified as a strategic area designated for commercial growth.

15. When the 2017 version of the Comprehensive Plan was updated by a professional consultant hired by Brunswick County, that update intentionally removed open-ended business or business corridor designation from the Ebony area while it was maintained for other communities such as nearby Gasburg, VA. This removal is consistent with the fact that Ebony’s existing infrastructure, landscape, preserved country setting and historic integrity, traffic patterns, and local land uses render the community fit for and consistent with rural residential and agricultural purposes (A-1 classification) that accommodates community business by an A-1 Conditional Use Permit to ensure appropriate businesses that are a fit for the A-1 community and do not harm. Much effort by landowners has gone into preserving the integrity of the community

and bucolic country setting that is a source of great pride and enjoyment for the community as a whole. B-1 business zoning is wholly incompatible with this rural agricultural community.

16. The County selectively picked portions of the Comprehensive Plan solely related to business development to justify their vote that allows the construction of a Big Box Dollar General store in a location that is just wrong on many levels, and in doing so ignoring all of the negative impacts that are in direct conflict with the foundational aspects of the Comprehensive Plan and Vision. (Reference is made here to the County's legislative record submitted with Motion Craving Oyer previously). The Board did not take a wholistic view of the Comprehensive Plan, and looked at this project in a vacuum, ignoring the land use and land preservation aspects of the plan and the according harm it would do to the Ebony community.

IMPACTED ROADS, VIRGINIA SCENIC BYWAYS, AND TRAFFIC SAFETY ISSUES

17. Two of the three roads that serve said property and proposed Dollar General box store operation, Hendricks Mill Road (State Route 903) and Robinson Ferry Road (State Route 626), are designated as a Virginia Scenic Byways. (*See* Commonwealth Transportation Board ("CTB"), Minutes of Meeting (June 17, 2004), at p. 7, attached hereto as Exhibit C.) The third road, Ebony Road (also State Route 903) has been designated as a future Scenic Byway. 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 Board has an obligation to maintain the Ebony area's natural beauty and historic integrity in order to conform with the underlying purpose of the Scenic Highway Act and the corollary regulations.

18. The designation of these roads as Virginia Scenic Byways invites tourism with well-defined expectations. Hendricks Mill Road is also in close proximity to US Highway 1, which is designated as a US National Bicycle Route. These historic and scenic designations in conjunction with seasonal uptick of Lake Gaston traffic bring an influx of recreational vehicles, motorcycling and bicycling with increasing volume through an already problematic intersection very close to the said property proposed for the Big Box Dollar General.

19. Hendricks Mill Road (State Route 903), Ebony Road (State Route 903), and Robinson Ferry Road (State Route 626) -- converge at a skewed 3-way "T" intersection near Plaintiffs' properties and the property that is the subject of this action. These roads are all relatively narrow two-lane roadways, with no shoulders or street lighting and a posted speed limit zone of 45 mph that is often ignored. Due to a hill and curve, there is also hidden traffic that approaches from the north on Robinson Ferry Road. There is one stop sign at the Hendricks Mill and Robinson Ferry skewed 3-way "T" intersection that is also frequently ignored and treated more like a yield sign.

20. To reiterate, the three roadways serve seasonal traffic for motorists destined for Lake Gaston. Significant seasonal Lake Gaston traffic flows through the skewed 3-way "T" intersection during the later spring, summer and fall months.

21. Ebony General Store is across Ebony Road from said property, with a commercial parking lot that faces Ebony Road without designated driveways. This creates a haphazard, random and disorderly traffic mess, as those visiting the store now pull in or out wherever they want along hundreds of feet of frontage adjacent to the already dangerous and inadequate intersection while those passing through converge on the scene at a high rate of speed. The other store, formerly 903 Race-In and now Race-In of Ebony, has a designated entrance/exit that is

also very close to the complex and confusing intersection.

OCTOBER 7 REZONING APPLICATION SUBMISSION AND ACCEPTANCE

22. On October 7, 2019, Par 5 Development Group, LLC (“Par 5”) submitted a rezoning application in Case #19-032 concerning a portion of the real property owned by Jerry Michael and Susan Royster Jones and identified on Tax Map 98-10. A copy of Par 5’s rezoning application is attached hereto as Exhibit D.

23. Par 5’s rezoning application requests that the Board rezone a 2.04-acre portion of the 8.36-acre tract from A-1 (Agricultural) to B-1 (Business.) (Exhibit E, Planning Commission Report, at page 1.)

24. Par 5 did not subdivide and acquire title to the subject 2.04 acres prior to its submission of the rezoning application and, indeed, no title transfer has occurred to date.

25. Par 5’s rezoning application was submitted to obtain a rezoning of the 2.04-acre tract in order to construct, operate, and maintain a 9,100 square foot Dollar General retail store. The proposed Dollar General store would possess a total of 7,422 square feet of retail floor space and would require a minimum of 37 parking spaces. The store would be open seven days a week from 8 AM to 10 PM.

26. The proposed 9,100 square foot Dollar General will generate approximately 578 trips per day per the trip generation methodology contained in the Institute of Transportation Engineers (ITE) Trip Generation Manual, 10th Edition, 2017. Based on the location of this site, it is anticipated that the peak tourist activity may generate higher volumes at the site driveway than the traditional ITE trip generation methodology.

27. The store's proposed design is a standard fare industrial-looking metal box building that would visually decimate and dominate the look and feel of the community. The water and sewer system calls for the construction of a new private well and private septic system. (*Id.* at p. 3.) The store would utilize a "standard lighting" system. (*Id.*, at p. 7.)

28. The Planning Department should have rejected the application from the beginning and redirected to an A-1 Conditional Use Permit approach to stay true to the County's Zoning Ordinances and its Comprehensive Plan.

NOVEMBER 12 PLANNING COMMISSION PUBLIC HEARING AND VOTE

29. On November 12, 2019, the Brunswick County Planning Commission ("Planning Commission") held a public hearing on Par 5's Rezoning Application

30. The Planning Commission Report dated 11/4 included Staff Analysis was read by the Planning Director at the beginning of the meeting concluded with the following and is attached as Exhibit E:

a. STAFF FINDING: Staff finds the applicants' request to be in general [not substantial] accord with the Comprehensive Plan. (emphasis added)

b. RECOMMENDATION: Should the Planning Commission find that the requested rezoning is in accord with the Comprehensive Plan, staff recommends approval of Rezoning Case #19-032 (emphasis added)

31. The Virginia Code provides that a locality's comprehensive plan is a guide "for the physical development of the territory within its jurisdiction." Virginia Code § 15.2-2223(A). The Comprehensive Plan "shall designate the general or approximate location, character, and extent of each feature, including any road improvement and any transportation improvement,

shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.” Id.

32. The Code further 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).

33. In deciding whether to grant a rezoning application, the Planning Commission and Board are obligated to ensure that the rezoning is in substantial accord with the Comprehensive Plan. See Virginia Code § 15.2-2232. There is no record of this separate forum having taken place to ensure that there is substantial accord with or that a modification to the Comprehensive Plan may be needed. This is evidenced by reviewing the County’s legislative record submitted with Motion Craving Oyer of Legislative Record of Board of Supervisors of Brunswick County, Virginia served June 30, 2020

34. The Planning Commission Minutes of that date are attached hereto as Exhibit F.

35. Sixteen individuals, including Hartley, spoke against Par 5’s Rezoning Application. Home district Supervisor Zubrod was also among those who spoke and requested the Planning Commission to deny the Dollar General rezoning request because of the outpouring of public opposition he had received and also because of his personal concern for the impact on the historic community and traffic safety issues. Two people spoke in favor of the Application. (*Id.*) – the landowner and his brother-in-law. (Exhibit E, Planning Commission Minutes, at p. 2.)

36. A motion was initially made and seconded at the November 12th Planning Commission meeting to deny Par 5’s Rezoning Application on the grounds that the Application did not align with the Comprehensive Plan and specifically with the 5000 sq ft limitation

described in the Comprehensive Plan for future community businesses associated with A-1 communities. However, the vote on the motion did not carry and was interrupted. Those in attendance including, Hartley, thought it was a tie. The Chair chose not to vote and break the tie. The vote was allegedly tabled by a procedural maneuver using a VDOT letter suggesting that more information was required in order for VDOT to approve the conceptual design. This letter and impact had been withheld from the public until this moment.

DECEMBER 10 PLANNING COMMISSION MEETING #2

37. At the following Planning Commission meeting held on December 10, 2019, the lack of proper analysis or determination as to whether Par 5's rezoning application was substantially in accord with the Comprehensive Plan is evidenced by the Planning Director's clarifying comments read at the beginning of the meeting that the Comprehensive Plan was a suggestion, had no binding effects, and that the County could ultimately do whatever it wanted to do. This is in conflict with the notion of being "substantially in accord" per Virginia Code § 15.2-2232. (Exhibit G – Directors Report). No additional public comment was allowed.

38. Following the Planning Director comments, the Planning Commission voted 8-1 to recommend approval of Par 5's rezoning application to the Board, even though the application had not been deemed in substantial accord with the Comprehensive Plan and significant evidence had been provided that an approval would be in conflict with many aspects of the Comprehensive Plan as well as Virginia statutes. Again, no such hearing to assess proper alignment with or in the alternative the necessity to amend the Comprehensive Plan was held prior to the vote. The Planning Commission Minutes of that date are attached as Exhibit H.

JAN 29, 2020 BOARD OF SUPERVISORS HEARING AND VOTE

39. On January 29, 2020 the Board, ignoring their own Vision Statements and their own legal and valid Comprehensive Plan, as well as their Zoning Ordinance, and Subdivision Ordinance decide in 3-2 highly controversial vote to grant Par 5's rezoning application and rezone the legally undefined 2.04-acre portion of larger 8.36 acre tract in the heart of the historic, rural residential and agricultural Ebony community from A-1 (Agricultural) to B-1 (Business).

40. The Board voted this way to allow a 9,100 square foot box metal building for a Dollar General store that exceeds even the forward-looking 5000 sq ft limitation in the Comprehensive Plan for the intended location to be haphazardly placed in the middle of this beautiful country setting and residential area of this community that is NOT a designated business corridor nor is there a pattern of commercialization that suggests it will be. There was no consideration for the negative implications. There are already two stores of this nature within 6 ± miles and a third less than 10 miles to the west in Bracey. In addition, there are two local stores already in place that are a part of the community. Plus, there are full-service stores (Food Lion, Ace Hardware and DrugCo pharmacy just 6.5 miles away.

41. Even so, the Board's vote **was not conditional** and, therefore, any Business (B-1) use is permitted on the subject 2.04-acre tract that does not legally exist. The scenario that was voted on does not match the application and, in fact, granted something much broader. The County's zoning map was revised the very next day to show an open-ended B-1 zoning with no context and no provision for reversion should the Dollar General project not materialize.

42. The Board's vote on Par 5's rezoning application was 3-2. The three supervisors (which included the Chair breaking the tie) who voted to approve the rezoning application

overrode the position and vote of the Vice Chair and home district supervisor, John Zubrod, and one other supervisor.

43. In a Facebook post made on January 30, 2020, Vice-Chair Zubrod stated: “Very disappointed in last nights [sic] 3-2 vote, especially given the location and with an overwhelmingly visible community against this. Apparently the almighty dollar is more important than maintaining the charm of a dedicated rural community.” A copy of this Facebook post is attached hereto as Exhibit I.

DID NOT FOLLOW SUBDIVISION ORDINANCE

44. The Board’s actions did not comply with Brunswick County’s own Subdivision Ordinance. However, the Board was legally required to comply with the provisions and requirements of Brunswick County Code, App’x A - Subdivisions (“Subdivision Ordinance”), a copy of which is attached hereto as Exhibit J , prior to granting Par 5’s rezoning application.

45. Formal subdivision of a parcel is required when the parcel is divided into three or more tracts containing less than ten acres. (Exhibit J, Subdivision Ordinance, at § 2-32.) The code specifically states that no one is exempt from this requirement. (*Id.* at § 4-4.)

46. The land records in the Brunswick County Clerk’s Office show that the parent parcel of the subject property has been divided into parcels of less than ten acres at least 24 times, and because of this fact all future subdivisions of this property must go through and comply with the processes and conditions set forth in the Subdivision Ordinance.

47. Consequently, in conjunction with the rezoning application, either Par 5 or the landowners, Jerry Michael and Susan Royster Jones, were required to comply with the procedure set forth in the Subdivision Ordinance to obtain a proper subdivision of the 8.36 acre parcel into

two separate parcels: (1) the 2.04-acre slice that is the subject of Par 5's rezoning application; and (2) the remaining 6.32 acre tract that is not subject to Par 5's rezoning application. (*See* Exhibit J, Subdivision Ordinance, at §§ 2-32, 4-4.) However, neither Par 5 nor the landowners complied with this requirement. Upon information and belief, no subdivision application for this 2.04 tract has ever been filed.

48. Brunswick County officials are charged with the duty to ensure compliance with the Subdivision Ordinance. (*Id.* at § 7-2-3.) Because 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 Planning Commission and Board lacked the authority to approve Par 5's rezoning application that was submitted in violation of said Ordinance. (*Id.*) As a result, they have rezoned land that has no legal description, and no tax map identification. Yet they have updated the zoning map to show it legal and legitimate unconditional B-1 property.

DID NOT COMPLY WITH VIRGINIA CODE § 15.2-2232

49. The Board's actions did not comply with Virginia notice and hearing requirements.

50. Virginia Code § 15.2-2232 imposed upon the Planning Commission the obligation to provide due notice and hold a public hearing on Par 5's rezoning application. In addition, the statute required the Planning Commission to determine whether Par 5's rezoning was substantially in accord with the Comprehensive Plan. Only after all these steps were properly undertaken could the Planning Commission validly hold a vote to decide whether Par 5's rezoning application should be granted and referred to the Board.

51. The Planning Commission failed to comply with the procedural requirements set forth in Virginia Code § 15.2-2232 in that it failed to provide due notice and hold a public hearing in the manner required by the statute. The Planning Commission also failed to comply with the requirements of § 15.2-2232 when it tabled any decision on Par 5's Rezoning Application in its November 12, 2019 meeting and then simply referred the Rezoning Application to the Board on December 10, 2019 without holding the required public hearing to first make a determination as to whether the proposed Dollar General store in the designated location was substantially in accord with the Comprehensive Plan.

52. The Board did not refer the matter back to the Planning Commission to fulfill its obligation under Virginia Code § 15.2-2232 to properly assess and hold a public hearing about whether the request substantially aligned with the Comprehensive Plan after due notice and to make a determination as to whether Par 5's rezoning application was substantially in accord with the Comprehensive Plan. The Planning Commission approach was to suggest that Virginia Code § 15.2-2232 does not matter as communicated in the Planning Director comments shared at the second Planning Commission meeting on December 10 attached as Exhibit G. The Planning Director's position is that the Comprehensive Plan was a suggestion, had no legally binding effects, and that the County could ultimately do whatever it wanted to do. *As an encouraging side note, subsequent to this case and its appeal, there has been at least one instance to amend the Comprehensive Plan. This was at the July 2020 Board of Supervisors regular meeting that included public hearing and vote. Meeting minutes are attached hereto at Exhibit K.*

NOT SUPPORTED BY LAW OR FACTS: ARBITRARY AND CAPRICIOUS

53. The Board's actions were not supported by law or facts and are arbitrary and capricious.

54. The Planning Commission and the Board knew or should have known that the site of the proposed Dollar General store posed serious health and safety threats due to hazardous road conditions and traffic congestion. However, the Planning Commission and the Board wholly ignored such threats when in considering, analyzing, and approving Par 5's rezoning application. VDOT Policy Guidelines¹ 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 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.)

The Planning Commission ignored these valid concerns and voted to recommend approval of Par 5's Rezoning Application to the Board. Also notable is that the periodic traffic counts for the Ebony location are not performed during peak seasonal traffic, but in the slow times of the year. However, the Planning Commission and Board failed to obtain or even ask for a proper traffic

¹ The VDOT Guidelines may be accessed online via this link: http://www.virginiadot.org/projects/resources/chapter527/Administrative_Guidelines_TIA_Regs_7.2012.pdf

study to be performed in connection with Par 5's rezoning application. In fact, the local VDOT Office stated it was not required in violation of their own regulations.

55. Further, in contravention to standing VDOT requirements, the required 500-foot line-of-sight at 3.5 feet from ground level at the entrance to the proposed Dollar General store is not met.

56. Within the immediate vicinity of the proposed site area for the Dollar General development, 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. Exhibit L - Crash Report 2015 – 2019 ²

57. Any future development along Hendricks Mill Road (State Route 903), Robinson Ferry Road (State Route 626), and Ebony Road (State Route 903) is anticipated to increase traffic congestion in the dangerous and confusing section of roadway around the proposed Dollar General site.

58. Further, the Planning Commission and Board knew at the time Par 5's rezoning application was approved that prior to 2017, the Ebony area where the current stores are located had been designated in the Comprehensive Plan as an area for business development. However, that designation was intentionally removed in the 2017 Comprehensive that is consistent with these two facts: (1) the inadequate and dangerous road infrastructure problems that have not been addressed in decades, and (2) the desire to preserve the heritage of the location as an important asset for the County. The Board paid an appreciable amount of money to hire the

² This is the link to the site where dots on the integrated map can be clicked on and the detailed information will pop up.

<https://www.virginiaroads.org/datasets/b086753548b248539d5d58a8710ce087?geometry=-78.077%2C36.564%2C-77.913%2C36.588>

consultant that performed this study and adopted the revisions to the Comprehensive Plan she came up with. In particular the provision removing Ebony from the list of areas targeted for commercial development.

59. A VDOT study performed approximately 20 years ago recognized the safety issues presented by the skewed 3-way “T” intersection fronting the proposed Dollar General site and proposed to relocate the end point of Hendricks Mill Road. Although the proposed solution redirecting traffic was ultimately abandoned due to the potential negative impact on existing businesses, the safety hazards presented by the skewed 3-way “T” intersection that VDOT recognized 20 years ago have increased significantly over time. This prior history of the intersection and known impacts of traffic volume impacts was never considered. Had they been the proposed 2.04-acre site for the Big Box Dollar General would not be workable, as it would preclude the re-alignment of the road as previously recommended by VDOT.

60. Under the circumstances, the Planning Commission and Board had a duty to perform a proper traffic study of the area that conformed with VDOT’s Guidelines for Traffic Analysis to assess the true impact on local traffic for the proposed Dollar General store. However, the Planning Commission and Board wholly failed to perform a proper traffic study prior to approving Par 5’s rezoning application.

61. To reiterate, the location is protected and clearly NOT designated in the Comprehensive Plan for commercialization to support an operation like Dollar General. In Gasburg, VA, there is such a designation in the Comprehensive Plan land use map and a Dollar General has been built there – just 6.5 miles away. In addition, the Zoning Ordinance requires a Conditional Use Permit for business development in an A-1 community – not rezoning a small portion of land within an A-1 district to unrestricted B-1. The Planning Commission and Board

had a duty to honor the Comprehensive Plan and Zoning Ordinances in this regard and reject the application.

FAILED TO CONSIDER VIRGINIA CODE §§ 15.2-2283 and -2284

62. 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.

DISREGARD OF THE COMPREHENSIVE PLAN AND VISION STATEMENT

63. The Board's actions disregarded their own Comprehensive Plan and Vision Statement.

64. In deciding whether to grant a rezoning application, the Planning Commission and Board are obligated to ensure that the rezoning is substantially in accord with the Comprehensive Plan. *See* Virginia Code § 15.2-2232.

65. Par 5's rezoning application violated or at least was inconsistent with the Comprehensive Plan. The plain language of the Comprehensive Plan provides that a retail store placed in an Agricultural (A-1) area that allows for only small business development is limited in size to an area of 5,000 square feet or less. (Exhibit A, Comprehensive Plan, at pp. 91-92.) The proposed Dollar General store is nearly twice that size.

66. The Board is required to comply with Comprehensive Plan provisions pertaining to growth, public investment, and land use. (*Id.* at p. 2.) The Board must "[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.) By fostering the outdoor recreation amenities and cultural assets of the rural regions, such as Ebony, the Board promotes the needed tourism that provides economic growth. (*Id.* at pp. 42, 74-75.)

67. To promote tourism, 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.) 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.)

68. 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 value as a bucolic and scenic historic area. 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.

69. The Historic Ebony Community whose land use designated by the Board as “Agricultural-Forestry-Rural Residential” is the type of area referred to in the Board’s “VISION FOR 2035” statement that is known for its “scenic rivers and lakes, serene rural landscapes and beautiful farmlands”. A copy of this Vision Statement is attached hereto as Exhibit B.

70. The “2037 COMMUNITY VISION FOR BRUNSWICK COUNTY” in the Comprehensive Plan states that “Brunswick County will be recognized as an inviting community

for young professionals, families, retirees, and visitors, all of whom cherish the community's heritage and history" and the statement goes on to list Brunswick's "scenic landscapes".

71. The County selectively picked portions of the Comprehensive Plan solely related to business development to justify their vote that allows the construction of a Big Box Dollar General store in a location that is just wrong on many levels, and in doing so ignoring all of the negative impacts that are in direct conflict with the foundational aspects of the Comprehensive Plan and Vision. (Reference is made here to the County's legislative record submitted with Motion Craving Oyer previously).

72. The aspects of the Comprehensive Plan that are ignored or overlooked in the decision are included with this Amended Petition as Exhibit M. Had the proper procedure as dictated by Virginia Code § 15.2-2223(A) been followed the Board would have been left no choice but to amend the Comprehensive Plan or deny the application. The plan along with Virginia land use statutes make this issue under appeal clearly "**not fairly debatable**".

73. Land use is the most important asset any County has. All well-informed land use decisions consider both the positive and negative implication of the proposed land use change. Managing negative implications of Land Use is precisely what Land Use Management and Zoning is about – to ensure harmony in communities, that proper development is in the appropriate location and that there is no harm to the character of the communities that adversely impacts the lives of its citizens. The Comprehensive Plan is designed to consider the whole picture as a guide to land use management that preserves health and well-being of the land and its people.

VIOLATED ZONING ORDINANCES WITH UNAUTHORIZED CHANGE

74. The Board's actions violated their own zoning ordinances.

75. In approving rezoning applications, the Board is required to comply with the terms and requirements set forth in the Brunswick County Zoning Ordinance ("Zoning Ordinance"), Brunswick County Code, App'x B - Zoning, a copy of which is attached hereto as Exhibit N.

76. Like the Comprehensive Plan, the Zoning Ordinance places Agricultural (A-1) lands and Business (B-1) lands in completely different categories. The Agricultural (A-1) District "covers the unincorporated portions of the county primarily intended for agricultural and open space uses such as farms, forests, parks, and lakes." (Exhibit N, Zoning Ordinance, Article 4).

77. The Zoning Ordinance provides that business development within an Agricultural (A-1) District is to be conducted only through the use of a conditional use permit. (*Id.*)

78. 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.

(*Id.* at Art. 2-1.)

79. With a conditional use permit, the grantee of said permit within an Agricultural (A-1) district is authorized to operate a country general store. (*Id.* at Articles 4, 4-1-18.) A country general store is the only type of business operation that the Zoning Ordinance authorizes within an Agricultural (A-1) district. (*Id.*)

80. 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.” (*Id.* at Article 2-1.) Thus, the Zoning Ordinance prohibits the operation of a retail business in a building greater than 4,000 square feet within an Agricultural (A-1) district, even with a conditional use permit. Even considering the forward-looking 5000 square feet limitation in the Comprehensive Plan for community business in this location, the proposed Dollar General store is almost twice the size.

81. Under the Zoning Ordinance, retail stores or shops that are permissible uses of property zoned as Business (B-1) are not permitted uses of property zoned as an Agricultural (A-1) district, even with a conditional use permit. (Exhibit N, Zoning Ordinance, at Article 2-1, 4, 4-1-18, 9, 9-1-1.)

The Zoning Ordinance does not confer authority upon the Board to rezone a property zoned as Agricultural (A-1) directly to Business (B-1). Upon information and belief, the Board has improperly rezoned or spot zoned other properties before including the Ebony General Store. The Board is improperly relying on previous improper and misrepresented zoning to justify this decision. The history of prior zoning in Ebony is attached as Exhibit P

82. Par 5’s rezoning application was facially deficient because it requested a form of zoning change, *i.e.*, a direct change in zoning from Agricultural (A-1) to Business (B-1), that is not authorized by the Zoning Ordinance. Thus, the Board was required to deny the rezoning application outright. (*See id.* Articles 2-1, 4, 4-1-18, 9, 9-1-1.) The Board lacked the legal authority to approve the rezoning application.

83. The Board's actions constitute an unreasonable deviation from existing zoning provisions regarding size, shape, setback, height, bulk and location and are contrary to the purpose of the Defendant's own zoning ordinance.

84. The Board's actions constitute Spot Zoning for the benefit of the property owner and developer to the detriment of the community as a whole and existing neighboring land use.

CONSEQUENCES OF BOARD'S DECISION

85. Land use is the most important asset any County has. Well-founded land use decisions consider the positive and negative implication of proposed land use change. Managing negative implications of Land Use is precisely what Land Use Management and Zoning is about – to ensure harmony in communities, that proper development is in the appropriate location and that there is no harm to the character of the communities that impacts the lives of its citizens. The Comprehensive Plan is designed to consider the whole picture as a guide to land use management that preserves health and well-being of the land and its people while making land use decisions.

86. A Land Use Management training presentation prepared by Sand Anderson makes these points very clear and in particular the role and enforcement of the Comprehensive Plan attached as Exhibit O.

87. The Board of Supervisors is accountable for defining and enforcing the Comprehensive Plan along with supporting Zoning Ordinances. In the matter at hand, the Board's final vote to approve rezoning of said acreage was not made conditional upon proper subdivision for the proposed Dollar General. The vote unilaterally rezoned the legally non-existent 2.04 acres to B1-Business with no provision for reversion should the planned use never

materialize. The County's zoning map was then updated the very next day making it appear that the legally non-existent 2.04 acre parcel was now official and zoned as unconditional B-1, legally, and legitimately. It is not. This is a pattern the County has used for years and the Board is now using their history of improper past decisions to justify their improper procedure in the matter at hand now that it is being challenged. See Exhibit P – History of Zoning Cases in Ebony

88. The Board's actions and resulting decision completely abandoned their responsibility. Focusing solely on speculative tax benefit that is unlikely to materialize because of the proliferation of similar stores in close proximity, they made a decision that will completely destroy the character and integrity of a rare asset of the County and the quality of life and well-being of the community endangering the neighboring properties (residences, local business, and the church and cemetery setting) and will irrevocably damage the lives of multiple generations of families who are connected to Ebony as a strong sense of home and place. This is being sacrificed for Ebony to become the closest Dollar General within a 3-mile radius. There will not be a net increased in business because the only way this new Dollar General will attract business is by redirecting it away from an existing nearby Dollar store.

89. The proposed Dollar General store would be located in the heart of Ebony's historical center and authentic country setting and would completely overpower the neighborhood and harm the character of the community, while also putting the existing local businesses at risk, based on experiences from other communities where Dollar General encroaches and the locally owned stores are damaged and oftentimes shuttered.

90. The proposed Dollar General store would not provide essential retail services needed in the Ebony community since there are two Dollar stores within 6 miles and a third within 10 miles – plus full services grocery store, pharmacy, and hardware just 6.5 miles away.

91. The Board's actions will subject Plaintiff's properties and Ebony residential community to noise, disturbances, dangerous traffic changes, garbage odors, vandalism, crime, and a host of other serious problems; in addition for Hartley, a degradation in property value, marketability, residential character of the community, and overall enjoyment will be an additional direct and proximate result of the Board's actions.

92. This overall effect is putting a Dollar General in the middle of a residential subdivision.

93. The plans for the proposed Dollar General store call for the installation of a "standard lighting system." (Exhibit D, Rezoning Application.) 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.

94. This point is demonstrated by the fact that in January 2017, the Halifax County Board of Supervisors overrode the Planning Commission's recommended approval and rejected a rezoning application for a Dollar General store in the Cluster Springs area, "after hearing from a resident who complained about the retailer's plans to mount a large illuminated sign and outdoor lighting at the site across from his Route 501-S home." (News Article attached as Exhibit Q³.) In that case, Par 5 -- the same corporate applicant involved in the present dispute -- refused to agree to a conditional use permit in lieu of "wholesale rezoning" because a conditional use permit would not give it full control over the property, including control over the type of signage and lighting to be installed. (*Id.*)

³ News Article by SoVaNow.com, published on Jan. 17, 2017, and accessible through the following internet link:
http://www.sovanow.com/index.php?/news/article/halifax_county_supes_nix_rezoning_for_dollar_general/

95. The Board's actions could very likely damage the nearby Cemetery with the operation of heavy excavating equipment and delivery trucks.

96. The Board's actions open up the opportunity to easily commercialize the remainder of the 8.36 acres and other properties in the area, destroying the areas ambience and in particular, the respected peaceful and sacred setting of the Cemetery and Church.

COUNT ONE: ARBITRARY AND CAPRICIOUS LEGISLATIVE ACT

1. Plaintiffs repeat and reallege the above paragraphs as if the same were fully set forth herein in their entirety.

2. Under established Virginia law, a locality may not undertake a legislative act arbitrarily, capriciously, unreasonably, or contrary to statute. *Glazebrook v. Bd. of Sup'rs of Spotsylvania Cty.*, 266 Va. 550, 555, 587 S.E.2d 589, 592 (2003).

3. As detailed above, in granting Par 5's rezoning application, the Board acted arbitrarily, capriciously, unreasonably, and/or contrary to statute in that it:

a. Failed to comply with Virginia's notice and hearing requirements as set forth in Virginia Code § 15.2-2232;

b. Acted in a manner that either violated or was inconsistent with the Comprehensive Plan;

c. Violated the Zoning Ordinance by rezoning a tract in a manner not authorized or permitted by said Ordinance;

d. Violated the Subdivision Ordinance by approving the rezoning application despite the fact that neither the applicant nor the landowners fulfilled their obligations under that Ordinance to formally subdivide the property;

e. Failed to consider the required factors set forth in Virginia Code §§ 15.2-2283 and -2284 in considering and analyzing the application; and

f. Ignored VDOT Guidelines and wrongly failed to perform a proper traffic study and impact analysis.

g. Unconditionally rezoned a portion of property that is completely independent of the intended use stated in the application and for a parcel that does not legally exist.

4. 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.**” *Renkey v. Cty. Bd. of Arlington Cty.*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006) (emphasis added).

This is exactly what transpired here.

5. Under the circumstances, the Board’s grant of Par 5’s rezoning application was arbitrary and capricious, and it must be set aside.

COUNT TWO: ULTRA VIRES ACT

6. Plaintiffs repeat and reallege the above paragraphs as if the same were fully set forth herein in their entirety.

7. “Dillon's Rule provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.” *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). Dillon’s Rule applies

with equal effect to boards of supervisors, including the Board herein. *Id.* at 554, 666 S.E.2d at 317.

8. As detailed above, the Planning Commission failed to comply with the procedural requirements set forth in Virginia Code § 15.2-2232 when it tabled any decision on Par 5's rezoning application in its November 12, 2019 meeting and then simply referred the Application to the Board on December 10, 2019 without providing due notice and holding the required public hearing to determine as to whether the rezoning application was substantially in accord with the Comprehensive Plan or may require an amendment.

9. The Board's granting of Par 5's rezoning application without referring the matter back to the Planning Commission with a directive that the Planning Commission fulfill its statutory obligations under Virginia Code § 15.2-2232 constitutes an action that is ultra vires and unauthorized by state law, and, therefore, should be classified as void.

10. As explained above, the Board acted in a manner that either violated or was wholly inconsistent with the Comprehensive Plan when it granted Par 5's rezoning application.

11. The Board's granting of Par 5's rezoning application in contravention of the Comprehensive Plan constitutes an action that is ultra vires and unauthorized by state and county law and, therefore, should be classified as void.

12. As explained above, the Zoning Ordinance did not authorize or permit the Board to grant Par 5's rezoning application because the application requested a change in zoning that is not authorized by the Zoning Ordinance.

13. The Board's decision to rezone the subject property in violation of the Zoning Ordinance is by definition "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.

14. The Board's granting of Par 5's rezoning application in violation of the Zoning Ordinance constitutes an action that is ultra vires and unauthorized by state and county law and, therefore, should be classified as void.

15. Further, as detailed above, under the Subdivision Ordinance, the Board lacked the authority to grant Par 5's rezoning application in the absence of a proper subdivision of the subject property by either Par 5 or the landowner. No such subdivision of the subject property was made or even attempted by either Par 5 or the landowners.

16. The Board's granting of Par 5's rezoning application in violation of the Subdivision Ordinance constitutes an action that is ultra vires and unauthorized by state and county law, and, therefore, should be classified as void.

17. VDOT requirements provide that a 500-foot line-of-sight at 3.5 feet from ground level at the entrance to the proposed Dollar General must exist.

18. The Board granted Par 5's rezoning application despite the fact that these requirements were not satisfied. Such act is ultra vires and unauthorized by state law, and, therefore, should be classified as void.

19. VDOT guidelines required that the Planning Commission and Board perform a proper traffic study that conformed with the guidelines prior to making any decision on Par 5's rezoning application.

20. The Board's granting of Par 5's rezoning application without first conducting any proper traffic study constitutes an action that is ultra vires and unauthorized by state law, and, therefore, should be classified as void.

PRAYER FOR RELIEF

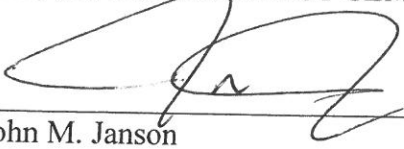
WHEREFORE, Plaintiffs, by counsel request that this Court:

1. Declare that the action of the Board in this matter is ultra vires, Void and of No Effect.
2. Declare that the action of the Board was not supported by the law or the facts and was an arbitrary and capricious decision.
3. Declare that the action of the Board in this matter is unlawful, unreasonable, arbitrary and capricious, as the acts of the Board are in violation of their own Subdivision Ordinance, Zoning Ordinance, Comprehensive Plan, and Vision Statement.
4. Declare that the action of the Board violated Virginia Code Section 15.2-2232 and that proper notice was not given, a proper hearing was not held, and the Planning Commission did not make the necessary finding that Par 5's rezoning petition was substantially in accord with the Comprehensive Plan and, therefore, the Board's decision is void.
5. To the extent the law allows, grant certiorari regarding this matter.
6. Award Plaintiff all costs, reimburse all fees, legal and other and grant any other relief that the Court deems necessary.

October 14, 2020

ANNE HARTLEY, and THE PROSPECT CEMETERY ASSOCIATION

By Counsel:



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CERTIFICATE OF SERVICE

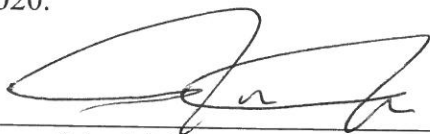
I certify that a copy of the foregoing was served upon:

Paul Jacobsen
County Attorney
1111 East Main Street
Suite 2400
Richmond, Va. 23219-0003

and,

George Morrison
Planning Director
228 North Main Street
Lawrenceville, Va. 23868

By depositing a copy in the United States Mail, Priority Mail, postage pre-paid this 14th day of October 2020.



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