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EXHIBITS

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF BRUNSWICK

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

PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENT'S DEMURRER OR, IN THE ALTERNATIVE, PLEA IN BAR

COME NOW Petitioners Anne Edward Hartley ("Hartley") and the Prospect Cemetery Association (the "Cemetery"), by counsel, and hereby submit their Response in Opposition to the Demurrer or, in the Alternative, Plea in Bar filed by Respondent, Board of Supervisors of Brunswick County, Virginia (the "Board").

INTRODUCTION

This case concerns the validity of the Board's decision to approve an application to rezone a portion of an agricultural parcel, that has yet to be subdivided and legally described, located in the center of the historic and picturesque community of Ebony from an Agricultural (A-1) to a Business (B-1) classification. Following the Board's controversial 3-2 approval of the rezoning application, Petitioners filed a Petition for relief with this Court. In response, the Board filed its Demurrer or, in the Alternative, Plea in Bar. For the reasons detailed below, the Board's filing should be denied as unmeritorious.

FACTUAL BACKGROUND[1]

Ebony is a historic and scenic Rural Residential / Agricultural community in Brunswick County, Virginia that has largely retained its authenticity and character since it was first named in 1882 – the community itself is actually older. The predominant landowners of the community have made an effort to preserve as much of the historic integrity and charm as possible. There is much community pride associated with Ebony and efforts to preserve its history and authentic setting. This Agricultural (A-1) community includes two local stores that represent the role of the locally owned, community-based country store of yesteryear that have evolved over time with the food and services they offer. They coexist nicely, preserve the character of the community, and do not overpower the essence of this Rural Residential / Agricultural setting.

Ebony is known for its rare authenticity, quaintness, and local charm. Not only is it a special place for residents and a site of historic significance, it is a treasured destination for Lake Gaston communities and an attraction for the tourism-related business that the Brunswick County Comprehensive Plan ("Comprehensive Plan") desires. (Petition, at ¶¶ 3, 4, 7.) The Board's own vision statement, entitled "VISION FOR 2035," emphasizes Ebony's reputation for scenic landscapes, including "scenic rivers and lakes, serene rural landscapes and beautiful farmlands." (*Id*. at ¶¶ 7, 8.) Similarly, the Comprehensive Plan, which was last updated on September 20, 2017 and applies through the year 2037, states that "[d]eveloping outdoor

[1] A court generally will not consider documents that are not referenced in the Petition when ruling on a demurrer. *TC MidAtlantic Dev., Inc. v. Commonwealth, Dep't of Gen. Servs*., 280 Va. 204, 212, 695 S.E.2d 543, 548 (2010). In this case, however, the Board's Demurrer raises several issues outside the four corners of the Petition and refers to documents that were not referenced in the Petition. To address these extraneous matters, and out of an abundance of caution, Petitioners likewise allege several counter-facts and refer to documents that are not referenced in the Petition. In ruling on the Demurrer, the Court may consider the documents presented by both parties. *See Mansfield v. Bernabei*, 284 Va. 116, 121, 727 S.E.2d 69, 72 (2012).

recreation attractions and marketing of the natural assets of Brunswick County are key economic strategies for both the County and the Commonwealth of Virginia." (Comprehensive Plan, at p. 42.)

The Comprehensive Plan provides for nine zoning districts. The Agricultural (A-1) District is described as generally permitting "[a]griculture, forests, lakes, rural residential (1 acre or more)." (Comprehensive Plan, at p. 87.) Zoning Ordinances specify that A-1 Districts control business use via a Conditional Use Permit to protect the integrity of the community. The Business (B-1) District generally permits "[r]etail and service businesses, highway commercial uses[.]" (*Id.*)

The Comprehensive Plan states that Ebony, Gasburg, and Lake Gaston are located in the South County Planning Area. (*Id.* at p. 90.) The Comprehensive Plan further 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.*) However, Ebony lies on a Virginia Scenic Byway and is not a strategic area designated for growth. The Comprehensive Plan's current and future land use maps show that Ebony is to remain classified as Agricultural (A-1) lands, with no commercialization or businesses larger than a country general store (permitted via a Conditional Use Permit). (*Id.* at p. 91.) This Agricultural (A-1) designation is intended to ensure that what is special and rare about Ebony's history and unique country setting is preserved. (*Id.*)

On October 7, 2019, Par 5 Development Group, LLC ("Par 5") submitted a Rezoning Application in Case #19-032. (Petition ¶ 12.) A copy of Par 5's Rezoning Petition is attached hereto as Exhibit A. A copy of the Brunswick County Planning Commission's Report of November 12, 2019 is attached hereto as Exhibit B.

Par 5's Rezoning Application concerns 2.04 acres of an 8.36-acre parcel owned by Jerry Michael and Susan Royster Jones. (Exhibit B, Planning Commission Report, at p. 1.) The property is located on the east side of Ebony Road (State Route 903), across from the intersection of Hendricks Mill Road (State Route 903) and Robinson Ferry Road (State Route 626), and the two existing local general stores, Ebony General and 903 Race-In. (*Id.*) The land is currently used for active farming, timberland, and a residential setting for a home, scenic open space, and buffer for Prospect Cemetery and Church. (Petition, at ¶ 13; Exhibit B, Planning Commission Report, at p. 1.) Par 5's Rezoning Application requests that the Board rezone the subject 2.04 acres from A-1 (Agricultural) to B-1 (Business.) (Petition, at ¶ 12.)

Par 5 did not 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. Further, in contravention to Brunswick County Code, App'x A - Subdivisions, no formal subdivision application for the division of the 8.36-acre tract was made in conjunction with Par 5's Rezoning Application.[2] Because no Subdivision Application was submitted on the subject 2.04 acres, Par 5's Rezoning Application was facially deficient and should have been denied. (Petition at ¶ 15.)

Similarly, Par 5's Rezoning Application was facially deficient and was required to be denied because it requested a form of rezoning that is not authorized by the Brunswick County

[2]It has become commonplace for the Board to engage in ~~the~~ recurring -- but procedurally incorrect -- practice of rezoning a portion of a tract of land before it is subdivided and given its own unique property identifier. (Petition, at ¶ 14.) Per the application for this case, the Board's rezoning decision was intended to be linked to the actual subdivision of the property and transfer of ownership from the landowners to Par 5. However the vote included no such provisional verbiage and the subject 2.04 acres has been effectively rezoned from Agricultural (A-1) to Business (B-1), independent of Par 5's acquisition and its approved site plan for the Dollar General store to be built. This rezoning change has been improperly memorialized in writing and on the Zoning Map that has also been updated prior to any actual transfer of title or subdivision of the land – even though the intended land use and transfer that sponsored this rezoning may never take place.

Zoning Ordinance ("Zoning Ordinance"). (*Id.* at ¶¶ 18, 21.) The Zoning Ordinance required that Par 5 submit an application for a conditional use permit to operate a small store within the bounds of approved uses of Agricultural (A-1) properties. *See* Brunswick County Code, App'x B - Zoning, Articles 2-1, 4, 4-1-18, 9, 9-1-1. The Planning Commission and Board lacked the statutory authority to approve the complete rezoning of the acreage to a Business (B-1) classification. (Petition, at ¶ 21.)

The proposed rezoning is intended to allow for the erection of a 9,100 square-foot metal building wherein a nationally branded, retail Dollar General store would operate. (*Id.*, at ¶ 13; Exhibit B, Planning Commission Report, at p. 1.) The proposed building would have a total of 7,422 square feet of retail floor space and would require a minimum of 37 parking spaces. (*Id.* at p. 6.) The store's water and sewer system call for the construction of a new private well and private septic system. (Exhibit A, Rezoning Application, at p. 3.) The store would utilize a "standard lighting" system. (*Id.*, at p. 7.)

The Dollar General store would be located in the heart of Ebony's historic area and beautiful country setting and would completely overpower the neighborhood and harm the character of the community, while also putting the existing local businesses at risk. (Petition, at ¶¶ 7-9, 13, 24-26.) These are the exact harms that zoning management statutes are designed to prevent. (*Id.*)

Further, the proposed Dollar General store would not provide a convenience store needed in the Ebony community. (*Id.* at ¶ 13.) The aggressive proliferation of the Dollar General chain[3] has already established nearby presence in commercially designated locations: Bracey, Virginia (10 miles away) and Gasburg, Virginia (6.5 miles away). (*Id.*) In addition, just 6.5 miles away

[3] Learn more about Dollar store proliferation and impact. See Institute for Local Self-Reliance, *Dollar Store Impacts*, attached hereto as Exhibit L.

in a different direction are Family Dollar, a full-service grocery and other stores, such as Food Lion, Ace Hardware, and DrugCo. (*Id.*) Plus there are two local stores literally across the road that provide community-based goods and services. (*Id.*) Forcing another Dollar General into the sparsely populated Ebony area solely based on speculative tax base development for the County and under the guise of "competition is good" will be a setup for colossal failure. Dollar General eliminates competition and discourages businesses that may be well-suited for the community.

The soul of a very special place will be destroyed and rebranded as yet another Dollar General invasion and potentially one that fails financially. Ebony, as we know it, and multiple generations of lives will be irrevocably harmed with no turning back. There may be appropriate locations for another Dollar General within Brunswick County. Ebony is simply not one.

State Route 903 (Hendricks Mill Road) and State Route 626 (Robinson Ferry Road), the roadways that converge at the skewed T-intersection adjacent to the Dollar General site, are designated Virginia Byways. (*Id.* at ¶ 6; Commonwealth Transportation Board ("CTB"), Minutes of Meeting (June 17, 2004), at p. 7, attached hereto as Exhibit C.) Virginia's State Scenic Highway and Virginia Byway Act ("Scenic Highway Act") defines a "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.

Hartley is an adjacent property owner to the proposed Dollar General site. (Petition, at ¶ 1.) Her property is 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. (*Id.* at ¶ 3.) The farming operation on her property would be located just feet from the proposed Dollar General's septic system and drain field. (*See* Exhibit A, Rezoning Application.)

Hartley's residential-agricultural property, its presence, coexistence with community-aligned business, and quiet enjoyment that is preserved by the Agricultural (A-1) zoning is representative of other neighbors in the community. (Petition, at ¶¶ 5, 7.) These landowners have all been irrevocably harmed by the Board's support of Dollar General's aggressive proliferation model into the Ebony location, and they stand in opposition to the rezoning decision. (*Id.* at ¶¶ 3-26.)

The Cemetery is another adjacent property owner. (*Id.* at ¶ 4.) The historic Prospect United Methodist Church (the "Church") is located adjacent to the Cemetery. (*Id*.) The Cemetery and Church are historic Landmarks, and the Church is a cultural and historic anchor of the Ebony community dating back to 1882. (*Id*.) The Church was established in that location in 1887; however, its roots date back to the 1700s. Numerous multi-generational families from the area, including Veterans spanning more than 150 years of several wars, Virginia Senators, and other prominent local residents have been buried in the Cemetery. (*Id*.) Current and future generations of local family connections planned to be buried there. The Cemetery is a respected, sacred ground and a spiritual destination for visitors of loved ones who have passed on. The idea of introducing a commercial presence that will absolutely erode the reverence of the Cemetery is heartbreaking to many who have voiced their opposition to the rezoning and Dollar General. (*Id.* at ¶¶ 5, 24-26.)

In a letter dated November 7, 2019 C. Todd Cage, Land Development Engineer, Southern Regional Land Development, Richmond District, said, "The [Dollar General] commercial site and entrance will be required to meet Access Management Regulations due to Rte. 903, Ebony Road being classified as a rural major collector. The commercial entrance will be required to

have 335 feet of intersection spacing and 500 feet of sight distance in both directions. We highly recommend the applicant make sure he can meet these regulations before proceeding."

A public hearing on Par 5's Rezoning Application was held before the Brunswick County Planning Commission ("Planning Commission") on November 12, 2019. The Planning Commission Minutes of that date are attached hereto as Exhibit D. Sixteen individuals, including Hartley, spoke against Par 5's Rezoning Application. (Exhibit D, Planning Commission Minutes, at p. 2.) Three people spoke in favor of the Application. (*Id.*). They were the landowner, his brother-in-law, and Par 5.

In the November 12th Planning Commission meeting, the Board's Vice-Chair, John W. Zubrod, eloquently summed up the safety concerns surrounding Par 5's Rezoning Application when he said: " My first issue with this rezoning proposal is safety. The intersection of Hendricks Mill Road, Robinson Ferry Road and Ebony Road is way overdue for rebuilding, however VDOT keeps putting it off due to the relocation expense with the existing businesses. The existing traffic hazards are bad enough, without adding another parking lot entrance within 75 yards of it to increase the dangers." In fact, VDOT identified this location as a hazard 20 years ago and suggested the relocation of the intersection to be moved to the south side of Ebony General Store very close to the commercial entrance of the proposed Dollar General.

A motion was 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. However, the vote on the motion did not carry. Those in attendance including, Hartley, thought it was a tie. The Chair chose not to vote and break the tie. The vote was tabled by a procedural disruption. It was suddenly proposed that the vote be deferred to

address the alleged need to obtain information from the Virginia Department of Transportation ("VDOT") regarding sight distance requirements.[4]

On November 21, 2019, a mere nine days later, the VDOT Southern Region Land Development Office sent a letter that stated they "had reviewed the revised sketch received on November 19, 2019 by email at the South Hill office. At this time we have completed our review and find the entrance location meeting access management regulations. Entrance geometrics and drainage will be addressed during the site plan review stage."

Apparently, this cursory approval was sufficient, ignoring existing problems. All traffic concerns were glossed over and forgotten in the December 10, 2019 Planning Commission meeting. This was in spite of the fact that VDOT's "Guidelines for Traffic Analysis" ("VDOT Guidelines")[5] 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**

[4] Although the Planning Commission was in receipt of the VDOT letter prior to the November 12th meeting, the letter was not brought up at the meeting until it was suddenly raised as a reason to prevent the Planning Commission from taking a vote at the meeting.

[5] The VDOT Guidelines may be accessed online through the following link: http://www.virginiadot.org/projects/resources/chapter527/Administrative_Guidelines_TIA_Regs_7.2012.pdf

generates summer trips, summer traffic counts should be used." *Id.* (emphasis added.) This was never done.

The Planning Commission nevertheless ignored these valid concerns and voted to recommend approval of Par 5's Rezoning Application to the Board. However, the Planning Commission failed to adhere to 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. (Petition, at ¶ 16.) In addition, the Planning Commission did not comply with its statutory obligation to determine whether the proposed Dollar General store was substantially in accord with the Comprehensive Plan before it recommended that the Board approve Par 5's Rezoning Application. (*Id.* at ¶ 10.) *See* Virginia Code § 15.2-2232(A).

The Planning Director stated that the Comprehensive Plan did not matter and the County could do whatever it wanted to do. (*Id.* at ¶ 10.) He clarified that was because the Plan was a suggestion and had no legal binding. As evidenced by this statement, the Planning Commission **did not comply with its statutory obligation** to determine whether the proposed Dollar General store was substantially in accord with the Comprehensive Plan before it recommended that the Board approve Par 5's Rezoning Application. *See* Virginia Code § 15.2-2232(A). Instead they chose to claim alignment with one aspect of the Comprehensive Plan – business development – and ignored or devalued the many negative impacts to other strategic elements of the Comprehensive Plan. **Therefore, the recommendation was not in substantial accord with the Plan.**

On January 29, 2020, the Board held a public meeting that addressed Par 5's Rezoning Application. Of those in attendance with a full house, the vast majority which aligned with

public sentiment were against the proposed Dollar General rezoning. Despite the strenuous local opposition, the Board controversially voted 3-2 to grant Par 5's Rezoning Application and to rezone the subject 2.04-acre parcel from Agricultural (A-1) to Business (B-1). (*Id.* at ¶ 12.) 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.

In a Facebook post made on January 30, 2020, Vice-Chair Zubrod stated: "Very disappointed in last night's [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 E.

As these comments indicate, the Board's single-minded pursuit of speculative business development benefits without addressing the negative side effects is not aligned with the purpose of the Comprehensive Plan or with state and local zoning laws. (Petition, at ¶¶ 12, 19-21.) It has resulted in a vote that completely ignored and devalued all concerns expressed by those in opposition, including nearby landowners and other residents, who repeatedly articulated the negative side effects as part of their opposition platform. (*Id.* at ¶¶ 24-26.) Also articulated in various communication channels was that blatant misalignment with the Comprehensive Plan, Virginia Code, and Zoning Ordinances.

STANDARD OF REVIEW

I. DEMURRER

A demurrer is used to determine whether a complaint states a cause of action upon which the requested relief may be granted. *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 135, 818 S.E.2d 788, 791 (2018). A demurrer "tests the legal sufficiency of facts alleged in pleadings, not the strength of proof. [The court] accept[s] as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts." *Glazebrook v. Bd. of Sup'rs of Spotsylvania County*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003).

"At the demurrer stage, it is not the function of the trial court to decide the merits of the allegations set forth in a complaint[.]" *Friends of the Rappahannock v. Caroline County Bd. of Sup'rs*, 286 Va. 38, 44, 743 S.E.2d 132, 135 (2013); *see also Riverview Farm Assocs. Va. Gen. P'ship v. Bd. of Supervisors of Charles County*, 259 Va. 419, 427, 528 S.E.2d 99, 103 (2000). If the complaint is made "with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment," the demurrer must be denied. *Friends of the Rappahannock*, 286 Va. at 44, 743 S.E.2d at 135 (internal quotation marks omitted).

II. PLEA IN BAR

"The standards of review for a defensive plea in bar and a demurrer are substantially similar." *Sullivan v. Jones*, 42 Va. App. 794, 802, 595 S.E.2d 36, 40 (2004). "The defensive plea in bar shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. The moving party carries the burden of proof on that issue of fact." *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996). In

considering a plea in bar, the court is to consider the facts stated in the pleadings in the plaintiff/petitioner's favor. *Sullivan*, 42 Va. App. at 803, 595 S.E.2d at 40.

III. ZONING DECISIONS

A board of supervisors' decision on a rezoning application is classified as a legislative act that is presumptively reasonable. *Gregory v. Bd. of Sup'rs of Chesterfield Cty*., 257 Va. 530, 537, 514 S.E.2d 350, 354 (1999). "The presumption, while not conclusive, stands until surmounted by evidence that the legislative action was unreasonable. The litigant attacking the legislative act has the burden to establish unreasonableness." *City Council of City of Salem v. Wendy's of W. Virginia, Inc*., 252 Va. 12, 14-15, 471 S.E.2d 469, 470 (1996).

If the petitioner objecting to the board's rezoning decision meets his/her burden of establishing unreasonableness, the petition cannot legitimately be dismissed upon a demurrer. *Concerned Taxpayers of Brunswick Cty. v. Cty. of Brunswick*, 249 Va. 320, 327-28, 455 S.E.2d 712, 716 (1995). The determination as to whether the board's rezoning decision was sufficiently reasonable presents issues of material fact that cannot be definitively resolved at the demurrer stage. *Id.*

ARGUMENT

I. THE PETITION IS NOT SUBJECT TO DISMISSAL ON A DEMURRER

A. The Demurrer Must Be Denied Because the Petition Alleges Sufficient Facts to Show that the Board's Decision to Rezone a Portion of the Subject Property from Agricultural (A-1) to Business (B-1) Was Unreasonable

The Demurrer is fatally defective because it relies on an incorrect legal standard and attempts to prematurely resolve factual disputes. The Board cannot so easily avoid judicial review of its decision on the subject Rezoning Application.

To begin with, it must be recognized that the Demurrer submits an incorrect standard of review. Contrary to the Demurrer's representations, the only question that the Court should consider in ruling on the Demurrer is whether Petitioners have "allege[d] facts which, if true, would be probative evidence that . . . [the Board's] consent [to the Rezoning Application] was unreasonable." *Helmick v. Town of Warrenton ("Helmick I")*, 254 Va. 225, 230, 492 S.E.2d 113, 115 (1997). If Petitioners have successfully alleged such facts, "the demurrer cannot be sustained[.]" *Id.*

This is so because a demurrer "does not permit the trial court to evaluate and decide the merits of the claim set forth in a bill of complaint or a motion for judgment, but only tests the sufficiency of the factual allegations to determine whether the pleading states a cause of action." *Concerned Taxpayers*, 249 Va. at 327-28, 455 S.E.2d at 716. If, as occurred here, a petitioner alleges facts sufficient to meet that standard in a rezoning case, he/she "is entitled to present such evidence to challenge the presumptive reasonableness of the legislative action. Until it has heard evidence in this case, the trial court cannot determine whether the Board's decision is 'fairly debatable[]'" and, therefore, is reasonable. *Id.* at 328, 455 S.E.2d at 716.

For the reasons detailed below, Petitioners have met their burden of proof in this case. As a result, the Demurrer must be denied. The question as to whether the Board's decision to grant Par 5's Rezoning Application was, in fact, reasonable under the circumstances cannot be definitively resolved by the Court at this early juncture. *See id.*

In an effort to avoid this conclusion, the Board attempts to show that its rezoning decision was, in fact, reasonable. However, Virginia case law has clearly established that a board's factual assertions of reasonableness cannot be weighed or resolved upon a demurrer. *See Helmick I*, 254 Va. at 230, 492 S.E.2d at 115; *Concerned Taxpayers*, 249 Va. at 328, 455 S.E.2d at 716. Instead, Petitioners must be permitted a fair opportunity to challenge the reasonableness of the Board's decision through continued judicial proceedings in this Court. *See Helmick I*, 254 Va. at 230, 492 S.E.2d at 115; *Concerned Taxpayers*, 249 Va. at 328, 455 S.E.2d at 716. Accordingly, the Demurrer must be denied.

B. Petitioners Have Stated a Claim on Which Relief Can Be Granted

The Virginia Supreme Court has stated that zoning has a two-fold purpose: "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." *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). Accordingly, 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." *Carper*, 200 Va. at 660, 107 S.E.2d at 395; *see also DeGroff Enterprises*, 214 Va. at 238, 198 S.E.2d at 602.

As a matter of public policy, "permissible land use should be reasonably predictable[.]" *Cole v. City Council of City of Waynesboro*, 218 Va. 827, 834, 241 S.E.2d 765, 770 (1978). Hence, a board of supervisors should not make zoning changes "suddenly, arbitrarily or capriciously, but only after a period of investigation and community planning, and only where circumstances substantially affecting the public interest have changed." *Id.*

Toward this end, in making local zoning and rezoning decisions, a board of supervisors, including the Board herein, is subject to the dictates of Virginia Code §§ 15.2-2283 and -2284. 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.

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

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

> their values and the encouragement of the most appropriate use of land throughout the locality.

These statutes "set out the purpose of the zoning ordinances and a number of factors which a zoning authority must consider when taking zoning actions." *Bd. of Sup'rs of Fairfax Cty. v. Miller & Smith, Inc*., 242 Va. 382, 384, 410 S.E.2d 648, 650 (1991) (discussing prior statutes).

Where, as here, a petition alleges that the board of supervisors' approval of a rezoning application is inconsistent with Virginia Code §§ 15.2-2283 and -2284, is inconsistent with the locality's comprehensive plan and zoning ordinance, and is incompatible with surrounding land uses, the petition shows on its face that the rezoning is unreasonable. *Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104; *Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650; *Barrick v. Bd. of Sup'rs of Mathews Cty*., 239 Va. 628, 632-33, 391 S.E.2d 318, 320 (1990). This is all that is required for the petition to state a viable cause of action against the board of supervisors and, therefore, to survive a demurrer. *Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104.

As detailed below, the Petition sufficiently meets the forgoing requirements. As a result, it must be concluded that Petitioners have stated a valid cause of action, and the Demurrer must be denied.

1. Handling of Par 5's Rezoning Application In Conflict With Virginia Code §§ 15.2-2223 and -2232 (Statutory Alignment with Comprehensive Plan)

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.

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).

"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). The phrase "shall control" is mandatory in nature and, therefore, requires a locality's compliance. See id. Thus, as expressly stated in Sands Anderson's own Presentation, a locality's comprehensive plan is "[b]oth a guide . . . [a]nd a control to development." [6] (Exhibit H, Sands Anderson Presentation.)

2. Par 5's Rezoning Application Is Inconsistent With Virginia Code §§ 15.2-2283 and -2284

In granting Par 5's Rezoning Application, the Board wholly failed to consider the factors set forth in Virginia Code §§ 15.2-2283 and -2284, as listed above. However, the facts clearly show that the rezoning is inconsistent with these statutes. "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.

Specifically, the rezoning fails to ensure the intended purpose of several applicable zoning management directives among this list derived from the statutes (1) provide for adequate

[6] Counsel's allegations set forth in Demurrer ¶ 38 are disingenuous, as they are in direct conflict with the assertions made in their own law firm's Presentation attached hereto as Exhibit H. The Presentation shows that Counsel is well aware of the controlling effect the Virginia Legislature has given to a locality's comprehensive plan by way of Virginia Code § 15.2-2232. The contention set forth in Demurrer ¶ 38 that this statute is not one of general application and does not affect the present case is not made in good faith and is, at best, misleading.

light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime and other dangers; (2) reduce or prevent congestion in the public streets; (3) facilitate the creation of a convenient, attractive and harmonious community; (4) protect against destruction of or encroachment upon historic areas; (5) protect against danger and congestion in travel and transportation; (6) provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment; and (7) consider the growth trends and future needs of the community. These points are discussed in detail below.

a. Creation of dangers [with irrevocable harm]

The proposed Dollar General box store would create undue dangers to the Ebony community. As discussed throughout this Response, the store's location significantly exacerbates an existing traffic hazard due to insufficient roadway infrastructure, particularly in the summer and early fall seasons when there is seasonal increase in traffic flow that must navigate a confusing T-intersection configuration and ambiguous entrances to existing businesses across from the site and the proliferation of motorists driving to Lake Gaston. In addition, the fact that the Dollar General's septic system would be just feet from Hartley's active organic farming operation poses a significant health and safety risk.

Further, the close proximity of the proposed Dollar General 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. The proposed Dollar General store will also subject the neighboring properties to noise, disturbances, bright 24-hour lighting, and garbage odors. (Petition, at ¶ 24.) It will result in the degradation in the value of the landowners' properties and will reduce the marketability of those lands. (*Id.*) Even the Par 5 application

Project Narrative acknowledges this point in the statement "…the rezoning will not…**substantially diminish and impair property values** within the surrounding neighborhood." However, the reality is that **it will be substantial** to those impacted.

Plaintiff Hartley's property, the setting of the Cemetery and Church, and respective peaceful enjoyment along with multiple generations of community families will be irrevocably harmed as this historic area of the Ebony community and sense of place will be destroyed and replaced with real threats from a level of commercialization NOT IN ACCORD WITH the Comprehensive Plan. Hartley's open view across agricultural land from her backdoor will be dominated with a Dollar General box store, traffic generation, and commercial activity all day from 8AM to 10PM, every day. This will be the impact from other neighboring residences as well. This **negative change** introduces real threats to safety and disruption to peaceful enjoyment – that impacts all neighboring properties and families.

b. Traffic congestion [with dangerous traffic generation]

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.

This was not done even though all three roads -- Hendricks Mill Road (SR 903), Ebony Road (SR 903), and Robinson Ferry Road (SR 626) -- converge at a skewed "T" intersection near the Dollar General site in close proximity to the proposed access to the store. 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 are often traveled well in excess of the 45 mph limit. Due to a hill 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 intersection that is often ignored and treated like a yield sign. In addition, Ebony General Store has a parking lot that faces both roads without designated driveway. This creates a confusing mess of already dangerous patterns of traffic movement near the intersection and also in close proximity to the proposed Dollar General commercial entrance from Ebony Rd. The other store, 903 Race-In, has a designated entrance/exit that is also very close to the intersection. While "locals" may be familiar with this race track geometry inherently dangerous convergence of roads and parking lots, tourist and travelers are not. All three roads — Robinson Ferry Road, Hendricks Mill Road, and Ebony Road — also serve seasonal traffic for motorists destined to Lake Gaston who may not be familiar with these geometric constraints.

This traffic generation is concentrated in an area that VDOT identified 20 years ago as being hazardous exacerbated by increase in traffic. Any future development along Hendricks Mill Road, Robinson Ferry Road, and Ebony Road is anticipated to add traffic to this dangerous and confusing roadway already in need of significant improvements that could run into hundreds of thousands of dollars. The existing life and health safety issues as well as the lack of sufficient infrastructure were considered when the Comprehensive Plan designated this area as Agricultural (A-1). A current Ebony resident whose home is located right across the 2-lane road from the commercial entrance for the proposed Dollar General said it this way: "We have more traffic in an hour now than we had in a week ten years ago."

The haphazard placement of Dollar General and future commercial development in an area without sufficient traffic infrastructure creates numerous design problems and challenges

that the Board failed to consider. These include, but are not limited to, the proposed location of commercial entrance, the random and unpredictable turning movements to and from the adjacent general stores and gas station, movements to and from Hendricks Mill Road and Ebony Road and the odd angle skew of the intersection. Further, the VDOT requires 500 ft line-of-sight at 3.5 feet from ground level at the commercial entrance. This is NOT met due to existing road geometry and elevation south of the entrance, based on our actual measurement and observation.

There are also numerous other geometric conditions within the study area that require a detailed traffic study be performed to assess the traffic impact and operation at this specific location before the Board could legitimately approve any retail business of Dollar General's size and significant daily trip generation that requires 37 parking spaces. A traffic study would ensure that the roadway network within the study area has the necessary turn lanes, signing, speed limit adjustments, widening of roads, installation of shoulders, leveling of terrain and increasing sight distances, pavement markings and other improvements needed to provide a safe transportation network to all users, now and for the foreseeable future.

The Board utterly failed to take the VDOT Guidelines[7] into account when it voted to approve Par 5's Rezoning Application. It failed to take into account the exponentially greater traffic that traverses Ebony Road (State Route 903), Robinson Ferry Road (State Route 626), and Hendricks Mills Road (State Route 903) during the summer and early fall months, as required by the VDOT Guidelines. (VDOT Guidelines, at p. 51.) In addition, the Board failed to recognize that, contrary to VDOT requirements, no 500 foot line-of-sight at 3.5 feet from ground level at store entrance exists

[7] The VDOT Guidelines may be accessed online through the following link: http://www.virginiadot.org/projects/resources/chapter527/Administrative_Guidelines_TIA_Regs_7.2012.pdf

The Planning Commission and the Board herein have ignored their Comprehensive Plan, common sense and proper procedure by making what is an already dangerous and potentially deadly traffic situation even worse. A high daily volume traffic generating Dollar General store being placed haphazardly in an already dangerous location without customary, necessary and proper professional evaluation of the adverse impacts and future infrastructure needs is a dereliction of their duty. It also creates a situation that could cost the county taxpayers more in right of way acquisitions and road improvements than the proposed facility could ever generate in revenue for the County. In addition, roadway improvements driven by the projected increase in traffic in this dangerous location would also destroy the charm and quaintness of the community, which is the reason the Ebony location is not designated for commercial development on the current legally-approved Comprehensive Plan land use map.[8]

c. Detraction from harmonious and attractive community

Ebony is a rural, picturesque community whose history, appeal, character, and buildings have been intentionally preserved by landowners. The proposed Dollar General store would subject Ebony landowners and other residents to undue noise, disturbances, bright 24-hour lighting, garbage odors, litter, and a concentration of continuous increased traffic every day during business hours 8AM – 10 PM (Petition, at ¶ 24.) Projected traffic during peak morning

[8] In the prior version of the Comprehensive Plan, the area on the east side of the intersection at Hendricks Mill Road (SR 903) and Robinson Ferry Road (SR 626) was designated commercial development as it was the location of the 2 existing stores. This designation, however, was intentionally removed in the 2017 revision of the Comprehensive Plan. Upon information and belief, that decision was based on the desire to preserve rural communities of the County as well as the known deficiencies in the existing traffic infrastructure.

and afternoon/evening hour is 45 Vehicle Per Hour. It would result in the degradation in the value of all parcels of real property and will reduce the marketability of those lands. (*Id*.)

Ebony's main roads, Hendricks Mill (SR 903) and Robinson Ferry (SR 626) are designated Virginia Byways.[9] (Petition, at ¶ 6; Exhibit C, CTB Minutes, at p. 7.) 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.

[9] 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.

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.
- 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 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. This would occur through the noise, bright 24-hour lighting, and garbage odors that would necessarily accompany the store's operation. (Petition, at ¶ 24.) In addition, the placement of a Dollar General store in Ebony would lower neighborhood property values and reduce the marketability of the lands. (*Id.*) In short, the proposed rezoning would greatly reduce the quality of life that Ebony residents currently enjoy.

In the words of one local resident: "Some of the things they enjoy [about living in Ebony] are hunting, fishing and the ability to have cows, riding horses and things such as gardens and trees. It has always been a quiet community and people that live there hope that it will stay that way. Rezoning this property will change the uniqueness of our country community." (Patricia B. Conner, Amicus Curiae Brief, at p. 1.)

Notably, plans for the proposed Dollar General store call for the installation of a "standard lighting system." (Exhibit A, 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. *See AT & T Wireless PCS*, 172 F.3d at 315.

This point is demonstrated by the fact that in January 2017, the Halifax County Board of Supervisors 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 F[10].) 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.*)

The adverse impact that the proposed Dollar General store would have upon the aesthetic quality of the landscape should not be underemphasized. *See* Virginia Code § 15.2-2283.

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).

[10] 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/

d. Encroachment on historic areas and agricultural lands

A rezoning must adequately protect against the destruction or encroachment of historic areas. Virginia Code § 15.2-2284; *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 2010). The proposed location of the Dollar General store on Ebony Road (State Route 903), near the skewed T-intersection of Robinson Ferry Road (State Route 626) and Hendricks Mills Road (State Route 903), lies near the center of Ebony's historic district and is directly adjacent to the Church and Cemetery.

As one local resident has explained:

> A number of historic structures can be seen from the T-intersection of Robinson Ferry Road and Hendriks [sic] Mill Rd. These buildings are major contributing resources to the historic character of the oldest section of Ebony. Two stately homes of two Virginia state senators grace hills on either side of the intersection. The first Ebony Post office opened in 1882 anchors a stretch of Robinson's Ferry Road which has been designated a scenic byway. The home of the first doctor in the neighborhood can be seen to the [north] . . . along a stretch of timber and farmland. This historic road passes the old post office, country store and polling place, Senator H.B. Moseley's home and then along a stretch of farm land that connects to the historic Prospect Cemetery with graves [of soldiers who fought in various wars that span more than 150 years.] Next to the cemetery is Prospect United Methodist Church, the current building erected in 1887, the original part of the building still standing with the latest extension added in 2012. It is this length of byway that is so representative of the history and character of Ebony. These sites have been preserved and maintained by groups and individuals who respect and love their history. And it is it his small section of Ebony that will be forever destroyed by the introduction of a commercial structure and parking.

(Sarah N. Moseley, Amicus Curiae Brief, at pp. 3-4.)

The Board failed to properly consider the negative impact that the proposed Dollar General store would have upon these 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. (Petition, at ¶¶ 5-26.)

e. Growth trends and future needs 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.

As discussed in Argument Part I(B)(2), *infra*, the Comprehensive Plan depicts Ebony as retaining its Agricultural (A-1) setting through the year 2037. (Comprehensive Plan, at p. 90.) A fundamental policy of Virginia land use management is that the board of supervisors should direct development into designated Development Areas and should preserve Rural Areas for rural uses. (Albemarle County Community Development, Fundamentals of Virginia Land Use Law publication[11], attached hereto as Exhibit G.) Accordingly, only small businesses akin to country general stores should be approved for operation in Ebony. Brunswick County Code, App'x B - Zoning, Articles 4, 4-1-18. The proposed Dollar General store does not fit within this classification.

[11] This publication is accessible through the following internet link: http://www.albemarle.org/upload/images/forms_center/departments/Community_Development/forms/Fundamentals-of-Virginia-Land-Use-Law.pdf

The Comprehensive Plan further provides that any retail business that is approved as a community business within the meaning of the Plan's future land use designations is to be limited to 5,000 square feet or less.[12] (Comprehensive Plan, at p. 92.) The proposed Dollar General store is almost twice that maximum size. 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 ¶¶ 5-26.)

Moreover, as recognized in the Comprehensive Plan, Ebony serves as a magnet for tourism in southern Brunswick County precisely because it is a "scenic, rural region[] that offers outdoor recreation amenities and cultural assets[.]" (Comprehensive Plan, at p. 74.) Such tourism brings with it much-needed revenue for the County and its residents. This is a key aspect of the Comprehensive Plan that the Board wholly ignored when it approved Par 5's Rezoning Application.

As detailed above, two of Ebony's main roads have been designated as Virginia Byways. This invites tourism through the use of both automobiles and bicycles. Indeed, U.S. Route 1, which is in close proximity to one of these collector roads, is designated as a U.S. National Bicycle Route. (*Id.* at p. 41.) The Comprehensive Plan recognizes that this configuration 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.) Recommended measures include the conversion of additional old railways to bicycle trails and "[i]mproving safety for bicyclists along U.S. Bicycle Route 1 and

[12] This suggested retail definition for a rural / agricultural district has never been added to the Zoning Ordinance. It would be a good example of a new conditional use permit.

replacing missing signs along the historic route." (*Id.*) The Comprehensive Plan recognizes the importance of such measures in the current and future promotion of Ebony as a great place for tourists to safely participate in healthy outdoor activities, such as bicycling. (*Id.*)

Southside Planning District Commission (PDC) website highlights the commitment and expectation of Brunswick County and it strategic commitment to tourism as a source fo economic development. A ribbon cutting for the Brunswick County Byways Visitor Center was held on June 28, 2018. With the assistance of the Southside Planning District Commission, the County of Brunswick received a $458,375 grant from the Virginia Tobacco Commission and a $638,479 National Scenic Byways grant from the Department of Transportation to plan and construct a comprehensive tourist welcome center with interpretive displays, maps, brochures and restrooms. The Southside PDC staff provided the County with grant administration services throughout construction and completion of the project.[13]

It defies logic and contradicts the major tenets of the Comprehensive Plan as well as the commitments to the Commonwealth for the Board to approve the placement of an unsightly Dollar General store in the midst of this rural setting that is so attractive to tourists. The proposed placement of the Dollar General store in the middle of Ebony would deter the automobile and bicycling tourism that Brunswick County is trying to attract, as enunciated in the Comprehensive Plan. (*Id.* at pp. 41-42, 74.) The store would also decrease the safety for bicyclists, in contravention of the recommendations set forth by the Virginia Department of Conservation and Recreation and recognized as important by the Comprehensive Plan. (*Id.* at p. 42.)

"Successful communities capitalize on their distinctive assets. . . . 'Tourism simply doesn't go to a [locality] that has lost its soul.'" (Exhibit G, Fundamentals of Virginia Land Use

[13] Copied from http://www.southsidepdc.org/index.php/projects/brunswick-county

Law.) As a massive, box-like, retail chain store, the proposed Dollar General would significantly detract from Ebony's idyllic rural setting and would thereby serve to deter tourism. In effect, it is Ebony's scenic and historical setting that makes Ebony a strategic source of economic revenue for Brunswick County. This valuable asset will be significantly and permanently harmed by the proposed Dollar General store.

This point is described by an Ebony landowner, nearby resident, and Senior Analyst for the EPA as follows:

> The rezoning in Ebony will also hurt the community by devaluing or imposing a cost on our "Sense of Place." In benefit-cost analyses of government policies, "Sense of Place" is a term used to value the special meaning a place holds for particular people or animals or places. It defines a strong identity that is deeply felt by inhabitants and visitors. The tourism in Ebony from our visitors is important to this community. When describing how Sense of Place can affect a community, it is described as: "The more one city comes to look and feel just like every other city, the less reason there is to visit." In other words, the rezoning action in Ebony and the opening of yet another Dollar General in a pristine and historical agricultural community will lower the value visitors and citizens place on the Sense of Place (the feeling) of Ebony, Virginia.

(Marie E. Conner, Amicus Curiae Brief, at p. 2.)

Importantly, economic development within a locality "is to be accomplished *along with and within the framework* of other goals and objectives of the Comprehensive Plan." (Exhibit G, Fundamentals of Virginia Land Use Law.) A Presentation prepared by Sands Anderson, the Board's own counsel, explains that a locality's growth should be concentrated "in selected areas," as designated by the Comprehensive Plan, so that land development is "coordinated and harmonious." (*See* Sands Anderson, Land Use Regulation from the Perspective of Four Professionals ("Sands Anderson Presentation"), attached hereto as Exhibit H.) *See also* Virginia Code § 15.2-2223(A).

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. *See* Brunswick County Code, App'x B - Zoning, Articles 2-1, 4, 4-1-18. Such businesses could 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.

The massive Dollar General store with unsafe and high volume 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 framework of other goals and objectives of the County's Comprehensive Plan. Contrary to Sands Anderson's own advice, the rezoning calls for business development in an uncoordinated and inharmonious manner. (*See* Exhibit H, Sands Anderson Presentation.)

Accordingly, it must be concluded that the Board's grant of Par 5's Rezoning Application was unreasonable. Consequently, the Demurrer is unmeritorious and should be denied. *See Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104; *Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650; *Barrick*, 239 Va. at 632-33, 391 S.E.2d at 320.

3. The Rezoning Is Inconsistent With the Comprehensive Plan

`"[N]o street or connection to an existing street, park or other public area, public building or public structure, public utility facility or public service corporation facility . . .whether

publicly or privately owned, shall be constructed, established or authorized, unless and until the general location or approximate location, character, and extent thereof has been submitted to and approved by the [planning] commission **as being substantially in accord with the adopted comprehensive plan or part thereof.**" Virginia Code § 15.2-2232(A) (emphasis added). This means that unless a feature is already shown on the comprehensive plan, its general or "approximate location, character, and extent" must be "submitted to and approved by the [planning] commission as being **substantially in accord** with the adopted comprehensive plan" before being constructed." *Bd. of Supervisors of Loudoun Cty. v. Town of Purcellville*, 276 Va. 419, 440, 666 S.E.2d 512, 523 (2008) (emphasis added).

The comprehensive plan is intended to guide and accomplish "a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants." Virginia Code § 15.2-2223(A); *see also Town of Jonesville v. Powell Valley Vill. Ltd. P'ship*, 254 Va. 70, 75, 487 S.E.2d 207, 210 (1997). The 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).

Here, 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. (Comprehensive Plan, at p. 90.) The Comprehensive Plan further provides that "[g]rowth areas for commerce and industry are in strategic areas along the primary road corridors." (*Id.*)

Ebony is not a strategic area designated for growth in commerce and industry. Instead, current and future land use maps show that Ebony is to remain classified as Agricultural (A-1)

lands through the year 2037, with no suggested commercialization or business dominance. (*Id.* at p. 91.) It is aligned with rural authenticity, historic preservation, scenic beauty, and tourism. Thus, the placement of a Dollar General store within the Ebony community, a purely Agricultural (A-1) section of Brunswick County, is inconsistent with the clear terms of the Comprehensive Plan.

This point is underscored by the Brunswick County future land uses described in the Comprehensive Plan:

> 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.

(*Id.* at p. 92) (emphasis added).

In an attempt to justify the rezoning of the subject 2.04 acres, the Planning Commission and the Board improperly interpreted the Comprehensive Plan's definition of a "community business" in an unnatural and strained manner. In so doing, the Planning Commission and the Board wrongly stated that the use of the word "may" means that the 5,000 square foot size limitation is purely optional. The Virginia Supreme Court, however, has stated otherwise. "[T[he courts in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe 'may' and 'shall' as permissive or mandatory in accordance

with the subject-matter and context." *Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E. 191, 193 (1912); *see also Lewis v. City of Alexandria*, 287 Va. 474, 486, 756 S.E.2d 465, 473 (2014).

Moreover, 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. (Comprehensive Plan, 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 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* Comprehensive Plan, at p. 92; Exhibit A, Par 5's Rezoning Application; Exhibit B, Planning Commission Report.) Thus, the Board's approval of the rezoning is inconsistent with 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. These provisions set forth policies for the years 2017 through 2037 that "shall guide County growth, public investment and land use decisions." (Comprehensive Plan, 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. 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.

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. (Exhibit C, CTB Minutes, at p. 7.) 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. (Comprehensive Plan, 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. 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 id.* at p. 42.)

In its Demurrer, Sands Anderson, as counsel for the Board, repeatedly states that the rezoning's inconsistency with portions of the Comprehensive Plan does not necessarily negate the Board's authority to approve of the rezoning. However, this argument is undercut by Sands Anderson's own written Presentation. In that Presentation, Counsel states that planning commission and board of supervisors should "Always Consider and Address [the] Comprehensive Plan" and that "[t]he first question in reviewing any zoning application should be '*Is the application supported by the County Comprehensive Plan*.'" (Exhibit H, Sands Anderson Presentation.) Counsel's Presentation further states that "[t]he best defense to a challenge of a rezoning decision is that [the board of supervisors'] decision was based upon the Comprehensive Plan and the record before [it]." (*Id.*)

As Counsel's own Presentation makes clear, a rezoning application should be denied if it is unsupported by and inconsistent with the county's comprehensive plan. (*See id.*) 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.

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. The Demurrer must, therefore, be denied. *Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104.

4. The Rezoning Is Inconsistent With the Brunswick County Zoning Ordinance

Par 5's Rezoning Application as facially deficient because it contravened the Brunswick County Zoning Ordinance. Consequently, the Board acted unreasonably when it failed to deny the Application.

The Zoning Ordinance places Agricultural (A-1) lands and Business (B-1) lands in different categories. The Agricultural (A-1) District is described as follows:

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

Brunswick County Code, App'x B - Zoning, Article 4 (emphasis added).

The express provisions of Article 4 state that business development within an Agricultural (A-1) District is to be conducted only through the use of a conditional use permit. *Id.* 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.

In effect, a conditional use permit is a permit that "allows a use in a zoning district that is generally consistent with uses allowed by right, but has impacts that warrant case-by-case

review." (Exhibit G, Fundamentals of Virginia Land Use Law.) Because the use that is conditionally allowed must be compatible with the neighborhood in which it is located, a locality's grant of a conditional use permit in an appropriate situation furthers the Virginia public policy that "permissible land use should be reasonably predictable[.]" *Cole*, 218 Va. at 834, 241 S.E.2d at 770.

Here, the Zoning Ordinance provides that the approved structures and uses of buildings and lands within the Agricultural (A-1) District include single family homes, farms, schools, churches, cemeteries, home occupations, and "[c]ountry general stores, with a conditional use permit."[14] Brunswick County Code, App'x B - Zoning, at Articles 4, 4-1-18. A "country general store" is defined as a "single store, the ground floor area of which is 4,000 square feet or less and which offers for sale, primarily, most of the following articles: bread, milk, cheese, candy, papers and magazines, and general hardware articles." *Id.* at Article 2-1.

A country general store provides needed goods and services to local residents and tourists alike, within a rural setting that is consistent with Agricultural (A-1) lands. The country general store provides local flair and adds color to the rural community in a manner that enhances the locality's uniqueness and thereby both improves residents' quality of life and also promotes tourism. (*See* Comprehensive Plan, at p. 75) (stating that "[f]rom a tourism perspective visitors want to experience the 'authentic' local culture of a destination").

[14] If the Board intends to allow additional uses for real property zoned as Agricultural (A-1), then it must follow the proper procedure to modify the Zoning Ordinance so as to create new or additional types of conditional use permits. The Board cannot bypass the required Ordinance modification procedure by simply ignoring the express language of the Zoning Ordinance and approving the wholesale rezoning of Agricultural property in violation of the requirements of Articles 4 and 4-1-18.

In contrast, a Business (B-1) District is described as:

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

Brunswick County Code, App'x B - Zoning, at Art. 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 appear to fall into this category.

Ebony is not in an incorporated area of Brunswick County. Further, the subject 2.04 acres is currently zoned as Agricultural (A-1) land. Consequently, the express terms of the Zoning Ordinance required Par 5 to apply for a conditional use permit for business development uses. *Id.* at Article 4. With a conditional use permit, Par 5 could operate a "country general store." *Id.* at Article 4, 4-1-18.

Instead of applying for a conditional use permit as required by Article 4, Par 5 applied for a complete rezoning of a 2.04 acre slice of the landowners' 8-plus acres from Agricultural (A-1) to Business (B-1). (*See* Exhibit A, Par 5's Rezoning Application.) This procedure was not authorized by the Zoning Ordinance; therefore, the Board was required to deny Par 5's Rezoning Application .[15] *See* Brunswick County Code, App'x B - Zoning Articles 2-1, 4, 4-1-18.

As established by the Virginia Supreme Court, a structure cannot be erected at a location that is prohibited by a zoning ordinance. *Hurt v. Caldwell*, 222 Va. 91, 97, 279 S.E.2d 138, 142

[15] *See* n. 6, *supra*.

(1981). If the local authorities fail to follow the requisite steps to rezone a property for a use approved by the rezoning classification, then any building permit that is subsequently issued to erect the structure for a use that is not authorized by the original zoning ordinance is void and of no effect. *Id.* 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.

"We must construe the law as it is written. An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute." *Id.* (internal quotation marks omitted); *see Conyers v. Martial Arts World of Richmond, Inc*., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) ("When the language of a statute is unambiguous, we are bound by the plain meaning of that language"). No presumption of correctness applies to a "zoning administrator's action is to approve a use forbidden by the zoning ordinance." *Crestar Bank v. Martin*, 238 Va. 232, 236, 383 S.E.2d 714, 716 (1989). Rather, the administrator's action must be stricken as void. *Id.*

These fundamental principles are fully applicable to the present case. The proposed Dollar General does not qualify as a "country general store" that could permissibly operate under Agricultural (A-1) zoning, with a conditional use permit. *See* Brunswick County Code, App'x B - Zoning, at Articles 2-1, 4, 4-1-18, 9, 9-1-1. The Zoning Ordinance defines a "country general store" as a business that is 4,000 square feet or less and 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. The proposed Dollar General is over twice the permissible size and would sell miscellaneous, generic, low-priced items that do not include fresh produce. (*See* Exhibit A, Par 5's Rezoning Application; Exhibit B, Planning Commission Report; Exhibit F, *Dollar Store Impacts*).

Par 5's proposed use of the subject property is a non-permitted use under the Zoning Ordinance. *See* Brunswick County Code, App'x B - Zoning, 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 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.

This conclusion is underscored by the express language of the Zoning Ordinance. The Zoning Ordinance provides that before a building or structure may be erected within Brunswick County, a zoning permit must be issued. Brunswick County Code, App'x B - Zoning, at Article 1-1-1. The Ordinance further provides that a public employee or official may issue a zoning permit "only when they are in harmony with the provisions of this ordinance. Any such permit, if

issued in conflict with the provisions of this ordinance, shall be null and void." *Id.* at Article 31-1. If the Board intends to allow additional uses of land zoned as Agricultural (A-1), then it must go through the proper procedure to modify the Zoning Ordinance. Such a modification could expand upon or create new types of conditional use permits that protect the integrity of the community. In no event, however, may the Board simply ignore the mandatory language of the existing Zoning Ordinance, as it wrongly did when it approved Par 5's Rezoning Application. *See* Brunswick County Code, App'x B - Zoning, Article 4 ("Uses not consistence [sic] with the existing character of this [Agricultural] district are not permitted"); Article 4-1-18 (stating that uses permitted in an Agricultural (A-1) district include "[c]ountry general stores, with a conditional use permit").

Finally, the Board admits that no formal subdivision of the 8.36-acre tract that contains the 2.04-acre parcel to be rezoned has occurred. (Plea in Bar, at ¶ 3.) However, the land records in the Brunswick County Clerk's Office show that the parent parcel has been divided into parcels of less than ten acres at least 24 times.

The Brunswick County Code, App'x A - Subdivisions ("Subdivision Ordinance") §§ 2-32 and 4-4 require that a subdivision application be made to formally subdivide a parcel whenever said parcel is divided into three or more lots or parcels, either concurrently or cumulatively. Here, no subdivision application has been tendered. Hence, Par 5's Rezoning Application failed to comply with the mandatory terms of the Subdivision Ordinance. Consequently, the Board was required to deny the Rezoning Application. *See* Brunswick County Code, App'x A - Subdivisions § 4-4 ("stating that "[n]o person shall subdivide any tract of land that is located within the county except in conformity with the provisions of this ordinance").

For all of the foregoing reasons, it is evident that the Board acted unreasonably in granting Par 5's Rezoning Application. As a result, the Board is not entitled to the outright dismissal of the Petition. *See Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104.

5. The Rezoning Is Incompatible With Surrounding Land Uses

If a proposed rezoning is incompatible with surrounding land uses, the rezoning application should be denied. Virginia Code § 15.2-2284. A board of supervisors acts unreasonably if it instead grants the rezoning application. *Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104; *Miller & Smith*, 242 Va. at 384, 410 S.E.2d at 650; *Barrick*, 239 Va. at 632-33, 391 S.E.2d at 320.

Similarly, in considering whether a future rezoning of property is likely, the court should consider the "physical characteristics of the subject and of nearby properties[.]" *Helmick II*, 297 Va. at 793, 832 S.E.2d at 9. The likelihood of future rezoning may also depend on "growth patterns, change of use patterns and character of neighborhood[.]" *Id*.

Except for contained road improvements over time to better accommodate traffic increase and safety, Ebony has remained basically unchanged by time, and residents hold to the same agricultural traditions and enjoyment of country living as their predecessors. (Petition, at ¶¶ 3-26.) Because the character and use of the neighborhood has remained essentially unchanged, the Board's decision to abruptly rezone two-plus acres for the purpose of allowing a massive Dollar General store to be erected in the middle of this peaceful country setting is nonsensical. The proposed rezoning is utterly inconsistent with surrounding land use.

Further, one of the Board's primary duties is to enact and enforce zoning regulations that "preserve the existing character of an area by excluding prejudicial uses[.]" *Carper*, 200 Va. at

660, 107 S.E.2d at 395; *see also DeGroff Enterprises*, 214 Va. at 238, 198 S.E.2d at 602. A prejudicial use is one that contravenes the statutory considerations set forth in Virginia Code § 15.2-2283. *Bd. of Sup'rs of Fairfax Cty. v. Williams*, 216 Va. 49, 51, 216 S.E.2d 33, 36 (1975) (interpreting prior statute).

As detailed above, the proposed Dollar General store contravenes several of the statutory considerations set forth in Virginia Code § 15.2-2283 and, therefore, constitutes a prejudicial use. *See id.* The Board acted unreasonably when it approved Par 5's Rezoning Application for the purpose of allowing a prejudicial use of the property. *See DeGroff Enterprises*, 214 Va. at 238, 198 S.E.2d at 602; *Carper*, 200 Va. at 660, 107 S.E.2d at 395. Accordingly, it must be concluded that the Petition states a claim on which relief can be granted and, therefore, the Demurrer must be denied. *See Riverview Farm*, 259 Va. at 428-29, 528 S.E.2d at 104.

In an attempt to avoid this conclusion, the Demurrer relies on the Business (B-1) zoning of the Ebony General Store as justification for the rezoning of the subject property. Petitioners submit that the Ebony General Store is a far different type of operation than the proposed Dollar General store.

In 2001, the Board conditionally rezoned the Ebony General Store location to a Business (B-1) property in order to allow the current store to hold a weekly flea market. This conditional rezoning includes proffer language that allows the current store operation with the ability to host weekly flea markets.[16] In contrast, no conditions whatsoever are attached to the proposed Business (B-1) rezoning of the proposed Dollar General site. The potential uses of the property

[16] Although this store is a restricted Business (B-1) property, Brunswick County's Zoning Map does not show this distinction, and it is the same color (red) as an unrestricted Business (B-1).

subject to Par 5's Rezoning Application are open-ended unless otherwise restricted in a manner that is bound to the land that would survive Par 5's ownership if Par 5 were to sell.

Further, the Ebony General Store is the type of "country general store" that could legitimately operate in an Agricultural (A-1) District with a conditional use permit. Brunswick County Code, App'x B - Zoning, Articles 2-1, 4, 4-1-18. Indeed, it appears that the Board's conditional Business (B-1) zoning of the property is the functional equivalent of an Agricultural (A-1) zoning with a conditional use permit. *See id.* If the Board had followed the correct rezoning procedures set forth in the Zoning Ordinance, it would have rezoned the Ebony General Store location as an Agricultural (A-1) property with a conditional use permit instead of as a conditional or limited Business (B-1). *See id.* at Articles 4, 4-1-18, 9, 9-1-1.

Ironically, although the Demurrer repeatedly alleges that Petitioners improperly reference past incorrect rezoning decisions by the Board, it relies on those very decisions as justification for the Board's grant of Par 5's Rezoning Application. However, the Board's reliance on the Business (B-1) zoning of the Ebony General Store is misplaced, as that property should not have been rezoned as a Business (B-1) property in the first place. *See id.* The Board exceeded its authority by failing to adhere to the express requirements of the Zoning Ordinance and improperly rezoning the Ebony General Store property as a conditional Business (B-1). *See Conyers*, 273 Va. at 104, 639 S.E.2d at 178. This action was ultra vires and should be deemed null and void. *See* Brunswick County Code, App'x B - Zoning, at Article 31-1.

If the Board wishes to allow additional uses of real property currently zoned as Agricultural (A-1), then it must go through the proper and established procedure to modify the Zoning Ordinance. The Board cannot legitimately shortcut or avoid this requirement by bypassing and ignoring the mandatory language of the Zoning Ordinance presently in place, as it

did when it approved Par 5's Rezoning Application. *See id.*, at Article 4 ("Uses not consistence [sic] with the existing character of this [Agricultural] district are not permitted"); Article 4-1-18 (stating that uses permitted in an Agricultural (A-1) district include "[c]ountry general stores, with a conditional use permit").

The Board's reliance on other local rezonings is similarly unavailing. In 2003, Hartley anticipated using a portion of her acreage that lay on the west side of Robinson Ferry Road to support a component of a retail boat business she and her husband developed that was based on Lake Gaston in Warren County, North Carolina. The Brunswick County property was intended location for inside boat storage and maintenance. She was advised to rezone the property to Business (B-1), which she did. The request was approved. The intended use for the boat business never materialized and the property still sits as an open-ended Business (B-1). The only change to the property has been upkeep and preservation of the vintage residence on the property. There has been no business development on the property although the zoning changed. Based on what Hartley has learned through this case, in March 2020, Hartley requested that the Planning Commission clean up the zoning to be consistent with the rest of the tract as so desired, the requirements of the Zoning Ordinance, and the provisions of the Comprehensive Plan, by rezoning the acreage back to Agricultural (A-1). The Planning Commission denied this request but failed to provide a legal justification for this denial. Indeed, no such legal justification seems to exist. *See id.* at Articles 4, 4-1-18, 9, 9-1-1.

In 2006, another Ebony landowner submitted a rezoning application that requested the Board rezone a portion of his acreage from Agricultural (A-1) to Business (B-1) so that he could operate an antique store and garden shop. The Board conditionally approved the Business (B-1)

rezoning with proffer language.[17] As was the case with the Ebony General Store, the Board's conditional grant of Business (B-1) zoning was not authorized by the Zoning Ordinance. The proper procedure would have been for the Board to continue to zone the property as Agricultural (A-1) but to grant a conditional use permit that would have allowed the landowner to operate a small antique and garden shop akin to a "country general store." *Id.* at Articles 2-1, 4, 4-1-18.

In any event, the question as to whether the zoning of existing local businesses supports the Board's decision to rezone the subject 2.04 acres from Agricultural (A-1) to Business (B-1) involves questions of material fact that cannot be definitively weighed and resolved by the Court upon the Board's Demurrer. *See Concerned Taxpayers*, 249 Va. at 327-28, 455 S.E.2d at 716. Instead, the case must be allowed to move forward so that both parties may obtain and present evidence in support of their respective positions to the Court.[18] *See id.*

II. THE BOARD HAS FAILED TO SHOW THAT ITS PLEA IN BAR SHOULD BE SUSTAINED

"A plea in bar is a defensive pleading that reduces the litigation to a single issue of fact which if proven creates a bar to the suit and the moving party carries the burden of proof on that issue." *Weichert Co. of Virginia v. First Commercial Bank*, 246 Va. 108, 109 at n. *, 431 S.E.2d 308, 309 at n. * (1993). For a plea in bar to be granted and a petition dismissed, the defendant

[17] Although this store is a restricted Business (B-1) property, Brunswick County's Zoning Map does not show this distinction, and it is the same color (red) as an unrestricted Business (B-1).

[18] As explained in the body of this Response, in March 2020, Hartley submitted an application to the local Planning Commission to request that a portion of her adjacent tract, which was initially inappropriately rezoned from Agricultural (A-1) to Business (B-1), be correctly rezoned as Agricultural (A-1) to be consistent with the rest of the tract. In the event that this application is denied, Hartley intends to exhaust her administrative remedies and, if necessary, file a separate petition against the Board. If that should occur, given the Board's history of noncompliant zoning decisions, Hartley's counsel will request that Hartley's action be consolidated with the present case.

must establish "a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. *Tomlin*, 251 Va. at 480, 468 S.E.2d at 884.

In the present case, the Plea in Bar admits that Petitioners have the right to challenge the Board's decision on Par 5's Rezoning Application by filing the instant lawsuit. (Plea in Bar, at ¶ 1.) Hence, by Counsel's own admission, the discrete issues raised in the Plea in Bar are insufficient to create a single issue of fact which, if proven, would create a bar to Petitioners' right of recovery. Consequently, the Plea in Bar is not well taken and must be denied. *See Weichert Co.*, 246 Va. at 109 at n. *, 431 S.E.2d at 309 at n. *; *Tomlin*, 251 Va. at 480, 468 S.E.2d at 884.

Moreover, the discrete issues concerning the Board's past incorrect rezoning practices, its violation of the Subdivision Act, and its failure to adhere to the Zoning Ordinance, are not stand-alone causes of action, as the Plea in Bar incorrectly suggests. Rather, those matters bear on the unreasonableness of the Board's decision to grant Par 5's Rezoning Application. Because none of the issues provides a complete defense or bar to Petitioners' right of recovery, the Plea in Bar must be denied. *See Weichert Co.*, 246 Va. at 109 at n. *, 431 S.E.2d at 309 at n. *; *Tomlin*, 251 Va. at 480, 468 S.E.2d at 884.

III. IF THE COURT SHOULD FIND THAT THE PETITION IS DEFICIENTLY PLEADED, PETITIONERS SHOULD BE GRANTED LEAVE TO AMEND BY WAY OF THE BOARD'S REQUEST FOR A BILL OF PARTICULARS

In cases where a complaint or petition is inadequately drafted but contains sufficient allegations "so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer; if a defendant desires more definite information, or a more specific statement of the grounds of the claim, the defendant should request the court to order the plaintiff

to file a bill of particulars." *CaterCorp, Inc. v. Catering Concepts, Inc*., 246 Va. 22, 22, 431 S.E.2d 277, 279 (1993)."

Based on the language of the Demurrer presented here, it is evident that the Board and its Counsel are fully aware that the Petition challenges the Board's decision to grant Par 5's Rezoning Application. Thus, in the event that the Court should find that the Petition is inadequately pleaded, the Demurrer should still be denied and Petitioners granted leave to amend by way of the granting of the request for a Bill of Particulars. *See id.*

CONCLUSION

For the foregoing reasons, the Demurrer or, in the Alternative, Plea in Bar should be denied. In the event that the Court should find that the Petition is inadequately pleaded, the request for a Bill of Particulars should be granted so as to allow Petitioners an opportunity to amend their Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of May, 2020, a true and correct copy of the foregoing Petitioners' Response in Opposition to Respondent's Demurrer or, in the Alternative, Plea in Bar, was served via email and United States mail, first-class postage prepaid, in an enveloped properly addressed to the following:

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