VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF BRUNSWICK

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

PETITIONERS' RESPONSE IN OPPOSITION

TO RESPONDENT'S AMENDED DEMURRER

COME NOW Petitioners Anne Edwards Hartley and the Prospect Cemetery Association, by counsel, and hereby submit their Response in Opposition to the Amended Demurrer filed by Respondent, Board of Supervisors of Brunswick County, Virginia (the "Board") on July 20, 2020.

For purposes of economy, Petitioners incorporate herein by reference the entirety of their initial Response in Opposition to the Board's Demurrer or, in the Alternative, Plea in Bar (the "Response"), along with all Exhibits thereto, that were previously filed with the Court.

INTRODUCTION

Having forced through the approval of Par 5 Development Group, LLC's ("Par 5") Rezoning Application in Case #19-032 on an expedited basis, the Board now seeks to short-circuit judicial review concerning the legitimacy of its action. The Board effected a wholesale change in the zoning of an undesignated portion of the landowner's 8.36 acre property from Agricultural (A-1) to Business (B-1) and did so in a manner completely independent of and not contingent upon

the proposed usage of the yet to be defined 2.04 acre subdivided parcel for the Dollar General Box Store that is the purported basis of the application by Par 5. This action was in violation of Brunswick County's Comprehensive Plan, Zoning Ordinances, Subdivision Ordinances and was taken with complete disregard for existing traffic infrastructure problems, the historic and scenic significance of the designated Ebony location, and the irrevocable harmful side effects to multiple generation of neighbors and families including Plaintiffs, as well as many other statutory considerations.

The Court should not condone the Board's attempt to bypass the procedural safeguards that have been installed by law to ensure that localities make fully informed and well-reasoned zoning decisions. *See Town of Vinton v. Falcun Corp.*, 226 Va. 62, 67, 306 S.E.2d 867, 870 (1983) (stating that zoning ordinance must be adopted "in compliance with all the procedural safeguards built into the enabling statutes"). These procedural safeguards require that this matter proceed forward through litigation, so that both parties will have a full and fair opportunity to develop their claims and defenses and to present the same to the Court. *See Bd. of Supervisors of Fairfax Cty. v. Snell Const. Corp.*, 214 Va. 655, 658, 202 S.E.2d 889, 892 (1974) ("The Virginia landowner always confronts the possibility that permissible land use may be changed by a comprehensive zoning ordinance reducing profit prospects; yet, the Virginia statutes assure him that such a change will not be made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning").

Petitioners do not oppose the Board's submission of the current legislative record pertaining to this matter. Even with the inclusion of those documents, however, the record is far from complete. In any event, the Board is not entitled to the outright dismissal of Petitioners'

Petition. Rather, it is Petitioners who are more likely entitled to the entry of Summary Judgment in their favor.

THE LAW DOES NOT SUPPORT THE GRANTING OF THE BOARD'S AMENDED DEMURRER

A. Legal Standard

Once again, the Board has employed an incorrect legal standard for the Court's consideration of its Amended Demurrer. Contrary to the Board's allegations, the Court cannot legitimately rush to judgment on whether the Board's grant of Par 5's Rezoning Application was arbitrary and capricious or fairly debatable. This question simply cannot be properly resolved upon the Board's demurrer.

Indeed, if anything, the governing legal standard requires the entry of immediate Summary Judgment in the Petitioners' favor as the Virginia Supreme Court has held that when. a Board rezones a portion of a parcel of property "**without complying with the eligibility requirement set out in its own ordinance, its action was arbitrary and capricious, and not fairly debatable, thereby rendering the rezoning void and of no effect.**" *Renkey v. Cty. Bd. of Arlington Cty.*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006) (emphasis added).

In any event, for all civil actions, including rezoning decisions, the legal standard for a demurrer remains the same: "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 of Brunswick County v. County of Brunswick*, 249 Va. 320, 327-28, 455 S.E.2d 712, 716 (1995). In effect, "[a] demurrer tests the legal sufficiency of facts alleged in

pleadings, not the strength of proof." *Glazebrook v. Bd. of Sup'rs of Spotsylvania County*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003).

To withstand a demurrer, the petitioners in a zoning case must "allege facts which, if true, would be probative evidence" that the Board's decision was unreasonable. *Helmick v. Town of Warrenton*, 254 Va. 225, 230, 492 S.E.2d 113, 115 (1997). "If such allegations were made, the demurrer cannot be sustained[.]" *Id.*

As detailed in Petitioners' initial Response, Petitioners have alleged sufficient facts which, if true, would provide probative evidence that the Board's grant of Par 5's Rezoning Application was unreasonable. Consequently, the Board's Amended Demurrer must be denied. *See id.* The relative strength or weakness of Petitioners' evidence cannot be properly weighed at the demurrer stage. *Glazebrook*, 266 Va. at 554, 587 S.E.2d at 591.

The cases cited by the Board do not show otherwise. For example, the primary case relied on by the Board, *Gregory v. Bd. of Sup'rs of Chesterfield County*, 257 Va. 530, 535, 514 S.E.2d 350, 352 (1999), involved a court's decision rendered **after a bench trial** to uphold a board's rezoning decision. Thus, in that case, both the petitioner and the board were afforded full-blown opportunities to compile and introduce evidence to the trial court of the reasonableness or unreasonableness of the board's rezoning decision. This process culminated in a full bench trial of the matter. *Id.* at 538, 514 S.E.2d at 354-55.

As a matter of fundamental fairness, Petitioners here should be afforded a similar opportunity to compile and "present[] probative evidence that the legislative act was unreasonable." *Id.* at 537, 514 S.E.2d at 354. By definition, this process takes time and simply cannot be achieved at the demurrer level.

B. Petitioners Have Alleged Facts Demonstrating that the Board's Rezoning Decision Was Unreasonable

For all the reasons described in Petitioners' initial Response, Petitioners have alleged sufficient facts to meet their burden of demonstrating that the Board's decision to approve Par 5's Rezoning Application was unreasonable. This is all that is required to enable Petitioners to surmount the Board's Amended Demurrer. *See Helmick*, 254 Va. at 230, 492 S.E.2d at 115.

Ironically, Petitioners' arguments in this regard are bolstered by the recent decision of *Byrne v. City of Alexandria*, 842 S.E.2d 409 (Va. 2020) -- a case on which the Board wrongly relies. *Byrne* involved a property owner in a historic district who submitted to the local board of architectural review the architectural plans for the reconstruction of a fence enclosing a portion of his property. These plans included a "wicket and spear" designed fence and an eight-foot gate. *Id.* at 410.

The board found that Byrne's fence design "was architecturally and historically appropriate but that an eight-foot wide double gate would be 'completely out of scale' for pedestrian gates in the district." *Id.* at 411. The board thus approved of the use of the materials and design but imposed a condition that the width of the gate not exceed six feet. *Id.* The board's decision was ultimately upheld by the city council, the circuit court, and the supreme court.

Here, the overwhelming evidence submitted by Petitioners in conjunction with their initial Response shows that the mammoth size and operational scope of the Dollar General Box Store proposed by Par 5's Rezoning Application would be "completely out of scale" to the small country stores, rural residences, and historic sites, such as the adjacent Prospect United Methodist Church and Cemetery, in the Ebony community. *Id.* This alone tends to show that the Board's decision

to allow the proposed rezoning was unreasonable, arbitrary, and capricious. *See Helmick*, 254 Va. at 230, 492 S.E.2d at 115.

C. The Question as to Whether the Board Acted Arbitrarily and Capriciously, or in a Fairly Debatable Manner, Cannot Be Properly Resolved Upon a Demurrer

1. *Byrne* Does Not Support the Board's Position

The Board wrongly relies on *Byrne* to support the proposition that the Court may definitively decide upon a demurrer that the Board's grant of Par 5's Rezoning Application was not arbitrary and capricious but rather was fairly debatable. *Byrne* does not, however, support such a claim.

After Byrne filed his lawsuit in the circuit court objecting to the city council's affirmance of the board of architectural review's decision to prohibit him from building a fence with an eight-foot gate, the city filed a demurrer and a motion craving oyer of the legislative record that had been before the city council. *Id.* Byrne objected to the motion craving oyer and the introduction of the legislative record. *Id.*

The supreme court determined that the motion craving oyer was proper. *Id.* at 413. This record consisted of the following documents:

> the minutes of the initial meeting of the [board of architectural review], the recommendations of the City's staff, the minutes of the second meeting of the [board], the transcript of the public hearing held by the [board], Byrne's appeal to the City Council, the City staff's report to the City Council, the transcript of the public hearing held by the City Council, and the minutes of the City Council's final meeting.

Id.

The content of the legislative record added to the pleadings showed that "the City Council, when deciding Byrne's appeal, had all the essential facts before it, considered all opinions and arguments presented by interested parties, and made its decision within its lawful authority." *Id.* Under the circumstances, it was clear that the city council's decision was not arbitrary, capricious, contrary to law, or an abuse of discretion and, therefore, the circuit court did not err in sustaining the demurrer. *Id.*

The straightforward procedural background and the narrow legal issue at stake in *Byrne* are completely unlike the convoluted factual background and complex legal issues involved in the present case. Thus, *Byrne* provides no support for the granting of the Board's Amended Demurrer.

To begin with, *Byrne* was primarily concerned with the propriety of the motion craving oyer. Here, in contrast, Petitioners have not raised any such objection.

Further, *Byrne* involved a simple dispute over the design of a single property owner's fence and gate. The present case, in contrast, involves complicated factual and legal issues raised by a commercial rezoning application. The grant of this commercial rezoning application would alter the entire landscape of Ebony's rural, scenic, and historic community and could forever destroy the very attributes that make Ebony worth preserving. In addition, for the reasons detailed in Petitioners' initial Response and in their Motion for Summary Judgment for Failure to Perform Traffic Study and Impact Analysis, the proposed rezoning would present significant safety issues, based on the existing traffic congestion, serious traffic accidents and roadway design problems. This complication was not a factor in *Byrne.* Also, unlike the situation in *Byrne*, the Board's decision here has wide-ranging adverse effects on all nearby property owners and local residents.

Importantly, the *Byrne* court's decision was also grounded on the fact that the legislative record in question showed that the city council had "all the essential facts" about the matter at the

time it rendered its decision on the petitioner's application. *Id.* The same cannot be said of the legislative record submitted by the Board here.

In this case, the rezoning process was fundamentally flawed from the beginning. In violation of Virginia Code § 15.2-2232(A), the Planning Commission never fulfilled its statutory obligation to determine whether the Dollar General store proposed by Par 5 was substantially in accord with the Comprehensive Plan before it recommended that the Board approve the Rezoning Application. Instead, the Planning Commission at the Nov 12, 2019 meeting, after hearing many opposition speakers including the home district Supervisor, disrupted the initial vote to deny the Par 5's Rezoning Application, tabled the decision, and then simply referred the Application to the Board at the Dec 2019 with an 8 – 2 vote without discussion of, public comment on or a determination being made on whether the Par 5 proposal complied with Virginia Code Section 15.2-2232(A). (Petition, at ¶ 16.)

Moreover, the legislative record here is incomplete. This is shown by Petitioners' allegations that Board, in granting the Rezoning Application (1) violated the Brunswick County Zoning Ordinance; (2) did not comply with the Brunswick County Subdivision Ordinance; (3) failed to consider the required factors set forth in Virginia Code §§ 15.2-2283 and -2284; and (4) ignored VDOT Guidelines and wrongly failed to perform a required traffic study and impact analysis. These procedural deficits are not fully fleshed out in the legislative record because they were not and could not have been fully developed and argued before the Board prior to the Board's Rezoning decision. Accordingly, *Bryne* does not provide a basis for the granting of the Board's Amended Demurrer in this case.

2. The Board's Alleged Failures to Comply With the Requirements of the Brunswick County Zoning Ordinance, the Brunswick County Subdivision Ordinance, Virginia Code §§ 15.2-2283 and -2284, and VDOT Guidelines and Requirements Necessitates the Denial of Its Amended Demurrer, as These Ordinances and Statutes Take Precedence Over the Comprehensive Plan

Next, the Board incorrectly asserts that the Comprehensive Plan, standing alone, definitively shows that the Board's Rezoning decision was fairly debatable and was not arbitrary and capricious. However, the snippets from the Comprehensive Plan that the Board cites cannot properly be read in isolation. The Comprehensive Plan must be viewed as a whole in order to determine whether a particular feature is substantially in accord with it. Virginia Code § 15.2–2232; *Bd. of Supervisors of Loudoun Cty. v. Town of Purcellville*, 276 Va. 419, 440, 666 S.E.2d 512, 523 (2008).

Moreover, the present dispute cannot be appropriately resolved solely by reference to the Comprehensive Plan. As detailed in Petitioners' original Response as well as in their Motions for Summary Judgment, Petitioners have also alleged that the Board, in approving the Rezoning Application (1) violated the Brunswick County Zoning Ordinance; (2) violated the Brunswick County Subdivision Ordinance; (3) failed to consider the required factors set forth in Virginia Code §§ 15.2-2283 and -2284; and (4) ignored VDOT Guidelines and failed to conduct a required traffic study and impact analysis.

As a matter of law, the above statutes and ordinances take precedence over the Comprehensive Plan. As the Virginia Supreme Court has noted, "a comprehensive or master plan

does not have the status of a zoning ordinance. It is advisory only and serves as a guide to a zoning body." *Bd. of Sup'rs of Fairfax Cty. v. Allman*, 215 Va. 434, 441, 211 S.E.2d 48, 52, *cert. denied*, 423 U.S. 940, 96 S. Ct. 300, 46 L. Ed. 2d 272 (1975). A zoning ordinance, in contrast, is fully binding on a locality. *Renkey*., 272 Va. at 376, 634 S.E.2d at 356.

If a Board rezones a portion of a parcel of property "**without complying with the eligibility requirement set out in its own ordinance, its action was arbitrary and capricious, and not fairly debatable, thereby rendering the rezoning void and of no effect**." *Id.* (emphasis added). This is true regardless of whether the rezoning decision is arguably consistent with the locality's comprehensive plan. *Allman*, 215 Va. at 441, 211 S.E.2d at 52,

These principles are fully applicable to the present case. As detailed in Petitioners' initial Response and their corollary Motion for Summary Judgment for Procedural Irregularities and Failure to Follow Zoning Ordinances and Virginia Statutes Related to Comprehensive Plan Adoption and Enforcement, the Board utterly failed to comply with the eligibility requirements of the Brunswick County Zoning Ordinance when it approved Par 5's Rezoning Application. The Zoning Ordinance expressly provides that business development within an Agricultural (A-1) District is to be conducted only through the use of a conditional use permit. Brunswick County Code, App'x B - Zoning Articles 2-1, 4. However, Par 5 did not apply for nor did the Board grant a conditional use permit here.

Moreover, the Zoning Ordinance prohibits the issuance of a conditional use permit for a proposed business over 4,000 square feet in size. *Id.* at Articles 2-1, 4, 4-1-18. The Dollar General Box Store proposed by Par 5's Rezoning Application is more than double this existing maximum size limitation. Thus, the Board acted in violation of its own Zoning Ordinance when it approved Par 5's Rezoning Application. As established by *Renkey*, the Board's action was by definition

"arbitrary and capricious, and not fairly debatable," which thereby rendered "the rezoning void and of no effect." *Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *see also Hurt v. Caldwell*, 222 Va. 91, 97-98, 279 S.E.2d 138, 142 (1981) (ruling that building permit issued in violation of local ordinance was void and of no effect).

For essentially the same reasons, the Board's approval of Par 5's Rezoning Application was arbitrary and capricious, and not fairly debatable, because it was made in violation of the Brunswick County Subdivision Ordinance. Like the Zoning Ordinance, this Subdivision Ordinance takes precedence over the Comprehensive Plan. *See Allman*, 215 Va. at 441, 211 S.E.2d at 52.

As detailed in Petitioners' Motion for Summary Judgment for Failure to Follow Brunswick County Subdivision Ordinance, 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 despite the fact that the parcel has been cumulatively divided into three or more lots or parcels. Hence, Par 5's Rezoning Application failed to comply with the mandatory terms of the Subdivision Ordinance, and 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"). The Board's grant of the Rezoning Application is by definition arbitrary and capricious, and not fairly debatable. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Hurt*, 222 Va. at 97-98, 279 S.E.2d at 142.

Further, for all the reasons detailed in Petitioners' initial Response, the Board wrongly failed to consider the required factors set forth in Virginia Code §§ 15.2-2283 and -2284 prior to

approving Par 5's Rezoning Application. The provisions of the Virginia Code take precedence over the Comprehensive Plan; therefore, the Board's grant of the Rezoning Application was arbitrary and capricious, and not fairly debatable. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Hurt*, 222 Va. at 97-98, 279 S.E.2d at 142; *Allman*, 215 Va. at 441, 211 S.E.2d at 52.

In addition, for all the reasons detailed in Petitioners' initial Response and their Motion for Summary Judgment for Failure to Perform Traffic Study and Impact Analysis, the Board was required to comply with VDOT Guidelines and to perform a traffic study and impact analysis prior to making any decision on Par 5's Rezoning Application. The Board utterly failed to comply with these requirements. Hence, its grant of the Rezoning Application was arbitrary and capricious, and not fairly debatable. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Hurt*, 222 Va. at 97-98, 279 S.E.2d at 142; *Allman*, 215 Va. at 441, 211 S.E.2d at 52.

Because the provisions of the Virginia Code, the Brunswick County Zoning Ordinance, the Brunswick County Subdivision Ordinance, and VDOT Guidelines and requirements necessarily take precedence over the Comprehensive Plan, the Board's argument that its Rezoning decision was consistent with the Comprehensive Plan is unavailing and should be disregarded. *See Renkey*, 272 Va. at 376, 634 S.E.2d at 356; *Hurt*, 222 Va. at 97-98, 279 S.E.2d at 142; *Allman*, 215 Va. at 441, 211 S.E.2d at 52. Thus, it must be concluded that Petitioners have stated viable causes of action against the Board. Consequently, the Amended Demurrer must be denied. *See Glazebrook*, 266 Va. at 554, 587 S.E.2d at 591; *Helmick*, 254 Va. at 230, 492 S.E.2d at 115; *Concerned Taxpayers*, 249 Va. at 327-28, 455 S.E.2d at 716.

3. The Comprehensive Plan and Legislative Record Do Not Support the Grant of the Board's Amended Demurrer

Even if the Comprehensive Plan is taken into consideration, the Board still is not entitled to the grant of its Amended Demurrer. Although the Comprehensive Plan provides that Brunswick County generally encourages new business, the Plan does not provide for the erection of large commercial or retail buildings in any random or haphazard location. Moreover, the Comprehensive Plan shows that Ebony is inappropriate for commercialization due to its insufficient infrastructure and significant roadway congestion and safety issues, as well as the desire to preserve Ebony's quaint, attractive, and rural authenticity.

In further contravention to the Board's suggestion, Ebony is not located in a commercial corridor. (*See* Comprehensive Plan, at pp. 90, 91.) Instead, the Comprehensive Plan depicts Ebony as an Agricultural (A-1) area that is "expected to remain in agricultural and low-density rural residential through the year 2037. (*Id.*) Indeed, when version of the Comprehensive Plan now in effect was created by the professional consultant hired by the Brunswick County, that consultant working with input from the county and focus groups intentionally removed Ebony from any strategic commercialization designations (e.g. Community Business or Business Corridor). This change was consistent with the fact that Ebony's existing infrastructure, landscape, traffic patterns, and local land uses render the community fit for only rural residential and agricultural designations. Thus, the placement of a massive Dollar General Box Store in the heart of Ebony's preserved historic area, a purely Agricultural (A-1) section of Brunswick County, is inconsistent with the clear terms of the Comprehensive Plan. The Board points to nothing in the Comprehensive Plan that shows otherwise nor has any attempt been made to modify or amend the Comprehensive Plan

as required to allow a Business (B-1) zoning of this nature in a location that the Comprehensive Plan deems to preserve as rural and agricultural.

Finally, the Board's reliance on certain documents in the legislative record is unavailing. If anything, those documents show that the Planning Commission and the Board disregarded the requirements of the law in order force through a premature acceptance of Par 5's Rezoning Application and to approve the construction of a massive Dollar General Box Store in a wholly unsuitable location. The documents certainly do not support the grant of the Board's Amended Demurrer which seeks to dismiss Petitioner's Petition outright.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Petitioners' initial Response and their various Motions for Summary Judgment, the Board's Amended Demurrer should be denied. If the Court should conclude that the Petition is inadequately pleaded, the Board's request for a Bill of Particulars should be granted so as to allow Petitioners an opportunity to amend their Petition.

July 29, 2020

Respectfully submitted,

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

Counsel for Petitioners

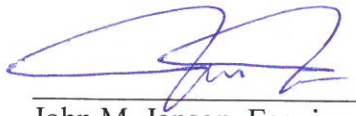
CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2020, a true and correct copy of the foregoing Petitioners' Response in Opposition to Respondent's Amended Demurrer was served via email and United States mail, first-class postage prepaid, in an enveloped properly addressed to the following:

Andrew McRoberts, Esq.
Christopher Mackenzie
Sean M. Hutson
SANDS ANDERSON PC
1111 East Main Street, 23rd Floor
Post Office Box 1998
Richmond, VA 23218-1998
amcroberts@sandsanderson.com
cmackenzie@sandsanderson.com
shutson@sandsanderson.com

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

Counsel for Respondent



John M. Janson, Esquire
Counsel for Petitioners