VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

JOSEPH W. LEVINE, et al, Plaintiffs, v. TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGINIA, et al, Defendants.	)	Case No. 16-46

OBJECTION TO PLAINTIFFS' POST-TRIAL MEMORANDUM AND INTRODUCTION OF ISSUES NEITHER PLED NOR IDENTIFIED DURING DISCOVERY

Defendant Town Council of the Town of Abingdon, Virginia, submits the following objection to plaintiffs' post-trial memorandum.

1. In the plaintiffs' post-trial memorandum, the first issue they raise is a claim that the Town Council failed to state a public purpose for the zoning ordinance amendment. (Pls.' Post-Trial Mem. 1-2.) They cite Va. Code Ann. § 15.2-2286(A)(7) in support of the proposition that any resolution or motion of a governing body proposing rezoning must "state the above public purposes therefor." *Id.*

2. The plaintiffs first raised this issue during the trial and both defendants objected to the interjection of an issue not previously pled or mentioned in discovery.

3. In the amended petition the plaintiffs set forth the basis of their claims. In discovery they were asked specifically about those claims. This claim was not mentioned anywhere within the pleadings or discovery responses.

4. Under Virginia law, plaintiffs must plead those claims they intend to assert at trial. Trial by ambush is specifically disallowed, and the Virginia Supreme Court has long held that a plaintiff may only pursue those claims that are set forth in the pleadings. *Ted Lansing Supply Co. v. Royal Aluminum & Const. Corp.*, 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981) ("It is firmly established that no court can base its judgment or decree upon facts not alleged or upon a right which has not been pleaded and claimed."); *Bank of Giles County v. Mason*, 199 Va. 176, 180, 98 S.E.2d 905, 907 (1957) ("Pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading."); *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935) ("A decree cannot be entered in the absence of pleadings upon which to found the same, and if so entered it is void.... Every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense.... The issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence.") *Jenkins v. Bay House Associates, L.P.*, 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003) (holding that the chancellor was precluded from imposing a remedy based on facts not alleged).

5. The plaintiffs actions are doubly improper because the plaintiffs neither mentioned this claim in their discovery responses nor advised counsel prior to

trial that the plaintiffs intended to assert such a claim. They obviously wanted to spring the claim at trial to prevent the defendants from being prepared to address it. They also wanted to prevent the Town Council from amending its minutes, *nunc pro tunc,* to reflect the statements made during the Council hearings that reflect the basis of the Council's decision.

6. The importance of providing notice is apparent and indispensable. The notion of due process requires that parties be given notice and an opportunity to defend or rebut a claim by both presenting evidence and being prepared to respond to the claim at trial. Virginia law rejects the concept of trial by ambush. *See Potts*, 165 Va. at 207, 181 S.E. at 525 ("Every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense...."). Here the defendants were denied those opportunities by counsel's deliberate and preconceived decision to raise the issue for the first time during trial.

7. Assuming *arguendo* that the plaintiffs had properly pleaded the claim they are now trying to include within their case, it would not have succeeded. As a threshold matter, the statutory language, when read in context, reveals that the plaintiff's argument is completely without foundation. Va. Code Ann. § 15.2-2286(A)(7) states

> Any [] amendment [of the regulations, district boundaries, or classifications of property] may be initiated (i) by resolution of the governing body; (ii) by motion of the local planning commission; or (iii) by petition of the owner, contract purchaser with the owner's written consent, or the owner's agent therefor, of the property which is the subject of the proposed zoning map amendment, addressed to the governing body or the local planning commission, who shall

> forward such petition to the governing body; however, the ordinance may provide for the consideration of proposed amendments only at specified intervals of time, and may further provide that substantially the same petition will not be reconsidered within a specific period, not exceeding one year. Any such resolution or motion by such governing body or commission proposing the rezoning shall state the above public purposes therefor.

The rezoning in this matter was initiated by the application of the owner, not by a resolution or motion of the governing body. Thus, the final sentence of the first paragraph, which refers to "[a]ny such resolution or motion…proposing the rezoning," is inapplicable here because there was no "such resolution or motion." Rather, the motions at issue here, as reflected in the minutes, were motions *to approve* the rezoning application of the owner, not motions proposing rezoning being offered by the governing body. (Trial Ex. 17, 22.)

8. The plaintiffs cite two cases in support of their claim. However, both are distinguishable and inapposite, as the cursory analysis in the plaintiffs' trial memorandum would suggest.

9. First, in *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991), the Virginia Supreme Court held that the trial court erred in concluding that the Board's resolution initiating zoning ordinance amendments failed to state a valid public purpose. The trial court held erroneously that an initiating resolution of a zoning ordinance amendment was insufficient where it recited that "the public necessity, the convenience, general welfare and good zoning practice" required the amendment. *Id.* at 441, 410 S.E.2d at 677. While disagreeing with the trial court, the

Supreme Court of Virginia wrote that the Board had found that all four fundamental purposes set out in the statute required its action. *Id.* at 443, 410 S.E.2d at 679. Thus, the issue of failure to identify the public purpose for an amendment in the text of the initiating motion was not before the Court in the *Southern Iron Works* case. Critically, the resolution at issue was a resolution initiating amendments to the zoning ordinance, not a resolution for approval of an application for rezoning.

Likewise, in *Ace Temporaries, Inc. v. City Council of City of Alexandria*, 274 Va. 461, 649 S.E.2d 688 (2007), the Virginia Supreme Court held that the statutory procedural requirements had not been met where the City Council introduced and had the first reading of an ordinance without an initiating motion. The Court noted that "[t]he Code permits any such amendment to be initiated 'by resolution of the governing body' or 'by motion of the local planning commission.'" *Id.* at 466, 649 S.E.2d at 690. The Court's analysis and holding focused entirely on the absence of any resolution or motion initiating the amendment, not on the resolution or motion's failure to state a public policy purpose. *Id.* Like *Southern Iron Works*, the rezoning in *Ace Temporaries* was not initiated by petition or application of the owner.

10. The plaintiffs rely solely upon the Council meeting minutes of the October 7 and December 7, 2015, meetings. The plaintiffs claim that because the text of the oral motion to approve the application for rezoning does not include a stated public policy reason for the motion, the Town's action is invalid. However, the plaintiffs have deceptively cherry-picked portions of the statute and dicta unrelated to the Virginia

Supreme Court's holdings which do not stand for the propositions for which they are cited in order to craft an argument that has no support in Virginia law.

11. As the Supreme Court wrote, this Court is not limited in determining whether the motion states appropriate public purposes for the amendments. As set forth in the Town Council's post-trial memorandum discussing *County of Fairfax v. Southern Iron Works, Inc.* 242 Va. 435, 410 S.E.2d 674 (1991), the Virginia Supreme Court held that the Code section allowing amendment of a zoning ordinance does not dictate that the ordinance amendment take a specific form in order to be validly enacted.

12. Similarly, the Virginia Supreme Court in *Southern Iron Works* recognized that drafts of proposed changes in local ordinances may incorporate by reference other documents made part of the public record (*Id.* at 446, 410 S.E.2d at 680), just as the declarations of the Town Council are part of the public record and a part of the Town Council's action in this case. Plaintiff's counsel introduced and called attention to specific statements of the town manager and council members who explained the basis of their support. These statements reflect the reasons for the introduction and passage of the motion approving the rezoning application.

13. Here, recordings of the Town Council's meetings are part of the record. The Court may easily refer to the entire record in determining the purposes of the application and motion approving it. It is clear that from the record that each of the purposes set forth in Va. Code Ann. § 15.2-2286(A)(7) support the conclusion that the

motion was made for public necessity, convenience, general welfare, and good zoning practices.

14. To rule otherwise, or to find otherwise based upon the record, would be to ignore the very purposes of the motion and the stated reasons in the record. Accordingly, even if the Court were allow this late claim that was neither pled nor identified during discovery, nor provided to counsel prior to trial, and therefore grossly and blatantly unfair and in violation of the very spirit and letter of the Virginia Rules of Civil Procedure, such issue is without merit in any event.

15. The plaintiffs also take issue with the traffic impact study in their brief as well as the alleged absence of economic impact analysis study.

16. With respect to the traffic impact study, the depth and period of VDOT's involvement and VDOT's ultimate approval is well established in the record. Even though not pled, this issue is without merit.

17. Similarly, plaintiffs question the Town's statement regarding the economic benefits of the proposed development, which they inaccurately describe as a "bald assertion," and argue that the Court should not consider the economic benefits because of limited testimony on this issue.

18. What the plaintiffs urge the Court to ignore is the substantial volume of evidence within the record from the Planning Director and staff, the Planning Commission, the Town Council itself, and as the record further reflects, the Town's employment of Davenport & Company to perform economic impact analysis. This

evidence and the testimony of Mr. Kelly support the Town's position that the proposed development will have a substantial, positive economic impact. It is the plaintiffs' burden to show that the Town's position and testimony is without support, not the other way around. The plaintiffs presented no evidence. Accordingly, this issue should be disregarded as well.

WHEREFORE, the Town Council of the Town of Abingdon objects to the plaintiff's attempt to raise new issues for the first time at trial and during the post-trial briefing, and suggests that these issues may not properly be considered by the Court.

TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGINIA

By Counsel

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I hereby certify that a true copy of the foregoing has been mailed to:

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and

David J. Hutton, Esq.
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Abingdon, VA 24210

this 29th day of November, 2016.

W. Bradford Stallard

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

JOSEPH W. LEVINE, et al., Plaintiffs, v. TOWN COUNCIL OF THE TOWN OF ABINGDON, VA, et al. Defendants,	Case No. 16-46

PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY BRIEF

Plaintiffs move to file the attached Reply Brief in response to Defendant Town Council of the Town of Abingdon's Trial Memorandum brief and Defendant Marathon's Final Argument brief. In support thereof, Defendants state:

1. At trial on November 10, 2016, following the close of Plaintiffs' and Defendants' evidence, this Court invited the parties to submit any post-trial briefs by November 22, 2016.
2. All parties submitted post-trial briefs on November 22, 2016.
3. Defendants' briefs addressed several issues not previously briefed.
4. Plaintiffs wish to file the attached Reply Brief to respond to the issues addressed in Defendants' briefs.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing document has been served upon counsel, by mailing a copy of same by United States Mail, postage prepaid, addressed to the offices of said counsel (with advance courtesy copy by email), this the 1st day of December 2016, as follows:

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Rebecca J. Ketchie

VIRGINIA:
IN THE CIRCUIT COURT OF WASHINGTON COUNTY

JOSEPH W. LEVINE, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 16-46
	)	
TOWN COUNCIL OF THE TOWN OF ABINGDON, VA, et al.	)	
	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY BRIEF TO DEFENDANTS' POST-TRIAL BRIEFS

Plaintiffs write to reply briefly to issues raised in defendants' post-trial briefs. As demonstrated below, those briefs make clear that plaintiffs should prevail and be granted the relief they seek.

1. **Town Council's primary argument is that plaintiffs lack standing, even though Town Council in its brief points to the evidence that refutes its argument.**

Town Council's main argument for why it wins has nothing to do with the merits, but rather is based on a technicality—that each plaintiff did not submit sufficient evidence of his or her standing. Tellingly, defendant Marathon failed to even mention the issue in its brief.

Town Council's argument is easily disposed. To avoid a resolution of the case on this issue, all plaintiffs had to do was demonstrate that at least one of them had standing. As Town Council points out, plaintiffs introduced the testimony of Plaintiff Harman that the planned grading that would be allowed under the new zoning ordinance would threaten the integrity of the spring on her property and risk polluting it. (Town Council Br.5) This Court has already held that Plaintiff Harmon adequately plead standing. Her sworn testimony confirms her allegations; she meets the test for standing that Town Council lays out in its brief—that the

plaintiff owned land in close proximity to the rezoned land and that plaintiff's land would be subject to a particularized harm from the rezoning. (*Id.* at 15-16) The other plaintiffs' deeds to their property in close proximity to the rezoned land are also in evidence, and their sworn allegations stand unrefuted. Accordingly, plaintiffs established the standing of, at the very least, Plaintiff Harman to bring this case.

Town Council's only specific argument against plaintiff Harman's standing is apparently that plaintiffs did not offer any "expert" testimony on this issue. (Town Council Br. 5) However, Town Council cites no authority for this purported requirement, nor is there any such authority. Harmon testified that she has owned and lived on her land for many years, and demonstrated through her testimony that she is intimately familiar with the geology of her land and its natural waters. A fact finder may use his common sense in giving plaintiff Harman's testimony the weight it deserves. Thus, Town Council's argument on this point fails and the Court may confidently proceed to addressing the merits of the case.

2. The Supreme Court requires that a zoning ordinance that fails to comply with the statutory "stated purpose" requirement be voided.

Both defendants failed to rebut, or even address, plaintiffs' demonstration in their lead argument that the zoning ordinance at issue is fatally flawed, and controlling law requires that it be declared void, because of Town Council's failure to state the public purpose of the amendment of the ordinance in contravention to the clear mandate of Va. Code § 15.2-2286(A)(7). (Plaintiffs' Post-Trial Br. 1-2). As was demonstrated in plaintiff's post-trial brief, that statutory provision requires that one or more of the listed public purposes be stated in the proposed ordinance amendment. *See* Va. Code Ann. 15.2-2286(A)(7); *County of Fairfax v. Southern Iron Works, Inc.*, 410 S.E.2d 674, 678 ((Va. 1991) ("The General Assembly has directed local governing bodies to determine which of the four previously-listed purposes

necessitates their action, and to state for which of those purposes it is acting"). Defendants did not dispute that Town Council did not meet this requirement. (See also evidence of noncompliance with this statutory requirement cited in Plaintiff's Post-Trial Brief at page 2) Accordingly, pursuant to controlling authority, the ordinance is void. *See Ace Temp., Inc. v. City Council of City of Alexandria*, 649 S.E.2d 688, 690 (Va. 2007) (reversing trial court's conclusion that zoning ordinance was valid, and ruling that the ordinance was invalid because, in part, the ordinance was introduced at first reading "without a stated public policy reason").

Because controlling law, as applied to undisputed evidence, compels the conclusion that the zoning ordinance is invalid on this point alone, the Court need not address plaintiffs' other arguments showing that the ordinance is void. Nonetheless, plaintiffs will address defendants' attempt to refute plaintiffs' demonstration of contract zoning, because the two deficiencies are related: the failure of Town Council to disclose a legitimate public purpose for the rezoning goes hand-in-glove with Town Council's real—yet illegitimate—purpose of granting the rezoning as a special favor to a developer in exchange for a cash "gift" to the Town.

3. The Town's rezoning and grant of special use permit was an illegal *quid pro quo* for the acquisition of the Recreational Tract.

Marathon does not dispute that contract zoning is illegal in Virginia. As noted in plaintiffs' trial brief, the Virginia Supreme Court has long recognized its illegality. *See Mumpower v. Hous. Auth. Of City Of Bristol*, 11 S.E.2d 732, 742 (Va. 1940) (a municipality cannot divest itself of one of its police powers (like zoning) "by contract"). Nor does Marathon dispute that if the Town's zoning actions were the result of contract zoning, then the rezoning ordinance is void.

Rather than dispute plaintiffs' exposition of the law on illegal contract zoning, Marathon argues that there is no evidence of a such a *quid pro quo* — no evidence that in exchange for the Town taking zoning actions to allow the developer to build a big-box store where it was currently prohibited from doing so, the developer would give the Town $2,289,700 to buy a separate piece of real estate. In doing so, Marathon requires the Court to make a farfetched assumption: that the developer's December 2, 2015 letter to the Town of its intent to "donate" funds for the real estate came completely without prior discussion between Marathon and the Town, and that the letter somehow did not make it to the Town until after the December 7, 2015 Town Council meeting approving the rezoning. Marathon simply ignores the statements by Town Council members like that of Town Council member Jayne Duehring that she was voting for the rezoning because it would allow the Town to acquire the Recreational Tract.

Town Council takes a different tack, by arguing the obvious—that conditional zoning is allowed. This is a red herring. Town Council concedes that the rezoning it issue here was *not* permissible conditional zoning. (Town Council Br. 27) No one, including plaintiffs, disputes that some types of conditional zoning are allowed. Town Council's attempt to conflate conditional zoning with illegal contract zoning is refuted by the authority that Town Council cites; even the title of the article that Town Council cites recognizes the difference between illegal contract zoning and permissible conditional zoning. (Town Council Br. 26, citing *Development Agreements: Bargained-for Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 Cap. U.L. Rev. 383 (2004))

Town Council also suggests erroneously that illegal contract zoning is properly limited to express bilateral contracts. This suggestion ignores other universally recognized modes of contracting, like unilateral contracts that consist of an offer that is accepted by performance.

Here, Marathon, in essence, offered the ability to acquire the Recreational Tract (whether by explicit offer of cash to purchase it, by valuable grading and engineering work, or by assigning its purchase rights) in exchange for the Town rezoning to allow Marathon to build a big-box store on land in the historic design review overlay that was zoned agricultural. The Town accepted the offer by rezoning. The donation had conditions such that had the Town not rezoned, the Town would have had to forfeit the property. This amounts to explicit contract zoning, which is illegal in Virginia, and renders the rezoning (and special use permit) void.

Conclusion

Controlling law compels the conclusion that Town Council's failure to identify and state at least one of the statutorily allowable public purposes as part of its rezoning amendment, as required by statute, renders the rezoning void. This was not a mere oversight, but rather reflected a Town Council unwilling to state the true purpose of the rezoning --- doing a special favor for a big-box store developer in exchange for a payment of millions of dollars to buy long-coveted property. This is the essence of illegal contract zoning.

The named Plaintiffs in this case are those who will suffer particularized harm from the rezoning and special use permit, as required by Virginia's rules on standing. But they are not the handful of selfish malcontents the Town Council paints them to be. The public outrage at Town Council allowing a developer to build a big-box store in Abingdon's sensitive entrance corridor in exchange for a multi-million dollar cash payment resulted in the unseating of the two incumbent Town Council members who were up for reelection this year.

This lawsuit goes to the heart of proper, democratic town governance. Town officials are required to follow procedures that ensure the Town exercises its police power properly,

impartially, and in the best interest of the Town's citizens. The Town Council has failed to follow those procedures in this case, has lost its impartiality along the way, and sold its land use control powers for cash.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing document has been served upon counsel, by mailing a copy of same by United States Mail, postage prepaid, addressed to the offices of said counsel (with advance courtesy copy by email), this the 1st day of December, 2016 as follows:

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VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

JOSEPH W. LEVINE, et al,	)	
	)	
Plaintiffs,	)	
	)	
	)	
v.	)	Case No. 16-46
	)	
	)	
TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGINIA, et al,	)	
	)	
	)	
Defendants.	)	

OBJECTION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY BRIEF

Defendant Town Council of the Town of Abingdon, Virginia, submits the following objection to plaintiffs' Motion for Leave to File Reply Brief.

1. Plaintiffs' Motion for Leave to File Reply Brief is simply the latest in the series of plaintiffs' harassing, improper, and unfounded filings that have plagued this litigation since its inception.

2. The verifiably false premise of plaintiffs' motion is that "Defendants' briefs addressed several issues not previously briefed." (Pls.' Mot. for Leave to File Reply Br. ¶ 3.)

3. The Reply Brief plaintiffs seek to file addresses three issues, all of which have been briefed and argued by the parties ad nauseam.

4. The first issue is the plaintiffs' lack of standing. This issue was raised by the defendants at the inception of the litigation and has been addressed by the Town and Town Council in the Town of Abingdon's Plea and Demurrer to the Plaintiff's original Petition, the Town's Memorandum in Support of Plea and Demurrer, the Town's Objection to Plaintiffs' Motion to Amend, the Town's Reply to Plaintiffs' Consolidated Memorandum in Opposition, the Town Council's Demurrer to the Amended Petition, the Town Council's Answer to the Amended Petition, and the Town Council's Plea to the Amended Petition. Thus, any assertion that this issue was not previously briefed is patently absurd.

5. In the absolute height of irony, the second issue plaintiffs seek to rehash is the argument that they improperly raised for the first time at trial and in their post-trial brief – that the Town Council failed to comply with Va. Code § 15.2-2286(A)(7). This claim was not pleaded nor raised during discovery and defendants timely objected to its introduction for the first time at trial and filed an Objection to Plaintiffs' Post-Trial Memorandum based on plaintiffs' improper attempt to raise this issue at trial without notice to the defendants, thereby depriving defendants of the opportunity to prepare for and rebut this baseless claim.

6. The third and final issue is the plaintiffs' claim that, despite the absence of *any* evidence of a contract between the Town Council and Marathon prior to the Town Council's approval of the application for rezoning, the rezoning at issue was "contract zoning." The plaintiffs have addressed this issue at length both in their Trial

Brief and their Post-Trial Memorandum. The plaintiffs have not articulated any reason they should be permitted a third bite at the apple in their proposed Reply Brief.

7. Contrary to the plaintiffs' assertion, the defendants' briefs raised no new issues that have not already been briefed by the parties. In fact, it was plaintiffs who raised issues that had not been pleaded or disclosed in discovery.

8. If plaintiffs wished to have an opportunity to respond to the defendants' briefs, the appropriate time request leave to do so was on November 10, 2016, when the Court set the briefing schedule, so that all parties would be afforded an equal opportunity. Instead, the plaintiffs waited until the eleventh hour in order to "have the last word" and attempt to bolster their claims.

WHEREFORE, the Town Council of the Town of Abingdon objects to the Plaintiffs' Motion for Leave to File Reply Brief and moves the Court to deny the motion and decline to consider the inappropriately filed Reply Brief.

TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGINIA

By Counsel

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I hereby certify that a true copy of the foregoing has been mailed to:

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this 5th day of December, 2016.

_____
W. Bradford Stallard

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WM. A. STUART (1922-1976)
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W. CHALLEN WALLING [III]
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November 7, 2016

Patricia S. Moore, Clerk
Circuit Court of Washington County
189 East Main Street
Abingdon, VA 24210

Re: Joseph W. LeVine, et al v. Town Council of the Town of Abingdon, Virginia, et al
Case No. 16-46

Dear Ms. Moore:

I enclose for filing the Town Council of the Town of Abingdon, Virginia's Objections to Plaintiffs' Discovery Requests, Motion for Protective Order, and Motion for Sanctions.

Thank you.

Sincerely,

PENN, STUART & ESKRIDGE

By: W. Bradford Stallard

WBS/pjf
Enclosure

cc: Rebecca J. Ketchie, Esq. (via mail, with enclosure)
David J. Hutton, Esq. (via mail, with enclosure)

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

JOSEPH W. LEVINE, et al, Plaintiffs, v. TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGINIA, et al, Defendants.	)	Case No. 16-46

TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGNIA'S OBJECTIONS TO PLAINTIFFS' DISCOVERY REQUESTS, MOTION FOR PROTECTIVE ORDER, AND MOTION FOR SANCTIONS

Pursuant to Rules 4:1, 4:9, and 4:12, defendant Town Council of the Town of Abingdon, Virginia, objects to the plaintiffs' abusive requests for production of documents on the following grounds:

1. This action involves the plaintiffs' challenge to the Town Council's legislative action of rezoning property and issuing a special use permit to allow construction of a sports complex and retail development within the corporate limits of the Town of Abingdon.

2. The plaintiffs originally filed a petition on January 6, 2016. The Friends of Abingdon, Inc., a Virginia non-stock corporation, was among the plaintiffs. Following a hearing on the defendants' pleas and demurrers, and the plaintiffs' motion to

amend the petition, the plaintiffs filed an amended petition on August 29, 2016. The parties subsequently agreed to entry of an order providing for the completion of discovery and the setting of this matter for trial on November 10, 2016, at 9:00 a.m.

3. Plaintiffs served interrogatories and requests for production of documents on September 23, 2016. The Town Council provided its responses on October 17, 2016. In response to the plaintiffs' requests for production of documents, the Town Council produced over 10,500 pages of documents.

4. While the Town Council set forth numerous objections to the very objectionable interrogatories and requests for production of documents, the Town Council nonetheless responded and provided the documents requested. It is not believed that the Town Council withheld any documents on the grounds of privilege. Rather, the Town Council produced these documents because it wished to ensure that the case set for trial on November 10 went forward as scheduled.

5. During the course of communications regarding the discovery, Town Council advised counsel for the plaintiffs, by email, that the Town Council was producing the documents requested so there would be no grounds for a continuance.

6. The plaintiffs served a second set of discovery requests on the Town Council on or about October 24, 2016. The Town Council delivered its responses on or about November 4, 2016. As a casual review of the plaintiffs' interrogatories and requests for production of documents reveals, the discovery sought goes far beyond the issues in this case. The only claims raised by the plaintiffs' amended petition are related

to the issuance of the special use permit, whether the decision of the Town Council to rezone the property was arbitrary and capricious, and the plaintiffs' novel theory of contract zoning. All of these discrete events related to these claims occurred during the year of 2015 and the transaction that resulted in the sale of the property occurred in December, 2015. Notwithstanding the plaintiffs' effort to expand the scope of discovery on grounds of pretext, plaintiffs' counsel has deposed principals from Marathon and Town employees, so she knows that there were no events pertinent to the issues in this case earlier than 2015 and later than January, 2016. She still served discovery requests unlimited in scope and time.

7. The plaintiffs originally served the Town Council eleven (11) requests for production of documents. In their second set of discovery requests, the plaintiffs served an additional thirteen (13) requests for production of documents. Among the items sought in plaintiffs' Request No. 16 are "agendas, notes and minutes from the following meetings or conference calls," followed by a list of fifteen (15) conference calls and meetings.

8. The Town Council has performed both an IT search and an internal search to identify items responsive to these requests.

9. In addition, in plaintiffs' Request No. 17, the plaintiffs seek similar documents related to meetings between the Town of Abingdon and K-VA-T Food Stores, Inc.

10. All documents responsive to these requests have been produced. The Town Council has not asserted a privilege, but is not aware of any such documents responsive to this request.

11. Similarly, the plaintiffs have asked for written correspondence from Garrett Jackson and any party between 2008 and the present that relate to the Meadows Property. In her email of November 7, 2016, plaintiffs' counsel indicated she needed this information to prepare for trial.

12. It is respectfully submitted that Mr. Jackson is a former employee of the Town of Abingdon and has not worked for the Town since July, 2014. The Town Council has searched for emails that fall within the parameters of the plaintiffs' request and, according to the IT director, none were located.

13. As the Town Council advised in its response, Mr. Jackson apparently deleted a number of items prior to his departure. He may have also used a private laptop, a private email address and perhaps a private server. However, this response was insufficient for plaintiffs' counsel, who suggested that such items must undoubtedly exist.

14. The plaintiffs cannot articulate any reason why Mr. Jackson would have any information relevant to the claims in this case. Mr. Jackson is currently incarcerated in a federal correctional facility. However, plaintiffs are using this request as a pretext for seeking a continuance.

15. Similarly, the plaintiffs request financial information related to the presentation to Davenport & Company relating to the Town's bond financing package. According to the Town Council, Davenport & Company retrieved the information that was distributed at the meeting and the Town Council does not have it available.

16. The Town Council has made a good faith effort to produce all the specific items requested in the plaintiffs' interrogatories and request for production of documents.

17. The Town Council set forth objections in both of its responses to discovery. Those objections, which are set forth in its responses, include objections on the ground of the scope of the discovery, the breadth of the discovery, the purpose and intent of the discovery, and the fact that plaintiffs' counsel is essentially going on a fishing expedition which is apparently directed by her clients. The fact that documents regarding Garrett Jackson are being sought directly indicates that the plaintiffs have some knowledge or information that Mr. Jackson has information which will assist them in their claims. While the Town of Abingdon does not wish to speculate how Mr. Jackson may assist the plaintiffs, the Town questions how Mr. Jackson can have any relevant information when all of the events giving rise to their claims occurred in 2015, after Mr. Jackson was no longer employed by the Town.

18. The plaintiffs' requests obviously show they are seeking discovery for an improper purpose. Among other things, they have asked for the approvals that must be obtained before construction can begin. The plaintiffs may suggest that they need

this information to decide when to seek an injunction; however, this is not a legitimate basis for seeking this information because it does not bear on any of the issues in the case. The Court has addressed this issue in an order.

19. The Town Council has made available all the witnesses the plaintiffs have requested. These include the Town Manager, Greg Kelly, the Director of Planning, Matthew Johnson, the Assistant Director of Planning, Shawn Taylor, and the Town Clerk and Assistant Town Manager, Cecile Rosenbaum. The Town Council offered to produce any other witnesses the plaintiffs wished to depose and no other requests were made.

20. Despite the availability of these witnesses, the plaintiffs' counsel asked very few questions related to the issues in this case. The plaintiffs could have sought any information they chose regarding the issues of this case during the depositions, but instead they asked few questions.

21. In addition, the plaintiffs have deposed Steve Smith and Stephen Spangler of Marathon. They similarly had an opportunity to ask questions regarding any of the issues in this case.

22. It is abundantly clear, based upon the breadth and scope of the requests made, that the plaintiffs are seeking information to satisfy their curiosity and obtain information that has nothing to do with this case. They are using the discovery process in lieu of FOIA requests, which they would have to pay for. By email dated November 7, 2016, plaintiffs' counsel described the Town's partial responses to discovery requests received Friday afternoon. She then identified the problems she had

with discovery because it was delayed by a few days. She objected to the failure of the Town to produce certain items, which, as far as the Town knows, do not exist. She also references only one email from Garrett Jackson being produced from 2008. Again, this shows that the plaintiffs are on a fishing expedition because they undoubtedly have some information from some source regarding some email that Garrett Jackson has apparently sent or received at some unknown time in the past. The real issue is why the plaintiffs need information regarding Garrett Jackson when they apparently have it themselves or else they would not have even known to ask for emails from Garrett Jackson, who left the employment of the Town in July, 2014. While the Town may have electronic correspondence produced or received by Garrett Jackson, it has none related to the parameters of the request regarding the Meadows project.

23. The plaintiffs ostensibly have some evidence to support their claims or else they would not have made them. However, the plaintiffs are now using the Town's failure to respond to certain discovery requests as a pretext for seeking continuance of the trial. This response was entirely predictable. The Town has produced nearly 12,000 pages of documents and responded completely to the plaintiffs' discovery. The Town is unaware of any documents that it possesses that it has not produced responsive to the plaintiffs' discovery. Accordingly, the basis for the plaintiffs' discovery complaint is unfounded. If counsel for the plaintiffs had asked, she would have been told. She certified in her motion to compel that we had conferred. This is false.

24. The defendant seeks a protective order limiting the scope of the plaintiffs' discovery, prohibiting the plaintiffs from seeking information that is irrelevant and not likely to lead to the discovery of relevant information. The Town of Abingdon further strongly objects to any continuance of this case because plaintiffs presumably possess the information they need to prosecute their case. If the plaintiffs did not and never have possessed such evidence, then in addition to sanctions for discovery reasons, the Town of Abingdon plans to seek sanctions pursuant to Va. Code Ann. § 8.01-271.1. The Town would note that the plaintiffs have been asked through interrogatories the basis for their claims and it is the Town's position that the basis set forth in their answers to interrogatories and responses to requests for production of documents demonstrate the absence of evidence and show a lack of good faith as a matter of law.

25. The Town Council suggests that the plaintiffs should be ordered to appear and show cause why they should not be sanctioned for their discovery abuses. The Town Council further urges the Court to enter a protective order prohibiting these discovery abuses in the future.

TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of November, 2016, I mailed a true and accurate copy of the foregoing to:

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