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' POST-TRIAL MEMORANDUM

Plaintiffs submit this post-trial memorandum upon the Court's invitation for any additional written arguments following the November 10, 2016 trial:

I. Town Council Failed to State A Public Purpose for the Zoning Ordinance Amendment.

A local government must have a permissible public purpose for passing a zoning ordinance amendment, and it is required by statute to state that purpose in the resolution or motion initiating the amendment. Va. Code § 15.2-2286(A)(7) provides in relevant part:

> Whenever the public necessity, convenience, general welfare, or good zoning practice requires, the governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or classifications of property. . . . Any such resolution or motion by such governing body or commission proposing the rezoning shall state the above public purposes therefor.

The Virginia Supreme Court observed:

> The plain language of that statute [Va. Code § 15.2-2286(A)(7)] provides that in order to initiate a zoning ordinance amendment, the governing body must state the "above purposes" for the amendment. We believe that in its reference to "above purposes," 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.

County of Fairfax v. Southern Iron Works, Inc., 410 S.E.2d 674, 678 (Va. 1991).

The failure to identify any of the permitted public purposes for the ordinance amendment in the initiating motion is fatal to the amendment. *Ace Temporaries, Inc. v. City Council of City of Alexandria*, 649 S.E.2d 688, 690 (Va. 2007) (reversing a trial court's finding that a zoning ordinance amendment was valid, because the ordinance was introduced at first reading "without an initiating motion or resolution and without a stated public policy reason").

Here, the motions of the Town Council (Exhibit 17, Minutes of Oct. 7, 2015 meeting; Exhibit 22, Minutes of Dec. 7, 2015 meeting) do not identify any public purpose for the rezoning. This omission is fatal.

II. Town Council's Votes to Rezone the Meadows Property and grant a Special Use Permit was based on Incomplete and Legally Insufficient Information.

The majority of the Town Council's evidence presented at trial concerns approvals and submissions to the Town Council that came *after* the Town Council approved the rezoning and Special Use Permit applications. None of this evidence is relevant to the adequacy of those decisions. Justifying a land use decision after the fact does not make the Town Council's initial decision any less arbitrary and capricious. State law and local ordinance require proper consideration by the Town Council *before* voting.

Moreover, the approvals and submissions that came after the rezoning and Special Use Permit came under the shadow of the Joint Development Project Agreement (Joint Exhibit 29).

That Agreement conditioned the Town's ability to keep the Recreational Tract on the Town's approval of a site plan that is commercially reasonable at the "sole discretion" of Marathon.

a. The Planning Commission and Town Council did not have a Traffic Impact Study before them when they considered the applications.

The Town Council argues that it did not send notice to VDOT within ten days of receiving the rezoning application, as required by Va. Code § 15.2-2222.1, because VDOT already knew about the project, and had been considering the roadwork for many years. First, complying with the spirit of the law does not excuse failure to observe the minimum procedural requirements of Va. Code § 15.2-2222.1. Second, "the project" the Town had been discussing with VDOT was road improvements that long predated the potential traffic generated by the proposed Meadows development. Finally, VDOT apparently did not agree with the Town's view that the earlier conversations about traffic mitigation complied with Va. Code § 15.2-2222.1 (added by Chapter 527 of the 2006 Acts of Assembly), since it still insisted on a Chapter 527 review of the Traffic Impact Analysis submitted for the Meadows project. (See Joint Exhibit 42, Traffic Impact Analysis with VDOT comment letters). This Traffic Impact Analysis added the increased traffic generated by the Meadows development into the previously-discussed road improvements.

By the time VDOT accepted the Traffic Impact Analysis as complete on December 4, 2015, the Planning Commission had already made its recommendation and the Town Council had already cast votes to approve the rezoning and special use permit on October 7, 2015, without consideration of any traffic impact study reviewed by VDOT or otherwise. Further, there is no evidence in the record that the Traffic Impact Analysis finally completed on December 4, 2015 was ever presented to the Town Council before it voted to approve the

rezoning on December 7, 2015. (See Joint Exhibit 23, Video of Dec. 7, 2015 Town Council meeting.)

b. The Planning Commission and Town Council did not have an Economic Impact Analysis before them when they considered the applications.

The only justification the Town Council offered at trial for its rezoning decision that is related to the rezoned property itself was economic development, and, by extension, the potential for increased tax revenue. That rationale was not supported by the evidence.

The Town Council relies on a bald assertion that improving real property within the Town of Abingdon results in economic gains for the Town. There is no evidence that either the Planning Commission or Town Council was ever presented with a financial analysis of the project before it voted on the applications. The record contains no estimates or projections of net revenue, property values, net job increases, or any other financial data to support an economic rationale for the project. Notably, as of the trial date, eleven months after the rezoning vote, Town Manager Kelly had no knowledge of what the economic impact of closing the existing Food City store would be when the proposed new one opens—or even of whether the existing one would be closed. With so little financial information before it, the Town Council could not have rationally based its decision on economic factors.

c. The Planning Commission and Town Council did not have a complete Site Plan before them when they considered the applications.

Town Planner Matthew Johnson testified that the site plan before the Town Council when it voted to grant the Special Use Permit lacked multiple elements required by the Zoning Ordinance. He admitted that his discretion as planning staff does not allow him to excuse non-compliance with the Ordinance. His ability to waive site plan requirements found in Zoning Ordinance § 18-2 is limited to additions to existing buildings, structures or uses; it does not

extend to new development. He protests that a complete site plan is too expensive a burden to place on an applicant in the initial stages of development planning, but he concedes that the Zoning Ordinance requires it.

At the very least, it is unreasonable to excuse the absence of square footage of uses proposed on a site plan that accompanies an application for a Special Use Permit designed solely to waive the limits on square footage allowed for a particular use. Without that information, the only basis for the Town Council's decision on the Special Use Permit is the location of the property (which was placed in the Historic District Entrance Corridor Overlay District by the Town Council) and the identity of the applicant. Good land use decisions cannot be based on who is requesting the permit.

The Town Council did not evaluate traffic impacts, economic impacts, or even a site plan in accordance with standards required by state law and the Abingdon Zoning Ordinance. Their decisions should not stand.

III. Town Council Voted to Rezone the Property for Contract Considerations Outside the Rezoned Property

Marathon and the Town Council argue that there cannot be contract zoning where Plaintiffs have not produced a written agreement between the parties. However, contracts do not have to be written. Plaintiffs produced extensive evidence of the verbal understanding between the Town and Marathon whereby the Town's acquisition of the Recreational Tract was contingent on rezoning the Meadows Property. Plaintiffs demonstrated that the Town Council and Marathon met in multiple closed sessions—at which no minutes were taken—in the months leading up the rezoning, that the Town Council understood the deal, and that it was the reason for approving the rezoning. Marathon and Town representatives discussed Marathon "turning

over" the property to the Town already rough graded in meetings as early as March 2015. *See* Joint Exhibit 8, Meeting notes.

Mr. Kelly testified extensively about the Town's unsuccessful attempts to buy the Recreational Tract on its own, and about how the development of the Meadows would make the acquisition and build-out of the Recreational Tract possible. Whether that acquisition was made possible by donation, by gift of grading work performed by Marathon, or by assignment of Marathon's right to purchase the subdivided portion of the property, it was valuable consideration for the land use decisions.

When the Town Council discussed the Meadows development in closed session a few weeks before its initial consideration of rezoning, it certified that the session was closed under the Freedom of Information Act exception for acquisition of public property. There is another exception in the law for expansion or location of a business or industry, but the Town Council did not choose that exception; its view was that the decisions before it were not about business expansion, but about acquiring the Recreational Tract.

Council members stated in open meetings that their reason for voting to approve the applications was the Town's ability to get property to build a sports complex. As evidenced by the signed Letter of Intent from Marathon, the Town knew at least as early as December 2, 2015 that KVAT intended to donate the money to buy the sports complex property, when the final vote on rezoning was not until December 7, 2015. Even if the agreement to *donate* the property was not confirmed earlier than that, it was clear that the Town Council believed it would receive a benefit related to the sports complex property if it approved the land use changes Marathon wanted.

Illegal contract zoning includes basing land use decisions on promises for off-site improvements not made necessary by the proposed development itself. As the court in *HMK Corp. v. Chesterfield* stated, "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." No. 84-0170R, 1984 WL 2859, at *16 (E.D. Va. Aug. 9, 1984) (internal citations omitted).

IV. CONCLUSION

The evidence presented at trial was that the Town Council of the Town of Abingdon granted Marathon Realty Corp. rezoning and a Special Use Permit based on contract considerations and devoid of any legally permissible rationale. The rezoning and grant of Special Use Permit should be held void.

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 this the 22nd day of November, 2016, as follows:

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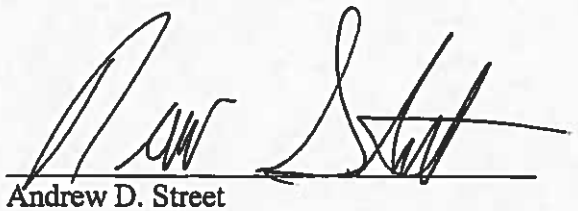

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° TN Supreme Court Rule 31 Approved Family Mediator
▲ Certified Civil Trial Specialist

November 22, 2016

Tricia S. Moore
Circuit Court Clerk
189 East Main Street
Abingdon, VA 24210-2838

Re: Joseph W. Levine, et al. V. Town Council of The Town of Abingdon, VA, et al.
Circuit Court of Washington County, Virginia
No. 16-46

Dear Ms. Moore:

Enclosed for filing please find Plaintiffs' Revised Post Trial Memorandum correcting some typographical errors. This will replace the Post Trial Memorandum that was sent to your office today via Federal Express.

Also, please send us a file stamped copy of the Revised Memorandum in the enclosed self-addressed stamped envelope.

Thank you for your assistance with this matter. If you have any questions, please feel free to contact me.

Very truly yours,

WILSON WORLEY PC

Drew Street
For the Firm

FILED
NOV 22 2016
DEPUTY CLERK
CIRCUIT COURT
WASHINGTON COUNTY, VA

Enclosure

cc: David Hutton, Esq.
W. Bradford Stallard, Esq.

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Moreover, the approvals and submissions that came after the rezoning and Special Use Permit came under the shadow of the Joint Development Project Agreement (Joint Exhibit 29).

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Land use decisions cannot be based on promises for off-site improvements not made necessary by the proposed development itself. As the court in *HMK Corp. v. Chesterfield* stated, "A strong public desire to improve the public condition is not enough to warrant achieving the

desire by a shorter cut than the constitutional way of paying for the change." No. 84-0170R, 1984 WL 2859, at *16 (E.D. Va. Aug. 9, 1984) (internal citations omitted).

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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 this the 21st day of November, 2016, as follows:

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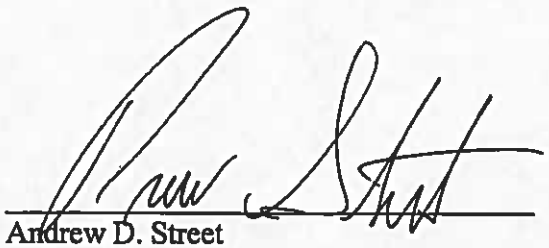

Andrew D. Street

COMMONWEALTH OF VIRGINIA:

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

TRIAL MEMORANDUM

Defendant Town Council of the Town of Abingdon, Virginia submits the following trial memorandum.

I. STATEMENT OF THE CASE

The initial Petition filed against the Town of Abingdon pursuant to Va. Code Ann. § 15.2-2285(f) contested amendment to the Town of Abingdon's zoning ordinances when the Town Council granted a rezoning application and request for a special use permit, thereby allowing the development of the Meadows Property. Defendants the Town of Abingdon and Marathon Realty filed demurrers and pleas in bar. Prior to the hearing, the plaintiffs hastily sought leave to amend their Petition to include additional allegations in response to the issues raised by the Town and Marathon Realty that exposed the shortcomings of the plaintiffs' claims.

Following the hearing on the plea and demurrer, the Court entered an order on August 4, 2016, denying the pleas in bar of both defendants, sustaining the demurrers of the defendants related to standing of all plaintiffs except Nan Harman, and granting the plaintiffs 21 days to amend their pleading.

The Amended Petition, filed on August 29, 2016, included much more than the amendments identified and sought in the motion to amend. The plaintiffs named in the Amended Petition were Joseph W. LeVine, Donna H. LeVine, Nan A. Harman, Terry Simon, and Suzanne Pasick. The plaintiffs added the Town Council as a defendant and dropped the Town of Abingdon from the pleadings, over the objections of the defendants. There is a recitation of facts, but only two counts in the Amended Petition. In Count I, the plaintiffs' claims address the special use permit. The plaintiffs' allegations are that the "Town's grant of a special use permit to allow a building with retail space greater than 50,000 square feet on the Meadows Property is *ultra vires* and void, because the Town lacked the authority to permit a use on a property zoned AFOS that is not permitted by the Zoning Ordinance and because The Town acted on an application with a site plan that did not comply with the mandatory requirements of the Zoning Ordinance." (Amended Petition ¶ 60).

The plaintiffs further alleged that the "Town's grant of a special use permit was arbitrary and capricious, as it was supported only by the Town's desire to obtain contiguous property as consideration for its approval, and was not related to the health,

safety or welfare of the Town as an exercise of the Town's police powers." (Amended Petition ¶ 61).

In their amended petition and discovery responses, plaintiffs never asserted the claim that the Town lacked authority to allow a special use on a property zoned AFOS that is not permitted by the zoning ordinance. This claim was based upon the allegation that the Town approved the special use permit following the first reading of the proposed rezoning application. The plaintiffs also omitted any claims based on VDOT's involvement, approval, or review of the Traffic Impact Study.

In Count II, the only other count asserted in the Amended Petition, plaintiffs claim that the Town's approval of the rezoning of the Meadows property from AFOS to B2 was arbitrary and capricious as it is supported only by the Town's desire to obtain contiguous property as consideration for its approval and it was not related to the health, safety or welfare of the Town as an exercise of its police powers. (Amended Petition, ¶ 62). Plaintiffs further allege that the approval of the rezoning constitutes illegal contract zoning. (Amended Petition, ¶ 63).

These are the sole and exclusive claims set forth in the Amended Petition, and the only claims before the Court. Defendant Town Council objects to the plaintiffs attempt to raise any new claims for the first time during trial or after trial in their filings. Virginia law mandates that the evidence must follow the pleadings, and if the plaintiffs are to proceed with any claims against the Abingdon Town Council, they are limited to those claims set forth in their pleadings. It would be improper and fundamentally unfair

for the plaintiffs to be permitted to pursue new claims at this juncture (as the defendants prepared for the case and responded to the specific claims the plaintiffs made in their Amended Petition), but also the plaintiffs were asked very specifically about their claims during discovery and identified their claims in their responses. (*See* Plaintiffs' Consolidated Discovery Responses, Exhibit 67).

At trial, only plaintiff Nan Harman was called to testify. No other plaintiffs testified. Accordingly, there is no evidence before the Court from the other plaintiffs. The plaintiffs also called Matthew Johnson, the Town Planner, Greg Kelly, the Town Manager, and Stephen Spangler, an executive with Marathon Realty. The exhibits before the Court, and the testimony of those witnesses, are the only evidence presented on behalf of the plaintiffs.

At the close of the plaintiffs' evidence, the defendants moved to strike the evidence on grounds and for the reasons stated in the record. The Court took the motion under advisement. The defendants renewed their motion to strike at the close of all the evidence, and the Court took the renewed motion under advisement as well.

The plaintiffs presented no evidence supporting the award of an injunction. There is no evidence before the Court supporting the notion that the plaintiffs will suffer irreparable harm, that there is not adequate remedy at law, that they are likely to succeed on the merits, that an injunction will be in the public interests, or that the balance of equities tip in favor of the plaintiffs. Accordingly, the Court should strike that claim as well.

II. STATEMENT OF THE FACTS

The facts set forth below will be stated based on the testimony of the witnesses before the Court and the documents submitted into evidence. For the Court's ease of reference, the facts will be organized to correlate with the issues as set forth in the Law and Argument section below.

A. Plaintiff's Lack of Standing

The only evidence before the Court regarding the plaintiffs' standing is the trial testimony of one plaintiff, Nan Harman. Ms. Harman identified her property as "between 25 and 26 acres" that is bordered by Magic Mart, Interstate 81, and the Meadows property. (Harman Trial Tr. 5:5 – 6:15.) Ms. Harman identified a pond on her property, used to water livestock, that is fed by a larger pond located on the Meadows tract that is now owned by the Town. (Harman Trial Tr. 7:9 – 8:7.)

Ms. Harman testified that she is "concerned" about grading on the Meadows property, "pollution" going into her pond, and the integrity of a small spring on her property. (Harman Trial Tr. 10:1-5, 11:5-17.) Her concern is based on "stories" she has heard about drilling and blasting causing springs to sink. (Harman Trial Tr. 11:18 – 12: 3.) Ms. Harman has not had anyone with expertise look at her spring or give a report regarding the effect a development on the Meadows property may have on her spring or pond. (Harman Trial Tr. 14:2-12.) Ms. Harman is aware that the Army Corps of Engineers and the Virginia Department of Environmental Quality are both involved to address the issues about which she is concerned. (Harman Trial Tr. 15:5 – 16:4.)

No evidence whatsoever was presented regarding the properties owned by the other plaintiffs, nor is there any evidence before the Court regarding the impact the rezoning will have on the properties owned by these plaintiffs. The only evidence presented by plaintiffs on this issue is that Nan Harman owns a piece of property that is contiguous to the Meadows property and, based solely on anecdotal "stories" and speculative assumptions, Ms. Harman is concerned that the development of the property will negatively impact her property.

B. The VDOT's Involvement and the Traffic Impact Analysis

The plaintiffs' Amended Complaint does not assert any claim based upon the timing of the submission of a traffic impact analysis ("TIA") to the Virginia Department of Transportation ("VDOT"). (*See generally* Am. Compl.)

VDOT was involved in discussions regarding the Meadows projects "from the very beginning" and participated in multiple meetings going back to at least February 2015. (Kelly Trial Tr. – Pl.'s Case 9:7-15; Kelly Trial Tr. – Town's Case 15:23-11; Trial Ex. 47.) In fact, Mr. Kelly had been discussing Green Springs Road with the VDOT before the Meadows development was even conceived. (Kelly Trial Tr. – Pl.'s Case 9:16-23.)

A Traffic Impact Analysis was discussed with the VDOT on October 5, 2015, two days before the joint meeting of the Town Council and the Planning Commission at which the first reading of the rezoning was approved. (Kelly Trial Tr. – Town's Case 16:18 – 17:5.) The Town Council and Planning Commission were aware

that a TIA was being commissioned and that the VDOT was involved in the review and approval of it. (Kelly Trial Tr. – Town's Case 17:6-8.)

With the participation and assistance of the VDOT, the TIA was completed and submitted to the VDOT on November 23, 2015. (Trial Ex. 47.) The VDOT reviewed the TIA and made comments and suggestions. (Trial Ex. 47.) By letter dated December 2, 2015, the VDOT noted that it had reviewed the draft TIA "in accordance with Chapter 527 requirements." *Id.* The VDOT's comments regarding the required corrections to the TIA were communicated to the Town on November 24, 2015. *Id.* The VDOT noted that "[o]nce those corrections have been made, then the TIA will be considered acceptable by the VDOT." *Id.*

On December 4, 2015, the TIA with the VDOT's requested corrections was submitted to the VDOT, and Steve Buston of the VDOT communicated to the Town that the TIA was acceptable to the VDOT. *Id.* This approval was confirmed by letter dated December 16, 2015. *Id.* Thus, the VDOT's approval was not a "hasty review," as alleged by the plaintiffs. Instead, the VDOT was involved with the Meadows project from its inception, attended multiple meeting regarding the proposed Meadows development, contributed to and assisted with the performance of the TIA, reviewed the TIA in accordance with Chapter 527 requirements, and approved the TIA prior to final approval of the rezoning.

As the VDOT communications with the Town indicate, the Green Springs road project was of great interest to VDOT because it played an integral part of VDOT's

plans to improve Exit 17 on I-81. VDOT suggested and supported the transfer of funds to the Green Springs road project because of VDOT's intent to redo Exit 17. Consequently, VDOT was involved in all phases of the project, including planning and funding. (Exhibit 47 – attachments to affidavit of John Dew.)

C. The Sufficiency of the Special Use Permit Application

On September 11, 2015, CEMA Corp., the entity who owned the Meadows property at the time, submitted a special use permit application. (Trial Ex. 13.) A special use permit was required for the proposed Meadows development because the property is located in the Historic District Entrance Corridor Overlay zone and the proposed retail use exceeded 50,000 square feet. (Johnson Trial Tr. – Town's Case 12:7-14.)

Included with the special use permit application were a list of conditions and several maps. (Trial Ex. 13, 50; Johnson Trial Tr. – Town's Case 13:8 – 14:24.) The conditions addressed utilities, building facades, serving, loading and equipment storage areas, signage, lighting, and required an environmental and archeological studies, as well as a certificate of appropriateness. (Trial Ex. 13; Johnson Trial Tr. – Town's Case 13:20 – 14:15.) Specifically, the conditions required that a comprehensive signage plan for the development be approved by the Town and required that each parcel and outparcel appear before the Planning Commission and Town to request a "Certificate of Appropriateness." (Trial Ex. 13.) The maps attached to the application showed the proposed location of the roads, buildings, and landscaping. (Trial Ex. 50; Johnson Trial Tr. – Town's Case 16:15 – 17:20.)

Both Matthew Johnson, Director of Planning for the Town of Abingdon, and Greg Kelly, Town Manager for the Town of Abingdon, testified that it would be practically impossible for an entity applying for a special use permit to submit a complete final set of plans with the application for a special use permit. (Johnson Trial Tr. – Town's Case 26:17 – 27:5; Kelly Trial Tr. – Town's Case 27:1-4.) This is because, as explained by Mr. Johnson, the final site plan cannot practically be completed until a number of other requirements are met, much later in the process than the special use permit application and approval. (Johnson Trial Tr. – Town's Case 28:1 – 29:5, 30:3-23.)

Mr. Kelly stated that the applicant substantially complied with the special use permit process and application process. (Kelly Trial Tr. – Town's Case 26:18-24.) Likewise, Mr. Johnson testified that the special use application and attached documents contained all of the necessary information for the Planning Commission and the Town Council to make a reasonable decision based on the proposed development. (Johnson Trial Tr. – Town's Case 17:4-20, 26:4-16.)

Importantly, the specific items of which the plaintiffs complain that were not included with the site plans were in fact part of the application and plans. The items that were allegedly omitted were the streets and roadways, signs, and height and total square footage of the buildings. (See Exhibit 67, answer to interrogatory 10) ("The site plan . . . did not include internal streets, roadways, signs, and height and total square footage of the floor area . . . .). The plans submitted with the special use permit application have a scale showing the dimensions of the proposed building. Streets and

roadways are present on the plans, and approval of signage was a specific condition of both the special use permit and the COA application process. (*See Complete Application introduced as Exhibit 50).*

D. No Contract to Rezone the Meadows Property

Neither the Town Council nor the Planning Commission entered into any agreement or contract in which they bound themselves to approve the rezoning or the special use permit.

In late 2014 or early 2015, Steve Smith, the CEO of Food City, and Greg Kelly began discussing a possible three phase project involving the Meadows property that would include the realignment of Green Springs Road, a commercial development, and a sports complex. (Kelly Trial Tr. – Town's Case 12:16 – 14:7.) The Town had explored purchasing the entirety of Meadows property to build a sports complex before the discussions between Mr. Smith and Mr. Kelly. (Kelly Trial Tr. – Pl.'s Case 5:24 – 7:19; Kelly Trial Tr. – Town's Case 7:23 – 11:19.) As Mr. Kelly explained, the Town would have had to sell part of the Meadows property to a commercial developer if the Town had acquired the Meadows property, in order for the project to be financially feasible. (Kelly Trial Tr. – Town's Case 9:12 – 11:1.) Also, the Green Springs Road improvement project had been on the Town's radar for over twelve years. (Kelly Trial Tr. – Town's Case 14:8 – 15:17.)

Thus, while the Town acquiring a portion of the Meadows property for recreational facilities was discussed as a possibility from the inception of the Meadows

project, no contract was entered between the Town and Marathon or CEMA Corp. prior to the rezoning. (Kelly Trial Tr. – Town's Case 21:17 – 22:4, 30:15 – 31:9, 32:16-19.) The Town never promised to rezone the property or to approve the special use permit and never entered a contract or agreement that limited its discretion or police power with regard to the rezoning or special use permit. *Id.*

Mr. Kelly testified that, while he hoped Mr. Smith would contribute to the recreational facilities, he expected that the Town would have to pay for the recreational tract of the Meadows property. (Kelly Trial Tr. – Town's Case 22:2-10; Kelly Trial Tr. – Pl.'s Case 11:22 – 12:18.) Mr. Kelly's undisputed testimony is that he first learned of Marathon's proposal to gift money to the Town to purchase the recreational tract after the rezoning was approved. (Kelly Trial Tr. – Pl.'s Case 22:8-12.)

Mr. Kelly was asked about a Letter of Intent from Steve Smith to the Town attorney dated December 2, 2015. (Kelly Trial Tr. – Pl.'s Case 22:13 – 23:16.) While the Letter of Intent reflects Marathon's intention to gift money to the Town to purchase the recreational tract, by its terms the letter did not obligate either party "unless and until the necessary parties execute a definitive written agreement…" (Trial Ex. 20.) Importantly, the Letter of Intent does not even address the approval of the rezoning. *Id.* Moreover, the plaintiffs never presented any evidence establishing if or when the Town Council received the letter, or when it acted upon the offer. The plaintiffs speculate that since the letter is of a certain date, it was received and acted upon, but there is no such evidence in the record.

The only contract entered between the Town and Marathon was the Joint Development Project Agreement, which was executed on December 29, 2015, well after the rezoning and special use permit had already been approved by the Town Council. (Kelly Trial Tr. – Pl.'s Case 24:16-22; Kelly Trial Tr. – Town's Case 34:2-19; Trial Ex. 29.)

E. The Town's Decision was Not Arbitrary and Capricious

The plaintiffs have not presented any probative evidence that the zoning decision was unreasonable. As stated above, the only evidence presented by the plaintiffs were Ms. Harman's concerns about the rezoning based upon "stories" she had heard. While plaintiffs' counsel takes issue with the description in the Zoning Case Staff Report of the Meadows property as "infill and underutilized property," Mr. Johnson, who has 15 years of experience in local government, a master's degree in geography with a concentration in economic development and planning, and is a Member of the American Institute of Certified Planners, stated that he considers the Meadows project an "infill project." (Johnson Trial Tr. – Pl.'s Case 36:5 – 39:12; Johnson Trial Tr. – Town's Case 3:21 – 4:11.) This is because of its location beside an existing commercial development, Magic Mart, and Interstate 81. (*Id.)*

The Town of Abingdon Planning Staff recommended that the applications for rezoning and for a special use permit be approved. (Johnson Trial Tr. – Town's Case 7:16-24; Trial Ex. 15.) The Planning Staff performed an evaluation and concluded that

the special use permit was in conformity with the comprehensive plan. (Johnson Trial Tr. – Town's Case 9:6-14.)

Mr. Kelly testified that there are multiple benefits the rezoning provides to the Town, including: (1) the realignment of Green Springs Road with Cook Street, which improves safety; (2) in excess of 300 new jobs; (3) recreational facilities for the well-being of local children and travel circuit teams, which will also boost tourism; (4) generation of net new revenues; and (5) avoidance of raising taxes to pay for recreational facilities. (Kelly Trial Tr. – Town's Case 24:19 – 25:24, 41:18 – 42:7.) Mr. Kelly also testified that the Meadows project allows the Town to preserve the historic house on the recreational tract. (Kelly Trial Tr. – Town's Case 28:11 – 30:3.)

The Town Council went to great lengths to address many of the concerns raised. For example, the Town imposed requirements upon Marathon regarding berming and additional landscaping to ensure that the viewshed was protected and adjusted a boundary line to move one of the proposed outparcel lots further from the house on the recreational tract. (Kelly Trial Tr. – Town's Case 39:11-19; Johnson Trial Tr. – Town's Case 33:4 – 34:13.) All of the benefits of the rezoning, as well as the concerns of the plaintiffs, were before the Town Council when it made its decisions to approve the rezoning and the special use permit. (Kelly Trial Tr. – Town's Case 39:5 – 40:1.)

Importantly, among the items admitted into evidence were the transcripts of the Town Council meetings. These transcripts prove beyond any doubt that the Council members were aware of the concerns of the citizens, but were equally mindful of the

innumerable benefits the project will provide to the Town and its citizens. The benefits are far-reaching as Mr. Kelly testified: a much needed sport complex, improvements in roads and public safety, an enhanced tax base, improved tourism, economic development and jobs, as well as keeping taxes low for the Town's residents. This project will provide immense benefits that contribute to and improve the general welfare, safety, and health of the Town and its citizens, which is why the Town Council, the Planning Commission, the Town's staff, and state agencies have thrown their complete support behind it.

III. LAW AND ARGUMENT

1. Standard of Review

Under Virginia law, the adoption of a zoning ordinance and the granting of a special use permit are legislative acts governed by the same standard of review. *See County Bd. Of Arlington County v. Bratic,* 237 Va. 221, 377 S.E.2d 368, 372 (1989); *City Council of Virginia Beach v. Harrell,* 236 Va. 99, 372 S.E.2d 139, 141 (1988). Local governing bodies have broad discretion in taking zoning actions in the exercise of their police powers. *Harrell,* 236 Va. at 102, 372 S.E. 2d at 141. As a result, a governing body's grant or denial of a rezoning application or special use permit need not be supported by any evidence but "is presumed to be valid and will not be disturbed by a court absent clear proof from the challenging party that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals or general welfare." *Id.* Any decision "supported by evidence sufficient to make the question fairly debatable must be sustained." *Id.*

2. The Plaintiffs Failed to Present Sufficient Evidence to Establish Standing

It is well established under Virginia law that a complainant must be "an aggrieved party" with "a justiciable interest" in an actual controversy such that the complainant's rights will be affected by the outcome of a case. *Friends of Rappahannock v. Caroline Co. Bd. of Supv.*, 286 Va. 38, 743 S.E.2d 132 (2013). To be aggrieved, a party mush have a proprietary or legal right affected by the rezoning. *Braddock, L.C. v. Bd. of Supv. of Loudon Co.*, 268 Va. 420, 601 S.E.2d 552 (2004). Moreover, to establish a justiciable controversy, a complainant "must articulate legally enforceable rights." *Friends of the Rappahannock*, 286 Va. at 48, 743 S.E.2d at 137. To put it differently, a complainant "must establish a justiciable interest by alleging facts demonstrat[ing] an actual controversy . . . such that [the complainant's] rights will be affected by the outcome of the case." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supv.*, 285 Va. 87, 98, 737 S.E.2d 1, 7 (2013) (internal citations and quotations omitted).

When a party has no ownership interest in the subject property being rezoned, a party has standing only if two conditions are met. First, the complainant must own property within or in close proximity to the property subject to the land use determination, thus establishing a "direct, immediate, pecuniary, and substantial interest in the decision." *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415, 420, 344 S.E.2d 899, 903 (1986). Second, the complainant must allege facts

demonstrating a particularized harm to "some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." *Virginia Marine Res. Comm'n v. Clark*, 281 Va. 679, 687, 709 S.E.2d 150, 155 (2011).

Regarding the second condition, several Virginia Supreme Court decisions have "established the parameters for demonstrating that one is 'aggrieved'" as that term is used in a statute:

> [I]t must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. *Nicholas v. Lawrence*, 161 Va. 589, 592, 171 S.E. 673, 674 (1933). The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." *Id.* at 593, 171 S.E. at 674. Thus, *it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated. The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally. Insurance Ass'n v. Commonwealth*, 201 Va. 249, 253, 110 S.E.2d 223, 226 (1959).

Va. Marine Res. Comm'n, 281 Va. at 687, 709 S.E.2d at 155 (2011) (quoting *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415, 419-20, 344 S.E.2d 899, 902-03 (1986)) (emphasis added).

In *Clark*, a case that is particularly relevant here, Virginia Beach applied with the Virginia Marine Resources Commission ("VMRC") to install a stormwater

outfall pipeline. The Commission conducted a public hearing, where a number of residents objected to the project stating that it was not needed, posed environmental and water quality concerns, and was inconsistent with other similar pipeline installations. VMRC approved the project and a number of Virginia Beach residents appealed the decision to the circuit court pursuant to Va. Code § 28.2-1205(F). VMRC filed a motion to dismiss the appeal because the petition failed to establish that the residents were "aggrieved," a requirement before anyone can appeal a VMRC decision under the statute. The circuit court agreed with VMRC and dismissed the case, finding that the "petition alleged only 'non-particularized claims of harm' which did not establish standing." *Id.* at 683, 709 S.E.2d at 153. The residents appealed to the Court of Appeals. The Court of Appeals reversed the circuit court and "held that Rule 2A:4 which governs the petitions for appeal from agency decisions did not require the petition to contain allegations to establish standing." *Id.* at 684, 709 S.E.2d at 153.

The Supreme Court reversed the Court of Appeals, holding that the petitioners lacked standing because "[t]he petition and its attachments contain no other allegations or demonstration of *direct injury*, of an *immediate pecuniary and substantial interest that would be affected*, or that a *personal or property right was denied or that a burden was imposed* on the Residents different from that imposed on the public generally." *Id.* at 687, 709 S.E.2d at 155. In sum, the allegations and claims did not meet the definition of "aggrieved" because "[t]hey are either disagreements with the pipeline project itself or, as the circuit court observed, concerns shared generally with the public."

Id. at 688, 709 S.E.2d at 155. The Court went further to note that "Code § 28.2-1205(F), restricting appeals from the VMRC's decisions to persons 'aggrieved,' sets the standing requirement." *Id.* Rule 2A:4 "cannot supersede or displace other statutes relevant to the appeal." *Id.* at 685, 709 S.E.2d at 154. Accordingly, the Court affirmed the circuit court's order dismissing the petition "for failure to allege facts sufficient to demonstrate that the Residents were 'person[s] aggrieved' by the decision of the VMRC within the intendment of Code § 28.2-1205(F)." *Id.* at 688-89, 709 S.E.2d at 156.

Similarly, in *Friends of Rappahannock*, the Virginia Supreme Court rejected the complainant's efforts to generate standing through conclusory allegations as to possible harms. The Court noted that proximity to the proposed site was insufficient to show a justiciable interest. 286 Va. 38, 50, 743 S.E.2d 132, 138 (2013). Rather, the complainants must allege facts showing harm to some personal or proprietary right different from that suffered by the public generally. *Id.*

Here, the evidence introduced at trial is insufficient to establish that any of the plaintiffs have standing. As in *Clark* and *Friends of Rappahannock*, the plaintiffs' have failed to introduce any evidence that supports the claim that plaintiffs were "aggrieved" by the Town Council's rezoning; or that they have been denied a personal or property right of any nearby landowners or the imposition of a burden or obligation upon the complainants different from that suffered by the public generally. *See Va. Beach Beautification Comm'n*, 231 Va. at 419-20, 344 S.E.2d at 902-03 (affirming the circuit

court's ruling that petitioner had no standing because petitioner was not "aggrieved" as required by the subject statute).

The only plaintiff who testified is Nan Harman, and she only expressed concerns related to a pond that provided water for her animals. Those potential harms are speculative and unrealized, and without expert testimony to support them, are insufficient to establish standing. There is no direct injury to her demonstrated by her concerns. Were it otherwise, standing could be manufactured by concerns that may never be realistic, realized or even possible. To have standing, there must proof of some denial of right. That is simply not present here.

Accordingly, the plaintiffs' action must be dismissed because they have no standing to seek judicial review of the Town Council's actions.

3. The Plaintiffs Failed to Present Sufficient Evidence to Support Their Claim Regarding the VDOT Traffic Study

In their Amended Petition, plaintiffs failed to include any claim based upon the Town's alleged failure to comply with the statute governing the performance of a traffic impact study.

Despite the fact that the Virginia Department of Transportation ("VDOT") was aware of the Proposed Meadows Development since at least February 19, 2015, that VDOT was involved in discussions with the Town throughout 2015 regarding the Proposed Meadows Development, and that a traffic impact study ("TIA") was performed, commented upon, and approved by the VDOT prior to the final approval of the rezoning,

the plaintiffs take the untenable position that the reasoning "cannot be valid" because the notice to the VDOT was insufficient. The VDOT, in its December 16, 2015 letter, specifically found that "**[t]he TIA review was performed in accordance with Chapter 527 requirements.**" VDOT refers to the requirements of Virginia Code § 15.2-2222.1 as "Chapter 527 requirements" because § 15.2-2222.1 was added to the Virginia Code by Chapter 527 of the 2006 Acts of Assembly. The revised TIA was "found to be acceptable to VDOT." *Id.* Thus, the position taken by the plaintiffs, that VDOT's review was not performed in accordance with statutory requirements, is contradicted by VDOT itself.

The requirements of Virginia Code § 15.2-2222.1 are designed to "enhance the coordination of land use and transportation planning" and "expand VDOT's role in the land planning and development review process." Updated Administrative Guidelines for the Traffic Impact Analysis Regulations, Nov. 2014 at 1 (*available at* http://www.virginiadot.org/projects_/resources/chapter527/ Administrative_Guidelines_TIA_Regs_Nov_2014.pdf). Unlike the public notice requirements of Virginia Code § 15.2-2204, which provides that a governing body shall not adopt any amendment until notice has been provided as required by that statute, VDOT's review of proposed rezoning applications pursuant to Virginia Code § 15.2-2222.1(B) is not a prerequisite for the enactment of rezoning. VDOT's own Administrative Guidelines provide that Virginia Code § 15.2-2222.1 "**does not affect local government authority to adopt plans and make decisions on proposed land uses.** Instead, § 15.2-2222.1 of the Code

provides VDOT with the authority to analyze and provide comments to local governments on comprehensive plans and rezoning proposals that may have a significant impact on state-controlled highways." *See* Updated Administrative Guidelines for the Traffic Impact Analysis Regulations, Nov. 2014 at 21 (*available at* http://www.virginiadot.org/projects/resources/chapter527/Administrative_ Guidelines_ TIA_Regs_Nov_2014.pdf). The VDOT Guidelines further explain that "VDOT's findings are advisory in nature." *Id.*

The plaintiffs have to date cited no authority for the proposition that failure to strictly comply with § 15.2-2222.1 by failing to submit a rezoning proposal to the VDOT within 10 days of its receipt by the Town Council renders a rezoning decision void *ab initio*. In this instance, it would have been a hollow and useless exercise because VDOT was not only aware of what was being proposed, it was providing direction and support. Moreover, while the statute uses the word "shall," the Virginia Supreme Court has repeatedly held that "[a] statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute." *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994) (quoting *Commonwealth v. Rafferty,* 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991)). *See also Huffman v. Kite*, 198 Va. 196, 202, 93 S.E.2d 328, 332 (1956).

In *Huffman*, the plaintiff challenged the validity of orders of a circuit court appointing members of the Electoral Board. The relevant statute provided that "[a]ny

vacancy occurring within the term of the appointees shall be filled by the circuit court, or by the judge in vacation, within thirty days thereafter." *Id.* at 197, 93 S.E.2d at 329. The plaintiff alleged that, because the appointments were made beyond the thirty day period, they were invalid. The Supreme Court of Virginia reviewed the statute and held that the word "shall" was directive rather than mandatory. In reaching its decision, the Court noted that "[t]he purpose of the provision is to prompt a regular and periodic consideration and review by the appointing power of the personnel of the electoral board. [I]t is not intended to fix a time limitation upon the power of the court or judge in vacation to make an appointment after the expiration of the thirty days mentioned or to invalidate a tardy appointment." *Id.* at 203-04, 93 S.E.2d at 333.

Similarly, the purpose of § 15.2-2222.1 is to enhance the coordination of land use and transportation planning between localities and VDOT. Nothing in the language of § 15.2-2222.1 indicates that the legislature intended zoning decisions to be invalidated for failure to forward the proposed rezoning application to the VDOT within 10 days of its receipt by the governing body. Rather, the language regarding submission of rezoning proposals to the VDOT is directive. Had the General Assembly intended such a result, it would have presumably said so in the statute.

In this case, the purpose of the statute was satisfied. VDOT already had "notice" of the Proposed Meadows Development and the Town Council forwarded the TIA to the Virginia Department of Transportation on the same day that it was received by the Town Council, November 23, 2015. Because of the VDOT's familiarity with the

proposed development and their ongoing discussions with the Town regarding the realignment of Green Springs Road and the Proposed Meadows Development, the VDOT was able to provide feedback and approval of the TIA before the rezoning was approved.

Contrary to the plaintiffs' assertions, Virginia Code § 15.2-2222.1(B) does not even contemplate that the VDOT review and approval must occur before a governing body approves a rezoning. The statute provides that after the proposal and TIA are submitted to VDOT, VDOT has 45 days to complete its initial review and 120 days to complete its final review. Thus, the statute contemplates that VDOT's final review may not be completed until well after a rezoning decision has already been made. In this case, there was no rush for the VDOT to approve the TIA, and the Town Council had the authority to approve the rezoning without the VDOT's review and approval regarding the TIA.

4. *The Town Council Properly Received the Application for Special Use Permit and the Application Satisfied the Town's Zoning Ordinance*

The application for the special use permit included the site plan, numerous topographical maps, site maps, and a list of special use permit conditions which were submitted with the applications. In addition, all of the conditions with the COA process applied automatically to the approval process.

The specific items the plaintiffs complain that are not within the application (set forth in their trial brief and discovery responses) are streets and roadways, signs, and height and total square footage of the proposed buildings. These claims are demonstrably

incorrect. The Court may refer to the special use permit and attachments. The testimony of Mr. Kelly and Mr. Johnson established that all of the information required by Abingdon Town Code § 17-3-2 was submitted to the Town Council and the site plan submitted with the application substantially complied with the site plan ordinance. Substantial compliance is all that is required. *See Reich v. Snead,* 5 Va. Cir. 541 (Craig Co. 1979) (Stephenson, J.) (substantial compliance with site plan requirements for a special use permit is sufficient). The site plan included scaled drawings which reflect the size of the proposed buildings, as well as the proposed internal streets and roadways. Signage for the proposed development was specifically addressed in the special use permit conditions.

As Mr. Johnson testified, the site plan process is a lengthy process that evolves as the Planning Department receives input and evaluates the plans. Moreover, the plaintiffs cite absolutely no legal support for their argument that the perceived inadequacies in the application for the special use permit would render the Town Council's decision to approve it void *ab initio*. In fact, their argument is simply a creative restyling of the argument that the Council lacked sufficient information and thus its decision was "arbitrary and capricious."

An argument similar to the plaintiffs' was considered and rejected by the Virginia Supreme Court in *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991). In *Southern Iron Works*, the trial court held that a zoning ordinance was not validly enacted because the governing body did not have before it the

full text of the ordinance. *Id.* at 441, 410 S.E.2d at 677-78. The Supreme Court reversed and held that the trial court erred, stating: "Code § 15.1-486 [current § 15.2-2281] authorizes counties and municipalities to regulate, by ordinance, the use of land and buildings, including the size, height, area, and location of those buildings. Neither that nor any other code section dictates the form that an ordinance or ordinance amendment must take in order to be validly enacted." *Id.* at 445-46, 410 S.E.2d at 680.

Similarly, in this case, the only authority cited by plaintiffs is Town Code § 17-3-2, which states that "[i]t shall be the responsibility of the applicant to provide information and data to...(e.) [p]rovide a site plan prepared and submitted in accordance with the requirements of article 18." The Town Council, Planning Commission, and Town staff were satisfied that the site plan submitted with the special use permit met these requirements, but even if it had approved the special use permit without the site plan, the Town Council would not have been deprived of its authority to review and approve the special use permit and ultimately approve the final site plan, as Mr. Johnson testified.

As the testimony established, a final site plan must be submitted and approved before any permits allowing construction to proceed will be issue. To hold that a project site plan must contain all of the final elements of a site plan ignores the realities of the process.

The plaintiffs reliance upon *Town of Jonesville v. Powell Valley Village Limited Partnership,* 254 Va. 70, 487 S.E.2d 207 (1997) is unavailing. The Supreme

Court held that before a municipality may adopt a zoning ordinance, it must adopt a comprehensive plan as required by statute. The court did not speak to the adequacy of a special use permit application.

The evidence before the Court established that the special use permit application, the special use permit conditions and the Certificate of Appropriateness conditions, when read together with the Town Council's ability to evaluate whether the conditions are satisfied (including final approval of the site plan, Article 18, Section 18-7-3), meets all requirements of the ordinance that applies to the special use permit application process.

5. There is No Evidence of Contract Zoning and Such a Claim is Not Recognized under Virginia Law

The plaintiffs in their amended petition contend that the rezoning constituted contract zoning, a theory that has not been recognized by the Virginia Supreme Court, and is in fact contrary to statutory enactments of the General Assembly. This claim is without merit for several reasons.

First, conditional zoning is specifically authorized by statutes enacted by the Virginia General Assembly. *See* Va. Code Ann. § 15.2-2297; *Riverview Farm Assoc. Va. Gen. P'ship. V. Bd. Of Supv. Of Charles City County*, 259 Va. 419, 528 S.E. 2d 99 (2000) (holding that proffered conditions are permissible). *See* Shelby D. Green, *Development Agreements: Bargained-for Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 Cap. U. L. Rev. 383 (2004) (recognizing Virginia as a state that

authorizes development agreements and conditional zoning). While what occurred here is not conditional zoning, Virginia statutes specifically authorize proffers and conditions for rezoning, which would include items such as property donations.

Those courts that have considered contract zoning as illegal have generally done so when a municipal government bargains away its police powers. "Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a bilateral contract." *Dale v. Town of Columbus*, 101 N.C. App. 335, 399 S.E.2d 350 (1991). *See also Chung v. Sarasota County*, 686 S.2d 1358 (Fla. Dist. Ct. App. 1996) (contract rezoning refers to an agreement between a property owner and a local government where owner agrees to conditions in return for the government's rezoning or enforceable promise to rezone); *McLean Hosp. Corp. v. Town of Belmont*, 56 Mass. App. Ct. 540, 778 N.E.2d 1016 (2002) ("illegal contract zoning has been defined as a process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property"); *Dacy v. Village of Ruidoso*, 114 N.M. 699, 845 P.2d 793 (1992) (a contract in which a municipality promises to zone property in a specified manner is illegal because, in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures).

"One of the reasons contract zoning is generally rejected is because the legislative power to enact and amend zoning regulations requires due process, notice, and hearings." *Chung,* 686 So.2d at 1359 (internal quotations and citations omitted); *Dacy*, 114 N.M. at 703, 845 P.2d at 797 (contract to zone is illegal because it circumvents mandatory zoning procedures); *Carlino v. Whitpain Investors*, 499 Pa. 498, 504, 453 A.2d 1385, 1388 (1982) (legislative functions may not be surrendered by entering into a contract; individuals cannot by contract abridge police powers which protect the general welfare and public interest).

The manner in which the Meadows property was rezoned does not fit within the definition of contract zoning. First, there was no bilateral contract that approves the rezoning and issuance of the special use permit in exchange for property. Therefore, this claim fails for the total absence of a necessary predicate – a bilateral contract. There is absolutely no evidence that the Town ever promised to rezone the property, or that it made any promises in exchange for any consideration.

In this instance, the Town followed all of the proper notice and procedural requirements for rezoning the property, as evidenced by the plaintiffs conceding away this issue. There was no bilateral contract which obligated the Town to rezone in exchange for anything of value which omitted these steps. Consequently, as a matter of law the plaintiff's claim fails because the very essence of a contract zoning claim is absent. Green, 33 Cap. U. L. Rev. at 416 (contract zoning is illegal because it obligates a municipality to rezone property without the prescribed procedures such as notice and a

public hearing, thereby denigrating the process and committing itself to action without public involvement). The evidence in this matter is to the contrary, as all required procedures were followed.

Importantly, the plaintiffs claim is apparently based upon the Joint Development Project Agreement to establish that the rezoning resulted from a bilateral contract. However, this Agreement was entered into on December 29, 2015, after the rezoning had been voted on and approved. The Agreement purports to obligate the Town of Abingdon to secure financing for roadway construction and obligates Marathon to deliver to the Town a deed of dedication related to the project. It does not require the Town to the rezone of the property. Accordingly, it does not meet the most basic requirement of contract zoning.

There is nothing improper or illegal about the Joint Development Agreement, and the plaintiffs cite no authority supporting their contention. The plaintiffs cite *Mumpower v. Housing Authority,* 176 Va. 426, 11 S.E. 2d 732 (1940), for the proposition that municipalities may not, by contract, divest themselves of police powers. This *dicta* is a proposition with which the Town does not take issue. But the holding of the case is to the contrary and does not support the plaintiffs here. Similarly, the circuit court decision in *Pima Gro Systems, Inc. v. King George County,* 52 Va. Cir. 241 (2000), does not cite a single Virginia authority in holding that contract zoning is impermissible. However, even if it were binding precedent, the facts of the case are inapposite and

distinguishable, because by contract the county was permitting an activity prohibited by the applicable the zoning ordinance. Those facts are not present here.

In this instance, the Abingdon Town Council followed all of the procedures provided for by the General Assembly and the Abingdon Town Code. The joint development agreement was signed after the rezoning, and the rezoning was not contingent upon execution of the Joint Development Agreement. Indeed, there are numerous conditions that remain in the Agreement that could render it non-operative. However, there was never a bilateral contract or agreement to exchange land for rezoning.

6. Plaintiffs Failed to Present Any Evidence that the Town Council's Granting of the Zoning and Special Use Permit was Arbitrary and Capricious

The plaintiffs claim the Town Council's decision was arbitrary and capricious. This Court's evaluation of the Town Council's legislative act is entitled to great deference and a Court may not substitute its judgment for that of a legislative body. *Town of Leesburg v. Long Lane Assocs. Ltd. P'ship.*, 284 Va. 127, 138, 726 S.E.2d 27, 33 (2012). The Virginia Supreme Court has often reaffirmed in its recent decisions that courts should not substitute their judgment for that of the locally elected legislative bodies to whom these decisions have been entrusted. The Town Council's decision is presumed reasonable, and if the decision is debatable, the Town Council's decision may not be disturbed. *See, e.g., Gregory v. Bd. of Sup'rs of Chesterfield Cty.*, 257 Va. 530,

538, 514 S.E.2d 350, 354 (1999) (it is the prerogative of the legislative body, rather than the property owner or court, to choose the appropriate zoning classification).

In deciding to rezone the property at issue and grant a special use permit, the Town Council had to necessarily weigh a number of complex and competing interests, public and private. Notwithstanding the plaintiffs' challenge to the wisdom of rezoning the Meadows property and granting a special use permit, the Town of Abingdon's planning staff reviewed, analyzed, and supported the granting of the rezoning and special use permit.

Subsequently, the Town's Planning Commission gave its imprimatur as well. After reviewing all the evidence and balancing a multitude of competing considerations, the Planning Commission voted to approve the rezoning and issuance of a special use permit. Finally, the Town Council followed, granting the rezoning and issuing a special use permit. These legislative decisions were supported by ample evidence and were not arbitrary and capricious. Even if they were debatable, the plaintiffs lose. If challenged in court by probative evidence that the decision was unreasonable, the governing body need only produce sufficient evidence of reasonableness to make the issue fairly debatable; if the issue is fairly debatable, the legislative decision must be sustained. *Renkey v. County Board of Arlington County*, 272 Va. 369, 634 S.E.2d 352 (2006); *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003).

The plaintiffs also complain about an alleged inconsistency with the Town Comprehensive Plan. The plaintiffs argue that the Town was motivated by its desire to acquire property for a sports complex. The plaintiffs miscomprehend both the Town's Comprehensive Plan and the procedures involved.

As an initial matter, the Town's Comprehensive Plan is not a document that governs the Town's decision. It is an aspirational document that "is used as a guide for pubic investment decisions, as well as to provide the legal foundation for important amendments for tools like zoning and subdivision ordinances." The ordinances themselves are governing.

Even assuming *arguendo* that the Comprehensive Plan had the force of law, the Town's rezoning decision is specifically consistent with it in a number of ways. Among the items within the Comprehensive Plan are the creation of park areas and sports facilities. It supports controlled growth in entrance corridors. The plan seeks to enhance economic development. The rezoning of the property at issue satisfies each of these policy goals. In addition, there are other ways in which this project not only satisfies but fulfills the goals of the Comprehensive Plan, as the testimony of Mr. Johnson and Mr. Kelly attests. There is no evidence to the contrary. Accordingly, the plaintiffs' claim that the rezoning is inconsistent with the Comprehensive Plan does not state a legal basis for challenging Town Council's decision.

7. Plaintiffs Have Failed to Submit Sufficient Information in Support of an Injunction

Plaintiffs failed to present any evidence to support the award of an injunction, temporary or permanent. Accordingly, the Court should dismiss any such claim. The Town adopts by reference the principles set forth it its memorandum filed in opposition to the plaintiffs' motion for a temporary injunction.

To the extent a permanent injunction would supersede the temporary injunction, the Town believes that the evidence fails to establish any basis for the Court awarding an injunction.

IV. CONCLUSION

The plaintiffs opposed the rezoning of property and filed this legal action to contest the Town Council's legislative act with which they disagreed, one that is entitled to great deference as it was unanimously passed by the governing body to whom the general welfare and well-being of the citizens of Abingdon are entrusted. At the end of the day, the plaintiffs are asking this Court to reach a different conclusion and overturn the decision of those to whom the General Assembly, the Virginia Constitution, and the citizens of Abingdon have elected to make decisions of this nature. As the Virginia Supreme Court has written, land use decisions require the balancing of a host of competing interests, both public and private.

Remarkably, what began as litigation over such fundamental issues as notice, has given way to a few issues that are both narrow and general. However, what is

evident from the trial evidence, and the trial brief that plaintiffs submitted prior to trial, there are no legal precedents supporting their claims. Importantly, even if the Court were to accept their novel theories of first impression, and for the first time in the history of Virginia jurisprudence, find these theories actionable, the problem for them persists that they are without standing, and there is no evidence to support a finding that the special use permit application was insufficient and violated an ordinance, when the evidence before the court is to the contrary. Similarly, the plaintiffs' reliance on a statute that requires local governments to involve VDOT misses the mark, not only because VDOT was aware of and involved with this project from the outset, but also because the very statute, and VDOT policies and regulations, do not provide the remedy the plaintiffs seek.

The plaintiffs argue that what occurred here should be voided because it is contract zoning. Assuming *arguendo* that Virginia would recognize such a claim (which is strongly contested), there are absolutely zero facts to support the contention that the Town Council bargained away its police powers. Rather, it followed all of the appropriate procedures before granting the applications. Had it not, this Court would have heard about it.

Finally, to reach the conclusion that Town Council's decision was arbitrary and capricious would require the Court to ignore the only evidence and testimony before it. The Town Council approved this project because it is provides enormous benefits to the Town and its residents. If this project is derailed, the losers in this litigation will the citizens of Abingdon. The children will also be losers, because they will deprived of a

sports complex and ball fields to play on. Businesses in the Town will lose because they will be deprived of an opportunity to better serve their customers, provide jobs to our residents, and help the Town improve its business environment. Those who enjoy recreational facilities will lose because they will not have available to them better parking and improved access to the Creeper Trail. Abingdon taxpayers will lose because there will be less tax revenue to fund the services provided by the Town. Those who use the roads in Abingdon, specifically Exit 17 and Green Spring Road, will lose because they must continue to travel on congested and unsafe arteries that are outdated and insufficient to carry the traffic loads. Tourism will lose because it will suffer at the hands of NIMBIES who would rather they stay out and not support the Town and its businesses.

In fact, the only winners will be the small group of citizens who want to have this Court veto the Town Council's legislative act, and keep their little corner of the world unchanged. They have demonstrated they care nothing about property rights. Their actions likewise show little respect the very Town governing body that has protected the historical district, worked to maintain the historic charm of the Town, and acted to prevent another big box from building within the Town limits. One must ask why then would they risk doing anything to harm the Town? The answer is, of course, they would not, because they believe that this is a good project for the Town and in the best interests of its citizens. The meeting transcripts prove their conscientious deliberations, caring attitude, and the deep commitment they have for the Town.

The plaintiffs, with the exception Nan Harman whose limited testimony addressed only her fear of losing her water supply, didn't have the decency to stand up and tell the Court under oath how they will be harmed by the rezoning and proposed development. They have caused delay and great expense, and it respectfully submitted that it is time to bring this matter to a close. Not one of issues they raise has any merit, factual or legal. The Court should deny all remedies sought and dismiss the Amended Petition, with full and complete prejudice and bring an end to this litigation.

TOWN COUNCIL OF THE TOWN OF ABINGDON, VIRGINIA

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CERTIFICATE OF SERVICE

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

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