

## TWENTY-EIGHTH JUDICIAL CIRCUIT OF VIRGINIA

C. RANDALL LOWE, JUDGE

SAGE B. JOHNSON, JUDGE

DEANIS L. SIMMONS, JUDGE



COMMONWEALTH OF VIRGINIA

December 13, 2016

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**FILED**  
DEC 13 2016  
DEPUTY CLERK  
CIRCUIT COURT  
WASHINGTON COUNTY, V

Re: *Joseph W. Levine, et al. v. Town Council of the Town of Abingdon, VA, et al.*  
*Washington County Circuit Court – Case No. CL 16-46*

Dear Counsel:

This matter is before the Court on the Amended Petition filed by the Plaintiffs on August 25, 2016, upon answer by Town of Abingdon filed on September 19, 2016 and answer by Marathon Realty Corp filed on September 15, 2016. By agreed order of the parties entered on October 21, 2016, the Court set scheduling dates and set the matter for trial on the merits for both the Amended Petition and the Motion for Temporary Injunction for November 10, 2016. On that day, the Court convened and proceeded to hear opening statements of counsel, evidence by the Plaintiffs, followed by a Motion to Strike by defense counsel which was renewed at the completion of all the evidence, and evidence by the Defendants. The Court took Defendants' motion to strike the evidence under advisement and advised the parties that the Court would issue an Opinion letter setting forth the Court's decision. For the reasons set forth herein, the Court orders that Plaintiffs' Amended Petition and Motion for Temporary Injunction be dismissed.

### Facts

The evidence presented is largely undisputed with the parties agreeing to submit sixty-seven (67) exhibits at the outset of the case. Further, the testimony presented at trial was not materially disputed by the opposing side. Therefore, the facts as accepted and summarized here, as necessary, by the Court are the undisputed facts of the case as presented to the Court.



*Levine, et al. v. Town Council, et al.*  
 December 13, 2016  
 Page 2 of 5

CEMA Corporation (hereinafter "CEMA") owned approximately seventy-one (71) acres commonly known as the "Meadows property" consisting of 31 acres, known as the Meadows, and the Farmhouse parcel consisting of 40 acres, located within the Town of Abingdon's Historic District Entrance Corridor Overlay District. See Exhibits 16 and 17. As part of a possible sale of that property to Marathon Realty Corporation (hereinafter "Marathon"), CEMA requested from the Town to rezone the Meadows property and a small portion of the Farmhouse tract from Agricultural, Forrestal and Open Space (hereinafter "AFOS") to General Business B-2 (hereinafter "B-2"), as well as a special use permit to allow the rezoned site to have a commercial development consisting of numerous commercial structures with a "flagship" Food City store that would consist of over 50,000 square feet. See Exhibits 12 and 13. On October 7, 2015, the Town of Abingdon Planning Commission held a joint meeting with the Abingdon Town Council for the purpose of conducting a public hearing to consider the Rezoning and Special Use Permit applications filed by CEMA. See Exhibits 17 and 18. Following public comment, the Planning Commission discussed the applications and voted four (4) in favor, one (1) against, one (1) abstaining to recommend the approval of both the rezoning of 33 acres from AFOS to B-2 and the special use permit required as a result of the type of use being proposed within the Historic District Entrance Corridor Overlay District. See Exhibit 17.<sup>1</sup>

Immediately upon the adjournment of the Planning Commission meeting, the Town Council conducted a public hearing to likewise discuss the proposed rezoning and request for special use Permit. *Id.* at p. 136. The Town Council heard public comment and then discussed the merits of the applications. At the conclusion of all discussion, the Town Council voted unanimously (5-0) to approve both the application to rezone approximately 33 acres, consisting of all 31 acres known as the Meadows, and a small portion of the Farmhouse parcel and to approve the special use permit necessary for the proposed use in the Historic District Entrance Corridor Overlay District. *Id.* at p. 138-139. At the time of these votes by the Planning Commission and the Town Council, no report regarding a traffic impact study had been received. In fact, Matthew Johnson, Director of Planning, advised the Planning Commission that a "traffic impact analysis is required and will be performed." *Id.* at p. 133. Also, at the time of these votes, a site plan had been submitted but not with the specificity required by Town Ordinance. See Exhibits 34 and 35.

Thereafter, the attorney for the Town of Abingdon received a letter of intent dated December 2, 2015. Within the letter, Marathon agreed that it would provide \$2,289,700 to the Town for purpose of allowing the Town to purchase approximately forty (40) acres, known as the Farmhouse parcel, in exchange for conditions requiring the Town to assist with VDOT improvements to roads around the rezoned Meadows property totaling \$3,500,000. See Exhibit 20. Also, on December 4, 2015, the Town received notification from VDOT that the traffic impact analysis had been performed and the Town could proceed. See Exhibit 21. The Town Council conducted a second reading of the application to rezone the Meadows property on December 7, 2015. See Exhibit 22, p. 172. Following discussion, Town Council voted unanimously on the second reading to approve the rezoning of the Meadows property. *Id.* at p.

<sup>1</sup> The Court notes for the record that the vote total listed in Exhibit 17 was five (5) in favor and one (1) opposed. The Court recited four (4) in favor, one (1) opposed, and one (1) abstained because Mr. Shuman had previously indicated that he had a conflict and would not participate in the meeting and would abstain. The Court therefore assumes that he did not participate, and the "Aye" listed by his name was done so in error.



*Levine, et al. v. Town Council, et al.*  
December 13, 2016  
Page 3 of 5

175. Consistent with the terms contained in the letter of intent, Town Council met at a called public meeting and voted unanimously to accept the financial gift from K-VA-T Food Stores for the purpose of purchasing the Farmhouse parcel from CEMA. See Exhibit 27. By deed dated December 30, 2015 and recorded on that same day, CEMA transferred 40.740 acres to the Town of Abingdon in exchange for consideration of \$2,289,700. See Exhibit 30.

On January 6, 2016, the Plaintiffs filed an initial Petition against the Town of Abingdon and Marathon Realty Corp contesting the rezoning of the Meadows property by the Town of Abingdon. Defendants filed their respective Responses to the Petition and the Court conducted a hearing on those matters. By order entered August 4, 2016, the Court denied the Plea in Bar of both Defendants and granted the Defendants' Demurrer related to standing of all Plaintiffs, except for Ms. Harmon. The Court granted leave to the Plaintiffs to file an Amended Petition in light of the Court's ruling. Thereafter, the Defendants filed their respective Answers to the Amended Petition. The Court then entered an agreed order set forth scheduling matters and set the matter for trial on November 10, 2016.

#### Legal Analysis

All parties agree that the appropriate legal standard of judicial review for the Court to assess Town Council's decision to rezone property and grant a special use permit for said property is whether the Town Council acted "arbitrary and capricious." See Plaintiff Trial Brief, p. 1; Defendant Town Trial Memorandum, p. 14; Defendant Marathon Final Argument, p. 9 and 10; See also *City Council of Virginia Beach v. Harrell*, 236 Va. 99, 372 S.E. 2d 139 (1988). The decision of Town Council in approving the rezoning and special use permit is presumed valid, as a proper legislative function, and should not be disturbed by the Court "absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals or general welfare." *Id.* at p. 101-102, 372 S.E. 2d 139, 141 quoting from *EMAC, LLC v. County of Hanover*, 291 Va. 13, 21, 781 S.E. 2d 181, 185 (2016). The Plaintiffs challenging the action have the burden to show by "clear proof" that the Town Council action was "unreasonable." The Court should not set aside the actions of Town Council if the issues before Town Council were "fairly debatable" within the legislative function of Town Council. *City Council of Salem v. Wendy's*, 252 Va. 12, 14-15, 471 S.E. 2d 469, 470-471 (1996).

In an attempt to establish Town Council's actions were unreasonable, the Plaintiffs make three (3) primary arguments to support their position. First, Plaintiffs argue that Town Council failed to state a public purpose for the rezoning. Plaintiffs Post-Trial Memorandum, p. 1. They argue that Town Council failed to "identify any of the permitted public purposes." *Id.* at p. 2. See also *Ace Temporaries, Inc., et al. v. City Council of the City of Alexandria, et al.*, 274 Va. 461, 649 S.E. 2d 688 (2007). The Court acknowledges that the motion made and seconded at the Town Council meetings of October 7, 2015 and December 7, 2015, which were unanimously approved, do not specifically contain the language evidencing the public purpose for the rezoning. However, motions, on each Council meeting date, were made after full public hearing that clearly considered the rezoning to be necessary to serve the "general welfare" and "public necessity." There was significant discussion about improvements to traffic that would benefit the public along Green Springs Road, the longtime need of a sports complex, and the desire to protect historically significant buildings and the Creeper Trail. All of those discussed



*Levine, et al. v. Town Council, et al.*  
December 13, 2016  
Page 4 of 5

considerations affect the “general welfare” and “public necessity” of the Town of Abingdon. This case is factually distinguishable from *Ace*, because the Town conducted a hearing on the rezoning and then proceeded by way of motion, albeit incomplete with precise language as required by statute, to adopt the rezoning and special use permit. Justice Lemons, who is now Chief Justice, noted in *Ace*, “in this case, without an initiating motion or resolution and without a stated public policy reason, . . . the City Council introduced and had a first reading of an ordinance. . . .” *Id.* at p. 467, 690-691. In this case, there was a motion made following public hearing on both October 7, 2015 and December 7, 2015. While the motion was imperfect in form to comply with Section 15.2-2286(A)(7) of the 1950 Code of Virginia, as amended, the public hearings conducted, the motions made by Town Council, and the votes to rezone and grant a special use permit were taken after public hearing regarding the advantages and disadvantages expressed related to the benefits of such actions for the Town.

Next, the Plaintiffs assert that the rezoning and special use permit were based on “incomplete and legally insufficient information.” Plaintiffs Post-Trial Memorandum, p. 2. The thrust of Plaintiffs’ argument is that the Town Council action was unreasonable because it did not have a completed traffic impact study and a completed site plan before they acted on October 7, 2015. Plaintiffs argue that the Town Council was required to submit the proposed amendment to the Comprehensive Plan to VDOT within ten (10) days of receipt of the application by CEMA pursuant to statute. Section 15.2-2222.1 of the 1950 Code of Virginia, as amended. The act required of the Town Council is directive in that VDOT is to be provided the amendment being requested. It is further directive that it be forwarded within ten (10) days. The case law is clear that non-compliance with the timing of the statute does not invalidate subsequent actions taken. *Jamborsky v. Baskins*, 247 Va. 506, 442 S.E. 2d 636 (1994); see also *Huffman v. Kite*, 198 Va. 196, 93 S.E. 2d 328 (1956). The Town Council had the completed traffic impact analysis returned from VDOT before the second reading that ultimately allowed for the rezoning of the property in question on December 7, 2015.

Likewise, as it relates to the completed site plan, nothing within the adopted Town ordinance in effect at the time of the matters in question sets forth the timing of a “completed” site plan. The Town received an application for rezoning and special use permit with an accompanying site plan. The testimony of Matthew Johnson, Director of Planning, was that site plan provided with the application was substantially complete and contained all information necessary to allow the Planning staff and ultimately the Planning Commission and Town Council to make a “reasonable decision.” He further testified that since that initial application there have been many meetings, several public hearings and modifications that have been necessary. The Town ordinance does not require a completed site plan at the initial stages of the application process. The Town ordinances do not require at the initial application that every unknown or uncertainty be addressed. Rather, the ordinance requires site plan review “before building or occupancy permits may be issued.” See Exhibit 35. The process involved in this case further reinforces that process. By testimony of Mr. Johnson and Mr. Greg Kelly, it is clear that the original site plan provided with the applications gave the Town sufficient information to make a “reasonable decision.” Similarly, the information provided in the application and original site plan provided more than sufficient information to the concerned citizens and those potentially effected to allow them to activate and express their concerns to their duly elected leaders. In fact, of the approximately twenty-five (25) people who spoke to the rezoning issue as early as



*Levine, et al. v. Town Council, et al.*  
 December 13, 2016  
 Page 5 of 5

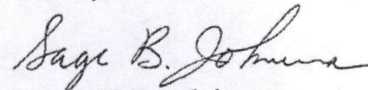
October 7, 2015, not one person among them did not know of the purpose of the rezoning. See Exhibit 17. One spoke of uncertainty regarding an adjoining trailer park and another spoke of needing more information about rescue vehicles traveling Green Springs Road. Since that initial public hearing on October 7, 2015, in an attempt to address some of the public concerns and some of the concerns of the immediately affected owners of adjoining property, Mr. Johnson testified that there have been changes made to the original site plans and specifications. The Court therefore finds that the Planning Commission, staff, and Town Council had sufficient information to allow it to make a reasonable decision as it related to the rezoning.

Finally, the Plaintiffs argue that the Town Council improperly rezoned based on contract consideration. While the Plaintiffs have maintained that argument throughout this case, the Plaintiffs failed to present any evidence to establish to this Court that such rezoning based on contract considerations in fact occurred. There was certainly no written document to support the argument by counsel of that point. Further, there was no evidence presented to show any oral agreement or understanding between any of the parties. There being no evidence presented by Plaintiffs to support this claim, the Court does not reach the merits of the Plaintiffs' legal argument. The record in this case is devoid of any fact that would support an argument that the Town engaged in contract zoning.

The Court having addressed the substantive arguments of Plaintiffs and having ruled against them as it relates to the Amended Petition will at this time direct that the Motion for Temporary Injunction be dismissed, because Plaintiffs have failed to show a likelihood of success as it relates to the Amended Petition. Also, the Court made no ruling on Defendants' argument as to the standing of the Plaintiffs, because the Court believes that Plaintiff Nan Harmon has standing. As a result, the Court resolved the matter on its merits in totality as to each of the named Plaintiffs in the Amended Petition.

The Court will direct counsel for the Town of Abingdon to prepare an Order consistent with this Opinion letter. The Court will set January 4, 2017 at 9:00a.m. for entry of the Order. As customary for this Court, if counsel has endorsed the Order and forwarded the same to the Court prior to that date, neither counsel nor the parties need to appear.

Sincerely,

  
 Sage B. Johnson, Judge

SBJ/afa