VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

G. EDWARD WHITE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.: CL24-25
	)	
CHARLOTTESVILLE CITY COUNCIL, *et al.*,	)	
	)	
Defendants.	)	

FILED
3/15/24 10:35 AM
(Date & Time)
City of Charlottesville
Circuit Court Clerk's Office
Llezelle A. Dugger, Clerk
By _____ Deputy Clerk

DEMURRER

The Defendants Charlottesville City Council ("City Council"), City of Charlottesville (the "City"), and City of Charlottesville Planning Commission (the "Planning Commission" and together with the City Council and the City, the "Defendants"), by counsel, pursuant to Virginia Code § 8.01-273 and Rule 3:8, of the Rules of the Supreme Court of Virginia, state as follows for their Demurrer to the Complaint for Declaratory and Injunctive Relief (the "Complaint"):

I. INTRODUCTION[1]

The Plaintiffs already have that which they now seek to deny to others—good, affordable housing in a desirable locality. To do so, the Plaintiffs, having lost at City Council and at the ballot box, seek a judicial veto of the City's zoning ordinance changes. Plaintiffs have concocted technical faults and attempted to impute those purported faults to the City Council. Those

[1] The Defendants' narrative of the facts relies on excerpts from the legislative history of the City Council's December 18, 2023 adoption of the updated Development Code and Zoning Map. As outlined in the Defendants' Motion Craving Oyer, submitted with this Demurrer, the Supreme Court of Virginia has held that including the legislative record at the demurrer stage is appropriate in actions challenging a local government's decision in a land use matter. *Byrne v. City of Alexandria*, 298 Va. 694, 699-02 (2020). Because Plaintiffs' factual narrative is inconsistent with the facts in the legislative record, Defendants rely on these documents rather than Plaintiffs' unsupported assertions.

attempts, however, fall flat. Indeed, embracing Plaintiffs' vision would require the Court to disregard years of inquiry, study, and public debate that concluded with the City Council's December 18, 2023 adoption of the updated Development Code and Zoning Map (the "NZO").[2] The NZO implements the goals of the community envisioned through "Cville Plans Together"—an extraordinarily labor intensive effort undertaken to ensure that Charlottesville's future development will include and serve all its citizens, including lower and middle income citizens for whom good, affordable housing has become increasingly less attainable.

Plaintiffs' challenge fails for multiple reasons, some of which this Court already addressed in prior litigation—*John Doe and Jane Doe No. 1, et al. v. Charlottesville City Council, et al.*, CL21-610 ("*Doe*"). Three out of the four claims for relief recycle old arguments that the City's 2021 Comprehensive Plan (which was initially adopted on November 15, 2020 and subsequently amended and re-enacted on January 17, 2023) is void because it fails to adequately address the City's transportation needs in the context of potentially higher density development.

In response to these arguments, this Court held that there is no statutory or common law right of action to challenge a locality's adoption of a comprehensive plan, and that the *Doe* plaintiffs lacked standing to challenge the 2021 Comprehensive Plan. This Court also held that "[t]he city is sufficiently in compliance . . . to have complied with the requirements of the comprehensive plan with regard to transportation." Aug. 26, 2022 Tr. at 3, **Exhibit 1**.

Even if Plaintiffs had a right of action to challenge the 2021 Comprehensive Plan, the assertion that the City Council was required, but failed, to have the 2021 Comprehensive Plan

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[2] The City Council's December 18, 2023 Agenda Packet includes the NZO which explains that "City staff began the Cville Plans Together process in January 2020" and that numerous deliberations, work sessions, and hearings took place, which led the City Council to adopt the NZO. *See* Excerpts from the Dec. 18, 2023 City Council Agenda Packet, pp. 281-308, **Exhibit 2**.

vetted by VDOT, is contradicted by the legislative record. Plaintiffs conjure dramatic claims about future population increases wrought by the 2021 Comprehensive Plan—a "guidance" document which neither creates nor modifies existing development rights. Plaintiffs' statements about population increase and infrastructure burden are exaggerated. The legislative record establishes that the development envisioned by the 2021 Comprehensive Plan and permitted under the NZO, will not "substantially affect transportation on state-controlled highways" or otherwise require "new and expanded transportation facilities . . . that support the planned development"—contrary to Plaintiffs' unfounded claims. The analyses considered by the City Council conclude that, in most cities that have allowed increased density for single-family residential areas, only a small part of market viable parcels are redeveloped into multi-family dwellings.

The Complaint asserts that the City Council acted arbitrarily when adopting the NZO by failing to consider certain factors stated in §§ 15.2-2284 and -2283. However, Plaintiffs have not made allegations sufficient to overcome the legislative presumption of the validity of the NZO, and cannot demonstrate that the City Council's consideration of those factors was not fairly debatable. Therefore, Plaintiffs' claims fail as a matter of law. *See Hartley v. Bd of Supervisors*, No. 1298-22-2, 2024 Va. App. LEXIS 69, *14-15 (Va. Ct. App. Feb. 13, 2024) (unpub.) ("Failure to consider the statutory factors on the record does not render a legislative decision arbitrary and capricious as a matter of law. We must instead evaluate only whether the Board's decision was fairly debatable in the context of the required statutory factors.").

The record establishes that the City followed applicable procedural requirements for the adoption of the NZO. The Complaint challenges the NZO based primarily on the argument that the 2021 Comprehensive Plan, adopted on November 15, 2021, is void. The record, however, establishes that VDOT approved the transportation elements of the 2021 Comprehensive Plan by

letter dated November 5, 2021. As to the adoption of the NZO, the legislative record establishes that the City identified a significant problem of the shortage of affordable housing in the City. The City Council determined that it was necessary—and good land use practice—to address the lack of affordable housing. The resulting review process took several years and included the development and adoption of the 2021 Comprehensive Plan. There were multiple public hearings and workshop meetings to discuss the proposed new zoning ordinance and opportunities for public participation. The City staff analyzed the appropriate zoning issues and shared those analyses with the Council. In certain areas—specifically the evaluation of the potential impact on population growth and infrastructure—the City hired consultants and the resulting analyses were considered by the City Council. These analyses conclude that any population growth resulting from the proposed zoning changes is expected to be gradual, and that the City's existing infrastructure will be sufficient to handle the expected potential population growth. The Plaintiffs disagree with these conclusions. Nevertheless, the legislative review process establishes, as a matter of law, that the City Council's adoption of the NZO was a fairly debatable legislative act.

In sum, the Complaint does not justify Plaintiffs' demand for a judicial veto of the legislative public policy decision made by the City Council, with which the Plaintiffs disagree. The Court should not substitute its judgment for the judgment of the City Council and the many citizens who elected the Council members and support the Cville Plans Together process. City Council complied with all relevant statutes and the 2021 Comprehensive Plan. Because the City Council followed the law and adopted a valid zoning ordinance, the Plaintiffs' claims are without merit. This Court should uphold the validity of the NZO because it addresses a legitimate zoning goal—making good housing more attainable for citizens at wider income levels.

II. LEGAL STANDARD

"A demurrer tests the legal sufficiency of the facts alleged in a complaint assuming that all facts alleged therein and all inferences fairly drawn from those facts are true." *Givago Growth, LLC v. iTech AG, LLC*, 300 Va. 260, 264 (2021). However, a demurrer "does not admit the correctness of the complaint's legal conclusions." *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 135 (2018). When deciding whether to grant a demurrer, a court "may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *EMAC, L.L.C. v. County of Hanover*, 291 Va. 13, 21 (2016); *Schaecher v. Bouffault*, 290 Va. 83, 107 (2015); *Ward's Equipment, Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382-83 (1997). It does not matter if the "authentic, unambiguous documents" were included in plaintiffs' original pleading or were incorporated later by an order granting oyer. *See EMAC, L.L.C.*, 291 Va. At 21.

III. KEY FACTS FROM THE LEGISLATIVE RECORD

On December 18, 2023, the City Council adopted the NZO which amended the City Code and adopted a new official zoning map for the City (the "NZO"). The NZO included recitals that outline its purpose and recount the multi-year legislative review that resulted in its adoption, notably:

> **WHEREAS,** City Council has committed to an updated community land use vision to include more progressive planning and zoning inclusivity of the City while preserving historic features and shepherding of public and private resources to improve affordability and livability for all residents and to ensure ongoing vitality of the City; and
>
> **WHEREAS,** pursuant to the direction of City Council, City staff began the Cville Plans Together process in January 2020, which resulted in a new Comprehensive Plan adopted by City Council in November 2021[;] and . . .
>
> **WHEREAS,** the City's consultant recommended reorganization of the City's zoning and development regulations[;] and . . .

> **WHEREAS,** on August 7, 2023, the City Council initiated the proposed City of Charlottesville Development Code and new Zoning Map and directed the Planning Commission to conduct a public hearing and provide recommendations to the City Council; and . . .
>
> **WHEREAS,** City Council also held work sessions on November 8, 13, 29, and December 4, 2023, to hear from its staff and consultants and to discuss the proposed Development Code and new Zoning Map; and
>
> **WHEREAS,** City Council finds that public necessity, convenience, general welfare, and good zoning practice require adoption of the proposed Development Code and new Zoning Map as advertised with certain additional revisions/changes[.]

See Excerpts from Dec. 18, 2023 City Council Agenda Packet, pp. 307-08, **Exhibit 2** ("Consideration of repealing and reordaining a new Chapter 34 of the Charlottesville City Code, and adopting a new official Zoning Map for the City of Charlottesville").

The Complaint challenges the City Council's adoption of the NZO. Plaintiffs argue that the City Council's adoption of the NZO was arbitrary and capricious because the City failed to consider certain statutory factors such as the Comprehensive Plan, the trends of growth or change, the current and future requirements of the community as to land, the transportation requirements of the community, and the effect of the NZO on stormwater management, sanitary sewer systems, schools, traffic volume, public services, and recreational facilities.

However, the legislative record establishes that the City did consider those factors and, as parsed below, the City Council's adoption of the NZO was at the very least "fairly debatable"—requiring the dismissal of the Complaint. The following exhibits, excerpted from the legislative record, are just a few of the many examples, all of which are referenced expressly or impliedly in

the Complaint.[3] The documents establish that the City Council gave due consideration to the statutory factors on which Plaintiffs stake their claims:

- **Exhibit 3: Excerpts from the March 2021 Charlottesville Affordable Housing Plan** (the "Affordable Housing Plan"). The Affordable Housing Plan explains that the Cville Plans Together process "entails three separate but related efforts: a comprehensive plan update, an affordable housing plan, and a zoning code rewrite." Recommendations in the Affordable Housing Plan, such as increasing density by-right in single-family neighborhoods, were incorporated in revisions to the Comprehensive Plan and informed the City's zoning code rewrite.

- **Exhibit 4: Excerpts from the 2021 Comprehensive Plan** (the "2021 Comprehensive Plan"), which serves as a guide for future development in Charlottesville, including the NZO. The 2021 Comprehensive Plan recognizes the need for additional affordable housing in the City and identifies strategies to achieve these goals which address transportation, land use, and utility burden in the context of additional density.

- **Exhibit 5: Excerpts from the August 2022 City of Charlottesville Inclusionary Zoning Analysis** (the "2022 Rate of Change Analysis"). This analysis concludes that "[o]f the more than 10,000 parcels in the study area, less than 2% would turn over and be market viable for redevelopment. Of this subset, an even smaller portion is likely to be redeveloped."

- **Exhibit 6: Excerpts from the February 3, 2023 Zoning Diagnostic and Approach Document** (the "Zoning Diagnostic"). The Zoning Diagnostic addresses the impact of potential increased density on stormwater, water protection, tree canopy protection, transportation, walkability, historic conservation, light pollution, and building codes. The Zoning Diagnostic proposes focus areas for the City when adopting the NZO, including the consideration of stormwater and other infrastructure, and the need for this infrastructure due to changes in impervious surfaces due to increased development intensity.

- **Exhibit 7: Excerpts from the July 2023 City of Charlottesville Inclusionary Zoning Feasibility Analysis, Zoning Rate of Change Analysis** (the "2023 Rate of Change Analysis"), which studies the number of available parcels that would potentially be sold for infill or redevelopment under the proposed zoning ordinance.

- **Exhibit 8: July 7, 2023 Infrastructure Capacity Memorandum** (the "July 7, 2023 Memorandum"). Based on careful consideration of the impacts of potential increased density on the City's water, sewer, stormwater, and transportation systems, coupled with the findings from studies of expected rate of change, this

[3] Defendants have included a Resource Notebook with copies of the referenced key documents from the legislative record for the Court's ease of reference.

Memorandum concludes that "Charlottesville's infrastructure systems have sufficient existing capacity to handle the likely development that could occur under the new zoning ordinance, in support of the City's adopted Affordable Housing and Comprehensive Plans."

IV. ARGUMENT

A. THE CITY AND THE PLANNING COMMISSION ARE NOT PROPER PARTIES AND SHOULD BE DISMISSED.

Neither the City nor the Planning Commission are proper parties to this action. The only necessary and proper defendant in such an action is the governing body. *Boasso Am. Corp. v. Zoning Adm'r*, 293 Va. 203, 207-08 (2017).

Localities and their planning commissions are not appropriate defendants in zoning amendment challenges because they are not statutory decision-makers. Decision-making authority regarding amendments to zoning ordinances is granted only to the governing body. *Miller v. Highland County*, 274 Va. 355, 365 (2007).

The declaratory judgment statutes do not change the result. "Our declaratory judgment statutes do not create or alter any substantive rights, or bring any other additional rights into being." *Miller*, 274 Va. at 370. In *Miller*, the Court held that the declaratory judgment statutes do not create a right to appeal a decision made by a planning commission which is not otherwise authorized by statute.

Here, the City Council adopted the NZO. The City Council is the only entity and governing body that adopted the challenged comprehensive plans and zoning ordinance amendments, and it is the only party against which relief can be sought. The City and the Planning Commission should be dismissed from this case.

B. COUNTS I, II, AND III SHOULD BE DISMISSED BECAUSE THERE IS NO RIGHT OF ACTION TO CHALLENGE THE ADOPTION OF A COMPREHENSIVE PLAN.[4]

In Counts I and II, Plaintiffs seek a declaration that the 2021 Comprehensive Plan is void *ab initio*, because, as alleged by Plaintiffs, the City Council failed to account for, or otherwise did not address, transportation (*i.e.*, roads) in the context of any prospective increase in density, when it adopted the 2021 Comprehensive Plan. Plaintiff's erroneously assert that this violated §§ 15.2-2222.1 and -2223. In Count III, Plaintiffs assert that, ***because the 2021 Comprehensive Plan is void***, the 2013 Comprehensive Plan was effective when the City Council adopted the NZO, and argue that, because the NZO does not reasonably consider the 2013 Comprehensive Plan, the NZO is void. In other words, in Counts I, II, and III, Plaintiffs seek a declaration from the Court that the 2021 Comprehensive Plan is void.

In *Doe*, this Court held that there is no legal basis (constitutional, statutory, common law, or otherwise) by which citizens can challenge a locality's adoption of a comprehensive plan. *See* Sept. 22, 2022 Order, **Exhibit 1**. This is because courts will not adjudicate declaratory judgment actions challenging a governmental action unless such challenge is expressly authorized by statute. *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors*, 285 Va. 87, 100 (2013) (citing *Miller*, 274 Va. at 371-372).

"In Virginia, substantive law determines whether a private claimant has a right to bring a judicial action." *Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways*, 298 Va. 616, 618 (2020). In lodging their challenge to the City's 2021 Comprehensive Plan, Plaintiffs do not allege

[4] In addition to the defenses asserted in this Demurrer, the Defendants' Plea in Bar, filed contemporaneously, explains why the Plaintiffs' challenge to the 2021 Comprehensive Plan, which was adopted on November 15, 2021, is untimely.

any right protected by the Virginia Constitution, nor do they assert any common law right of action; therefore, the existence of any viable right of action must come from statutory law. In *Shilling v. Jimenez*, 268 Va. 202, 208 (2004), the Supreme Court held that plaintiffs did not have a third-party right of action to challenge a county's subdivision decision in a declaratory judgment suit, absent a specific statutory authority granting third parties such a right.

While the Code requires localities to comply with certain requirements when they adopt their comprehensive plans, nothing in the Code grants a private right of action to enforce these requirements or otherwise challenge the adoption of a comprehensive plan. A private right of action cannot be inferred "based solely on a bare allegation of a statutory violation." *Cherrie v. Va. Health Servs.*, 292 Va. 309, 315-316 (2016).

In Counts I and II, Plaintiffs allege violations of statutes that do not give Plaintiffs a right of action to challenge the government act. To the extent any cause of action or right of action could be implied from §§ 15.2-2222.1(A)(1) and -2223(B)(1), such an implied right of action would lie with VDOT—*not* private plaintiffs.[5]

Accordingly, Counts I and II, which seek a declaration that the 2021 Comprehensive Plan is void *ab initio*, should be dismissed, as Plaintiffs have no right of action to challenge the Comprehensive Plan. In addition, this Court should dismiss Count III because it would require this Court to adjudicate the validity of the 2021 Comprehensive Plan.

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[5] VDOT approved the 2021 Comprehensive Plan on November 5, 2021. *See* Compl., Exhibit E. The VDOT approval letter states: "The resulting Comprehensive Plan integrates all the requirements of the Code of Virginia . . . ." No statute provides for a right of action to challenge VDOT's November 5, 2021 approval.

C. COUNTS I, II, AND III SHOULD BE DISMISSED BECAUSED PLAINTIFFS LACK STANDING TO CHALLENGE THE COMPREHENSIVE PLAN.

Counts I, II, and III seek a declaration that the 2021 Comprehensive Plan is void *ab initio*. In addition to there being no right of action to challenge the adoption of a comprehensive plan, Plaintiffs do not have standing to assert this claim because there is no "justiciable controversy" between Plaintiffs and the City Council with regard to the 2021 Comprehensive Plan. In *Doe*, this Court held that the plaintiffs could not proceed with their challenge to the 2021 Comprehensive Plan, which did not avail the plaintiffs of "specific adverse claims based upon present, rather than future or speculative facts." Aug. 26, 2022 Tr. at 3-4, **Exhibit 1**.

As "[t]he purpose of a declaratory judgment proceeding is the adjudication of rights[,] an actual controversy is a prerequisite to a court having authority." *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 98. Furthermore, "[t]he controversy must be one that is justiciable, that is, where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment." *City of Fairfax v. Shanklin*, 205 Va. 227, 229 (1964). For those reasons, individual property-owner plaintiffs do not have standing to challenge a locality's adoption of a comprehensive plan—an advisory planning "guide" for the future development and implementation of a zoning ordinance. *Bd. of Supervisors v. Lerner*, 221 Va. 30, 37 (1980).

Moreover, Plaintiffs do not argue that they will be harmed as a result of the 2021 Comprehensive Plan.[6] Instead, Plaintiffs assert that, in light of purported procedural defects in the adoption of the 2021 Comprehensive Plan, it was improper for the City Council to consider the 2021 Comprehensive Plan when it adopted the NZO. In sum, Plaintiffs have not established that a "justiciable controversy" exists as between the Plaintiffs and the City Council with regard to the

[6] All allegations of harm are related to the purported effects of the NZO. *See* Compl. ¶¶ 26.

2021 Comprehensive Plan. Because Plaintiffs do not have standing to challenge the validity of the 2021 Comprehensive Plan, Counts I, II, and III must be dismissed.

D. COUNTS I, II, AND III SHOULD BE DISMISSED BECAUSE THE CITY COUNCIL HAD NO OBLIGATION TO SUBMIT THE 2021 COMPREHENSIVE PLAN TO VDOT.

1. § 15.2-2222.1 (COUNT I)

In Count I, Plaintiffs assert that the 2021 Comprehensive Plan is void because the City Council was required, but failed, to submit the 2021 Comprehensive Plan to VDOT for review under § 15.2-2222.1(A)(1). Compl. ¶ 67-73. However, § 15.2-2222.1(A)(1) states that "the locality shall submit such plan" only "if the plan or amendment will substantially affect transportation on state-controlled highways."

Relying on speculative "back of the napkin" math, Plaintiffs argue that "[t]he increase in density permitted under the [2021 Comprehensive Plan] would 'allow the generation' of more than '5,000 additional vehicle trips per day on state-controlled highways' and, therefore, will substantially affect transportation on state-controlled highways." Compl. ¶ 71. Plaintiffs' contention is utterly speculative. *See id.* at ¶ 41.

The 2021 Comprehensive Plan, as a planning guide, does not "allow the generation" of additional vehicle trips. Any future new development would require zoning approval by the City. Also, the legislative record establishes that VDOT approved the transportation elements of the 2021 Comprehensive Plan. *See* Compl. (Exhibits B, E); *see also* Dec. 18, 2023 VDOT E-Mail, **Exhibit 9**. In addition, any determination regarding whether a proposed comprehensive plan amendment triggers this review is subject to the discretion of the City. Here, the City advised VDOT that none of the proposed comprehensive plan amendments would substantially affect transportation on state controlled highways. *See* Compl., Exhibit B, p. 2.

The VDOT regulations relied upon by Plaintiffs "do not carry the "force of law."" *Hartley*, 2024 Va. App. LEXIS 80, at *25. In *Hartley*, the plaintiff alleged that the Board failed to follow VDOT guidelines and conduct a traffic impact analysis in violation of § 15.2-2222.1(B). *Id.* at *24. The plaintiff in *Hartley* contended that the locality was required to submit a traffic impact study "if the proposal will substantially affect transportation on state-controlled highways," § 15.2-2222.1(B), or "if the proposal generates more than 5,000 vehicle trips per day." 24 VAC 30-155-40(A)(1). In response to the plaintiff's argument that the locality undercounted the number of trips per day, the Court of Appeals held:

> even if VDOT should have conducted a separate trip count in the summer per its own guidelines, . . . this defect would not invalidate the Board' s decision. Further, the Board could reasonably rely on VDOT's representation that the proposal satisfied its own regulations. Because any deviation from the guidelines does not violate the Board's obligations under the law, Hartley's ***allegations simply go to the upzoning decision's reasonableness and do not state an independent claim***. The circuit court thus did not err in sustaining the demurrer here.

Id. at *25-26 (emphasis added).

Here, the City's reasonable conclusion that the greater density envisioned in the 2021 Comprehensive Plan would not "substantially affect transportation on state-controlled highways" is consistent with the assessment in a July 7, 2023 Memorandum to the City Council which concluded that "[t]he rate of change analysis in the August 2022 Inclusionary Zoning report anticipates a maximum of approximately 1,300 new units over the next three years" and that "this estimate represents a theoretical maximum used for planning purposes." July 7, 2023 Memorandum, **Exhibit 8**; *see also* 2022 Rate of Change Analysis, **Exhibit 5**; 2023 Rate of Change Analysis, **Exhibit 7**.

For these reasons, the claim asserted in Count I challenging the adoption of the 2021 Comprehensive Plan based on the City's alleged failure to comply with § 15.2-2222.1(B), fails.

2. § 15.2-2223(B)(1) (COUNT II)

In Count II, Plaintiffs argue that the 2021 Comprehensive Plan is void because the City did not comply with § 15.2-2223(B)(1) which provides that a comprehensive plan should "designat[e] . . . new and expanded transportation facilities . . . that support the planned development of the territory covered by the plan." Compl. ¶ 75-76. In addition, Plaintiffs argue that because the 2021 Comprehensive Plan was reviewed by VDOT for compliance with the Commonwealth's "Six-Year Improvement Program," and not in the context of any potential density increases contemplated by the 2021 Comprehensive Plan or future zoning ordinance changes, the City could not have complied with § 15.2-2223(B)(1). *Id.* at ¶¶ 47-50, 77-78.

This issue—*i.e.*, whether the 2021 Comprehensive Plan violated § 15.2-2223(B)(1)—was litigated in *Doe*. This Court held that "[t]he city is sufficiently in compliance, based on the facts as alleged, the agreed facts as they appear to the Court, but at least as alleged by Plaintiff, to have complied with the requirements of the comprehensive plan with regard to transportation." *See* Aug. 26, 2022 Tr. at 3, **Exhibit 1**. For those same reasons, the Plaintiffs' claim should be denied.

Nothing in the plain language of § 15.2-2223 manifests an intent by the General Assembly to mandate that every comprehensive plan update must introduce road improvements to support an increase in density contemplated by the future land use map designations. Section 15.2-2223(A) merely states that a general or approximate location shall be designated for "any" road or transportation improvement shown on the plan, an approach echoed in § 15.2-2232 (legal status of comprehensive plan), which specifies that new transportation facilities cannot be constructed *until* their general or approximate locations are shown on a Comprehensive Plan. Finally, § 15.2-2230.1 states "[i]n ***addition*** to reviewing the comprehensive plan, the planning commission ***may*** make a

study of the public facilities, including existing facilities, which would be needed if the comprehensive plan is fully implemented." (emphasis added).

The statutes clearly contemplate that transportation planning may take place separately from land use designations. These statutes allow the City discretion to amend the transportation plan in the future at such time as it determines new transportation facilities are needed. Section § 15.2-2223 does not prescribe a formula for determining when, or if, new transportation facilities are required. Under the "reasonable selection of method" rule, the City has discretion to determine these matters for itself, on its own timeline.

In addition, the Plaintiffs' claim that Defendants violated § 15.2-2223(B)(1) fails. The legislative record, as well as the Exhibits attached to Plaintiffs' Complaint, contradict Plaintiffs' assertions. In a November 5, 2021 letter attached as Exhibit E to Plaintiffs' Complaint, VDOT explained that it evaluated and ***approved*** the transportation elements of the 2021 Comprehensive Plan in the context of "[t]he process called C'ville Plans Together [which] began in 2020 with the development of an Affordable Housing Plan."

Plaintiffs' argument that VDOT did not review, or could not have reviewed, the transportation elements of the 2021 Comprehensive Plan in the context of increased density, fails. The City analyzed and reported to City Council with respect to the limited rate of population change that could be expected as a possible result of the proposed zoning amendments. These "rate of change" analyses (attached as **Exhibits 5** and **7**) support the City's conclusion that new and expanded transportation facilities that support the "planned development" would not be required. For those reasons, the claim asserted in Count II based on the City's alleged failure to comply with § 15.2-2223(B), fails.

E. COUNTS III AND IV SHOULD BE DISMISSED BECAUSE THE CITY COUNCIL'S DECISION TO ADOPT THE NZO WAS FAIRLY DEBATABLE.

Counts III and IV challenge the validity of the NZO. In Count III, Plaintiffs assert that the City Council failed to consider certain factors under § 15.2-2284, namely, "the community's current and future requirements based on appropriate studies, and the community's transportation, school, recreational facilities and public service requirements." Compl. ¶ 83. In Count IV, Plaintiffs contend that: the "City Council neither commissioned nor conducted studies on stormwater management, sanitary sewer systems, schools, traffic volume, public services and recreational facilities[,]" *id.* at ¶ 89; that the "City Council failed to reasonably consider the basic statutory requirements outlined in Code § 15.2-2284, such as transportation, schools, recreational areas and public services[,]" *id.* at ¶ 90; and that the "City Council did not . . . give reasonable consideration to the factors outlined in Virginia Code § 15.2-2283." *Id.* at ¶ 91.

1. THE CITY COUNCIL REASONABLY CONSIDERED THE FACTORS IN §§ 15.2-2283 AND -2284 AND ITS ADOPTION OF THE NZO WAS FAIRLY DEBATABLE.

Sections 15.2-2283 and -2284 "list myriad factors to which a locality 'shall . . . give reasonable consideration' when drafting zoning ordinances and amending zoning districts. *Hartley*, 2024 Va. App. LEXIS 80, at *12. "[T]he lack of specific evidence that the Board considered the statutory factors in Code §§ 15.2-2283 and -2284 is not dispositive . . . ". *Id.* at *13. "Failure to consider the statutory factors on the record does not render a legislative decision arbitrary and capricious as a matter of law." *Id.* "[I]nstead[,] [the court] evaluate[s] only whether the Board's decision was fairly debatable in the context of the required statutory factors." *Id.*

Any legislative action, such as the City Council's adoption of the NZO, "is presumed to be valid and will not be disturbed by a court absent clear proof that the action is unreasonable,

arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare." *City Council v. Harrell*, 236 Va. 99, 101 (1988). A legislative action is reasonable if the matter in issue is "fairly debatable." *Byrne*, 298 Va. at 702. An issue is fairly debatable "when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Id.* If the action is fairly debatable, it will be upheld by a court because the court will not substitute its judgment for that of the legislative body. *Harrell*, 236 Va. at 101.

The legislative record demonstrates that the City Council reasonably considered the factors in §§ 15.2-2283 and -2284. The bulk of Plaintiffs' allegations are vague and unsupported. Nonetheless, Plaintiffs take apparent issue with the City's purported failure to consider utilities, transportation, and schools. The legislative record establishes that the City Council considered each of these issues during the deliberations leading up to City Council's adoption of the NZO. *See, e.g.*, Excerpts from the Dec. 18, 2023 City Council Agenda Packet at pp. 76-78, **Exhibit 2** (considering transportation infrastructure); Zoning Diagnostic, **Exhibit 6**.

For example, Plaintiffs overlook analyses that concluded that the "rate of change" would be gradual. The City Council considered these rate of change analyses in several contexts. One study provided to the City Council concluded that the City's existing infrastructure system had the capacity to handle any growth following the adoption of the proposed zoning amendments. The study stated:

> Charlottesville's infrastructure systems have sufficient existing capacity to handle the likely development that could occur under the new zoning ordinance, in support of the City's adopted Affordable Housing and Comprehensive Plans. The rate of change analysis in the August 2022 Inclusionary Zoning report anticipates a maximum of approximately 1,300 new units over the next three years across the proposed Residential A, B, and C zoning districts (currently being updated), which comprise the majority of the City's land area. As noted above, this estimate represents a theoretical upper maximum used for planning purposes rather than a likely outcome as other factors make a realistic production number lower. Further, the robust infrastructure planning program, both in the City and in conjunction with

> regional agencies, are well structured to prepare for the City and the region's needs going forward.

See July 7, 2023 Memorandum, **Exhibit 8**; *see also* 2022 Rate of Change Analysis, **Exhibit 5**; 2023 Rate of Change Analysis, **Exhibit 7**.

The Plaintiffs apparently disagree with the analyses and conclusions presented to the City Council. It is for the City Council, however, as the elected governing body, to make such legislative determinations. "It is not a function of the Court to exercise legislative discretion, that is left solely to the governing body provided it complies with the law." *Bell*, 224 Va. at 351. Under the fairly debatable standard, "the question is whether there is any evidence in the record sufficiently probative to make a fairly debatable issue of the Board's decision." *Town of Leesburg v. Giordano*, 280 Va. 597, 608 (2010).

The legislative record establishes that the City Council considered the potential impact of future "rate of change" in population on the City's infrastructure. The record also establishes adequate consideration of the factors listed in §§ 15.2-2283 and -2284, and that the NZO bears a relation to the public health, safety, morals, and general welfare of the City.

In *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603 (2006), developers challenged an ordinance that increased water and sewer connection fees, and attached to their complaint two studies: one conducted by the County, and one conducted by their own expert. *Id.* at 609. The trial court sustained the County's demurrer. On review, the Supreme Court held that the two studies showed that the ordinance was fairly debatable. *Id.* The Court wrote that the studies "presented both sides of the evidentiary issue . . . which was adequate for the trial court to determine that the . . . ordinances were 'fairly debatable and resolve the issue on demurrer.'" *Id.* at 620. Here, the legislative record establishes that the City Council's adoption of the NZO was,

at the very least, fairly debatable. It follows that the City Council's legislative action must be sustained and the claims asserted in Counts III and IV should be dismissed.

2. THERE IS NO REQUIREMENT FOR A ZONING ORDINANCE TO ALIGN WITH THE COMPREHENSIVE PLAN, OR FOR LOCALITIES TO COMMISSION OR CONDUCT FORMAL STUDIES WHEN ADOPTING A ZONING ORDINANCE.

Counts III and IV argue that the NZO is inconsistent with the applicable Comprehensive Plan and allegations that the City did not undertake sufficient formal studies as part of the legislative process. The Court of Appeals recently rejected similar arguments; the Court stated: "[f]ailure to align with the comprehensive plan does not render a zoning amendment arbitrary and capricious as a matter of law." *Hartley*, 2024 Va. App. LEXIS 80, at *11. Similarly, Virginia's zoning statutes do not mandate that a locality commission or conduct studies on all facets of a proposed zoning ordinance before adopting an ordinance. Instead, the General Assembly stated:

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

§ 15.2-2284 (emphasis added).

Here, the NZO is reasonably aligned with the 2021 Comprehensive Plan. In the 2021 Comprehensive Plan "[t]he City of Charlotteville will recognize the importance of housing for all residents by implementing strategies to achieve a housing market that is affordable, healthy, high quality, accessible to resources (affordable food, green space, schools, etc.), and, above all, equitable, meeting the needs of underserved communities and fostering a good quality of life for

all." *See* 2021 Comprehensive Plan at p. 45, **Exhibit 4**. In addition, the 2021 Comprehensive Plan states that "[h]ousing policies and plans will celebrate and enhance the variety of available housing types and sizes, for both rental and ownership opportunities, while providing protections and support for neighborhoods, people, and families at risk of displacement." *Id.*

This "Community Vision Statement" in the 2021 Comprehensive Plan, is addressed the Cville Plans Together process and in the NZO. For example, the Zoning Diagnostic, which incorporated a consultant's analysis of Charlottesville's then-existing zoning ordinance, as well as a proposed approach to rewriting the zoning ordinance, demonstrates how the Cville Plans Together process and, ultimately, the NZO, will implement the Community Vision Statement. *See e.g.*, Zoning Diagnostic at p. 104, **Exhibit 6** (considering energy and water efficiency); *id.* at p. 107 (considering stormwater, management, flood mitigation, air and water quality, habitat, species migration, connectivity, and livability); *id.* at p. 109 (considering water line capacity); *id.* at pp. 21, 22, 24, 26, 29, 61, 69 (considering parking effects).

The legislative record demonstrates that the City Council "reasonabl[y] consider[ed] . . . the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies." § 15.2-2284. As noted above, the City engaged consultants and relied on the expertise of its own planners to study the prior zoning regulations and develop an amended ordinance based on outreach in, and feedback from, the local community, and best practices implemented elsewhere across the United States.

In sum, there is no legal requirement for a zoning ordinance to align perfectly with a comprehensive plan, and no obligation for localities to conduct formal studies when amending a zoning ordinance. Nevertheless, the City did all of those things, and then some. Plaintiffs' claims

in Counts III and IV that the City Council failed to give due consideration to certain statutory factors, acted arbitrarily or capriciously, or otherwise contrary to Virginia law, should be denied.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court sustain their Demurrer, and dismiss the Complaint with prejudice.

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Respectfully submitted,

CHARLOTTESVILLE CITY COUNCIL, CITY OF CHARLOTTESVILLE, AND CITY OF CHARLOTTESVILLE PLANNING COMMISSION

By Counsel:

Jacob P. Stroman, City Attorney (VSB No. 31506)
Robinson J. Hubbard, Deputy City Attorney (VSB No. 91688)
Charlottesville City Attorney's Office
P.O. Box 911, 605 East Main Street, 2nd Floor
Charlottesville, Virginia 22902
Telephone: (434) 870-3131
Facsimile: (434) 970-3022
Email: stromanj@charlottesville.gov
Email: hubbardr@charlottesville.gov

D. Scott Foster, Jr. (VSB No. 87529)
Ryan J. Starks (VSB No. 93068)
GENTRY LOCKE
919 East Main Street, Suite 1130
Richmond, Virginia 23219
Telephone: (804) 956-2062
Facsimile: (540) 983-9400
Email: sfoster@gentrylocke.com
Email: starks@gentrylocke.com

Gregory J. Haley (VSB No. 23971)
GENTRY LOCKE
10 Franklin Road, SE, Suite 900
Roanoke, Virginia 24011
Telephone: (540) 983-9300
Facsimile: (540) 983-9400
Email: haley@gentrylocke.com