

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE, VIRGINIA

CABELL J. MARSHALL

Plaintiff,

V.

CHARLOTTESVILLE CITY COUNCIL,  
and CITY OF CHARLOTTESVILLE

Defendants.

Case No. CL-22-234

**DEFENDANTS' DEMURRER**  
**TO PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT**

COME NOW the Charlottesville City Council (“City Council”) and the City of Charlottesville, Virginia (together, “City” or “Defendants”), by counsel, and submit their Demurrer to the Complaint for Declaratory Judgment filed by Plaintiff on May 18, 2022 (“Complaint”).

## Introduction

Plaintiff seeks to invalidate a decision of the Charlottesville City Council (“Rezoning Decision”), rezoning land in the vicinity of Stribling Avenue to authorize a planned unit development (referred to within the Complaint as a “PUD” or the “240 Stribling PUD”), *see* Complaint ¶¶ 4, 5, 9. The Rezoning Decision is a legislative action of the City Council that is presumed valid, and a court may not alter or invalidate the legislative action absent “clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare.” *EMAC, L.L.C. v. Cty. of Hanover*, 291 Va. 13, 21, 781 S.E.2d 181, 185 (2016). For the reasons set forth within this demurrer, the Complaint does not state a cause of action against the City, and fails to state facts upon which the relief demanded can be granted.

### **Count I**

1. Before a complaint for declaratory judgment may be entertained by a court, it must appear that there is an actual controversy between the parties. Plaintiff has no justiciable interest in the Rezoning Decision. The Complaint fails to allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the Plaintiff that is different from that suffered by the public generally.

2. The allegations presented in support of Count I establish nothing more than a difference of opinion between the Plaintiff and the City Council. If the reasonableness of the Rezoning Decision is patently fairly debatable, the court should sustain the City's demurrer.

### **Count II**

3. Count II seeks a declaration that the Infrastructure Funding Agreement referenced in ¶ 7 of Plaintiff's Complaint fails to comply with debt restrictions set forth within Article VII, §10 of the Virginia Constitution (Complaint ¶12).

4. Count II does not state a cause of action, and fails to state facts upon which the relief demanded can be granted. Under established opinions of the Virginia Supreme Court, the Infrastructure Funding Agreement does not create Constitutionally-cognizable debt.

### **Count III**

5. Within Count III Plaintiff asks the Court to invalidate the Rezoning Decision, based on Plaintiff's claim that City employees or officials gave "insider encouragement" to the developer that higher density of development would be acceptable. (Complaint ¶¶ 13, 25).

6. No facts alleged within the Complaint establish that any City official or employee violated Virginia Code §2.2-3103(4).

7. Virginia law does not guarantee that each and every member of the public will know all information that might be known to, or knowable by, their elected legislators in any particular legislative process. The law allows Virginia residents, such as the Plaintiff, *upon request*, to obtain public records containing information. Va. Code §2.2-3704(A). The Complaint fails to allege any such request made by Plaintiff.

8. Apparently, the information cited in ¶13 of the Complaint is/was, in fact, available to the Plaintiff, who is a member of the general public.

#### **Count IV**

9. Within Count IV Plaintiff asks the Court to invalidate the Rezoning Decision, because City Council allegedly did not hold open meetings “even after schools were reopened.” (Complaint ¶¶ 17, 19, 26)

10. The term “open meeting” is defined as “a meeting at which the public may be present”. Virginia Code §2.2-3701. The General Assembly does not mandate physical presence by the public in a room together with the public body. (In comparison, *see* the definition of a “meeting” which references a public body “sitting physically” together or gathering by electronic communication means pursuant to Virginia Code §2.2-3708.2). When interpreting the applicable statutory provisions, the court must presume that the General Assembly’s use of the term “physical” in one place, but not another, is intentional.

11. The Complaint alleges that “many” people do not have the ability to participate in electronic meetings, but fails to allege that Plaintiff himself/herself/themselves do not or did not have such ability. Plaintiff does, in fact, utilize electronic technology (see Complaint, signature page: [mcabell398@aol.com](mailto:mcabell398@aol.com)).

12. City Council and the Charlottesville School Board are two separate public bodies. Decisions made by the Charlottesville School Board regarding how to conduct their meetings do not govern City Council's discretion as to how to conduct its own meetings.

13. Plaintiff may not utilize a declaratory judgment action to assert rights of the public generally. As to Count IV, the Complaint fails to allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, of the Plaintiff, or the imposition of a burden or obligation upon the Plaintiff that is different from that suffered by the public generally.

#### Count V

14. Within Count V Plaintiff asks the Court to invalidate the Rezoning Decision, because (i) City Council allegedly did not provide a place where the plans could be reviewed by the public and "particularly neighbors in a modest neighborhood", and (ii) City Council allegedly did not specify a time and a place of hearing where "members in a modest neighborhood could appear and present their views although mask wearing was no longer required and school children were required to go to school."

15. Virginia law neither requires nor allows the City to give special treatment, or make special arrangements, for neighbors or members "in a modest neighborhood".

16. To the extent that Plaintiff's use of the word "place" suggests that the law does not allow application materials to be made available for inspection electronically on the City's website, that is not the law.

17. The Complaint contains no allegation that Plaintiff sought to make an appointment for an in-person inspection of the records, or that Plaintiff ever sought copies of the records of the records of Rezoning Application ZM20-0002.

18. The provisions of foregoing paragraphs 10 through 12 of this Demurrer are incorporated here by reference.

19. Plaintiff may not utilize a declaratory judgment action to assert rights of the public generally. As to Count V, the Complaint fails to allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, of the Plaintiff, or the imposition of a burden or obligation upon the Plaintiff that is different from that suffered by the public generally.

### **Count VI**

20. Within Count VI Plaintiff asks the Court to invalidate the Rezoning Decision, because City Council allegedly “failed to improve streets and keep them in good order in anticipation of the impact of the rezoning ordinance”.

21. The decision as to whether or not to establish streets, or to make particular improvements to existing streets, is a discretionary, governmental function. No statute authorizes the court to invalidate the Rezoning Decision on the basis of the alleged “failure” of the City Council to exercise a discretionary governmental function. In the absence of a statute expressly conferring upon the Plaintiff a right of action against the City to improve a particular City street in advance of a rezoning application, there is no justiciable matter before the court as to Count VI.

22. The City is not required by law to improve streets in anticipation of the impact of any development plan. *See, e.g.*, Virginia Code §15.2-2268 (“Nothing herein shall be construed as creating an obligation upon any locality to pay for grading or paving, or for sidewalk, sewer, curb and gutter improvements or construction.”).

23. The City may not compel a developer to remedy pre-existing conditions on City streets as a condition of being granted a rezoning, nor can the City refuse to approve any and all rezoning application(s) in a particular area until such time as the City itself decides to improve existing streets.

24. Plaintiff may not utilize a declaratory judgment action to assert rights of the public generally. As to Count VI, the Complaint fails to allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, of the Plaintiff, or the imposition of a burden or obligation upon the Plaintiff that is different from that suffered by the public generally.

#### **Count VII**

25. Within Count VII Plaintiff asks the court to invalidate the Rezoning Decision, because City Council allegedly “did not provide for the preservation of the general health of the inhabitants of the City of Charlottesville”. In addition to other assertions within the Complaint, Plaintiff alleges that the City Council has failed to maintain an existing intersection in the vicinity of the approved development. (Complaint ¶¶ 29, 29A).

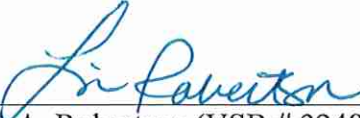
26. No statute confers upon the Plaintiff a right of action to compel the City to modify or improve a public street or the manner in which traffic is regulated on such street, or to otherwise compel the City to exercise any particular police powers. In the absence of any such statute, there is no justiciable matter before the court as to Count VII.

27. The City may not compel a developer to remedy pre-existing conditions on City streets as a condition of being granted a rezoning, nor can the City refuse to approve any and all rezoning application(s) in a particular area until such time as the City itself decides to improve existing streets.

28. Plaintiff may not utilize a declaratory judgment action to assert rights of the public generally. As to Count VII the Complaint fails to allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, of the Plaintiff, or the imposition of a burden or obligation upon the Plaintiff that is different from that suffered by the public generally.

Respectfully submitted,  
**CITY OF CHARLOTTESVILLE, VIRGINIA,**  
**CHARLOTTESVILLE CITY COUNCIL, et al.,**

By counsel for the Defendants:

  
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**CERTIFICATE OF SERVICE**

I certify that on the 14<sup>th</sup> day of June, 2022, pursuant to the provisions of Rule 1:12 of the Rules of the Supreme Court of Virginia, I served a true copy of the foregoing document, by electronic mail (where an e-mail address is indicated below) and also by U.S. Mail, first-class, postage pre-paid, to the Plaintiff, who is proceeding *pro se*, as follows:

Cabell Marshall  
239 Stribling Avenue  
Charlottesville, Virginia 22903

Email: mcabell398@aol.com

Signature:   
Counsel for Defendants