

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

WILLIAM T. SEMPLE,)

ELBERT MICHAEL USSERY,)

ELIZABETH S. USSERY)

CRAIG A. UPDYKE)

KATHLYN ROWLAND,)

LEE T. ROWLAND, and)

CAROL HEGWOOD)

CASE NO. _____

Appellants/Plaintiffs)

v.)

**COUNCIL OF THE TOWN OF
WARRENTON, VIRGINIA**)

Serve:)

Whitson W. Robinson)

Town Attorney)

35 South Fourth Street)

Warrenton,)

Appellee/Defendant)

)

)

)

COMPLAINT

COME NOW William T. Semple, Elbert Michael Ussery, Elizabeth S. Ussery, Craig A. Updyke, Kathlyn Rowland, Lee T. Rowland, and Carol Hegwood pursuant to Virginia Code Title 15.2 et seq., Title 8.01 et seq., and Warrenton Zoning Ordinance as each article therein may apply, and file this action against the Council of the Town of Warrenton (“Council” “Town Council”) contesting the July 11, 2017, decision of the Council approving “Zoning Map Amendment 2016-01 – Walker Drive Planned Unit Development Rezoning,” the written proffer statement and plans submitted by the applicant and staff recommendations as enumerated at the hearing by the Director of Planning and Development, including but not limited to waivers, modifications, the Master Development Plan, and Design Guidelines incorporated therein as shown in Attachment A—ZMA 2016-01 and set forth herein.¹

¹ The motion, made by Council member Robert H. Kravitz (Ward 4) stated: “I move to approve the ‘zoning map amendment 2016-01 application Walker Drive Planning [sic] Development Rezoning with Written Proffer Statement and Plan as submitted by the applicant and staff recommendations as enumerated earlier by Ms. Schaeffer.” The motion was approved 6-1. Posted 3:53:40 audio recording of the July 11, 2017 hearing.

STANDING

1. Appellant/Plaintiff Elbert Michael Ussery (“Mr. Ussery”) resides at 345 Hidden Creek Lane, Warrenton, VA 20186, as shown on Attachment B-1, which Mr. Ussery jointly owns with Elizabeth S. Ussery.
2. Appellant/Plaintiff Elizabeth S. Ussery (“Mrs. Ussery”) resides at 345 Hidden Creek Lane, Warrenton, VA 20186, as shown on Attachment B-2, which Mrs. Ussery jointly owns with Elbert Michael Ussery.
3. Appellant/Plaintiff Craig A. Updyke (“Updyke”) resides at 354 Hidden Creek Lane, Warrenton, VA 20186 as shown on Attachment B-3, which Updyke jointly owns with Laura A. Updyke.
4. Appellant/Plaintiff Kathlyn Rowland (“Mrs. Rowland”) resides at 361 Hidden Creek Lane, Warrenton, VA 20186 as shown on Attachment B-4, which Mrs. Rowland jointly owns with Lee T. Rowland.
5. Appellant/Plaintiff Lee T. Rowland (“Mr. Rowland”) resides at 361 Hidden Creek Lane, Warrenton, VA 20186 as shown on Attachment B-5, which Mr. Rowland jointly owns with Kathlyn Rowland.
6. Appellant/Plaintiff Carol Hegwood (“Hegwood”) resides at 288 Amber Circle, Warrenton, VA 20186 as shown on Attachment B-6. Hegwood owns this property.

7. Appellant/Plaintiff William T. Semple (“Semple”) resides at 319 Falmouth Street, Warrenton, 20186 as shown on Attachment B-7. Semple owns this property jointly with Sally H. Semple.
8. Each of the Appellants/Plaintiffs listed above resides in proximity to ZMA 2016-01.
9. Each of the Appellants/Plaintiffs above has a direct, immediate, pecuniary and substantial interest in the decision.
10. Each Appellant/Plaintiff listed above will be directly harmed at least by increased road noise, traffic, light pollution, increased exposure to his or her personal safety and to their respective families.
11. Each count in this pleading demonstrates a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon each Appellant/Plaintiff different from that suffered by the public generally.
12. Alternatively, each Appellant/Plaintiff claims a justiciable interest and substantial legal right in all counts pursuant to *River Farm Assoc. v. Board of Supervisors*, 259 Va. 419, 427 (2000) and *Cupp v. Board of Supervisors*, 227 VA 580 (1984).

COUNT I. THE TOWN COUNCIL DID NOT RECEIVE SPECIFIC RECOMMENDATIONS FOR WAIVERS AND MODIFICATIONS FROM THE PLANNING COMMISSION PURSUANT TO §3-5.2.4.3 ¶5 OF THE WARRENTON PUD PLANNED UNIT DEVELOPMENT DISTRICT ZONING ORDINANCE AND THEREFORE EXCEEDED ITS AUTHORITY IN APPROVING ZMA 2016-01.

13. On February 21, 2017, the Planning Commission of the Town of Warrenton held a public hearing on Zoning Amendment 2016-01 including proffers, waiver requests, a Master Development Plan and Design Guidelines brought under the Warrenton PUD--Planned Unit Development District (PUD) Zoning Ordinance §3-5.2 et seq. and the Warrenton Conditional Zoning Ordinance §11-3.9.17 et seq. The Planning Commission voted 6-1 to recommend denial of the application.

14. Warrenton Zoning Ordinance §3-5.2.4.3 ¶5 states:

The Town Council shall, *upon recommendation of the planning commission*, have the authority to *modify* (making the criteria more, less or equally restrictive) or *waive*, the criteria established §3-5.2 et seq. for Commercial or Industrial Planned Unit Development, if in the opinion of Town Council it shall determine that such modification or waiver: a. Shall advance the legislative intent and general planning considerations underlying the PUD and this Ordinance, b. Shall be in general conformity with the adopted Comprehensive Plan, and c. Shall not create an adverse effect on adjacent land uses. (emphasis added).

15. Article 3-5.2.4.3 ¶5 authorizes the Town Council to act only upon waivers and modifications of criteria specifically recommended by the

Planning Commission. The Planning Commission did not make such recommendations at its February 21, 2017, meeting.

16. ZMA 2016-01 adopted by the Town Council incorporates waivers and modifications not recommended by the Planning Commission. Accordingly, the Appellants/Plaintiffs pray that the Court find the Council's action null, void, and of no effect, or any such other relief as the Court deems appropriate.

COUNT II. PURSUANT TO WARRENTON ZONING ORDINANCE §3-5.2.4.3, THE COUNCIL FAILED TO RETURN ZMA 2016-01 TO THE PLANNING COMMISSION WITH WAIVERS AND/OR MODIFICATIONS THAT THE COMMISSION HAD NOT BEEN GIVEN THE OPPORTUNITY TO REVIEW OR HAD CHANGED AFTER THEIR REVIEW.

17. Warrenton Zoning Ordinance §3-5.2.4.3 ¶5 states, “The Town Council shall, *upon recommendation of the planning commission*, have the authority to modify . . . or waive, the criteria established in §3-5.2 . . .” (emphasis added).
18. The Planning Commission on February 21, 2017, recommended denial of ZMA 2016-01 without making any specific recommendations regarding waivers or modifications.

19. To the extent the Planning Commission's recommendation of denial of ZMA 2016-01 is found to be a recommendation on all specific waivers and modifications contained within the packet reviewed by the Planning Commission, certain land use mix information subsequently available to and adopted by the Town Council was not presented to the Planning Commission prior to their February 21, 2017 hearing, or was modified after that meeting.
20. The packet presented to the Planning Commission contained no calculated percentages of land use mixes because the applicant had not provided square footages for the residential component. Further, the applicant changed the land use mix subsequent to the Planning Commission's review of the project, including but not limited to the amount of commercial and industrial use in Land Bay E.
21. The land use mix change is also reflected in the difference between the land use tables published in the Notice of Public Hearing prior to the Town Council hearing and the Notice of Public Hearing prior to the Planning Commission hearing with respect to Land Bay "E."
(Attachment C - Public Notices).

22. Consistent with §3-5.2.4.3 ¶5, the Planning Commission cannot make recommendations on waivers and modifications that have not been provided to the Commission or amended after the Commission has acted upon the application.
23. The general denial of ZMA 2016-01 by the Planning Commission does not carry over to all possible reconfigurations of the land use mix, particularly those they cannot review.
24. Because the Council was not authorized to adopt such modifications or waivers, the Appellants/Plaintiffs pray that the Court find the Council's adoption of ZMA 2016-01 null, void and of no effect, or any such other relief as the Court deems appropriate.

COUNT III. PROFFERED CONDITIONS WERE NOT PROPERLY REVIEWED BY THE PLANNING COMMISSION PURSUANT TO ARTICLE 11-3.9.17 ET SEQ. OF THE WARRENTON CONDITIONAL ZONING ORDINANCE PRIOR TO THE COUNCIL'S DECISION.

25. Warrenton Zoning Ordinance §11-3.9.17 ¶5, Review and Revision of Proffered Conditions, states, "Additional conditions may be proffered by the applicant during or subsequent to the public hearing before the Planning Commission, provided however that *after proffered conditions are signed and made available for public review and the public hearing*

before the Town Council has been advertised (whether or not jointly held with the Planning Commission) no change or modification to any proffered condition shall be approved without a second advertised public hearing thereon. (emphasis added).

26. The Town Council held a work session on July 6, 2017, that occurred after the Town of Warrenton Notice of Public Hearing for the July 11, 2017 hearing was advertised. Applicant's counsel submitted a letter dated the same day without signature of the applicant addressing "concerns expressed that elements have not been proffered."

(Attachment D – Foote Letter on Proffers).

27. To the extent such intentions are equivalent to a signed proffer and are enforceable – and upon information and belief, the Council believes the letter is an acceptable substitute to a revised Proffer Statement – they constitute a modification or change to proffered conditions submitted after public notice.

28. This submission has two consequences: (1) the revised proffer should have received a second advertised public hearing before the Town Council and (2) the application should have been returned to the Planning Commission for further review, subject to a second public

hearing before the Planning Commission consistent with Warrenton Zoning Ordinance §11-3.9.17 ¶6.

29. Article 11-3.9.17 ¶6, Modification to Proffer, states, “After the Town Council’s public hearing has been advertised, should additional or modified conditions be proffered by the applicant, which conditions were specifically *discussed at the public hearing before the Planning Commission*, then a second public hearing need be held only before the Town Council before the application and the modified conditions can be reviewed and acted on by the Council.” (emphasis added).

30. Article 11-3.9.17 ¶7, Additional Conditions, states, “Should additional conditions be proffered by the applicant at the time of the public hearing before the Town Council, which conditions were not addressed at the public hearing before the Planning Commission, *or if the proffered conditions are modified beyond the scope of any conditions considered at the public hearing before the Planning Commission*, the application shall be the subject of a second public hearing before both the Planning Commission and the Town Council, which hearing may be held either separately or jointly.” (emphasis added).

31. Article 11-3.9.17 ¶7 stands independently of preceding ¶¶5-6. The condition, “Should additional conditions be proffered by the applicant at the time of the public hearing . . .” joined by the conjunction “or” stands alternatively to “if the proffered conditions are modified beyond the scope of any conditions considered at the public hearing before the Planning Commission.”
32. If either condition is not met, the application “shall be the subject of a second hearing.”
33. The proffered conditions were modified substantially beyond the scope of any conditions considered at the public hearing of the Planning Commission on February 21, 2017.
34. Conditions proffered February 1, 2017, that were modified subsequent to, but not specifically discussed at the public hearing before the Planning Commission include but are not limited to the removal of drawings from the December 1, 2016 Design Guidelines referenced on page 3 of the February 1, 2017 Proffer Statement, additional restrictions on Land Uses that do not appear on page 2 of the February 1, 2017 Proffer Statement, and modification of the Movie Theater proffer on page 3 of the February 1, 2017 Proffer Statement to encompass

substantially broader Entertainment Uses. (Attachment E – February 2017 Proffers; Attachment F – December 2016 Design Guidelines; Attachment G – Final Proffers; Attachment H – Final Design Guidelines).

35. Therefore, under one or more provisions of Article 11-3.9.17 et seq., a second public hearing was required to be held before the Planning Commission and/or the Council, which did not occur.

36. Because of the Council's failure to comply with the provisions of the Warrenton Zoning Ordinance, the Appellants/Plaintiffs pray that the Court find the actions of the Town Council in regard to ZMA 2016-01 null, void and of no effect, or any such other relief as the Court deems appropriate.

COUNT IV. ZMA 2016-01 CONFLICTS WITH BASIC USE CRITERIA FOR AN INDUSTRIAL PLANNED UNIT DEVELOPMENT (I-PUD) UNDER WARRENTON ZONING ORDINANCE §3-5.2 ET SEQ.; THE LAND USE IS INCONSISTENT WITH THE UNDERLYING INDUSTRIAL DISTRICT AND THE WARRENTON COMPREHENSIVE PLAN FUTURE LAND USE PLAN; THEREFORE, THE COUNCIL'S ADOPTION OF THE AMENDMENT IS NULL, VOID AND OF NO EFFECT.

37. Article 3-5.2.4.1 General Criteria of the PUD Ordinance clearly states, "Uses within the C-PUD and I-PUD *shall emphasize* commercial or

industrial uses, depending upon the underlying base zoning district . . .”
(emphasis added).

38. The term “emphasize” in the Warrenton PUD Ordinance may be fairly interpreted to mean a minimum of 50% of all uses *or* the substantially largest percent of all uses.
39. The chart in §3-5.2.4.1 PUD Development Standards allows 50% Industrial *minimum*, 30% Commercial *maximum*, 20% Residential *maximum*, 5% Mixed Use Residential *minimum*, and 35% Mixed Use Residential *maximum* for the I-PUD.
40. The applicant proffered a land use mix of 39.3% Industrial, 25.2% Commercial and 35.5% Residential.
41. The applicant did not calculate a figure for Mixed Use Residential and the Town staff incorrectly calculated the figure for Mixed Use Residential.
42. Article 3-5.2.6.4 I-PUD Uses Permitted by Right describes Mixed Use Residential as “. . . apartments located above ground floor retail and/or offices . . .”

43. On information and belief, the Mixed Use Residential square footage totals 181,030 square feet, which constitutes 45.6% of the square footage of the total site.
44. Article 3-5.2.6.4 I-PUD Uses Permitted By Right includes restaurants as both Commercial and Industrial uses of the I-PUD.
45. The applicant arbitrarily allocates 100% of all restaurants to Industrial use to achieve an industrial land use of 39.3% Industrial.
46. Even if the allocation of restaurants were distributed 50/50 (commercial/industrial), the Industrial land use percentage would be only 36%, *on par with the residential land use percentage of 36%*.
47. Article 3-5.2.4.1 of the PUD ordinance states “Uses within the C-PUD or I-PUD shall emphasize commercial or industrial uses, *depending upon the underlying base zoning district . . .*” (emphasis added).
48. The underlying Industrial District base zoning at §3-4.12.2 does not provide for restaurants in Industrial zoning, *only cafeterias or snack bars for employees*. Designating all restaurants as a commercial use would result in a land use mix of Industrial 33%, Commercial 32%, and Residential 36%.

49. The Warrenton Comprehensive Plan Future Land Use Plan and the Warrenton Future Land Use Map (Attachment I) specifically show the site of ZMA 2016-01 as reserved for light industrial use, which consistent with the Office Goal in the Comprehensive Plan would provide “a balanced mix of local employment opportunities.”² ZMA 2016-01 replaces the light industry zoning with primarily multifamily dwelling residential uses, high volume restaurants, and reduces industrial use such that it does not approach half of the site usage.
50. Warrenton Zoning Ordinance 11-3 Procedures for Application Review and Approval at §11-3.9.12 Criteria for Consideration of Zoning Map Amendments requires consideration of whether the rezoning is consistent with the town’s Future Land Use Plan as identified in the Comprehensive Plan.
51. To ensure conformance with the Warrenton Comprehensive Plan and the intent and applicability of the PUD overlay regulations, uses in an I-PUD must emphasize industrial uses.

² Town of Warrenton, Virginia Comprehensive Plan 2000-2025 Adopted June 11, 2002, see especially Chapter 3.D Land Use, and p. 3-31 Office Goal. Available on the Internet at: [http://www.warrentonva.gov/document_center/Planning/2002-2025%20Comprehensive%20Plan%20Full%20Comprehensive %20Plan%20PDF.pdf](http://www.warrentonva.gov/document_center/Planning/2002-2025%20Comprehensive%20Plan%20Full%20Comprehensive%20Plan%20PDF.pdf)

52. ZMA 2016-01 inappropriately relies on waiver/modification provisions in the Warrenton PUD Ordinance at §3-5.2.4.3 ¶5, and in the proffers (Attachment G, p. 11, ¶35)³ to allow a land use mix in an I-PUD which does not emphasize industrial uses. The waiver/modification provisions in the Warrenton PUD Ordinance at §3-5.2.4.3 cannot be used to create a land use mix that does not meet the underlying PUD Ordinance applicability criterion that the land use emphasize the base zoning. A waiver/modification of the land use mix requirements of §3-5.2.4.1 may only be applied after the applicability of the relevant PUD is established, and not to the extent that the land uses do not emphasize the base zoning. To do so otherwise would allow land uses that are not tied to the base zoning district, do not conform to the Comprehensive Plan, and do not meet the plain language of the PUD District.

53. ZMA 2016-01's clear nonconformance with the foregoing Planned Unit Development Ordinance results in its invalidity. The Appellants/Plaintiffs pray that the Court accordingly find the Council's actions null, void and of no effect, or any such other relief as the Court deems appropriate.

³ Attachment G -- Proffer Statement ZMA 16-01- Walker Drive Properties Zoning Map Amendment, May 19, 2017. Also included in Attachment A, ZMA 2016-01.

COUNT V. THE STAFF REPORT ON WHICH THE TOWN COUNCIL RELIED MATERIALLY ERRED IN ITS PRESENTATION OF LAND USE MIX PURSUANT TO WARRENTON ZONING ORDINANCE §3-5.2.4.1; THEREFORE, THE COUNCIL'S ADOPTION OF THE PROFFERED LAND USE MIX IS NULL, VOID AND OF NO EFFECT.

54. The Warrenton PUD Ordinance does not permit any residential use that is *not* mixed use in an I-PUD.

55. Article 3-5.2.4.3 Other Criteria for Commercial and Industrial Planned Unit Developments, ¶3 states, "Residential development within the I-PUD shall be limited to mixed commercial and/or industrial uses with dwellings having ten (10) or more dwelling units that may be designed as mixed-use developments."

56. The chart in §3-5.2.4.1 PUD Development Standards specifies that a maximum of 20% of Residential use is permitted in an I-PUD.

57. To the extent any Residential use is proposed by the applicant, a corresponding calculation of the Residential square footage as compared to the square footage of the entire project must be identified to evaluate compliance with the allowable Residential use maximum.

58. To the extent any Mixed Use Residential is proposed by the applicant, a corresponding calculation of Mixed Use Residential square

footage (including ground floor Industrial and Commercial components) as compared to the square footage of the entire project must be identified to evaluate compliance with the allowable Mixed Use Residential use maximum.

59. The proffer at page 11, ¶35 (Attachment G) as set forth in the Land Bay Plan (Attachment J) does not provide sufficient information to determine whether the proposed land use mix complies with the 35% Residential Mixed Use maximum. The Land Bay Plan General Notes state that mixed use residential buildings shall contain non-residential uses *in all or a portion of* the ground floor for each applicable building, but it is not clear how much of the commercial and industrial uses in Land Bays D and E will be in the residential buildings.
60. The applicant's Land Bay Plan (Attachment J) shows that total Residential area equals 140,824 gross square feet, 35.49% of the total project.
61. However, the table found in the "Staff Analysis", page B-9 (included in Attachment A) places the proffered Residential percentage in the wrong category, "Mixed Use Residential." Also, the table erroneously identifies the Residential Category as not applicable ("N/A").

62. A fair reading of the proffer would instead show Residential at 35.49%, and either have a question mark or up to 45.62% for Mixed Use Residential.

63. The misleading table in the staff analysis and the unspecific language in the Land Bay Plan General Notes make it impossible to determine whether the Mixed Use Residential component under the PUD Ordinance can be satisfied. Therefore, the Appellants/Plaintiffs pray that the Council's adoption of ZMA 2016-01 be determined null, void and of no effect, or any such other relief as the Court deems appropriate.

COUNT VI. THE PROFFER “NO HEALTH AND FITNESS FACILITIES SHALL BE PERMITTED IN LAND BAYS A, B, C, AND/OR D UNLESS THE PRESENTLY EXISTING OLD TOWN ATHLETIC CLUB SHALL PERMANENTLY CEASE OPERATION” VIOLATES VIRGINIA LAW §15-2.2296 ET SEQ, §15-2.2297, §15.2-2223, AND WARRENTON CONDITIONAL ZONING ORDINANCE §11-3.9.17.1; IT IS NOT A CONDITION PROFFERED “FOR THE PROTECTION OF THE COMMUNITY.”

64. Article 11-3.9.17.1 Conditional Zoning of the Warrenton Zoning Ordinance reads in part, “While the conditions may vary from property to property. . . at a particular location, it is not the intention of this section to authorize conditions *limited to a particular individual or group, owner, or operator. . .*” (emphasis added).

65. VA. Code §15.2-2296 states, “It is the purpose of §§ 15.2-2296 through 15.2-3000 to provide a more flexible and adaptable zoning method to cope with situations . . . whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant *for the protection of the community* that are not generally applicable to land similarly zoned.” (emphasis added).
66. ZMA 2016-01 proffers, “No Health and Fitness Facilities shall be permitted in Land Bays A, B, C, and/or D unless the presently existing Old Town Athletic Club shall permanently cease operation.” (Attachment G, p. 3, ¶3.a.)
67. The Old Town Athletic Club is located within the “Existing Land Bay.”
68. The proffer does not include Land Bay E.
69. On information and belief, the Existing Land Bay and Land Bay E are owned by a particular individual, group, owner or operator, including improvements known as the “Old Town Athletic Club.”
70. The proffer violates at least Virginia Code §15-2.2296 as it is clearly not intended to protect the community but rather to protect an individual owner, owners, group or operator of the Existing Land Bay, the owner or

owners of the parcel and improvements known as the Old Town Athletic Club and the individual owner, owners, group or operator of Land Bay E.

71. The proffer has no reasonable relationship to the rezoning per Virginia Code § 15-2.2297(iii).⁴
72. The proffer harms the public welfare because it disallows any other health or fitness facility consistent with the §12 Definitions of the Warrenton Zoning Ordinance, “an indoor establishment, which may include saunas and steam baths, offering or providing facilities for and instruction in general health, physical fitness, and controlled exercises such as weight lifting, calisthenics, and aerobic dancing.” This proffer thus could exclude from the public a variety of services beyond an athletic club, e.g., yoga studios, Pilates, martial arts, dance aerobic studios, physical therapy and even patient care.
73. The staff report stated, “The applicant has proffered out the use of health and fitness facilities. Staff has indicated throughout the process that the Town has no interest in this proffer and that it may not be in the best interest of the Town’s economic development. The applicant has the ability to deed restrict their own property.”

⁴ VA Code §15.-2298 provides additional conditions in certain high-growth localities. On information and belief, Warrenton’s annual growth has exceeded 5% from the “next-to-latest to latest decennial census year.” Alternatively, the locality may elect to utilize the conditional zoning authority granted under § 15.2-2303.

74. Appellants/Plaintiffs pray that the Court order the Council to strike the “No Health and Fitness Facilities” proffer, or any such other relief as the Court deems appropriate.

COUNT VII. THE PROFFERS VIOLATE §11-3.9.17 ¶2 OF THE WARRENTON CONDITIONAL ZONING ORDINANCE BY FAILING TO INCLUDE THE REGULATORY REQUIREMENT “STRICT ACCORDANCE.”

75. Article 11-3.9.17 Conditional Zoning at ¶2 expressly requires that “. . . proffers shall be annotated with the following statement signed by . . . owners of the subject property: “I (we) hereby voluntarily proffer that the development of the subject property of this application shall be in strict accordance with the conditions set forth in this submission unless an amendment *thereto* is mutually agreed upon by the Town Council, and the undersigned.” (emphasis added).

76. The proffer statement incorporated into ZMA 2016-01 by the Town Council reads on page 2 (Attachment G) in part, “the use and development of the Property *shall be in substantial conformance* with the following conditions. . .,” (emphasis added) in direct violation of the specific regulatory requirement of the Ordinance.

77. Substantial conformance is defined at §11-3.9.17 ¶11, “For the purpose of this Section, substantial conformity means that conformity

which leaves a reasonable margin for adjustment due to final engineering data but conforms with the general nature of the development, the specific uses, and the general layout depicted by the plans, profiles, elevations, and other demonstrative materials presented or proffered by the applicant. Determinations of substantial conformance shall be made by the Zoning Administrator.”

78. It is indisputable that the plain and ordinary meaning of “strict accordance” is not equivalent to “substantial conformance.”

79. Because this proffer fails to adhere to a material regulatory requirement of the Conditional Zoning Ordinance, the Appellants/Plaintiffs pray that the Court find the Council erred as a matter of law in its adoption of ZMA 2016-01, and find ZMA 2016-01 null, void, and of no effect, or any such other relief as the Court deems appropriate.

COUNT VIII. THE MASTER PLAN INCORPORATED INTO THE AMENDMENT IS IN VIOLATION OF WARRENTON ZONING ORDINANCE §3-5.2.4.3 ¶2.

80. Warrenton PUD Ordinance §3-5.2.4.3 at ¶2 states, “A Master Plan shall provide . . . for *integrated development of all of the proposed uses*

and the coordination of infrastructure as a cohesive entity, rather than separate components or independent cells of land use.” (emphasis added).

81. The “Existing Land Bay” and/or Land Bay E shown in the Master Plan (Attachment A, Master Development Plan) are not uniformly subject to the standards that apply to the remaining Land Bays. These standards include the unified sign program proffered for Land Bays A-E but not required of the Existing Land Bay, and the exterior building elevations proffered for Land Bays A-D, but not Land Bay E.

82. It is inconsistent to *include* Land Bay E and the Existing Land Bay to meet the minimum regulatory acreage requirements of the I-PUD (25 acres pursuant to §3-5.2.4.1) and then *exclude* Land Bay E and the Existing Land Bay from the same conditions and modifications that apply to the other land bays. Also, Land Bay E is the site for the development for forty condominium units.

83. According to the “Staff Analysis” page B-9, included with Attachment A, “The treatment of the Planned Unit Development is often not across all land bays. For transportation, trails, signage, open space, design, Property Owners Association, and others [sic] components, the

applicant has treated the existing buildings and Land Bay E as “sufficiently distinct” from Land Bays A-D.”

84. At page B-15, the "Staff Analysis" states, “As proffered, the site will contain a 5’ concrete sidewalk along the property’s frontage and an internal pedestrian/bicycle trail network for Land Bays A-D. As has been stated multiple times throughout the review process, the linkage along this property serves as a priority connection not only to the internal Town circulation for Academy Hill Park, Old Town, and residential neighborhoods for bicycles and pedestrians, but also with the connection to the County’s Whites [sic] Mill trail system. The internal trail system was a compromise during the process to remove it off Walker Drive as depicted in the Comprehensive Plan. However, as proffered it does not apply to the entire subject property resulting in no linkage to Academy Hill Road.” (Attachment A)

85. The Master Plan violates the requirement that the development be integrated and the infrastructure coordinated as a cohesive entity. The Appellants/Plaintiffs therefore pray that the Court find that the Master Plan, and therefore ZMA 2016-01 of which it is a part, null, void and of no effect, or any such other relief as the Court deems appropriate.

COUNT IX. THE PROFFERED MODIFICATIONS AND WAIVERS PURSUANT TO WARRENTON CONDITIONAL ORDINANCE ARTICLE 11-3.9.17 ET SEQ. VIOLATE VA. CODE § §15.2-2201 AND 15.2-2296 ET SEQ., AND WARRENTON CONDITIONAL ZONING ORDINANCE §11-3.9.17 ¶2.

86. Warrenton Zoning Ordinance Article 11-3.9.17 at ¶2 states,

As a part of an application for rezoning or amendment to the zoning district map, the owner or owners of the property involved may, prior to a public hearing before the Town Council, voluntarily proffer in writing such reasonable conditions, *in addition* to the regulations provided for the zoning district or districts as herein set forth, as he deems appropriate for the particular case to address impacts of the proposed use. (emphasis added).

87. Virginia Code §§ 15.2-2296 through 15.2-2303.3 also provide that

proffers consist of reasonable conditions that are *in addition* to the regulations of the zoning district. See, e.g., Virginia Code § 15.2-2298(A). (emphasis added).

88. ZMA 2016-01 incorporates proffered waivers/modifications of the land

use mix requirements of the Warrenton PUD Ordinance §3-5.2.4.1

General Criteria. (Attachment G, p. 11, ¶35).

89. The Land Use Mix waivers/modifications proffer are *alternative* or

lesser requirements, not *additional* requirements as required under the

law.

90. Therefore, the Appellants/Plaintiffs pray that the Court find the Council's incorporation of such waivers/modifications into ZMA 2016-01 pursuant to the proffer disclosed above null, void, and of no effect, or any such other relief as the Court deems appropriate.

JURY TRIAL DEMANDED

Elbert Michael Ussery
Elizabeth S. Ussery
Craig A. Updyke
Kathlyn Rowland
Lee T. Rowland
Carol Hegwood

By counsel



Bradley G. Pollack
Attorney at Law
Virginia State Bar No. 25290
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net
540-459-8600
540-459-8670 (fax)

Elbert Michael Ussery, Elizabeth S. Ussery, Craig A. Updyke, Kathlyn
Rowland, Lee T. Rowland and Carol Hegwood



William T. Semple
319 Falmouth Street
Warrenton, VA 20186
wsemple@msn.com
540-347-4378
540-347-4378 (fax)