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May 24, 2024

VIA ELECTRONIC MAIL & U.S. MAIL

Mr. Rob Walton, rwalton@warrentonva.gov
Director of Community Development
Martin Crim, Esq., mcrim@sandsanderson.com
Town Attorney
Ms. Heather Jenkins, hjenkins@warrentonva.gov
Zoning Administrator
Town of Warrenton
P.O. Box 341
Warrenton, Virginia 20188

Re: Rejection of Appeal Application (dated May 22, 2024), BZA-24-1

Dear Mr. Walton:

I am in receipt of your letter dated May 22, 2024 (the “**Town’s Refusal**”) but communicated on May 23, 2024. In the Town’s Refusal, you, in your capacity as Director of Community Development, purport to “reject[]” the appeal to the Board of Zoning Appeals for the Town of Warrenton (“**BZA**”) that was timely filed by my clients (collectively, the “**Citizens**”),¹ on May 16, 2023 (the “**Citizens’ Appeal**”). The Citizens’ Appeal seeks BZA review of the conditioned Site Development Plan approval issued to Amazon Data Services, Inc. (“**Amazon**”) by the Zoning Administrator pursuant to the Zoning Ordinance of the Town of Warrenton (“**Zoning Ordinance**”) on April 18, 2024 (the “**SDP Approval**”). A Zoning Official, Ms. Amber Heflin, who conveyed the Town’s Refusal requests that we “retrieve” the Citizens’ Appeal materials “within 10 days,” and suggests that the Town Officials² may “discard the submission.” Instead, the Town Officials must retain the submission and transmit it and this letter to the BZA.

¹ The Citizens are comprised of Charles and Marygay Cross; the Lauren Donahoo-Hatchell Trust; Kevin and Amy Hampton; Chrystal Mehl; Patricia Tucker and Scott Wehner; Claudia Dolores Sandoval González and Carlos Ivan Lemus Bojórquez; and Citizens for Fauquier County, a Virginia nonstock corporation.

² Capitalized terms not defined herein shall bear the same meaning as in the First Amended Petition in *Cross, et al. v. Town Council of the Town of Warrenton, et al.*, CL23-128, or in the Citizens’ Appeal, which exhibits the First Amended Petition as Exhibit 1.

The Citizens deny the legal correctness of the Town's Refusal to transmit the Citizens' Appeal to the BZA and the Town Officials' lawful authority to decide that the Citizens' Appeal is outside the BZA's jurisdiction. Such a decision prevents BZA review of the SDP Approval or any other such decision made by the Zoning Administrator or any other Town Official who administers, enforces or interprets the Zoning Ordinance. It also usurps the independence of the BZA, who may retain its own legal counsel and decide its own jurisdiction. Code of Virginia of 1950 ("Code") §§ 15.2-2308(D) and 15.2-2309(1).

Under the Code, the BZA, whose members are appointed by the circuit court, Code § 15.2-2308(A), has both the power and the duty "[t]o hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto." Code § 15.2-2309(1). This provision is not to be given a narrow construction: "[f]or purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer." Code § 15.2-2309(1). Its powers are to be exercised by majority vote, and only members have a vote. Code § 15.2-2308(C) ("A secretary who is not a member of the board shall not be entitled to vote on matters before the board.").

Despite this, the Town's Refusal contends, among other things, that the Town Officials, not the BZA, can decide that the Citizens Appeal is no good. This is because, we are told, the SDP Approval "relates to a site plan." Apparently, no "determination" can be reviewed by the BZA at the behest of the Citizens that "relates to a site plat." Per the Town's Refusal, this conclusion follows from two premises: one, that (uncited) "Virginia precedent" establish that "a third party has no right to challenge a subdivision plat" and two that "site plans are governed by the same statutes as subdivision plats." Even conceding for argument's sake the truth of the premises as stated, the conclusion reached in the Town's Refusal does not follow.

On the first point, Code § 15.2-2259, which are implicitly relied upon, creates no such immunity from review. That appeal provision only refers to a "plat," not a "site plan," both defined terms, Code § 15.2-2201. It also addresses only appeals of a failure to approve or disapprovals, not approvals. And it governs only the appeal by a "subdivider," not appeals by anyone else. The SDP Approval is not limited to a plat, but includes a large site development plan and the many conditions of approval applicable thereto, involves an approval, not a failure to approve or disapproval, and is brought by persons aggrieved, not by any subdivider. In fact, there is no "subdivider involved" whatever, suggesting it wouldn't even grant appeal rights to Amazon. For all these reasons, that provision by its terms has no application. Certainly, Code § 15.2-

2259 says nothing about review of site development plans more generally, much less the SDP Conditions that are part of the SDP Approval and which are not simply review of a site plan for conformity with a subdivision ordinance, as shown by the Zoning Ordinance.

In short, even if the SDP Approval were subject to review (had it been an SDP Disapproval) at the behest of Amazon by statute, namely Code § 15.2-2259, that does not prove that no portion of the SDP Approval, particularly the SDP Conditions, may be reviewed by the BZA to ensure that the Zoning Administrator acted in compliance with “any ordinance adopted pursuant to” Article 7 of Chapter 22, in Title 15.2, particularly in the “administration or enforcement” of the Zoning Ordinance. But that is precisely the conclusion that is needed to sustain the Town’s Refusal. Code § 15.2-2259 would have to be read to carve out otherwise reviewable determinations by the Zoning Administrator in the administration and enforcement of the Zoning Ordinance. Even if Code § 15.2-2259 said just that—and it cannot be construed fairly to mean that—Code § 15.2-2309(1) would tell us to ignore it when it comes to what “determinations” are subject to BZA review. That section defines “determination” broadly, “any order, requirement, decision, or determination made by an administrative officer,” full stop. And that section says “[a]ny appeal of a determination to the board shall be in compliance with this section, *notwithstanding any other provision of law, general or special.*” Code § 15.2-2309(1) (added by 2015 Acts of Assembly c. 597). The Town’s Refusal’s failure to cite any authority in support of its conclusion that otherwise reviewable determinations cannot be reviewed if they “relate[] to a site plan” proves the absence of such authority.

Such a conclusion would also be in tension with the Zoning Ordinance, whose provisions governing site development plan approval recognize the distinction between traditional subdivision plat approval and site development plans. This includes a provision noting that the Zoning Administrator reviews site development plans under the Zoning Ordinance, and not just the Planning Director under the Town of Warrenton Subdivision and Development Ordinance. *See* Zoning Ordinance §§ 11-3.7.3 and 11-3.7.4 (juxtaposing the two reviews). That review occurred here.

The SDP Approval is properly subject to the Citizens’ Appeal, because it, particularly the SDP Conditions, administers and enforces the Zoning Ordinance, including conditions that are part of the Amazon SUP issued putatively pursuant to the Zoning Ordinance. For example, the SDP Conditions purport to administer and enforce many of the SUP Conditions and other permitting requirements in the Zoning Ordinance. *See* SDP Conditions Nos. 2–27. Moreover, the Town’s Refusal itself recognizes that the SDP Approval is an exercise of the authority “to determine . . .

compli[ance] with the zoning ordinance,” something the Supreme Court of Virginia has made clear is a determination subject to review by the BZA to satisfy constitutional due process concerns.³ The BZA, thus, must treat the SDP Approval as an “order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto” within the BZA’s bailiwick to review, Code § 15.2-2309(1), and subject to appeal by “any person aggrieved,” Code § 15.2-2311(A).

Confirming this conclusion is the Town Council’s practical construction given Code § 15.2-2259 and Code § 15.2-2311 by the Zoning Ordinance, which expressly provides for a right of appeal of the SDP Approval to the BZA. Under the Zoning Ordinance, the issuance of site development plans is governed by Articles 10 and 11, *see* Zoning Ordinance §§ 10-1 through 10-9 and §§ 11-3.7.1 through 11-3.7.5, not just by the Subdivision Ordinance. And both of those Articles expressly provide a right of appeal to the BZA to “any person aggrieved” – an appeal “in accord with § 15.2-2[3]11 of the Code of Virginia as amended and Article 11 of the Zoning Ordinance.” Zoning Ordinance § 10-7.6. Turning to Article 11, we find express provision that:

An appeal to the Board of Zoning Appeals may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the Zoning Administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto.

Zoning Ordinance § 11-3.12.1. “[T]his article” in the Zoning Ordinance embraces the approval of Site Development Plans, including the SDP Approval, *see* Zoning Ordinance §§ 11-3.7.1 through 11-3.7.5, as indicated by Zoning Ordinance § 10-7.6.

To reach the conclusion that the SDP Approval is not subject to BZA review, the Town’s Refusal also declines to follow the plain language of these provisions of the

³ Cf. *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 580 (2012) (“Decisions to grant or deny a departure from a zoning ordinance necessarily implicate important property rights, not solely for the landowner applying for such a departure but also for other parties who may be adversely affected by a ruling. Accordingly, the decision of the zoning administrator to grant or deny a zoning modification may be appealed to the board of zoning appeals by any aggrieved party. Code § 15.2-2311(A). Similarly, the decision of the board of zoning appeals—whether a decision to grant or deny a variance or special exception or an appeal from a zoning administrator’s decision to grant or deny a zoning modification—may be appealed to the circuit court by any aggrieved party. Code § 15.2-2314. Yet in this case, aggrieved third parties have no right of appeal under the Waiver Provision at all.”).

Zoning Ordinance. In taking this tact, the Town's Refusal logically is taking the position that these Zoning Ordinance provisions, expressly authorizing appeal, are *ultra vires* and invalid. As striking as this position is on its face, it is made all the more so when considered with the other position asserted in the Town's Refusal: that "[o]nly a court can hold a Town ordinance invalid." But that is precisely what the Town's Refusal purports to do in not proceeding with the Citizens' Appeal.

The Town's Refusal to transfer the Citizens' Appeal to the BZA contravenes the Code and the Zoning Ordinance's command that the "zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed as taken." Code § 15.2-2311(A); Zoning Ordinance § 11-3.12.1(2) (same); *see* Zoning Ordinance § 11-3.12.2(1) ("Appeals shall be filed with the Board of Zoning Appeals in care of the Zoning Administrator, who *shall provide* a copy of the appeal to the secretary of the Board . . .") (emphasis added). Similarly, by purporting to dispose of the Citizens' Appeal without the involvement of the BZA and on the Town Officials' own motion, the Town's Refusal also violates the plain commands of both the Zoning Ordinance, particularly Section 11-3.12.3 ("An application or appeal which is not withdrawn pursuant to this subsection shall be either granted or denied *on the merits by the Board . . .*") (emphasis added), and of the Code. *See* Code § 15.2-2309(1) ("The decision on such appeal shall be based *on the board's judgment* of whether the administrative officer was correct.") (emphasis added).

By this letter, I am apprising you, the other copied Town Officials, representatives of Amazon, and the BZA Chairman of the Citizens' Appeal, the Town's Refusal, and the BZA's statutory obligation to process the Citizens' Appeal and of all parties' statutory obligation to stay "all proceedings in furtherance of the" SDP Approval. Va. Code § 15.2-2311(B).

Unless advised by **Tuesday, May 28, 2024**, of the BZA's intention to proceed with the Citizens' Appeal and all parties' recognition of the statutory stay under Code § 15.2-2309, it is the Citizens' intention to pursue all available remedies.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale G. Mullen". The signature is fluid and cursive, with the first name "Dale" and last name "Mullen" clearly distinguishable.

Dale G. Mullen

CC: *via electronic mail only*
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