In The

Supreme Court of Virginia

RECORD NO. 220112

OCEAN SHORE CONDOMINIUM ASSOCIATION, *et al.*,

***Petitioners – Appellants*,**

v.

VIRGINIA BEACH CITY COUNCIL, *et al.*,

Respondents – Appellees.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

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Westminster-Canterbury on Chesapeake Bay ("Westminster-Canterbury") applied for a modification of its conditional use permit ("CUP") so that it could expand its campus and provide much needed elderly housing in Virginia Beach. Recognizing the need for additional elderly housing and the stellar track record of Westminster-Canterbury in providing such housing, City Council ("Council") determined that the use was compatible with the neighborhood, that there was good cause for a deviation from the height restriction, and that the deviation would not cause significant detrimental effects. Council approved the Application in September of 2020, clearing the way to begin construction. That was over 17 months ago.

Petitioners are nearby property owners who have made it their mission to block this project. They filed suit asserting numerous claims, including that Council's approval of the CUP was arbitrary and capricious. As Petitioners attached no exhibits to their Complaint, Westminster-Canterbury and Council (collectively "Defendants") filed motions craving *oyer* to make the Legislative Record part of the pleadings. Defendants also demurred.

The court heard the Motions Craving *Oyer* on February 25. After taking testimony from the City Clerk that the 514 pages submitted by Council represented the entire Legislative Record, the court granted the motions and set the Demurrers

to be heard on April 29.[1] Petitioners' opposition brief represented that they intended to amend their equal protection claim.

At the Demurrer hearing, Petitioners insisted that they had uncovered "additional" documents that should be made part of the record. The court rescheduled the hearing for May 12. At the hearing, Defendants introduced additional testimony from the City Clerk with regard to the proper contents of the Legislative Record. The court concluded that the additional documents offered by Petitioners were not properly part of the Legislative Record and proceeded with argument on the Demurrers. After the hearing, Petitioners submitted a post-hearing brief and raised a new argument--that one Petitioner did not have actual notice of the Council hearing. In their response, Defendants supplied the court with an email from the Petitioner submitted to the Council on the day of its hearing asking that it vote against the application.

The trial court issued a letter opinion on July 29, 2021. In that opinion, the court indicated it was not ruling on Petitioners' equal protection claim because Petitioners intended to amend. The court sustained the demurrers as to the other counts, finding, among other things, that there was evidence of reasonableness in the record to render Council's actions fairly debatable, that Council did not approve the pedestrian bridges or the relocation of a beach access and therefore

[1] Council submitted the Legislative Record Bates numbered CVB0001-0514. R. at 36 *et seq.* Citations to the Legislative Record are to the Bates numbers.

could not have exceeded its authority in doing so, and that Council had the authority to deviate from the height restriction and properly did so.

The parties scheduled a hearing before the court for September 23 for entry of the order because Petitioners rejected Defendants' proposed order. Meanwhile, Defendants specifically requested that Petitioners disclose the basis for the proposed amendment to the equal protection claim. Petitioners ignored the request.

At the September 23rd hearing, counsel for Westminster-Canterbury argued that Petitioners' refusal to disclose any basis whatsoever for the proposed amended complaint since representing to the court almost five months earlier that Petitioners intended to file one was motivated by no other purpose than to delay entry of the order. In her response, counsel for Petitioners again failed to disclose any basis for the proposed amendment. The court found that the behavior of Petitioners' counsel "borders on unprofessional, to say the least," and dismissed all claims with prejudice, without leave to amend, directing Defendants to prepare an order.

Over the next several weeks Defendants unsuccessfully attempted to secure Petitioners' objections to and endorsement of a final order. As a result, Westminster-Canterbury filed a motion to have the court enter an order without endorsement or objections, but included language allowing objections to be filed within 21 days of entry of the order. The court entered this final order on November 15.

Petitioners moved to vacate the order. Judge Shockley refused. Petitioners filed an "emergency motion" asking that the Chief Judge remove Judge Shockley from the case and vacate her order. He referred Petitioners to Judge Shockley who refused to hear Petitioners' argument *ex parte* and instead scheduled a hearing for the following Monday. At this hearing, Judge Shockley denied the motion to vacate and included Petitioners' objections to the order entered on November 15. This appeal followed. Meanwhile, construction has been suspended and will not resume until this matter is resolved, resulting in significant losses associated with escalating construction costs.

STATEMENT OF FACTS[2]

After a hearing, the Planning Commission recommended approval of the application for modification of the CUP ("Application"). LR at CBV0068-70. All Petitioners had notice of the hearing and participated. Petitioner Ocean Shore Condominium Association was represented by its counsel, Jeanne Lauer ("Ms. Lauer"), at the Council hearing. LR at CBV0458. Marina Liacouras, President of Petitioner Ships Watch Condominium Association, also spoke at the hearing, as did several members of both condo associations, including Petitioner Terkeltaub. LR at CBV0483, CBV0462.

[2] Petitioners' statement of facts contains a number of assertions that appear nowhere in the record and are irrelevant to the issues now before the Court. Respondents include in this brief only those facts it contends are relevant to the appeal.

Council heard extensive comment both in support of and in opposition to the Application. LR at 0340-42. Council granted the Application, concluding that there was good cause for a deviation from the 165-foot height restriction imposed on housing for seniors in a B-4 district and finding that the height deviation would not cause any significant detrimental effects. LR at CBV0508.

Petitioners filed this lawsuit and Defendants filed Motions Craving *Oyer* and Demurrers. Council submitted with the motion craving *oyer* a 514-page Legislative Record along with an affidavit from the City Clerk attesting to its authenticity. R. at 36 *et seq.* At a February hearing, the City Clerk testified that the 514 pages was, in fact, the entire Legislative Record. Feb. 25 Tr. at 8-9, R. at 2487 *et seq*. The court granted the motion craving *oyer* concluding that the submitted documents represented the Legislative Record. R. at 1800-02.

On April 28, 2021 (the eve of the Demurrer hearing), Petitioners belatedly filed a brief in opposition to Defendants' demurrers. R. at 1760-82. In that brief, Petitioners represented that they "seek leave of court to amend the allegations in Count III," which was an equal protection claim. The next day, when the demurrer was supposed to be heard, Petitioners' counsel appeared claiming she had 164 pages of documents that were improperly excluded from the Legislative Record. The hearing was postponed so Defendants could consult with the City Clerk to

determine whether the "new" information was included in the record and, if not, why not. The Demurrer hearing was rescheduled for May 12.

At the hearing, the City Clerk testified that the documents Petitioners claimed were "missing" from the record were not Council records as they were never offered at the various hearings or otherwise submitted to be included in the Legislative Record. May 12 Tr. at 46-51, R. at 2295 *et seq*. The trial court's ruling remained the same: the 514 pages to which the Clerk attested was the Legislative Record. The court then proceeded to hear the demurrer as to all counts.

Due to Petitioners representation in their brief that they were "seek[ing] leave to amend" their equal protection claim, counsel for the Council specifically sought a proffer knowing that Petitioners could not plead any facts that would make out a cognizable equal protection claim. May 12 Tr. at 81, R. at 2295 *et. seq.* Petitioners refused. *Id.* at 112.

After the hearing, Petitioners submitted a post-hearing brief arguing that notice of the council hearing was deficient, and representing as follows:

> In anticipation of any defense, there is nothing in the Official Record which suggests Petitioner Richard D. Norris had actual notice of, or participation in, the September 22, 2020 City Council hearing which might prevent him from challenging the adequacy of notice in this proceeding.

R. at 1862. These allegations were never pled. The clear implication is that Petitioner Norris had standing to challenge notice. In fact, Petitioners' counsel was

well aware that Norris not only had notice of the hearing, but actively participated by emailing a councilmember on the morning of the hearing to thank him in advance for his vote against the CUP. R. at 1837.

The court was not persuaded by Petitioners substantive arguments and sustained the demurrers on most counts but, based on the representation that an amendment was forthcoming, withheld ruling on the equal protection claim. *See* July 29 Opinion. After the court issued its opinion, Petitioners still did not file the amended complaint, demanding that they be given 21 days to do so instead of the 14 proposed by Defendants. This dispute resulted in yet another hearing, scheduled 56 days after the court issued its opinion, further delaying entry of an order. R. at 2466 *et. seq.* During the 56 days, counsel for both Defendants asked Petitioners to disclose the basis for an amended complaint, and insisted that refusal to do so could serve only one purpose: improper delay. Sept. 23 Tr. at 9-10, R. at 2439 *et seq*.

Counsel for Westminster-Canterbury argued at the September 23 hearing that all claims should be dismissed with prejudice, specifically citing Petitioners' failure to disclose the basis for any amendment to the Complaint notwithstanding ongoing requests that they do so. Sept. 23 Tr. at 6-13, R. at 2439 *et seq.* In her argument, counsel for Petitioners once again failed to make any sort of proffer or provide any facts whatsoever to enlighten either the court or the Defendants as to

the basis for the proposed amendment. *Id.* at 13-19. Finding this conduct "borderline unprofessional," the court dismissed all claims with prejudice, directing Westminster-Canterbury's counsel to prepare and circulate a final order to that effect. *Id.* at 19-20. Defendants circulated the draft order on September 29.

Over the next several weeks, Petitioners again refused to endorse a final order, insisting on revisions and failing to provide objections. Motion for Entry of Order, Tabs 6 and 7 (email exchanges), R. at 1930 *et seq*. Eventually, Defendants agreed to certain revisions in order to get a final order entered and asked that proposed objections be submitted. *Id.* Ms. Lauer then represented that her inattention to the case was the result of dealing with family emergencies, and that Barry Koch would be taking responsibility for the file. *Id.* at Tab 8 (email exchanges). When Defendants' counsel asked Mr. Koch for objections, he said he would need to consult with Ms. Lauer. *Id.* at Tab 14 (email exchanges).

By November 12, 2021, neither Ms. Lauer nor Mr. Koch had provided simple objections to be included with the order. In an effort to get a final order entered, Westminster-Canterbury filed a motion pursuant to Rule 1:13 for entry of an order without endorsement, submitting the order to which Petitioners had already agreed with one addition--that Petitioners be allowed to submit their objections they had refused to provide within 21 days of entry of the order. R. at 1930. Westminster-Canterbury included in its motion the voluminous email

exchanges reflecting Petitioners' refusal to endorse the proposed order or provide objections thereto. R. at 1930-2161. Judge Shockley entered this final order on November 15, 2021. R. at 2162-70. Pursuant to the terms of the final order, Petitioners had 21 days to submit objections.

Instead of providing the missing objections, Petitioners moved to vacate the order claiming that it had been "altered" because additional language was added giving Petitioners the right to submit objections. R. at 2173-99. By this time, it had been well over a year since Council approved the Application, and more than two months since the court dismissed all Petitioners' claims with prejudice. The court issued a letter stating that the court would not vacate the order. R. at 2200-01.

In an attempt to "end run" the trial judge, Petitioners then filed what they termed an "emergency motion" to be submitted to Chief Judge Leslie Lilley asking that he remove Judge Shockley from the case and vacate Judge Shockley's order. R. at 2202-74. Petitioners appeared *ex parte* in an attempt to secure a hearing before Judge Lilley, who directed Petitioners to Judge Shockley. Ms. Lauer appeared before Judge Shockley with an order which she claimed was virtually identical to the court's final order of November 15 except that the submitted order included Petitioners' objections. Dec. 3 Tr. at 3-5, R. at 2555 *et seq.*

With regard to the *ex parte* nature of the hearing, Ms. Lauer insisted that she had notified counsel for Defendants and argued that, "to the extent that they did not

appear they chose to do so." *Id.* at 7. The judge's clerk then interjected that counsel had been advised that the court would not hear the matter. *Id.* The court then asked Ms. Lauer if she had circulated Petitioners' draft order to counsel for Defendants. When Ms. Lauer conceded that she had not, the court adjourned. *Id.* at 7-8.

The court contacted counsel of record and asked that they appear on the following Monday. After hearing argument of all counsel, the court denied the Motion to Vacate and instead included Petitioners' objections in the final order entered on November 15. Dec. 6 Tr. at 13-14, R. at 2466 *et seq.*

AUTHORITIES AND ARGUMENT

I. Standards of Review

Westminster-Canterbury agrees that the first assignment of error is subject to *de novo* review. For the second and third assignments of error, Westminster-Canterbury agrees that the meaning of the statute is reviewed *de novo*, but Council's application of the statute is subject only to a fairly debatable standard of review. *Richardson v. City of Suffolk*, 252 Va. 336, 338 (1996). Petitioners second assignment of error, however, does not need to be decided as a statutory interpretation issue, as it is fatally flawed for lack of standing. Standing is reviewed *de novo*. *Platt v. Griffith*, 299 Va. 690 (2021). It is undisputed that all Petitioners had actual notice and therefore lack standing to challenge notice. Petitioners are incorrect regarding the standard of review for their last assignment

of error. Under this Court's well-established precedent, whether to dismiss a claim with or without prejudice is reviewed for an abuse of discretion. *Primov v. Serco, Inc.*, 296 Va. 59, 62 (2018). Similarly, the trial court's decision to deny leave to amend is reviewed under an abuse of discretion standard. *Id.* at 70; *Roop v. Whitt*, 289 Va. 274, 280 (2015).

II. The Court Properly Granted *Oyer* of the Legislative Record

The trial court correctly granted the motion craving *oyer* as to the 514-page Legislative Record. This Court has determined that it is appropriate to make the Legislative Record part of the pleadings through a motion craving *oyer* when a litigant challenges a legislative act as arbitrary and capricious. *Byrne v. City of Alexandria*, 298 Va. 694, 700-01 (2020). There, this Court affirmed the trial court's grant of a motion craving oyer as to the Legislative Record comprised of: (1) the docket before the BAR and the City Council docket; (2) the Staff Reports; (3) Byrne's appeal to the city council; (4) minutes from the BAR and City Council meetings; and (5) transcripts of the BAR and City Council meetings. *Id.* at 701; *see also* J.A. at 29-30, *Byrne v. City of Alexandria*, 298 Va. 694 (2020) (identifying the documents subject to the motion craving *oyer*). Notwithstanding Petitioners implication to the contrary, these were, in fact, the *only* documents subject to the motion craving *oyer* in *Byrne*.

Here, the Legislative Record consists of virtually the same materials as *Byrne*. The record includes transcripts of both meetings, the staff report, meeting minutes, the agenda, and the packet of material that was given to city council for the meeting. LR at CBV0001-0514. Under the *Byrne* precedent, the trial court's ruling was proper.

Nonetheless, Petitioners try to manufacture error by claiming that there is no guidance regarding how the Legislative Record should be compiled or defined, and that there were records they thought should have been included. The error here lies not with the trial court, however, but with Petitioners' failure to properly build the record before Council. The leading treatise on local government law explains the method for ascertaining what constitutes the Legislative Record:

> The general well-established rule is that where a municipal corporation is required to keep a record of its proceedings, municipal records properly authenticated or verified are the only competent evidence of the corporate proceedings of the legislative or governing body and of the transactions of officers and boards connected with the local government.

§ 5 McQuillin Mun. Corp. § 14:6 (3d ed.). The Virginia Beach Code of Ordinances (hereinafter "Code") Section 2-56 requires that the clerk keep a record of all city council proceedings, and that "The City Clerk shall retain the records of the city council." Code § 2-343. Granting a conditional use permit is an act of Council. Thus, the Legislative Record necessarily consists of the Council's records pertaining to that Application.

The City Clerk testified that all of the Council records related to its consideration of the application were included in the 514 pages submitted as the Legislative Record. Feb. 25 Tr. 8-9, R. at 2489 *et seq*. These records included the documents provided to Council at the hearing, documents provided by citizens at the hearing for entry into the record, and a transcript of the hearing. *Id.* The Clerk testified that none of the documents Petitioners contend should have been included in the record were presented at the Council hearing or offered to the clerk to be included. *Id*. at 46-47. Petitioners could have made them part of the record by presenting them at the hearing and asking for the inclusion of those records into the record. *Id.* They did not do so notwithstanding that two attorneys participated in the hearing on behalf of Petitioners. None of those documents are records of the Council. Therefore, the documents were not part of the record of Council's proceedings and the court properly concluded that the 514 pages submitted by the City constituted the Legislative Record.

III. Petitioners Cannot Challenge Notice

As an initial matter, Petitioners *never pled* that they lacked notice of the Council hearing. Instead, they pled that the Council acted on the Application without public notice and comment, an allegation belied by the voluminous Legislative Record. Petition, ¶ 99, R. at 1 *et seq.* After the demurrer hearing, Petitioners attempted to amend their pleadings through their post-hearing brief,

introducing a lack of notice argument as to a particular Petitioner for the first time in their June 11 submission. *See* Pet. at 9 (citing only supplemental brief and final order for where issue was allegedly preserved).

More importantly, Petitioners lack standing to challenge the adequacy of notice pursuant to Virginia Code § 15.2-2204 as they had actual notice. That statute provides:

> A party's actual notice of, or active participation in, the proceedings for which the written notice provided by this section is required shall waive the right of that party to challenge the validity of the proceeding due to failure of the party to receive the written notice required by this section.

Va. Code Ann. § 15.2-2204(B). The record reveals that Petitioners not only knew about the Application and Council hearing, but also attended the hearing, spoke at the hearing, and were represented by counsel at the hearing. LR at CBV0462 (Petitioner Terkeltaub speaking at the City Council hearing); *id.* at CBV0458 (Petitioners' counsel, Ms. Lauer, speaking at the City Council hearing); *id.* at CBV0483 (Marina Liacouras, President of Petitioner Ships Watch Condominium Association, who is also an attorney, speaking at the City Council hearing).

To avoid these undisputed facts, Ms. Lauer attempted to mislead the trial court into believing that Mr. Norris (the only Petitioner who did not speak at the hearing) had standing to challenge this provision, stating:

> In anticipation of any defense, there is nothing in the Official Record which suggests Petitioner Richard D. Norris had actual notice of, or

> participation in, the September 22, 2020 City Council hearing which might prevent him from challenging the adequacy of notice in this proceeding.

R. at 1862. Petitioners' carefully worded statement avoids making the explicit misrepresentation that Mr. Norris lacked notice but was certainly designed to create that misperception. Mr. Norris not only knew about the hearing, but also participated by sending a letter to Councilman Moss on the morning of the hearing to thank him in advance for his vote against the application. R. at 1837. His actual knowledge of the proceedings renders him, like the rest of the Petitioners, unable to challenge the adequacy of the notice.

IV. The CUP Does Not Violate the City's Ordinance

Petitioners contend that the court erred when it determined Council had the authority to grant a height deviation and set density, and when it determined the supermajority requirement was not triggered. None of these contentions have merit.

A. City Council had the authority to grant the height deviation

The law is clear that a locality may, by special exception, grant a reasonable deviation from a height restriction. *See Bell v. City Council of City of Charlottesville*, 224 Va. 490, 496 (1982) ("Nothing in the enabling act prevents the alteration of setback and height requirements as part of the issuance of a special exception."). To utilize the special exception process to grant deviations from height restrictions, the locality must pass an ordinance authorizing relief from height restrictions through the special exception process. *See Owens v. City*

Council of City of Norfolk, 75 Va. Cir. 91 (Norfolk 2008) (holding that a special exception is a valid means of obtaining relief from a height restriction only when the city has passed an ordinance authorizing the use of the special exception process to grant relief from height restrictions). The City included in its zoning ordinance a provision which explicitly allows the Council to grant a deviation from a height restriction using the special exception process. Code, Appx. A, § 221(i). Therefore, Council had the authority to use the exception process to grant relief from the 165-foot height restriction in § 901.

Petitioners erroneously contend, based on the catchlines (headings) in the Code, that the height restriction contained in § 901 of the City's zoning ordinance is not really a height restriction and cannot be waived under § 221 because the heading of § 901 says "use restriction." The Code and precedent from this Court and the Court of Appeals prove Petitioners are incorrect. The Code expressly provides:

> The catchlines of the sections of this Code, printed in boldface type, are intended as mere catchwords to indicate the contents of the sections and shall not be deemed or taken to be titles of such sections, nor as any part of any section, nor, unless expressly so provided, shall they be so deemed when any section, including its catchline, is amended or re-enacted.

Code § 1-3. This provision is based on prior Virginia Code Section 1-13.9.[3] *See id.* Virginia's appellate courts have had occasion to interpret Section 1-13.9, as well as

[3] This code section has been moved to Va. Code Ann. § 1-217.

the current version of the statute, Section 1-217. When doing so, the courts have been clear that "by statutory mandate the headlines of the several Code sections are intended as mere catchwords to indicate the contents of the sections and do not control construction of the statute." *Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 484 (1986); *see also Butler v. Fairfax Cnty. Sch. Bd.*, 291 Va. 32, 38 (2015) ("the headline of a Code section is not part of the statutory language and does not have the force of law"); *Commonwealth v. Hall*, 297 Va. 143, 147 n.5 (2019) (same); *Foster v. Commonwealth*, 44 Va. App. 574 (2004) (headlines of a section headlines of code sections are "for information and convenience" and "do[] not give meaning to a statute"), *aff'd*, 271 Va. 235 (2006).

Since the heading of the section does not control its meaning, the court must look to other sources to ascertain what the term "height restriction" means. The Code does not define "height restriction." Therefore, the word must be afforded its ordinary meaning. *See Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340 (1998) ("[T]he general rule of statutory construction is to infer the legislature's intent from the plain meaning of the language used."). The ordinary meaning of the phrase "height restriction" is a limitation on how tall a structure may be. The 165-foot limitation contained in Section 901 is a height restriction under any ordinary meaning of the word.

Additionally, "every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Id.* at 340; *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 497 (2014) ("We adhere to rules of statutory construction that discourage any interpretation of a statute that would render any part of it useless, redundant or absurd. Instead, we seek to read statutory language so as to give effect to every word."). Petitioners' position that height restrictions are limited to the height restrictions in sections ending in the number "04" (under the heading "height regulations") would violate this principle of statutory construction because it would render parts of Section 221 superfluous.

Section 221 permits reasonable deviations from "Height restrictions, except as provided in section 202(b)." Code, Appx. A, § 221(i)(3). If Section 202(b) were not a height restriction, there would be no need to put language in Section 221(i)(3) indicating that the height restrictions imposed by Section 202(b) are not waivable. Through the inclusion of this language in Section 221(i)(3), the City made clear that the term "height restriction" is not limited to those appearing in sections ending in the numbers "04."

The 165-foot limitation contained in Section 901 restricts the height of a building and is a height restriction under any normal understanding of the word. It is clear that the City did not intend to limit the applicability of Section 221(i) to those restrictions appearing in sections of the code ending in "04." Therefore, the

only conclusion that can be reached is that Council had the authority under Section 221 to grant a deviation from the height restriction in Section 901.

B. Council had the authority to set density.

While Petitioners claim that "The density for all uses in the Shore Drive Overlay District is 36 units per acre in parcels larger than 4 acres," Pet. at 29, their assertion is belied by the plain text of the statute. Section 1704(a) does not apply to all uses. It applies only to multi-family housing. Other types of buildings, such as hotels and motels, which are a conditional use in that district, can have a density of up to 120 units per acre. *See* Code, Appx. A, §§ 901, 1704.

Petitioners' contention that Section 1704's density requirements for "multiple-family dwellings" should control the Court's inquiry is incorrect. Section 235, which lays out the density requirements for *housing for seniors*, is the more specific statute. Section 235 must, therefore, control the density. That provision allows Council to determine density. *Id.* § 235.

There are multiple reasons why Section 235 is the more specific statute that must control. First, while Section 1704 applies to *all* multi-family dwellings in the Shore Drive Overlay, Section 235 applies to a *specific subset* of multi-family dwellings—housing for seniors. As the definitions provided in the zoning ordinance make clear, housing for seniors and disabled persons is one specific "category of multiple-family housing," but it is not the only category. *See* Code,

Appx. A, § 111. Thus, restrictions on senior dwelling units are more specific than restrictions on the general category of multiple-family dwelling units.

The fact that housing for seniors is a specific type of use with different and more specific restrictions and permissions than the general category of multiple-family dwelling units is evident from Section 901. The more general category of "multiple family dwellings" is a permitted use in one type of business district, a conditional use in two types of business districts, and prohibited in four types of business districts. *Id.* § 901. In contrast, the more specific subset of use—housing for seniors—is a conditional use in five types of business district including in business districts zoned B-1 and B-1A, where the more general "multiple family dwellings" are not allowed. *Id.* Unlike multiple-family dwellings generally, senior housing is also only a conditional use in B-4 Districts, whereas multiple-family dwellings are a permitted use. *Id.* Other sections of the zoning code also treat senior housing differently than multiple family dwellings. *Id.* §§ 501, 601, 801. Thus, senior housing is a specific use with different constraints than the more general use of multiple-family dwellings and any restrictions set out in Section 235, applying only to the specific use of housing for seniors, are more specific than restrictions generally applicable to multi-family housing.

Housing for seniors is treated differently for a reason: it does not create the same concerns as housing for younger, more mobile people. *See* May 12 Tr. at 89,

R. at 2295 *et seq*. For example, it has less of a traffic impact due to the decreased mobility of many of the residents. Here, the specific statute, Section 235, allows Council to determine the density. They determined that the density created under the plan was appropriate, as Section 235 empowers them to do. Therefore, Council did not violate density restrictions when it granted the modification to the CUP.

C. The supermajority requirement was not triggered.

The trial court correctly concluded that a supermajority vote was not required because when Council granted the CUP, it did not approve the pedestrian walkways or relocate an easement. As the conditions attached to the CUP make clear, obtaining the approvals for the walkway and the relocation of the easement was a future task that Westminster-Canterbury needed to complete, not a decision that Council reached when granting the CUP permit. Petitioners have since admitted that those applications are not part of the CUP and are supposed to be pursued separately. *See* Sept. 23 Tr. at 19, R. at 2439 *et seq*.

V. The Court Properly Denied Leave to Amend the Equal Protection Claim

A. The trial court properly sustained the demurrer as to the Equal Protection Claim.

The trial court's dismissal of the equal protection claim was proper under Virginia law. Petitioners have never argued that the equal protection claim was adequately pled. *See, e.g.*, R. at 1760-82; May 12 Tr. at 112, R. at 2295 *et seq*. In fact, Petitioners conceded that, as pled, the claim was deficient and "would

absolutely require amendment." Sept. 23 Tr. 13:21-23. Thus, sustaining the demurrer was correct.

B. The trial court's dismissal without leave to amend does not constitute an abuse of discretion.

While Petitioners admit that they failed to allege facts sufficient to establish an equal protection claim, they argue that the court abused its discretion in not allowing an amendment in the face of Petitioners' ongoing and abject failure to disclose any basis whatsoever for the claim. Under such circumstances and in light of the court's conclusion that the failure represented "borderline unprofessional" behavior, it did not abuse its discretion in dismissing the equal protection claim with prejudice.

Had Petitioners actually moved for leave to amend, they would be required by Rule 1:8 to submit an amended complaint along with the motion. But Petitioners bypassed this requirement by instead representing *in a brief* that they *intended* to amend. The court relied on this representation in issuing its July 29 opinion, when it refrained from ruling on the equal protection claim, stating specifically that Petitioners represented that they would file an amendment to the claim. Still, Petitioners failed to lodge an amended complaint and ignored Defendants' ongoing requests that Petitioners do so, or *at least* disclose the basis for any such amendment. Indeed, Petitioners have had every opportunity to disclose facts to support such a claim but have refused to do so.

In fact, there are no facts supporting a claim for equal protection, and Petitioners have known this all along.[4] They failed to disclose facts supporting such a claim (1) in the brief in which they represented to the court that they intended to amend, (2) at the demurrer hearing where the Council's attorney requested that they disclose such supporting facts, (3) after the trial court's July 29 ruling which specifically stated that the court was not ruling on the equal protection claim in light of Petitioners' statement that they intended to amend, (4) at the September 23 hearing at which counsel for Westminster-Canterbury specifically challenged Petitioners' failure to proffer facts supporting such a claim as an attempt to delay entry of an order, and (5) in any one of the voluminous filings made after the trial court dismissed all claims with prejudice.

Even in this Petition for Appeal, Petitioners fail to cite any facts whatsoever to support the claim that Council's decision granting the application violates the equal protection clause.[5] This is because there are no such facts, and Petitioners' assertion that there were was made for no other purpose than to delay entry of a

[4] An equal protection claim is inconceivable as Petitioners are homeowners and not applicants for a permit to provide housing for the elderly.

[5] The failure to include any facts supporting an equal protection claim in the trial record makes it impossible for this Court to assess "how the amendment would alter the pleading upon which the circuit court ruled." *Roop v. Whitt*, 289 Va. 274, 280 (2015). Accordingly, this Court "cannot review the court's decision to deny leave to amend." *Id.* at 280-81.

final order in direct violation of Rule 1:4(a), which provides that any counsel tendering a pleading gives assurance that it is filed "in good faith and not for delay." If Petitioners had a single fact supporting the equal protection claim, they would have disclosed it to Defendants, to the trial court or to this Court. As they do not, the representation that there are such facts is a violation of Rule 1:4. Under these circumstances the trial court properly exercised its discretion in dismissing the claim with prejudice.

VI. The Petition was Not Timely Filed.

This Court should also deny the Petition because it was not timely filed. Virginia Code § 8.01-671 provides for a 90-day time limit in which to file the petition for appeal. That time limit is jurisdictional. *Sequel Invs. Ltd. P'ship v. Albemarle Place EAAP, LLC*, No. 150388, 2016 WL 3208946, at *2 (Va. Feb. 12, 2016); *Upshur v. Haynes Furniture Co.*, 228 Va. 595, 597 (1985); *Vaughn v. Vaughn*, 215 Va. 328, 329 (1974). While Rule 5:5 allows for extensions in limited circumstances, Rule 5:5(e) specifies that a request for an extension must come before the expiration of the deadline, which did not happen here.

While Ms. Lauer attempts to use her personal circumstances to justify her late filing, the facts make clear her late filing was completely avoidable. Ms. Lauer previously represented to defense counsel that Barry Koch was "assum[ing] responsibility for this matter." As the responsible professional for the case, he

could have ensured the Petition was timely filed. He did not, and neither the belatedly filed Motion for Extension of Time nor the Amended Motion for Extension of Time nor the Affidavit in Support of Amended Motion for Extension of Time explain why.

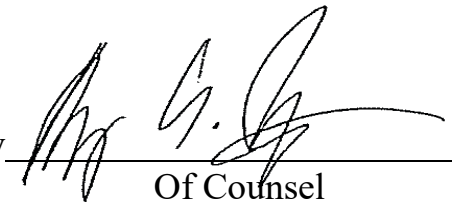
Moreover, Petitioners have no explanation for why they waited until after close of business on the day the petition was due to get the Petition filed, and why they did not ensure someone with appropriate knowledge of the e-filing system was available to file. These were not "inadvertent and unavoidable" delays as Petitioners' claim. Petitioners are represented by two experienced lawyers, both of whom had a duty to ensure the Petition was timely filed. The fact that one of them had family obligations to attend to less than five hours before the filing deadline simply does not justify the failure to timely file when timely filing is jurisdictional.

CONCLUSION

For the foregoing reasons, the Petition for Appeal should be denied.

Respectfully submitted,

WESTMINSTER-CANTERBURY ON CHESAPEAKE BAY

By 
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CERTIFICATE OF SERVICE

I, Gary A. Bryant, counsel for the Respondent-Appellee Westminster-Canterbury on Chesapeake Bay, hereby certify on this 7th day of March 2022 that:

1. The Respondents-Appellees are (a) Westminster-Canterbury on Chesapeake Bay, (b) Virginia Beach City Council, and (c) the City of Virginia Beach.

2. The name, Virginia State Bar number, address, telephone number, facsimile number, and email address of counsel for the Respondents-Appellees are:

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Virginia Beach City Counsel

3. The Petitioners-Appellants are (a) Ocean Shore Condominium Association, (b) Ships Watch Condominium Owners' Association, Inc., (c) Richard D. Norris, and (d) Paul Terkeltaub.

4. The name, Virginia State Bar number, address, telephone number, facsimile number, and email address of counsel for the Petitioners-Appellants are:

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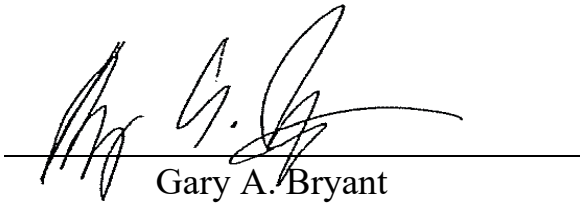
Richard D. Norris and Paul Terkeltaub

5. A true and correct copy of the foregoing Brief in Opposition to Petition for Appeal was emailed and mailed *via* first class mail, postage prepaid, to counsel referenced in paragraphs 2 and 4 above.

6. An electronic copy of the foregoing Brief in Opposition to Petition for Appeal has been filed, via VACES, with the Clerk of this Court on behalf of Westminster-Canterbury on Chesapeake Bay.



Gary A. Bryant