IN THE SUPREME COURT OF VIRGINIA

OCEAN SHORE CONDOMINIUM ASSOCIATION,
SHIPS WATCH CONDOMINIUM OWNERS' ASSOCIATION, INC.,
RICHARD D. NORRIS,
and
PAUL TERKELTAUB
Appellants,

v. Record No.: _____

VIRGINIA BEACH CITY COUNCIL,
CITY OF VIRGINIA BEACH,
and
WESTMINSTER-CANTERBURY ON CHESAPEAKE BAY
Appellees,

PETITION FOR APPEAL

Jeanne S. Lauer, Esquire, VSB #32022
Barry Randolph Koch, Esquire, VSB #16609
INMAN & STRICKLER, PLC
575 Lynnhaven Pkwy, Suite 200
Virginia Beach, VA 23452-7350
(757) 486-7055
(757) 431-0410 (facsimile)
Email: jlauer@inmanstrickler.com
bkoch@inmanstrickler.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

VIRGINIA CONSTITUTION

STATUTES:

CITY OF VIRGINIA BEACH ORDINANCES:

RULES OF THE SUPREME COURT OF VIRGINIA

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This appeal arises pursuant to the Virginia Beach Circuit Court's dismissal of a Petition challenging the September 22, 2020 action of the City of Virginia Beach, acting through the Virginia Beach City Council, (hereinafter collectively the City), in granting the application of Westminster-Canterbury on Chesapeake Bay (hereinafter Westminster) for a conditional use permit to construct multiple additional buildings on several existing parcels zoned B-4, Shore Drive Overlay District. The plans submitted for a conditional use permit (hereinafter CUP) included the construction of a 270-foot tall structure ("the Tower") designed for independent residential living restricted to seniors and disabled persons. The Tower location is immediately adjacent to the Chesapeake Bay and the appellants herein include Ocean Shore Condominium Association, Inc and Ships Watch Condominium Owners 'Association Inc,, the two communities on the Bay closest to the proposed Tower, as well as an individual owner of property within each of the two condominiums, namely Paul Terkeltaub and Richard D. Norris. The appellants will collectively be referred to as OSCA throughout this Petition.

On October 22, 2020, OSCA filed a Petition challenging the determination of the City and City Council to approve the CUP issued to

Westminster and requested service on Westminster and the City. On December 3, 2020, Westminster and the City filed responsive pleadings consisting of Motions Craving Oyer and demurrers to the Complaint. The Motions Craving Oyer of both the City and Westminster consist of an identical affidavit of the Clerk to the City Council Amanda Barnes and 514 pages of 8½ x 11 documents. OSCA initiated discovery to which both the City and Westminster had filed motions to stay or suspend on December 16 and December 18. Westminster undertook to have a Judge specifically designated to hear the Petition proceedings and the appointment of the Honorable A. Bonwill Shockley was entered on December 21, 2020. R.1089-1090. A hearing date on the motions Craving Oyer and the discovery issues was set, by agreement, for February 3, 2021. As the result of a COVID outbreak, the motions were continued by agreement to February 25, 2021. The trial court stayed discovery as requested by the City and Westminster which Order was entered on April 29, 2021. R.1784-1785.

On the Motions Craving Oyer, the trial court also found in favor of the City and Westminster and found the 514-page proffer as the complete legislative record over the objection of OSCA which had alleged that the record was incomplete and inaccurate. At that hearing, OSCA sought to

examine the the Clerk for City Council but was not permitted to do so by Judge Shockley. TR 2-25-21, p.9, ln 13-15.,

On March 11, 2021, the City solicited dates from the court for a hearing on its demurrer and that of Westminster, and an agreed date of April 29, 2011 was selected. At the April 29, 2021 hearing, OSCA proffered approximately 150 pages of information received from Tom Forrest, a non-party resident of Ocean Shore, who had collected documents he believed to have been omitted from the official record. The information was received by OSCA counsel the previous day. Based on the documentation, OSCA renewed its opposition to the legislative record, while conceding that the City and Westminster (and to some extent even OSCA) had not had an opportunity to review the newly acquired documents. OSCA agreed to the City and Westminster's request for additional time, and by agreement, the opposition to Oyer and the demurrers were continued to May 15, 2021.

On May 12, 2021, the trial court heard further argument and testimony on the Motion Craving Oyer but again refused the inclusion of any additional information to the 514-page proffer from the City and the order was entered contemporaneously with OSCA's written objections. R. 1800-1802. The objections reference an attachment which was tendered to the court but inexplicably separated from the Order and the record. R. 1802. Argument

on the demurrers was also heard and the trial court took those under advisement, requesting that a transcript of the proceedings be furnished. At the request of Westminster for a post-hearing briefing schedule, the trial court indicated that any additional argument could be filed by June 11, 2021 noting:

> THE COURT: Well, let me do this. Since it's going to take her a week or ten days to get me the transcript -- I hate to say this, but anybody can file anything that you want in the meantime. And we don't need dueling briefs, because I think you each understand what the other's argument is.
>
> So, you know, you can give me bullet points in a brief. You can give me page numbers in a brief. It doesn't have to be necessarily as pretty as it would be for the Supremes. TR. 5-12-21, p. 125, ln 3-13.

The trial court issued its Opinion Letter on July 29, 2021. Again, inexplicably, the trial court's Opinion Letter is not indexed or identified as part of the record contemporaneous with its issuance. In noting that the Opinion Letter was not listed among the pleadings or papers, and further that Westminster and the City had ceased including it in their proposed orders except by reference, OSCA included it as an exhibit to motion to insure its availability. R. 2214-2217. The Opinion Letter sustained all the demurrers of the City and Westminster save Count IV, which was nonsuited, and Count

Three Equal Protection[1], in which the trial court granted leave to amend the Petition without ruling on the demurrers. The Opinion Letter did not indicate that the sustaining of the demurrers was with prejudice nor was there an indication of whether any of the sustained demurrers would include leave to amend.

OSCA disagreed with the contents of the Order subsequently prepared by the City and endorsed by Westminster as to two issues, (1) the allowance of 14 days to amend the Equal Protection claim versus the 21 days provided in Rule 1:8 and (2) dismissal with prejudice of the remaining counts without further clarification from the trial court. The City and Westminster submitted an Order to the trial court, unsigned by OSCA, on Friday August 6, 2021 requesting entry which order was rejected for lack of Rule 1:13 compliance. A hearing was noticed by the City on entry of the order for September 23, 2021.

On September 23 2021, the City moved for entry of the Order which provided 14 days for the filing of the amended claim in the Petition in conformity with the July 29 Opinion Letter. Westminster then argued that an amended complaint should have already been filed, essentially the same

[1] The Petition erroneously included two counts with the same roman numeral III so they are further identified by name in addition to number.

argument which had been made in the briefs submitted by the City and Westminster in June 2021, well prior to the July 29, 2021 opinion letter. Westminster had not noticed a motion for reconsideration as part of the hearing. OSCA limited its argument to the matters pending before the trial court. The trial court smiled and inquired of Westminster, ""I'm going to – well, how would you like me to get rid of this case? Sustain the demurrer without leave to amend?" before reversing her decision in the opinion letter, and sustaining the demurrer on the Equal Protection count without leave to amend.

Orders were initially exchanged and redlined between counsel following the hearing on September 23, 2021 but no agreement on content was reached. Counsel for OSCA, who had been dealing with an escalating family medical emergency since August 2021, informed Westminster and the City of same. Although apprised of the circumstances and the need to transition the case to another attorney in her firm in order to meet Westminster's demands for resolution. Westminster sent a letter to the trial court alleging improper delay on the part of OSCA and requesting the court enter one of several order options which it had attached. On Friday November 12 at 4:19 PM, Westminster followed up by filing a motion for entry of a specific order, unsigned by OSCA, requesting that the trial court

dispense with signatures pursuant to Rule 1:13. Without allowing or seeking a response from OSCA, the trial court immediately obliged by entry of the Final Order sometime prior to 9 AM on Monday, November 15, 2021. Unaware of entry of the order, OSCA was continuing through its additional counsel to obtain dates for hearing on entry of the final order.

On November 19 2021, a motion to vacate the November 15 Final Order and motion for hearing on the entry of a proposed final order was served on opposing counsel. The motions were noticed for a hearing date of December 3, 2021, the last motions day available prior to the expiration of the 21-day period for finality of orders.

Westminster filed its Opposition to the motion to vacate on November 23, 2021. By letter her dated in December 1, 2021, Judge Shockley indicated that she was treating the motion for hearing and motion to vacate as motions to reconsider and that she was denying relief. It was subsequently discovered that she ordered the Clerk of Court to remove the motions from the December 3 motions docket. In response to the letter from Judge Shockley, OSCA filed a motion requesting that the Chief Judge remove Judge Shockley from the case and appoint an alternate judge. The motion was also noticed for December 3, 2021. On December 3, 2021 OSCA appeared to determine if Chief Judge Lilley would hear the matter however

he declined to do so as indicated by his letter dated December 14, 2021 R. 2292.

OSCA also appeared in front of Judge Shockley with regard to its previously filed motions noticed for December 3. Neither Westminster nor the City was present however the transcript reveals that Judge Shockley had spoken to counsel for Westminster and the City outside of the presence of OSCA and told them that they could leave as she had already determined she would not be hearing any matters in the case that day. TR. 12-3-21, P. 7, lines 11-18.

The trial court refused to enter OSCA's order to modify the Final Order to include the objections of Westminster but noted that they were reviewed on December 3 and were to be appended to the Final Order as it presently appears in the record. R. 2162-2170. The Notice of Appeal was timely filed by OSCA on December 13, 2021.

ASSIGNMENTS OF ERROR

1. The trial court erred in determining that the 514 pages proffered by the City and Westminster constituted the legislative record of which the court could crave oyer and proceed to a determination of the demurrers as the record was insufficient and Petitioners established

that there were records in existence not included in the proposed record submittal of Westminster and the City. R. 1801-1802.

2. The trial court erred in sustaining the demurrers to Counts Two (Arbitrary and Capricious Act), Three (15.2-2285) Five (Ultra Vires) and Six (Declaratory Judgment) as the legislative record accepted by the trial court did not establish compliance with the requirements of the law in granting a CUP application. R. 1845-1854, 2164.

3. The trial court erred in sustaining the demurrers to Counts Two (Arbitrary and Capricious Act) , Three (§15.2-2285), Five (Ultra Vires) and Six (Declaratory Judgment) in determining that the decision of the City to approve the CUP was fairly debatable as the fairly debatable standard requires that the legislative act first be lawful. The determination of the City Council was not lawful as it violated the Use Restrictions and density restrictions contained in the Virginia Beach Zoning Ordinances and lacked a supermajoirty to approve the air bridges and moving of the beach access easement. R. 5-6, 1760-1782, 2164.

4. The trial court erred in sustaining the demurrer to Count III Equal Protection and dismissing the claim with prejudice and without leave to amend based on the failure of OSCA to file an Amended Petition prior to the September 23, 2021 hearing because the court had no authority to require

an amended Petition to be lodged prior to sustaining a demurrer.R. 2166, 2167.

STATEMENT OF FACTS

In 1977, a Conditional Use Permit ("CUP") was granted by the City Council to Westminster to operate a Continuing Care Retirement Community on Parcel # 1. R. 29. Parcel 1 is located at the intersection of Shore Drive and Starfish Road, is bounded in part by the Chesapeake Bay, and at all times relevant hereto was zoned B-4, a mixed-use business and residential district. The Virginia Beach zoning laws are contained in Appendix A of the Ordinances. Article 1 describes the purpose for the City's Zoning Laws; Article 2 describes generally the procedure and process to address zoning issues; while Article 3- Article 22 identify the substantive aspects of the various Districts like Residential, Agricultural Business Districts.

As all other district Use Regulations mandate, Section 901(a) of the applicable Business District zone provides: "**NO USES OR STRUCTURES OTHER THAN AS SPECIFIED SHALL BE PERMITTED."** In 1988, the laws of the City of Virginia Beach included §901 of the Zoning Appendix and provided that housing for seniors and disabled persons was permitted as a conditional use provided that "the maximum height shall not exceed one hundred and sixty-five (165) feet." The 165-foot height limitation in the §901

Use Regulation was in full force and effect in 1998 when a modification of the CUP by City Council was granted to WESTMINSTER allow the construction of a 165- foot tall (14 story) home for the aged, disabled and handicapped on Parcel 1.

In 1998, the City Planning Staff, Planning Commission and City Council, incident to review and approval of the application, all noted the binding effect of the Use Regulation in §901 which required WESTMINSTER to limit the height of the facility even though there were no applicable §904 Height Regulations which limited the structure to 165 feet.

In 2019, Westminster tendered an application for modification of its CUP to the City Planning Director. The property affected by the Westminster Expansion is subject to the City Zoning Ordinances for B-4 Districts found in Appx. A, Sec 900 et seq., and the additional provisions Shore Drive Overlay District found in Appx A, Sec. 1200 et seq. The application proposes the new construction of a 22-story independent living tower joined in a “U” shape to another new healthcare building and residence on Parcels 2-4. In addition, two elevated (air) pedestrian bridges are proposed over Ocean Shore Avenue and Starfish Road to provide connections between the proposed buildings and the facilities on the existing Westminster campus. The Westminster Expansion also proposes

to close the existing 20-foot wide public beach access easement which currently runs the length of Parcel 1 from Shore Drive to the Chesapeake Bay. The Westminster Expansion proposed a new public beach access easement on the northeastern property line immediately next to OSCA, with an 8-foot solid wall to be installed immediately behind buildings 1 and 2 of OSCA. The project also calls for the demolition of existing buildings on Parcels 2-4 where the proposed Tower is to be erected.

A Petition challenging approval of the CUP alleged the following significant detrimental effects:

a. loss of scenic view by obstruction from the 270-foot tower;

b. loss of view from the 8-foot wall proposed at the property line shared with Westminster and OSCA;

c. increased pedestrian traffic upon establishment of the new beach access easement;

b. shade and shadows depriving Petitioners of rights to light and air;

c. decreased property values during the period of construction based upon the noise, vibration, noxious odors, construction debris and reduced air quality;

d. damage to property caused by reflective exterior components of the proposed land use;

e. increased traffic as a result of the increasing residential density and additional employment required by the new facilities;

f. increased traffic as a result of the new beach access;

g. loss of vested rights in the 165-feet limitation;

h. risk of injury to person and property based upon a construction height which exceeds that permitted by soil borings.

The City Council approved the conditional use permit by a majority vote, but by a vote less than 75% of the City Council.

ARGUMENTS AND AUTHORITIES

I. The trial court erred in determining that the 514 pages proffered by the City and Westminster constituted the legislative record upon which the court could crave oyer and proceed to a determination of the demurrers as the record was insufficient and Petitioners established that there were records in existence not included in the proposed record submittal of Westminster and the City.

A. Standard of Review

This assignment of error involves both application of the law and statutory interpretation. This error presents questions of law, or application of law to the facts, both of which this Court reviews de novo. Va. Dep't of Corrections v. Surovell, 290 Va. 255,262-63 (2015); Bell v. Casper, 282 Va. 203, 717 S.E.2d. 783 (2011).

B. Analysis

While this Court has frequently approved the use of a Motion Craving Oyer of the "legislative record" as a mechanism to expedite the review of challenges to local legislative action, this Court has not provided guidance on how the legislative record is defined or created. See Byrne v. City of

Alexandria, 298 Va. 694, 701, 842 S.E.2d 409 (2020). The Byrne court acknowledged and emphasized that the record must be full and complete, invoking the significantly older precedent of Culpeper Nat'l Bank v. Morris, 168 Va. 379, 191 S.E. 764 (1937) where the Court noted:

> It appears from the bill in this cause that appellant undertook to describe the proceedings in the other suit, the purpose for which it was brought, the evidence introduced, the issues submitted, the verdict of the jury, the motion to set aside the verdict, and the order of the court admitting the will to probate, but filed as exhibits with its bill only a small part of the record, and then asked the court to accept its construction of the whole record by an inspection of only such parts as complainant saw fit to introduce. No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced. A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view. When a court is asked to make a ruling upon any paper or record, it is its duty to require the pleader to produce all material parts. Ibid.

Nowhere in the Virginia Code is the term "legislative record" defined. In the definitional section of Virginia Code § 2.2-3701, part of the Freedom of Information Act, there is a definition of "Public Records" or "Records" which:

> … means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

In Byrne, the legislative record "…contained a number of documents, including the minutes of the initial meeting of the BAR, the recommendations of the City's staff, the minutes of the second meeting of the BAR, the transcript of the public hearing held by the BAR, Byrne's appeal to the City Council, the City staff's report to the City Council, the transcript of the public hearing held by the City Council, and the minutes of the City Council's final meeting." Byrne v. City of Alexandria, 298 Va. 694, 701, 842 S.E.2d 409 (2020). This Court did not opine that the enumerated items were the sum total of a legislative record, nor was any guidance offered which would indicate how the record would be composed.

Both Westminster and the City provided 514 pages which were identified as the "complete official record" per the affidavit of the Clerk of the City Council. No explanation was offered as to why the "official record" is the "legislative record." The City and Westminster failed to provide any definition of how the "official record" kept by the Clerk in this case is at all instructive on the substance of the required "legislative record." Nor is there any legal support for the idea that the 514 pages tendered represent the full panoply of documents considered by the Virginia Beach City Council on Westminster's Application. To the contrary, OSCA demonstrated, to no avail, that even by

the Clerk's compilation standards, the proffered legislative record was deficient.

The Virginia Beach City Code provides some general guidance as to the scope of the contents of the legislative record in Appx. A, §221(c) by requiring the Planning Director to make a report to the Planning Commission which includes "…all the findings and recommendations of the city agencies to the planning commission." Appx. A, §221(d) further notes that "After receiving the report of the director, with all pertinent related material, the planning commission shall give notice of and hold a public hearing in accordance with applicable provisions of Virginia Code Section 15.2-2204." The trial court was apprised of the fact that the public permitting system ACELA used by the City of Virginia Beach demonstrated numerous agency reports and recommendations had not been completed at the time of the Planning Commission hearing and remained incomplete as of July 28, 2020. The Traffic Engineering Memorandum from Heather Hartle and the minutes of the meeting of the Senior Housing Advisory Committee, although referred to in the Director's Report, are absent. (The SHAC is referred to in the Planning Director's report but the statement contained therein is inaccurate and misleading.) The Planning Director's Report notes "…the applicant (Westminster) submitted a comprehensive shadow study" but the study is

not included in the 514 page proffer. The included transcripts reference a Wind Study but there is no wind study included in the "official record." Limiting the record by refusing to engage in discovery or allowing Petitioner's to participate in the development of the legislative record is the antithesis of craving over and an impermissible establishment of "blinders."

Unlike Rowland v. Town Council of Warrenton, 298 Va. 703, 842 S.E.2d 398 (2020), the parties in the present case did not agree that there were no material facts in dispute. OSCA initiated a dialogue to try and flesh out vital information absent from the record but the City and Westminster proved unwilling to expand the record beyond what they desired be reviewed. The contradiction is evident. Knowing that the complete "legislative record" will not serve their interests in advancing the conditional use permit, the trial court erred in becoming a willing participant in this exclusionary act

II. The trial court erred in sustaining the demurrers to Counts Two (Arbitrary and Capricious Act) , Three (15.2-2285) Five (Ultra Vires) and Six (Declaratory Judgment) as the legislative record accepted by the trial court did not establish compliance with the requirements of the law in granting a CUP application.

A. Standard of Review

The second assignment of error involves both application of the law and statutory interpretation. This error presents questions of law, or application of law to the facts, both of which this Court reviews de novo. Va. Dep't of

Corrections v. Surovell, 290 Va. 255,262-63 (2015); Bell v. Casper, 282 Va. 203, 717 S.E.2d. 783 (2011).

B. Legislative Record Devoid of Proof Of Notice

In Paragraphs 99, 130 and 154 of the Petition, the absence of proper notice prior to the September 22, 2020 City Council hearing is alleged. R. 7,12, 16. The required notice to be given in a Conditional Use Permit application is threefold consisting of (1) newspaper advertisement (2) mailed notice to adjacent property owners and (3) the posting of signs regarding the proposed zoning action. The legislative record accepted by the trial court makes the following references to notice:

> City Council
> • As required by State Code, this item was advertised in the Virginian-Pilot Beacon on Sundays, August 9, 2020 and August 16, 2020.
> • As required by City Code, the adjacent property owners were notified regarding both the request and the date of the City Councils public hearing on August 12, 2020.
> • The City Clerk's Office posted the materials associated with the application on the City Council website of https://www.vbgov.com/government/departments/city-clerk/clty-council/Documents/Bookmarked/Agenda.pdf on August 21, 2020
> R. 58.

The first element of required notice is contained in Virginia Code §15.2-2204(A) which provides in pertinent part:

> Plans or ordinances, or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a descriptive summary of the proposed

> action and a reference to the place or places within the locality where copies of the proposed plans, ordinances or amendments may be examined.
> The local planning commission shall not recommend nor the governing body adopt any plan, ordinance or amendment thereof until notice of intention to do so has been published once a week for two successive weeks in some newspaper published or having general circulation in the locality…

There is copious legal support for the proposition that compliance with procedural requirements must precede the proper approval of a CUP. This Court has specifically opined on the City's obligation to comply with Virginia Code §15.2-2204 in Gas Mart Corp. v. Board of Supervisors, 269 Va. 334, 345, 611 S.E.2d 340 (2005), noting, "In sum, this statute provides that public hearing notices must contain three specific elements: (1) a descriptive summary of the proposed amendments; (2) a reference to the place within the locality where the proposed amendments may be examined; and (3) notice of the governing body's intention to adopt the proposed amendments." In Gas Mart, the record included the text of the notice so that the governing body could do its duty and verify that it was properly enacting a zoning ordinance. The legislative record adopted by the trial court only indicates that something appeared in the newspaper on two successive weeks.

Similarly, in Glazenbrook v. Board of Supervisors, 266 Va. 550, (2003), this Court reversed the trial court's grant of a demurrer where the

governing body was not held to performance of the procedural requirements. The Glazenbrook Court explained that "[I]f the notice published by the county did not meet the requirements of Code §15.2-2204, the county acted outside the authority granted by the General Assembly and the amendments are void *ab initio."* Id at 551. Both Glazenbrook and Gas Mart, while analyzing notice incident to the adoption of zoning ordinances under §15.2-2204, is clearly the standard to be applied in judging the adoption of a CUP as prescribed in §15.2-2285.

The legislative record discloses that with regard to the City Council hearing on September 22, 2020 "As required by City Code, the adjacent property owners were notified regarding both the request and the date of the City Council's public hearing on August 12, 2020." R. 58. Virginia Code §15.2-2205 authorizes localities to impose additional notice requirements which the City has done in the relevant provision of the Virginia Beach Ordinance, Appx. A, Section 104(e) which mandates that ". Action by city council; notice of public hearing. Before taking any action pursuant to this section, notice of a public hearing thereon, as required by Virginia Code Section 15.2-2204, or any successor statute, shall be given, as set forth in subsection (d). While Virginia Code §15.2-2204(B) in turn requires:

> …written notice shall be given by the local planning commission, or its representative, at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved; to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected, including those parcels which lie in other localities of the Commonwealth; and, if any portion of the affected property is within a planned unit development, then to such incorporated property owner's associations within the planned unit development that have members owning property located within 2,000 feet of the affected property as may be required by the commission or its agent. Notice sent by registered or certified mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed adequate compliance with this requirement. If the hearing is continued, notice shall be remailed. Costs of any notice required under this chapter shall be taxed to the applicant.
>
> Whenever the notices required hereby are sent by an agency, department or division of the local governing body, or their representative, such notices may be sent by first class mail; however, a representative of such agency, department or division shall make affidavit that such mailings have been made and file such affidavit with the papers in the case. (emphasis added).

Again, the legislative record accepted by the trial court is devoid of any indication that the proper adjacent landowners were duly notified in anything other than a conclusory statement. In past instances, the notices were only mailed by regular mail, and yet the legislative record contains no affidavit which was expressly required to be lodged as part of the record of these proceedings if the City sent the notices. Even if the City was requiring the Applicant, Westminster-Canterbury, to be responsible for such notice, a

record was required to be made by §15.2-2206 which would contain "A certification of notice and a listing of the persons to whom notice has been sent shall be supplied by the applicant as required by the local governing body at least five days prior to the first hearing." In its 514-page legislative record, the City includes no such document. Finally, a copy of the contents of such notice is not included from which City Council, and any subsequently reviewing court, can determine that the contents of the notice comply with §15.2-2204(A) including (1) a descriptive summary of the proposed conditional use permit; (2) a reference to where in Virginia Beach the conditional use application and related documents may be examined; and (3) notice of the City Council's intention to adopt the proposed amendments.

Because of the substantial negative impacts inherent in a deviation from the existing zoning classifications, Appx. A, Sec.108 of the Virginia Beach Zoning Ordinance imposes posting requirements for signage for conditional use permit applications. The ordinance provides in pertinent part:

> In any case in which a property owner … petitions the city council for the approval of any application seeking a … conditional use permit …or reconsideration of conditions, the applicant shall erect, on the property which is the subject of the application or within the unimproved portion of the abutting public street, a sign of a size, type and lettering approved by the planning director. …Such sign shall be erected not less than thirty (30) days before the planning commission hearing, or if none, the city council hearing, and shall state the nature of the application and date and time of the hearing. Such signs may not be

removed until the city council has acted upon the application, and shall be removed no later than five (5) days thereafter.

The City had been notified of complaints regarding the posting of inadequate and erroneous signs in July of 2020. The complaint from one homeowner was included in an email not made a part of the legislative record but tendered to the trial court as Exhibit A to the Order dated 5-12-21. R. 1800. In the case of posted notice, the legislative record does not even make a pretextual or conclusory statement that the ordinance was complied with in any manner.

The Petition alleges failure to comply with the notice requirements for a CUP and also asserts that the changes made by the City Council in ignoring the Use Restrictions and density requirements was tantamount to a change in the zoning classifications and comprehensive plan. A change in nonwaivable provisions would require at least as much notice, quantitively and qualitatively, as those described above for a CUP, but for which the record is similarly devoid. In short, the legislative record does not establish compliance with the conditions precedent of proper notice as articulated in §§15.2-2225, 15.2-2229, 15.2-2234, 15.2-2235 and 15.2-2285.

III. The trial court erred in sustaining the demurrers to Counts Two (Arbitrary and Capricious Act), Three (15.2-2285) Five (Ultra Vires) and Six (Declaratory Judgment) in determining that the decision of the City to approve the CUP was fairly debatable as the fairly debatable standard requires that the legislative act first be lawful. The

determination of the City Council was not lawful as it violated the Use Restrictions and density restrictions contained in the Virginia Beach Zoning Ordinances for construction of the Tower and lacked a supermajoirty to approve the air bridges and moving of the beach access easement.

A. Standard of Review

This assignment of error involves the interpretation of statutes by the trial court which this court reviews de novo. Janvier v. Arminio, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006); Sheets v. Castle, 263 Va. 407, 410, 559 S.E.2d 616, 618 (2002).

B. Local Govts Must Comply with their Own Ordinances

Through enactment of Sections 15.2-2280 et al., the Virginia Code permits localities to engage in developing laws on property within its jurisdiction to "regulate, restrict, permit, prohibit, and determine" the uses to which and buildings may be put as well as the "size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures." Virginia Code §15.2-2280. This delegation of rights by the Commonwealth to localities is strictly construed according to the Dillon Rule which demands that "...only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable" may be exercised by the locality. Schefer

v. City Council of Falls Church, 279 Va. 588, 93, 691 S.E.2d 778 (2010). If the locality exceeds the scope of its powers through enactment of an ordinance then the ordinance is deemed invalid. Id. This Court has opined that "If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body." Id.

The Virginia Attorney General has provided the following overview of the statutory scheme with regard to conditional use permits:

> In addition to the uses permitted by right in each district, § 15.2-2286(A)(3) authorizes "the granting of special exceptions under suitable regulations and safeguards." Sections 15.2-2285 and 15.2-2286 prescribe the specific procedures that must be followed when a locality proposes to enact a zoning ordinance or adopt an amendment to such an ordinance. First, the governing body may initiate the proposal by adopting a written resolution stating the underlying public purpose. Second, the proposal must be referred to the local planning commission for review. Third, the commission must give public notice pursuant to§ 15.2-2204, conduct a public hearing, and report its recommendations to the governing body. Fourth, upon receipt of the commission's report, the governing body must give public notice and conduct its own public hearing. "By complying with these procedures, the governing body acquires the same authority to act upon a zoning proposal as it has to act upon other legislative matters.
>
> Where statutes prescribe procedural steps that must be followed, the required procedure normally is regarded as mandatory.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING, 2003 Va. AG 45, 47 (2003)

It is conceded that § 15.2-2201 permits localities the ability to

grant conditional use permits or special exceptions which include "…a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." Further, the law allows localities to build waiver language into their zoning ordinances, which in some cases may result in deviations from prescribed height and density regulations. The City and Westminster have urged that is the case in the instant matter, but the proper statutory analysis requires a different conclusion.

C. The City Zoning Ordinances Do Not allow City Council to Waive the Density or Use Restrictions in the B-4 Mixed Use District in the Shore Drive Overlay District.

In Renkey v. County Bd. of Arlington County, 272 Va. 369, 634 S.E.2d 52 (2006), the County had enacted clear criteria and employed mandatory "shall" language upon its delegation to the local Board of Zoning Appeals with which it then failed to comply. In reversing the circuit court's deferral to the local Board under fairly debatable standard the Renkey court noted "…without complying with the eligibility requirement set out in its own ordinance, its action as arbitrary and capricious, and not fairly debatable, thereby rendering the re-zoning void and of no effect." Id. at 376. The City of Virginia Beach is similarly

such a jurisdiction.

The Virginia Beach zoning laws are contained in Appendix A of the Ordinances. Article 1 describes the purpose for the City's Zoning Laws; Article 2 describes generally the procedure and process to address zoning issues; while Article 3- Article 22 identify the substantive aspects of the various Districts like Residential, Agricultural Business Districts. The Articles regarding the various District types follow a common pattern of enactment, with the first section of each such Article numbered _00 and entitled "Legislative Intent." Thereafter, Section _01 is entitled "Use Regulations," Section _02 is entitled "Dimensional Requirements," Section _03 is entitled "Landscaping" and Section _04 is "Height Regulations." The "Legislative Intent" section is intended to provide an overview of the particular district and how it fits into the comprehensive plan as a guidance tool for decision-making related to that particular district.

Section _01 "Use Regulations" identifies the various types of activities and structures which are permitted as a matter of right or which may be permitted on a conditional basis. If the use is not listed as "principle (p)" or "conditional(c)" for the particular district, then it is prohibited. Just as all other district's Use Regulations mandate, Section

901(a) of the applicable Business District zone provides: **"No Uses Or Structures Other Than As Specified Shall Be Permitted."** (emphasis added.) Section 901 governs use determinations in the B-4 mixed use district in this case.

Section 901 was amended on June 23, 1998, and in effect on September 22, 2020, to provide as follows:

> "Homes Housing for the aged, seniors and disabled persons or handicapped, including convalescent or nursing homes; maternity homes; child care centers other than covered under permitted principal uses hereinabove, 'Then not operated by a public agency, provided that the maximum density for homes for the aged shall be sixty (60) dwelling units per acre and the maximum height shall not exceed one hundred and sixty five (165) feet, provided, however that no structure shall exceed the height limit established by section 202(b) regarding air navigation.

Pursuant to Section 221(a) entitled "Application for conditional use permit" "Any property owner... may file with the planning director an application for a conditional use permit. provided that the conditional use sought is permitted in the particular district." There is no conditional use for any senior or disabled housing in excess of 165 feet in the B-4 district. The reference to 165 ft is properly construed as a Use Regulation, not a waivable height limitation.

To illustrate the density issue alleged in the Petition, Sec. 1702f of the Virginia Beach Zoning Ordinances provides:

> The designation of any property as lying within the Shore Drive Overlay District shall be in addition to, and not in lieu of, the underlying zoning district classification of such property, such that any property situated in the Shore Drive Overlay District shall also lie within one or more of the zoning districts enumerated in section 102(a) of this ordinance. All such property shall be subject to the requirements of this article as well as to all other regulations applicable to it, and to the extent that any provision of this article conflicts with any other ordinance or regulation, the more restrictive provision shall control. (emphasis added)

The density prescribed in the Westminster Application is 57 units per acre, based on a 17-acre parcel with 627 existing units and 340 proposed additional units. The density for all uses in the Shore Drive Overlay District is 36 units per acre in parcels larger than 4 acres. Appx A, §l704(a)(3). The trial court ignores the binding effect of §1702, relying on 211(h) as a panacea for approving all of the City's actions, as well as §235, which is specific to senior housing, and provides "The density of the project shall be determined by the city council upon consideration of the extent to which such project conforms to the Development guidelines and the adequacy of facilities and services to meet the proposed needs of the project." It may be that when determining the density for senior housing in every other district the City is unfettered, but the B-4 District, Shore Drive Overlay District property chosen by Westminster requires the

density of any use to be the most restrictive of all the potentially applicable density standards. Even lawyers know that 57 is more than 36 and therefore LESS restrictive.

The permissive language found in the general guidelines appliable to all districts of Appx, A, §§211 and 235 undoubtedly create flexibility where appropriate, but should not allow the mandatory and directory language found in §901 for a B-4 district, and the further specificity of density regulations in §§1702 and 1704 for property in the Shore Drive Overlay District, to be ignored. Properly applied principles of statutory construction indicate that the trial court erred in its interpretation of the zoning provisions to confirm a conditional use permit to issue to Westminster.

D. The Failure to Obtain a supermajority vote of approval rendered the CUP unlawful

Pursuant to Virginia Code §15.2-2100 and Article VII, Sec. 9. of the Virginia Constitution a supermajority pf 75% of all the votes of the local governing body is required before approving acts which affect certain public lands. The Westminster CUP includes 2 air bridges over public roads and further contemplates a substantial relocation of a public beach access presently running across the Westminster property. OSCA contends that the easement and incursion into public air spaces are included among the

acts requiring a supermajority vote under the Virginia Constitution and the parallel section of the Virginia Code.

IV. The trial court erred in sustaining the demurrer to Count III Equal Protection and dismissing the claim with prejudice and without leave to amend based on the failure of OSCA to file an Amended Petition prior to the September 23, 2021 hearing because the court had no authority to require an amended Petition to be lodged prior to sustaining a demurrer.

A. Standard of Review

This assignment of error involves both application of the law and statutory interpretation. This error presents questions of law, or application of law to the facts, both of which this Court reviews de novo. Va. Dep't of Corrections v. Surovell, 290 Va. 255,262-63 (2015); Bell v. Casper, 282 Va. 203, 717 S.E.2d. 783 (2011).

B. Analysis

The demurrer of the City as to Count III Equal Protection alleged that the claim was deficient for failing to provide the requisite degree of specificity. In OSCA's response to demurrers, it noted that it would seek leave to amend to provide any required specifics. It was not conceded that the claim was deficient. This point was further clarified at oral argument on May 12, 2021, where OSCA noted, ""…they've alleged that we didn't plead it with specificity. I would simply ask that we'd be

given an opportunity to do that, if the Court sustains the demurrer and finds that it's not specific enough." TR. 5-12-21, p. 112 ln 6-11. OSCA never filed a separate motion for leave to amend nor contemplated that the trial court would grant leave to amend in the absence of a finding that the pleading was deficient. In fact, Westminster and the City each unsuccessfully argued that an amended Petition must be filed in advance of seeking leave to amend at the May 12 demurrer hearing. OSCA correctly reminded the trial court that pursuant to Rule 1:8, "Where leave to amend is granted other than upon a written motion, whether on demurrer or oral motion or otherwise, the amended pleading must be filed within 21 days after leave to amend is granted…." Pointedly, and contrary to Westminster's assertions on September 23, 2021, during the months when the case was under advisement, Westminster and the City never contacted OSCA about providing an amended pleading. When the City emailed OSCA to ask if it would provide a proffer or an amended Petition it was AFTER the July 29 Opinion Letter and with regard to the counts on which demurrers had been sustained and which OSCA indicated it might seek leave to amend. As OSCA determined not to seek such leave, and proceed solely as to the Equal Protection claim, no response was required to the City or to Westminster.

Westminster further argued that the time for filing the amended Petition began with the Court's issuance of its opinion letter. This is a flawed legal premise rejected frequently by this Court. See Shareholder Rep. Services v. Airbus Americas, 292 Va. 682, 690-691, 791 S.E.2d 724 (2016). A court speaks only through its written and endorsed orders. "It is the firmly established law of this Commonwealth that a trial court speaks only through its written orders. Furthermore, "orders speak as of the day they were entered," Davis v. Mullins, 251 Va. 141, 148, 466 S.E.2d 90 (1996).

The written opinion letter could not have acted as an order or "grant" of this court as Rule 1:13 requires that "Drafts of orders and decrees must be endorsed by counsel of record, or reasonable notice of the time and place of presenting such drafts together with copies thereof must be served pursuant to Rule 1:12 upon all counsel of record who have not endorsed them." To the contrary, these immutable principles are why the July 29 Opinion Letter directed that a confirmatory order be prepared and endorsed by counsel.

The trial court's sustaining of the demurrer and withdrawal of leave to amend was punitive and based upon an impermissible and unnoticed motion for reconsideration by Westminster. The only matter before the

court was the entry of the City's Order which Westminster had previously endorsed and sought to have entered, and OSCA was unprepared to respond to Westminster's misrepresentations including the false claim to the trial court "Your order was entered on the 27th. No one could look at that order and reach a conclusion that she doesn't have leave to amend. It's the very reason you didn't rule on the demurrer and -- not only 21 days, twice that -- 56 days have gone by," thereby convincing the trial court that OSCA was firmly in default. TR. 9-23-21, p.11, ln 7-11.

Rule 4:15 requires the filing of a motion for reconsideration but oral argument will not be had without the request of the court. The trial court prejudiced OSCA in failing to enforce this rule and clearly erred in granting a demurrer based on OSCA's failure to file an amended complaint which it was under no obligation to file at the time the trial court ruled on September 23, 2021.

CONCLUSION

The City of Virginia Beach extended a conditional use permit to Westminster to contract, among other things, a structure which violates the use regulations and density restrictions for the B-4 mixed use Shore Dive Overlay District. The Demurrers were erroneously sustained. This Court should make the correct statutory interpretations, with entry of final judgment

in favor of OSCA sustaining the challenge to the action of City Council and denying the conditional use permit to Westminster.

Certification Per Rule 5:17(i) of the Rules of the Supreme Court of Virginia

(1) The names of the appellants are:
Ocean Shore Condominium Association,
Ships Watch Condominium Owners' Association, Inc.,
Richard D. Norris, and
Paul Terkeltaub

(2) The name, address and telephone number of counsel for appellants is:
Jeanne S. Lauer, Esquire, VSB #32022
Barry Randolph Koch, Esquire, VSB #16609
INMAN & STRICKLER, PLC
575 Lynnhaven Pkwy, Suite 200
Virginia Beach, VA 23452-7350
(757) 486-7055 (p)
(757) 431-0410 (f)
E-mail: jlauer@inmanstrickler.com; bkoch@inmanstrickler.com

(4) The names of the appellees are:
Virginia Beach City Council,
City of Virginia Beach, and
Westminster-Canterbury on Chesapeake Bay

(5) The names, addresses and telephone numbers of counsel for appellees are:
Gerald L. Harris, Esquire, VSB #80446
Office of the City Attorney
2401 Courthouse Drive, Rm 260
Virginia Beach, Virginia 23456
Telephone: (757) 385-4531
Facsimile: (757) 385-5687
E-mail: glharris@vbgov.com
Counsel for City of Virginia Beach and Virginia Beach City Council
Gary A. Bryant, Esquire, VSB #27558

Willcox & Savage, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
Telephone: (757) 628-5500
Facsimile: (757) 628-5566
E-mail: gbryant@wilsav.com
Counsel for Westminster-Canterbury on Chesapeake Bay

Your appellants desire to state orally and in person to a panel of this Court the reasons why its petition for appeal should be granted.

A copy of this Petition for Appeal has been delivered, electronically to all opposing counsel, and to the Clerk of the Supreme Court of Virginia this 15th day of February, 2022.

Jeanne S. Lauer, Esquire, VSB #32022
Barry Randolph Koch, Esquire, VSB #16609
INMAN & STRICKLER, P.L.C.
575 Lynnhaven Parkway, Suite 200
Virginia Beach, VA 23452
(757) 486-7055 (p)
(757) 431-0410 (f)
Email: jlauer@inmanstrickler.com
bkoch@inmanstrickler.com