

VIRGINIA:

IN THE HANOVER COUNTY CIRCUIT COURT

ANDREA M. & RODERICK A. MORGAN, *et al.*)

Plaintiffs,)

v.)

Civil Action No.

CL20001902-00

THE BOARD OF SUPERVISORS OF)

HANOVER COUNTY, *et al.*)

Defendants.)

FINAL ORDER

This action came before this Court upon:

1. The Court’s November 24, 2020 Order addressing the Plaintiffs’ Complaint (which Order is hereby incorporated by reference);
2. Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief;
3. Defendant Board of Supervisors of Hanover County’s (the “Board”) Motion Craving Oyer in Response to Plaintiffs’ First Amended Complaint and the Board’s Memorandum in Support of Motion Craving Oyer;
4. The Board’s Demurrer and Motion to Dismiss the Plaintiffs’ First Amended Complaint;
5. Defendant Wegmans Food Market, Inc. (“Wegmans”) Demurrer and Motion to Dismiss, or, in the alternative, Motion to Crave Oyer;
6. Defendant Air Park Associates, LP’s (“Air Park Associates”) Demurrer and Motion to Dismiss, or, in the alternative, Motion Craving Oyer;

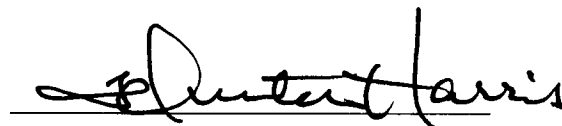
7. Plaintiffs' Memorandum in Opposition to Defendants' Demurrers and Motions Craving Oyer; and
8. The oral arguments of counsel at the hearing before this Court on June 25, 2021, which are contained in the transcript filed with the Court and made a part of the record of these proceedings, as well as the transcript of the September 8, 2020 hearing filed with the Court on the motions pending related to the initial Complaint filed herein, which is also made a part of the record of these proceedings.

After consideration of the above and for the reasons stated in this Court's Opinion Letter dated July 15, 2021, which is attached hereto and incorporated herein, it is hereby **ORDERED** that:

1. The Demurrers filed by the Board, Wegmans, and Air Park Associates are sustained as to the entirety of the Amended Complaint;
2. Defendants' Motions to Dismiss are granted and Plaintiffs' Amended Complaint is dismissed with prejudice;
3. Based upon the foregoing, the Motions Craving Oyer filed by the Board, Wegmans, and Air Park Associates are denied as moot and the Court, accordingly, does not rule on the substance of the arguments made therein; and
4. There being nothing further to be done in this matter, the case is dismissed and shall be placed among the ended causes.

The Clerk is directed to send certified copies of this Order to all counsel of record.

Enter: 8 / 2 / 2021



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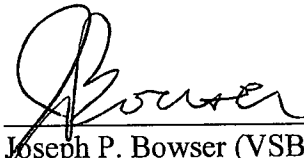
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Seen and Objected to, for the reasons stated in Plaintiffs' Memorandum in Opposition to Defendants' Demurrers and Motions Craving Oyer and during oral argument before the Court, including but not limited to the Court's determination that all Plaintiffs lack standing to assert claims set forth in Counts I-V of the First Amended Complaint for Declaratory Judgment and Injunctive Relief as well as Counts I-VIII of the initial Complaint and that the Board properly exercised its authority under the Dillon Rule even though it ignored and/or violated mandatory procedures, statutes and Executive Orders when exercising its zoning powers.



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FIFTEENTH JUDICIAL CIRCUIT

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Sarah L. Deneke
Michael E. Levy
Patricia Kelly
Herbert M. Hewitt
Victoria A. B. Willis
R. Michael McKenney
Ricardo Rigual
William E. Glover
J. Bruce Strickland



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RETIRED JUDGES

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Ann Hunter Simpson
John R. Alderman
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July 15, 2021

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**Re: Andrea M. & Roderick A. Morgan, et. al. v. The Board of Supervisors of
Hanover County, et. al.; CL20001902-00**

Dear Counsel:

STATEMENT OF THE CASE:

On November 9, 2020, this Court issued a Letter Opinion sustaining Defendant Board of Supervisors of Hanover County, Defendant Wegmans Food Market, Inc., and Defendant Air Park Associates, LP.'s Demurrers as to the entirety of Plaintiffs' Complaint. The Court found that Plaintiffs lacked standing as to all Counts. Counts I, II, II, IV, and V were dismissed without prejudice and Plaintiffs were granted leave to amend. Counts VI, VII, and VIII were dismissed with prejudice. The Court's ruling rendered Defendants' Motions Craving Oyer and Plaintiffs' Motion to Order Access to Defendant Air Park Associates, LP's Land moot. Plaintiffs filed their First Amended Complaint on December 15, 2020.

This matter now comes before the Court on all three Defendants' Demurrers and Motions to Dismiss Plaintiffs' First Amended Complaint for lack of standing or in the alternative, Defendants' Motions Craving Oyer. After considering the evidence, transcript and relevant law, the Court rules as follows: (1) Defendants' Demurrers are sustained as to each count of the Amended Complaint; (2) Defendants' Motions to Dismiss are granted and Plaintiff's Amended Complaint is dismissed with prejudice; (3) Defendants' Motions Craving Oyer are rendered moot.

FINDINGS OF FACT:

On demurrer, the Court accepts as true the following facts:

1. On January 15, 2020, Plaintiffs Andrea M. & Roderick A. Morgan, Sandra Blose, Katherine Woodcock & Timothy Miller filed a First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") against Defendants Board of Supervisors of Hanover County ("the Board"),

Wegmans Food Markets, Inc. (“Wegmans”), and Air Park Associates, LP (“Air Park”).

2. In their Amended Complaint, Plaintiffs’ allege they “will be adversely impacted by the construction and 24 hours a day / 7 days a week / 365 days a year operation of the Wegmans Distribution Center near their property due, *inter alia*, to:”
 - a. “A substantial increase in semi-trailer truck and other vehicular traffic congestion along the already overstressed Sliding Hill Road seeking access to the Air Park property;”
 - b. “an increase in travel time on already-stressed roads and an increase in dangerous driving conditions on roads not designed for such a heavy volume of traffic.”
 - c. “the increased noise generated by the vehicular traffic and facility operations in violation of the County’s Noise Ordinance decibel limits, including but not limited to the back-up beeping of the semi-trailer trucks;”
 - d. “the night sky light pollution caused by the increased height of Wegmans parking lot lighting;” and “the employee parking lot across from [Plaintiff Woodcock/Miller]’s home...will diminish the green farmland, trees, barn, and historic home site views that they currently enjoy.”

- e. “the substantial land disturbance caused by the Wegmans Distribution Center’s construction and operation will increase flooding of the Blöse property and Totopotomoy Cree where their children play...;”
- f. Increase in flooding caused by construction will lead to Ashcake road icing over in the winter and cause additional car accidents.
- g. “the unlawful nuisance that will be caused by the construction and operation of the Wegmans Distribution Facility causing unreasonable interference with the quiet use and enjoyment of their property;”
- h. “the decline in the value of their property directly caused by the proximity of their property to the construction and nuisance operation of the Wegmans Distribution Facility.”
- i. due to the Coronavirus pandemic, the Board took “action on the non-emergency Air Park/Wegmans rezoning and special exception applications...[and] limited statutorily authorized participation by Plaintiffs and other members of the public whose attendance at the public hearings was restricted, and whose right to be heard in a meaningful manner was impeded by the Board’s public participation procedures which was supported by the refusal of Wegmans to delay the public hearing until after the public health emergency and the Governor’s “stay at home” Executive Order #55 expired on June 10, 2020;” and
- j. “deprivation of their constitutional and statutory rights to attend meeting so the Board of Supervisors in person and meaningfully

present their grievances to their appointed and elected representatives at meetings of the Board, including but not limited to the May 6th Board of Supervisors meeting where the proffers were amended and adopted by the Board after the public comment period closed...;”

3. On January 7, 2021, the Board filed a Demurrer & Motion to Dismiss and Motion Craving Oyer in response to Plaintiffs’ Amended Complaint.
4. On January 15, 2021, Wegmans and Air Park filed their Demurrer and Motion to Dismiss, or, in the alternative, Motion to Crave Oyer.
5. In their motion, Wegmans and Air Park “join in and incorporate, in full and as set forth here, the arguments presented in the Board’s Demurrer and Motion Craving Oyer.
6. The Parties appeared in the Circuit Court for a hearing on all motions on June 25, 2021.

CONTENTIONS AND ISSUES:

Plaintiffs contend that (A) the Demurrer must be overruled because Plaintiffs have pled facts sufficient to establish that Plaintiffs have standing to bring these causes of action.

The Board contends that (A) their Demurrer should be sustained, and the Amended Complaint dismissed because Plaintiffs lack standing to challenge the decision by the Board of supervisors to approve the applications filed by air park associates.

Wegmans and Air Park contend that (A) their Demurrers should be sustained, and the Amended Complaint dismissed for the reasons stated by the Board.

The issue is:

- (1) Whether Plaintiffs' have alleged facts sufficient in any of their five counts to establish standing to bring this Amended Complaint for Declaratory and Injunctive Relief?

RULE OF LAW:

1. Va. Code Ann. Section 8.01-273(A): "In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer."
2. Friends of the Rappahannock, et. al. v. Caroline County Bd. Of Supervisors, 286 Va. 38, 44 (2013) [internal quotes omitted]: "The standard of review applicable to the circuit court's decision to sustain a demurrer is well established. A demurrer accepts as true all facts properly ped, as well as reasonable inferences from those facts. A demurrer, however, does not admit inferences or conclusions from facts not stated."
3. Friends of the Rappahannock, et. al. v. Caroline County Bd. Of Supervisors, 286 Va. 38, 44 (2013) [internal quotes omitted]: "To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment."
4. Friends of the Rappahannock, et. al. v. Caroline County Bd. Of Supervisors, 286 Va. 38, 47 (2013): "The 'aggrieved person' standard is appropriate in the context of a challenge to a land use decision [made by a local governing body or zoning board] by means of a declaratory judgment action...any distinction between an 'aggrieved party' and 'justiciable interest' is a distinction without a difference in declaratory judgment actions challenging land use decisions."

5. Friends of the Rappahannock, et. al. v. Caroline County Bd. Of Supervisors, 286 Va. 38, 48-49 (2013): “A party who claims no ownership interest in the subject property has standing to file a declaratory judgment action challenging the land use decision only if the party can satisfy a two-step test [the “aggrieved person standard”]. First, the complainant must own or occupy real property within or in close proximity to the property that is the subject of the land use determination, thus establishing that it has a direct, immediate, pecuniary, and substantial interest in the decision. Second, the complainant must allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.”

ANALYSIS:

I. Plaintiffs Lack Standing as to Each Count of Their Amended Complaint.

Defendants’ Demurrers are sustained as to each count of the Complaint. Defendants’ Motions to Dismiss are granted, and the Amended Complaint is dismissed with prejudice. In 2013, the Supreme Court of Virginia heard an appeal of a declaratory judgment action challenging a land use decision by the Caroline County Board of Supervisors. The plaintiffs bringing the case were a non-profit, conservationist group and neighbors, who owned property surrounding an area of the Rappahannock River where developers had sought approval to start a sand and gravel mining operation. Friends of the Rappahannock, et. al. v. Caroline County Bd. Of Supervisors 286 Va. 38, 42 (2013). Plaintiffs claimed the mining operation would cause increased noise, airborne particle matter, disturb animal populations used for fishing and hunting, interfere with plaintiffs’ access to the river, and interfere with the quiet enjoyment of their properties. Friends of the Rappahannock, 286 Va. at 42-43. The Circuit Court held plaintiffs’

claims were conclusory and not supported by sufficient fact to show injury “different from that suffered by the public generally.” Id. at 43. The Supreme Court upheld the Circuit Court’s ruling and application of a two-step test (also known as the “aggrieved person standard”) for plaintiffs to establish standing in declaratory judgment actions challenging the land use decision of a local governing body or zoning board when plaintiffs do not have an ownership interest in the subject property. Plaintiffs must first show they “own or occupy real property within or in close proximity to the property that is the subject of the land use determination.” Friends of the Rappahannock, 286 Va. 38, 48 (2013). Second, plaintiffs must “allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.” Id. at 48-49. Additionally, the particularized harm must be based on present, rather than future or speculative, facts to establish a justiciable issue ripe for adjudication. See Charlottesville Area Fitness Club Operators Ass’n v. County Board of Supervisors, 285 Va. 87, 98 (2013).

Like the claimants in Friends, in the case at bar, Plaintiffs are a group of homeowners whose properties are located near the proposed building site for Defendant Wegmans’ Distribution Facility. Plaintiffs allege a list of harms they have suffered or will suffer in their five-count Amended Complaint for Declaratory and Injunctive Relief based on the Board’s decision approving the application to build the Facility. Defendants still concede that Plaintiffs have met the first step of the Friends’ test. However, the Court finds that none of Plaintiffs’ alleged injuries meet the second step of the test.

Plaintiffs argue that an earlier case, Riverview Farm Associates Virginia General Partnership, et. al. v. Board of Supervisors of Charles City County, et. al. is more factually analogous to the case at bar. The Court disagrees. In Riverview Farm Associates, the Plaintiffs

owned homes next to an industrial area and dock that Charles City County used for a waste transportation operation. 259 Va. 419 (2000). Trucks picked up loads of waste from barges at the dock and drove across a private access road near plaintiffs' homes to get from the dock to the highway. Id. Plaintiffs alleged injury by newly approved zoning proffers that would increase the number of trips trucks made over the private access road. Id. at 423. The Supreme Court held plaintiffs had standing. Id. at 427. In the case at bar, none of the facts alleged indicate a harm specific to Plaintiffs, like the increased use of the *private* access road in Riverview Farm Associates.

Thus, Defendants' Demurrers are sustained as to each count of the Amended Complaint, as discussed below, for not alleging facts sufficient to establish standing. Plaintiff's Motions to Dismiss are granted and the Amended Complaint is dismissed with prejudice.

A. "Count I – The Board Violated Executive Order 53 and 55."

Plaintiffs lack standing as to Count I of their Amended Complaint. Plaintiffs allege injury by the Board for choosing to hold the public hearing for the Wegmans Distribution Facility despite the Governor's "stay at home order." Any injury was suffered not just by Plaintiffs, but by the public generally. The Court finds Plaintiffs have failed to plead facts sufficient to establish a particularized harm which is "different from that suffered by the public generally." Friends of the Rappahannock, 286 Va. at 48.

B. "Count II – The Board Deprived Citizens the Right to Meaningfully Participate."

Plaintiffs lack standing as to Count II of their Amended Complaint. Plaintiff allege injury because the Board limited the public hearing attendance to 20 people, and accepted written comments, voicemails, or emails to be presented at the meeting by anyone who could not attend. Any injury was suffered not just by Plaintiffs, but by the public generally. The Court finds

Plaintiffs have failed to plead facts sufficient to establish a particularized harm which is “different from that suffered by the public generally.” Id.

C. “Count III – The Board’s May 6, 2020 Meeting Violated FOIA.”

Plaintiffs lack standing as to Count III of their Amended Complaint. Plaintiffs allege that the limited attendance at the public hearing violated the Virginia Freedom of Information Act. Any injury was suffered not just by Plaintiffs, but by the public generally. The Court finds Plaintiffs have failed to plead facts sufficient to establish a particularized harm which is “different from that suffered by the public generally.” Id.

D. “Count IV – The Board’s Action on Proffered Conditions Prior to the May 6th Zoning Hearing Was contrary to Law and Thus Void.”

Plaintiffs lack standing as to Count IV of their Amended Complaint. Plaintiffs allege they were denied their right to review and comment on the Revised Final Proffer of REZ 2019-00037 which was submitted the same day as the public hearing. Any injury was suffered not just by Plaintiffs, but by the public generally. The Court finds Plaintiffs have failed to plead facts sufficient to establish a particularized harm which is “different from that suffered by the public generally.” Id.

E. “Count V – Defendants Proffered and the Board Approved Conditions That Are Less Protective of the Community Than the 1995 Conditions.”

Plaintiffs lack standing as to Count V of their Amended Complaint. Plaintiffs allege the accepted Revised Final Proffer is less protective of them, allowing Wegmans to build a taller building and light poles, and less esthetically pleasing exterior building materials. Any injury was suffered not just by Plaintiffs, but by the public generally. The Court finds Plaintiffs have failed to plead facts sufficient to establish a particularized harm which is “different from that suffered by the public generally.” Id.

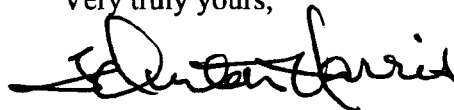
CONCLUSION:

The Court rules that (1) Defendants' Demurrers are sustained as to each count of the Amended Complaint; (2) Defendants' Motions to Dismiss are granted and Plaintiff's Amended Complaint is dismissed with prejudice; (3) Defendants' Motions Craving Oyer are rendered moot.

ORDER:

Counsel shall prepare and circulate an order consistent with the findings and ruling in this opinion for entry within two weeks.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Overton Harris", written in a cursive style.

J. Overton Harris
Hanover County Circuit Court Judge