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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STATEMENT OF THE CASE

On October 22, 2020, Petitioners Ocean Short Condominium Association, Ships Watch Condominium Association, Inc., Richard D. Norris, and Peter Terkeltaub (collectively "Petitioners") filed a Petition in Virginia Beach Circuit Court challenging the lawfulness of City Council's approval of Respondent Westminster Canterbury on Chesapeake Bay's ("Westminster") Conditional Use Permit application ("Westminster Application"). Westminster's Application provided for the modification of an already existing conditional use permit, which would allow it to expand the senior housing development which presently exists on the site in question. Westminster's Application includes requests for a deviation in the applicable height restriction, allowing it to add more senior housing units, which City Council has identified as badly needed in Virginia Beach.

In response to the Petition, Respondents City of Virginia Beach and Virginia Beach City Council (together "City") and Westminster each filed motions craving *oyer* of the complete legislative record of City Council's deliberation and vote on the Westminster Application. After a February 25, 2021 hearing on the motions craving *oyer*, the Circuit Court ordered that the 514-page official legislative record be attached to the Petition.

The City and Westminster each filed demurrers seeking dismissal of the Petition in its entirety. The Circuit Court heard argument on the demurrers at a May

12, 2021 hearing. Upon consideration of post-hearing briefs, the Circuit Court issued a letter opinion on July 29, 2021. The court sustained the demurrers on all counts withheld a ruling on the equal protection count based upon Petitioners' stated intention of amending that claim.

On multiple occasions, in court hearings and by email, respondents requested a proffer for the basis of their equal protection claim. At a September 23, 2021 hearing, Counsel for Westminster cited to the Circuit Court Petitioners' continuing refusal to lodge an amended equal protection claim – or make a proffer for the same – in arguing that Petitioners should be denied leave to amend their equal protection claim. Up until the date of the present filing, Petitioners have never made such a proffer.

On November 15, 2021, the Circuit Court entered an Order dismissing all counts to the Petition with prejudice and without granting leave to amend. The Petition for Appeal of the November 15, 2021 Order was due February 14, 2022. Petitioners untimely filed their Petition for Appeal on February 15, 2022. Petitioners thereafter also untimely filed two motions asking for an extension of time. The City and Westminster both filed responses objecting to Petitioners' request for leave to file late and requesting this appeal be denied as a result.

STANDARD OF REVIEW

On appeal to this Court, "[R]eview of a trial court's grant of a demurrer is de novo." La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC, 294 Va. 243, 255 (2017) (citing Rafalko v. Georgiadis, 290 Va. 384, 396 (2015)).

A decision to grant or deny leave to amend is within the sound discretion of the trial court. Kimble v. Carey, 279 Va. 652, 662 (2010) (citing Ogunde v. Prison Health Servs., Inc., 274 Va. 55, 67 (2007)). This Court reviews a trial court's decision whether to grant such leave under an abuse of discretion standard. Id.

ARGUMENT

I. Regarding Petitioners' First Assignment of Error: The Circuit Court Properly Ruled That the Materials Proffered by Respondents Constituted the Full Legislative Record of City Council's Approval of Westminster's Application.

The Circuit Court correctly ruled that the 514-page official legislative record attached to the City's Motion Craving Oyer and supported by the affidavit of the Virginia Beach City Clerk is the complete and official legislative record of City Council's deliberation and vote upon its approval of the Westminster Application. Petitioners are unable to point to any basis in caselaw or otherwise that supports their contention that it was error for the Circuit Court to rule that the record must include the materials Petitioners proffered for inclusion therein.

The parties appear to agree that, in considering whether City Council's actions were at least "fairly debatable" – the deferential standard applied to a municipal body's legislative acts – courts properly consider the official legislative record of the challenged decision. Byrne v. City of Alexandria, 298 Va. 694, 701-02 (2020). Petitioners argue, however, that "this Court has not provided guidance on how the legislative record is defined or created." (Pet. App. 13.) That is a striking contention given that Petitioners shortly thereafter quote Byrne's recitation that the legislative record included the following documents:

> the minutes of the initial meeting of the [Board of Architectural Review ("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 staffs 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.

(Pet. for App. 15) (quoting Byrne, 298 Va. at 701). Fittingly, the complete, official legislative record in this case includes the same documentation as in Byrne.

Moreover, attached as EXHIBIT A to the City's Motion Craving *Oyer* is an affidavit of the City Clerk, Amanda Barnes, affirming the certified, true and accurate copy of the complete, official record of the City of Virginia Beach relating to City Council's consideration and vote on September 22, 2020, at the

Special Formal Session wherein City Council approved the Westminster Application.

The City Clerk is responsible for the preparation and safekeeping of the legislative record in the City of Virginia Beach. Her certification is enough to establish the complete, official legislative record of City Council as a matter of law and forecloses any viable argument by the Plaintiffs to the contrary. See Virginia Beach City Charter § 3.08 (Appointment of a City Clerk to serve at the pleasure of City Council); Virginia Beach City Code § 2-54, et seq. (responsibilities of the Clerk of City Council); City Code § 2-343 (Custody and preservation of records of the city council by the City Clerk).

Petitioners highlight a snippet of the City Clerk's language in the affidavit to argue that Respondents do not provide any explanation as to why her attestation that of the "complete official record" should be regarded as the "legislative record." (Pet. App. 15) (emphases added). Examining the full statement makes it clear why the terms "official record" and "legislative record" are, for present purposes, functional equivalents. The City Clerk made the following attestation:

> I have prepared the attached documents and attest that they are true and accurate copies of the complete official record relating to City Council's consideration and vote on September 22, 2020 at the Special Formal Session wherein City Council approved an application by Westminster Canterbury on Chesapeake Bay for modification of conditions to a conditional use permit.

(R. at 1208.) As the clerk's attestation makes clear, the subject matter of this record is not in the least ill-defined. Rather, it is the "complete official record relating to City Councils' consideration and vote" on the very application whose approval Petitioners challenge. If Petitioners seek a definition of "official legislative record," they have a sound answer in this attestation. Moreover, at the February 25, 2020 hearing on defendant's motions craving *oyer*, the City Clerk testified that the submitted record contained all documents in her possession relating to the Westminster Application. (R. at 2494-95.)

In contrast, Petitioners confuse the matter by conflating the Virginia Code's definition of "public record" with "official legislative record." The former is a far broader definition that operates in the context of the Freedom of Information Act. See Va. Code § 2.2-3700 et seq. In contrast to Byrne and the City Clerk's affidavit, the code section Petitioner's rely upon does not in any measure attempt to define or make any reference to an "official legislative record."

Finally, Petitioner's reliance on what they correctly note is "significantly older precedent" of Culpepper Nat'l Back v. Morris, 168 Va. 379 (1937), is misplaced. At issue in Culpepper was a court's trial record on appeal, not an official record of a legislative act. Further, the Court noted that the attorney "filed with its bill only a small part of the record." 168 Va. at 382 (emphasis added). The Culpepper Court's admonition that a pleader is required "to produce all material parts" does not apply

where, as here, the City Clerk has attested to the completeness of the record of materials in front of City Council when it considered and voted on the application in question.

All who attended the Council meeting where the Westminster Application was considered – including the Petitioners and their counsel – had the opportunity to place items into the record and address City Council, such comments being captured in the transcript of the proceedings that are part of the official record. Nowhere do Petitioners contend that the items they aver belong in the legislative record were properly before City Council as it deliberated and voted upon the Westminster Application. Instead, Petitioners proceed on the mistaken belief that merely because a document exists in the volume of City records that they therefore must be part of the legislative record.

The Circuit Court's ruling as to which items constituted the official legislative record regarding the challenged decision is consistent with this Court's ruling in Byrne, supported by the attestation of the City Clerk, and reflect the materials the City Council had before it when the legislative action was taken. Petitioners provide no case law that would support that the trial court's decision was in error.

II. Regarding Petitioners' Second Assignment of Error: The Circuit Court Properly Sustained Respondents' Demurrers to Counts Two, Three, and Five, and the Issue of Whether the Legislative Record Established that Notice Requirements for CUP Applications Were Satisfied Is a Red Herring.

The Circuit Court correctly sustained respondents' demurrers to Counts Two, Three, and Five. Petitioners belatedly advanced an (unavailing) argument regarding the adequacy of notice, carefully crafting language that betrays the fact they do not actually allege that Petitioners did not receive notice of the City Council action.

The notice arguments Petitioners set forth in their Petition for Appeal were not raised on brief or in argument at any point during proceedings in Circuit Court until June 11, 2021. This is despite the fact that Petitioners did not brief the issue and passed on two separate opportunities to argue the contended notice issue prior to or during court appearances on April 29, 2021, and May 12, 2021. (See R. 2534-2554, 2295-2438.)

But beyond the Petitioners' tardiness in bringing forth this argument is the conspicuous lack of legal or factual substance to the related arguments in their Petition for Appeal. First, Petitioners do not have standing to challenge the adequacy of the notice. Virginia Code § 15.2-2204(b) states, in pertinent part, that:

> 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.

It is telling that Petitioners nowhere assert that they did not receive proper notice of the hearing for the Westminster Application. But more important, as the legislative records makes clear, each of the Petitioners and their counsel had actual notice of and/or actively participated in the September 22, 2020 City Council Hearing.

Specifically, Petitioners' own counsel was also present and participated in the City Council hearing on September 20, 2020. (R. at 1666-70) (Remarks of attorney Jeanne Lauer). Members of the Ocean Shore Condominiums Association and the Ships Watch Condominium Association were present and participated. (R. at 1689-90) (Fred Levitin, resident of Ocean Shores Condominiums); (R. at 1691-992) (Marina Liacouras, President of Ships Watch Condominiums). Petitioner Paul Terkeltaub and his wife, Marcy Terkeltaub, both were present (R. at 1641) and Petitioner Terkeltaub participated in the proceedings (R. at 1670-73). The fact that Petitioners had *actual* notice of the hearing and advocated against the application of Westminster-Canterbury at the Council hearing means that they do not have standing to challenge the City's satisfaction of the notice requirements contained in Virginia Code § 15.2-2204.

Furthermore, Plaintiffs do not even allege that the City did not fulfill the notice requirements. Rather, their carefully crafted allegation is merely that "the legislative record accepted by the trial court did not establish compliance with the requirements

of the law in granting a CUP application." (Pet. for App. at 17.) There is, of course, a stark difference between a legal requirement to perform an action and a legal requirement that an action be documented or recorded in a particular place and in a particular manner. Plaintiffs point to no legal requirement that the satisfaction of notice requirements must all be verified in detail within the legislative record.

The baselessness of Petitioners' notice argument notwithstanding, the City avers that proper notice was provided in accordance with Va. Code § 15.2-2204, and Petitioners do not offer or even allege a single fact suggesting the opposite is true. Petitioners' reliance upon the notice language found in the legislative record is to no avail, instead supporting that proper notice was given. Although Petitioners may wish for more details in regard to notice, the legislative record's averments – including repeated assertions that notice was given "[a]s required by state code" – directly undermine their notice argument. (R. at 1226.)

In sum, the Petitioners do not actually allege that proper notice was not given and point to no facts supporting any defect in notice. Further, they cite no legal basis for their apparent contention that the legislative record must establish in full detail that notice requirements were satisfied. And finally, the record establishes that Petitioners had actual notice of the hearing and participated in the hearing, a fact they cannot and do not deny. As such, Petitioners do not have standing to assert their Second Assignment of Error.

III. Regarding Petitioner's Third Assignment of Error: The Circuit Court Properly Sustained Respondents' Demurrers to Counts Two, Three, and Five Because City Council Has Authority to Modify Density and Height Restrictions and Has Taken No Action Requiring a Supermajority Vote.

a) City Council has authority to regulate height restrictions and deviations therefrom.

As Petitioners readily acknowledge, Virginia Code § 15.2-2280 grants to City Council the authority to "regulate, restrict, permit, prohibit and determine...[t]he use of land, buildings, structures, and other premises," including the "size, height, area... of structures." (See Pet. for App. 24.) Petitioners also do not challenge City Council's authority to draft ordinances setting forth criteria by which applicants can be granted permits for conditional uses of property. However, Petitioners contend that City Council, without proper notice, "engaged in a defacto [sic] amendment to the CZO" when it approved Westminster Canterbury's application to erect a 270-foot structure. Petitioners' argument is based upon a strained and ultimately unsupportable reading of the applicable ordinances.

Petitioners essentially argue that the height provisions at issue somehow are not height regulations after all. Petitioners aver that because the 165-foot height restriction for senior housing is found in City Code § 901 – setting forth "Use Regulations" – rather than in § 904 – titled "Height Regulations" – that the 165-foot limit is a fundamental and unalterable aspect of the

conditional use that Council has authority to approve. A plain reading of the City Code reveals that Petitioners' interpretation is untenable. City Code § 221 sets forth "Procedural requirements and general standards for conditional uses." Subsection (i) provides the following:

> [t]he city council may, for good cause shown and upon a finding that there will be no significant detrimental effects on surrounding properties, allow reasonable deviations from the following requirements otherwise applicable to the proposed development ... (3) ***Height restrictions,*** *except as provided in section 202(b).*

(Emphasis added). The referenced exception to City Council's authority to regulate height, City Code § 202(b), is a regulation to obstructions to air navigation pursuant to Federal Aviation Administration guidelines which are not applicable to this CUP application.

City Code § 221(i) gives City Council express authority to grant reasonable deviations from height restrictions except as to obstructions to air navigation under FAA rules. In light of this explicit provision, Petitioners' argument fails unless this Court concludes that City Code § 901's provision that "the maximum height [of senior housing and several other structures] shall not exceed one hundred sixty-five (165) feet" is something other than a height restriction." Such a conclusion would defy both common sense and the plain meaning of the text.

Moreover, while the provision that "city council may ... allow reasonable deviations from [h]eight restrictions" is unambiguous, Petitioners' unsupportable

interpretation is further undermined by the express limitation for granting relief from height restrictions set forth in CZO § 202(b). Council not only understood how to limit the authority it granted to itself in City Code § 221(i), it actually chose to exercise that prerogative as to obstructions to air navigation – but not as to the 165-foot height restriction contained in City Code § 901. Because City Code § 221 gives Council express authority to grant relief from height restrictions in the City Code, Council acted within its lawful authority in granting Westminster Canterbury's application.

City Code § 221(i) also prescribes the standards by which City Council was required to evaluate the Westminster Application, as well as those necessary to consider and grant a reasonable height deviation. Section 221(i) provides that the City Council may issue a conditional use permit upon finding that:

> the proposed use conforms to the requirements set forth in this ordinance and that the proposed conditional use, together with the conditions attached, will be compatible with the neighborhood in which it is to be located, both in terms of existing land uses and conditions and in terms of proposed land uses and uses permitted by right in the area.

City Code, Appx. A, § 221(i). Additionally, it provides that City Council may grant a reasonable deviation from a height restriction when there is good cause for the deviation and City Council finds that there are no significant detrimental effects on the surrounding properties. Id. The official legislative record amplifying the Petition provides ample support for City Council's finding that the CUP application was

compatible with the neighborhood-particularly when evaluated under the "fairly debatable" standard.

Specifically, the legislative record supplies the following examples that, without limitation, support City Council's finding that the use was compatible with the neighborhood: R. at 1220 (elderly housing already exists on the property directly adjacent to the proposed use); R. at 1215 (the proposed building was consistent with the Comprehensive Plan's goals and policies); R. at 1225 (the proposed use creates less traffic than the existing land use); R. at 1658-59 (testimony regarding existence of multiple beachfront high-rises along this corridor of Shore Drive). The legislative record also supplies ample justification for Council's decision to allow a height deviation, including, without limitation, the following: R. at 1716 (Council preference for taller, narrower structures for additional green space and reduction of impervious surfaces on site); R. at 1646 (increased green space reduces stormwater runoff, narrower building increases possible setback from neighboring properties, additional height allows more units and, thus, financial support for medical services-including the proposed memory care center).

Finally, the official legislative record supports a finding that the deviation from the height restriction would not cause significant detrimental effects to surrounding properties, including, without limitation, the following: R. at 1715-18 (Council Members Henley and Tower's expressions that there would be no

significant detrimental effects); R. at 1647 (voluntary increase in setback of proposed structure from neighboring properties); R. at 1233 (shadow study shows minimal impact on surrounding properties); R. at 1662 (wind study revealed no meaningful increase in surface winds and building would be constructed to withstand major hurricanes); R. at 1222-23 (City staff identifying use of materials consistent with Shore Drive Corridor Guidelines, low reflective material and sound mitigation material, increased parking ratio on site and no identifiable increase in daily travel as compared to current use); R. at 1663 (use of materials engineered for low reflectance). In fact, City Council imposed specific restrictions as part of this application to minimize negative impacts to surrounding properties. (See R. at 1515-16.) (requiring certain construction materials be used, requiring sound attenuation measures and requiring on-site parking to avoid use of off-site, public parking).

Petitioners' self-serving interpretation of City Code amounts to an effort to convert a height restriction – properly subject to waiver or complete elimination as part of City Council's plenary powers – into a use restriction to provide support to their claim of an *ultra vires* act. The Circuit Court was correct in dismissing Petitioners' claims insofar as they were based on this erroneous premise.

b) City Council had clear authority to approve the densities provided for in the Westminster Application.

Petitioners' assertion that the density prescribed in the Westminster Application violates City Code is incorrect, resulting from their ignoring the operable City Code section.

In support of their argument regarding density, Petitioners rely upon City Code § 1704(a)(3), part of the Shore Drive Overlay District regulations. (Pet. App. 29.) Petitioners state that the maximum density "for all uses in the Shore Drive Overlay District is 36 units per acre in parcels larger than 4 acres." (Pet. App. 29) (quoting City Code Appx. A, § 1704(a)(3)). Petitioners state that City Code § 1702 provides that, where provisions of the Shore Drive Overlay District conflict with other code provisions, "the more restrictive provision shall control." Therefore, Petitioners conclude that the 57-unit per acre density attached to the Westminster Application is impermissible.

Petitioners' argument is based upon an incomplete examination of the City Code. All the density restrictions found in § 1704(a) apply to "multiple-family dwellings," a broad category of building types. However, Petitioners completely ignore an entire section of the City Code that establishes regulations for housing for seniors and disabled persons. Amongst a host of other provisions regulating senior housing, City Code § 235 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." (Emphasis added.)

Throughout the City Code, senior housing is treated differently than multiple family dwellings, including with regard to its permitted uses in various types of districts. See §§ 501, 601, 801, 901. Undoubtedly the two building classifications are not identical; the germane question, then, is their categorical relationship to each other. Petitioners' argument acknowledges that the senior housing is a type of multiple-family dwelling. The inverse, of course, cannot be said to be true. Thus, senior housing is a narrower category than multiple-family dwellings. Virginia courts accept the cannon of statutory construction that holds that, where two ordinances deal with the same subject matter, and one does so "in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails. Virginia Nat'l Bank v. Harris, 220 Va. 336, 340 (1979) (quoting 2A Sutherland *Statutory Construction*). The upshot is that the more specific provision governing senior housing, § 235, applies to the density at issue. City Council was empowered to approve the density at issue because it operated under the more specific ordinance.

c) City Council has not granted Westminster Canterbury approval to create pedestrian bridges or to remove or relocate a public beach access.

Petitioners alleged that "City Council has exceeded its authority" by granting "approval of the [Westminster Canterbury] CUP to create pedestrian bridges and remove or relocate a public beach access without supermajority approval." (R. at 27, ¶ 157) (emphasis added). Petitioners' assertion in this regard is based upon their interpretation of Article VII, Section 9 of the Virginia Constitution, which requires a supermajority vote when localities sell their rights in certain public places. (R at 15, ¶ 83.) Petitioners allege that "City Council has approved the [Westminster Canterbury] expansion, which would extinguish the existing public access easement without a supermajority of 75% of the Council ..." (R. at 16, ¶ 86.)

The obvious flaw in Petitioners' claim is that City Council has not undertaken the very actions they characterize as *ultra vires*. As noted in the Council Minutes for September 22, 2020, Council "APPROVED, AS MODIFIED" Westminster Canterbury's application (R. at 1515-16) and provides that "[t]he following conditions shall be required:

> 6. Prior to approval of the construction plans, the applicant shall obtain City Council's approval for the encroachment of the proposed pedestrian bridges over Starfish Road and Ocean Shore Avenue.
>
> 7. Prior to the approval of the construction plans, the applicant shall have obtained the approval of City Council to relocate the existing public beach access easement ...

Id. (emphases added). Council did nothing more than approve an application with modifications that require the applicant to in the future satisfy the condition of obtaining – prior to the construction phase – Council's approval for the items in question. The approved Westminster Application simply establishes a condition precedent that Westminster Canterbury must later satisfy in order to move forward with construction. Nothing in the CUP approval requires or promises that City Council will grant such approval at a later date.

An act that has not yet occurred cannot constitute an *ultra vires* act. Respondent City Council had clear authority to approve Westminster Canterbury's conditional use permit application with the terms and conditions imposed as of September 22, 2020.

IV. Regarding Petitioners' Fourth Assignment of Error: The Circuit Court Exercised Its Proper Authority in Denying Petitioners Leave to Amend Their Complaint.

A decision to grant or deny leave to amend is within the sound discretion of the trial court. Kimble v. Carey, 279 Va. 652, 662 (2010). However, when a demurrer is sustained, the Court does not need to grant leave to amend when "the proffered amendments are legally futile..., when there is no proffer or description of the new allegations, when amendment would be unduly prejudicial to the responding party, or when the amending party has engaged in improper litigation tactics." AGCS Marine Ins. Co. v. Arlington City, 293 Va. 469, 487 (2017).

Here, the Circuit Court was justified in dismissing Petitioners' claims with prejudice where Petitioners, by counsel, affirmatively refused – continuing through this Petition for Appeal – to offer any proffer or description of any allegations supporting an amendment to their equal protection claim. Specifically, during the hearing on May 12, 2021, counsel for Petitioners stated:

> We did seek leave under the equal protection. I don't have a proffer. That's not required under a demurrer. The only question is whether or not – 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

(R. at 2406) (emphasis added). Even much later, during their efforts to have the Circuit Court modify its November 15, 2021 Order, the Petitioners still failed to make any proffer regarding an amended their Equal Protection claim, a factual vacancy that is conspicuous in their Petition for Appeal.

This Court has made clear that, on appeal, a record silent on any proffer cannot support a reversal of a Circuit Court's dismissal with prejudice. In Roop v. Whitt, the Court held, "[W]hile the record reflects that [Petitioner] made an oral motion for leave to amend the amended complaint, nothing discloses any proffer or description of how the amendment would alter the pleading upon which the circuit court had ruled. We therefore cannot review the court's decision to deny leave to amend."). 289 Va. 274, 280-81 (2015) (emphasis added).

Finally, while Petitioners are correct in stating, "It is the firmly established law of the Commonwealth that a trial court speaks only through its written orders." (Pet. for App. 33) (quoting Davis v. Mullins, 251 Va. 141, 148 (1996)), Petitioners fail to understand the import of this maxim in the present context. Although they frame the trial court's denial of leave to amend as a reversal of position, the Court spoke only once on the issue – in its November 15, 2021 Order. And in that Order, having failed to receive any proffer in the six months that had elapsed since the May 12, 2021 hearing on the demurrer, the Court dismissed the equal protection claim with prejudice. In any case, Petitioners' continuing failure to proffer a basis for the amended complaint precludes the Court from reviewing the Circuit Court's decision.

V. The Petition for Appeal Was Untimely Filed and Constitutes a Jurisdictional Bar to This Appeal.

The Circuit Court entered the Final Order in this case on November 15, 2021, disposing of Petitioners' claims entirely. The Petition for Appeal was untimely filed on February 15, 2022, after the expiration of the 90-day filing deadline, pursuant to Section 8.01-671(A) of the *Code of Virginia* and Virginia Supreme Court Rules 5:5(a1) and 5:17(a)(1).

Petitioners then filed two Motions for Extension of Time, which themselves also were untimely filed.[1] Rule 5:5(e) provides, "Except as provided in paragraph (a) of this Rule, a motion for an extension of time is timely if filed either within the original filing deadline or within any extension period specified by the governing rule." The original Motion for Extension was filed on February 15, 2022, which Petitioners acknowledge is not within the original filing deadline, and the deadline for any motion for extension of time is in turn governed by paragraph (a1) – which is not a subsection of paragraph (a). Therefore, subsection (e)'s provision – that a motion for extension of time is due by the deadline for the petition – governs the Motions for Extension. The upshot is that the Motions for Extension are untimely and not properly before the Court.

The lateness of Petitioners' Motions for Extension notwithstanding, granting Petitioners an extension of time would not serve the ends of justice. Although Petitioners justified their untimely filing by citing to one attorney's family circumstances – such situation being worthy of genuine sympathy – Petitioners' own telling of events clearly demonstrates that the circumstances described had been long ongoing and that a second attorney had brought onto this case in November 2021 to

[1] Petitioners moved for an extension of time only after the untimely filing of the Petition for Appeal and, in the first instance, without having consulted with counsel for Respondents. Then, as to the Amended Motion, Petitioners renewed their untimely request for relief, only correcting the failure to confer pursuant to Rule 5:4(a)(1).

ensure Petitioners would avoid missing additional deadlines. (See Petitioners' Amended Motion for Extension of Time.) Petitioners do not explain why, with the help of an additional attorney, a Petition they claim was substantially completed long before the mandatory filing deadline was nonetheless untimely filed.

As noted in the City's Response in Opposition to Petitioners' Motion and Amended Motion for an Extension of Time, Petitioners' motions for extension are merely the latest unnecessary delay Petitioners have caused through their dilatory actions. Beyond the legal inadequacy of their assignments of error, the Court should dismiss this appeal as untimely filed.

CONCLUSION

Wherefore, for the foregoing reasons, the Virginia Beach City Council and the City of Virginia Beach restate their opposition to Petitioners' Motion for Extension of Time, request that this Court dismiss the Petition for Appeal as untimely filed, and – in the alternative – ask this Court to dismiss the Petition for Appeal on the merits, with Prejudice.

Respectfully Submitted,

/s/ Gerald L. Harris

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CERTIFICATE

I, Gerald L. Harris, counsel for the Respondents-Appellees City of Virginia Beach and Virginia Beach City Counsel, hereby certify on this 8th 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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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.

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5. A true and correct copy of the foregoing Brief in Opposition to Petition for Appeal was emailed 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 Virginia Beach City Counsel and City of Virginia Beach.

/s/ Gerald L. Harris
Of counsel