



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 23, 2021

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Re: *Clyde A Miller, et al. v. Board of Supervisors of Fairfax*, Case No. CL-2021-0006071

Dear Counsel:

This Court heard the Board of Supervisors of Fairfax County, Virginia's (BOS) Motion to Dismiss Clyde A. Miller and Carol Haw'n's (the Taxpayers) Complaint on May 28, 2021. This Court must consider:

1. Whether the Taxpayers have alleged an illegal expenditure and/or alleged expenditures sufficiently connected to the challenged zoning ordinances to adequately plead local taxpayer standing.
2. If the Taxpayers have failed to allege standing, whether they should be given leave to conduct discovery on the limited issue of standing.

After reviewing the pleadings, oral arguments, and evidence presented to the Court, this Court holds that the Taxpayers have alleged standing as to the illegal expenditure, which is explained in Counts I and II but have failed to allege expenditures connected to the challenged

**OPINION LETTER**

zoning ordinances in Counts III, IV, and V. Therefore, this Court dismisses Counts III through V because the Taxpayers lack standing to bring those counts. The Plaintiffs are not permitted to generally challenge the Zoning Ordinances modifications and cannot seek a general declaration that they are *void ab initio* under Counts I and II. Their standing limits their challenge to only the expenditures connected to the challenged zoning ordinances.

## I. BACKGROUND

After several years of planning and several earlier drafts, the BOS advertised a proposal to update and modernize Fairfax County's Zoning Ordinances on December 1, 2020. Compl. ¶¶ 7-14, 18-23. The released BOS Agenda (December Agenda) proposed zoning ordinance modifications (the Z-Mod) to make the ordinances easier to understand, improve the ordinances' organization, and remove inconsistencies and ambiguities. BOS's Br. Supp. Mot. to Dismiss Ex. A [hereinafter MTD Br.]. The December Agenda also addressed the fiscal impact of the proposed changes, including an initial start-up fee of approximately \$67,000 to develop and launch an online platform to put the Z-Mod online and then \$7,000 per year thereafter to maintain the platform (Online Expenditures). *Id.* The purpose of this expenditure was to replace the online platform that had hosted the original zoning ordinances. MTD Br. 2.

A Planning Commission public hearing to review the December 1, 2020 proposal was noticed for January 28, 2021. Compl. ¶¶ 23-25. Several days before the public hearing, a new draft of the Z-Mod was released. *Id.* ¶ 25. At the January 28 hearing, the Planning Commission deferred making a decision until March 3. *Id.* ¶¶ 26, 29. In the interim, a new Z-Mod draft was released on February 19. *Id.* ¶ 28. On March 3, the Planning Commission adopted its recommendations to the BOS regarding the Z-Mod but did not indicate which Z-Mod draft. *Id.* ¶ 29. After providing notice of the public hearing in the *Washington Times* for two weeks, the BOS held the meeting on March 9, but deferred its decision until March 23. *Id.* ¶¶ 30, 32, 34. On March 23, 2021, the BOS adopted the Z-Mod. *Id.* ¶ 34. Given the on-going pandemic, the meetings were held electronically, and members of the public had an opportunity to present their testimony by telephone and pre-recorded videos. *Id.* ¶ 26, 33.

On April 22, 2021, the Taxpayers filed their five-count Complaint against the BOS. Count I alleges that the BOS violated Virginia law by approving the Z-Mod without an in-person hearing. Count II claims that the BOS failed to provide proper notice to the public of the Z-Mod hearings. Counts III through V state that various provisions of the Z-Mod violate Virginia law, impermissibly delegate legislative power, and violate the Z-Mod itself.

In response, the BOS filed a Motion to Dismiss for the Taxpayers' lack of standing. On May 28, 2021, the parties presented their arguments before this Court. During that hearing, the BOS submitted the December Agenda and the March 9, 2021, Board Agenda Item (March Board Agenda) as evidence. MTD Br. Exs. A & E. Both agendas noted the Online Expenditures as part of the Z-Mod's fiscal impact. *Id.* Further, the BOS submitted an Acceptance Agreement and contract between the County and the company hired to create the online platform with a Date of Award of December 21, 2020. *Id.* Ex. B. The County executed the contract on December 18,

2020. *Id.* The remainder of the BOS's evidence included a disbursement check for \$43,000 to the company and another \$12,400 bill from the company due April 20, 2021. *Id.* Exs. C & D.

At the hearing, the Taxpayers submitted a hearing transcript in another matter wherein an attorney for the BOS stated that the \$67,000 expenditure depended on the adoption of the Z-Mod and that no expenditure would be made if the Z-Mod was not adopted. Transcript of Hr'g at 37-38, *Berry v. Fairfax County Board of Supervisors*, CL-2021-0003366 (Fairfax Cnty. Cir. Ct. March 9, 2021) [hereinafter *Berry* March 9 Hearing].

## II. STANDARD OF REVIEW

While the plaintiff is ultimately responsible for alleging and proving standing, a defendant challenging standing at an evidentiary hearing must present sufficient evidence to demonstrate that the facts plaintiff alleged to support standing are untrue.<sup>1</sup> *Cf. Project Vote/Voting For America, Inc. v. Long*, 752 F. Supp. 2d 697, 701 (E.D. Va. 2010) (noting that a "court may go beyond the allegations of the complaint and make factual findings" when a defendant claims that the facts supporting standing are untrue); *Bragg v. Bd. of Supervisors*, 295 Va. 416, 423 (2018).

## III. ARGUMENTS

### A. BOS's Motion to Dismiss and Oral Argument

The BOS's Motion to Dismiss argues that the Taxpayers do not have local taxpayer standing because they allege costs and/or expenditures that are not remotely connected to the Z-Mod policies they are challenging. They contend that the staff salaries and Online Expenditures are not connected to the Taxpayers' challenge to the Z-Mod's substance and the BOS's manner of adopting the Z-Mod. Further, the BOS claims that the Online Expenditures are from a contract that is not contingent on the BOS approving Z-Mod. Moreover, the contract includes services other than putting the Z-Mod online. Lastly, the BOS notes that the Taxpayers demonstrate that they are not challenging the expenditures because they do not even ask for relief regarding those expenditures.

### B. The Taxpayers Opposition to the Motion to Dismiss and Oral Argument

The Taxpayers request that this Court only consider the pleadings on a motion to dismiss and ask that if the Court decides to consider the exhibits, it stay the Motion to Dismiss to allow limited discovery on the Z-Mod expenditures. Moreover, the Taxpayers respond that the alleged

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<sup>1</sup> This Court has not found a Virginia Supreme Court case that opines on the standard of review for an evidentiary hearing on a Motion to Dismiss for lack of standing. Thus, federal case law serves as a useful guide in reviewing the present matter. Federal cases also note that when "jurisdictional facts are intertwined with the facts central to the merits of the complaint, 'a presumption of truthfulness'" attaches to the alleged facts, and "the court should resolve the relevant factual disputes only after appropriate discovery." *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 629 (4th Cir. 2016) (quoting *Rich v. United States*, 811 F.3d 140, 145 (4th Cir. 2015)).

costs are connected to the challenged policies because the staff will implement the Z-Mod, and the BOS is spending money to put the illegally adopted Z-Mod online. Further, they argue that the expenditures are illegal because the BOS is acting outside of its authority and that the County had made payments for the online platform while the BOS represented that the expenditures were still speculative. Even if the expenditures were not ultimately illegal, the Taxpayers contend that prior caselaw has permitted local taxpayer standing when the Complaint alleges that the expenditures were made without authority. Finally, the Taxpayers note that if they do not have standing, the Z-Mod will become law without review.

#### IV. ANALYSIS

As an initial matter, this Court will not treat the BOS's Motion to Dismiss as a demurrer. Further, and contrary to Miller's assertion, the Court can review evidence submitted on a motion to dismiss. It is only when "no evidence [has been] taken with regard to [a] motion to dismiss" that a court reviews a complaint's factual allegations as it does on demurrer. See *Bragg v. Bd. of Supervisors*, 295 Va. 416, 423 (2018); see also *NAACP v. Comm. Offenses Against Admin. of Justice*, 201 Va. 890, 901 (holding that a chancellor had authority to hear evidence on a motion to dismiss). It should be noted that the Taxpayers generally objected to the use of evidence at a Motion to Dismiss, but did not raise any specific objection, or cite to any Rule of Evidence when the County offered specific items of evidence.

As a result, the two issues before this Court involve whether the Taxpayers have sufficiently alleged taxpayer standing, and if not, whether they should be granted limited discovery to address standing.

##### A. Standing

The question of a party's standing "is a preliminary jurisdictional issue" and does not relate to the "substantive merits" of a case. *McClary v. Jenkins*, 848 S.E.2d 820, 823 (Va. 2020) (quoting *Andrews v. American Health & Life Ins. Co.*, 236 Va. 221, 226 (1988)). The standing requirement serves to ensure that a party has a "substantial" legal right to assert a certain position and that the case's resolution will affect that legal right. *Cupp v. Bd. of Supervisors*, 227 Va. 580, 589 (1984). In other words, a party must show "a personal stake in the outcome of the controversy" to have standing. *Goldman v. Landsidle*, 262 Va. 364, 371 (2001).

In most situations, taxpayer status alone does not give an individual *carte blanche* to sue government entities. See *Goldman*, 262 Va. at 372-73. Yet, in a narrow and well-established line of cases, taxpayers have standing to challenge their local government's expenditures. *Id.* at 371-72. Local taxpayer standing arises from the relationship between local governments and taxpayers, which gives taxpayers a personal stake in the controversy's outcome because they have a direct and immediate interest in how a local government uses its tax revenue. *McClary*, 848 S.E.2d at 824. Thus, a taxpayer can

challenge the legality of local government expenditures without pleading any further injury. *Id.* at 823-24.

However, “taxpayer standing does not open the door to challenge any local government action.” *Lafferty v. School Bd.*, 293 Va. 354, 364 (2017). Instead, local taxpayer standing is circumscribed in that a taxpayer must either directly challenge a particular expenditure or allege local government “costs or expenditures connected to” the challenged policies. *Id.* at 363; *see also McClary*, 848 S.E.2d at 823-24; *Burk v. Porter*, 222 Va. 795, 796-98 (1981) (noting that a taxpayer may challenge the use of county funds to pay for a cross-country trip taken by members of the county’s board of supervisors); *Gordon v. Bd. of Supervisors*, 207 Va. 827, 829-30 (1967) (challenging a board of supervisors’ \$20,000 loan to an airport authority as either unauthorized by statute or unauthorized because the resolution authorizing the cost was improperly adopted); *Appalachian Elec. Power Co. v. Town of Galax*, 173 Va. 329, 333-34 (1939) (finding standing when a taxpayer challenged bonds issued to build a power plant because the bonds were adopted in an illegal election). A party cannot merely “tak[e] a position and then challeng[e] the government to dispute it.” *Lafferty*, 293 Va. at 358, 363, 365 (holding that the parties lacked standing because their request to infer expenditures associated with changing and implementing a nondiscrimination policy was speculative and would subject any government policy “to challenge by any taxpayer due to even nominal costs of implementation”).

In *McClary*, the Virginia Supreme Court held that the taxpayers lacked standing when they asserted standing based on a sheriff’s office’s use of local taxes to pay salaries and costs and expenses related to an allegedly unlawful agreement to enforce federal immigration laws. 848 S.E.2d at 822-23. It reasoned that taxpayers must allege “a connection between a local taxpayer’s complaint and government expenditures” to have standing because standing in these types of cases “is directly tied to” the local government’s expenditures. *Id.* at 824. The Court concluded that the taxpayers’ general allegations failed to identify “any discrete appropriation or payment by the local government in support of the policy or actions they seek to prohibit.” *Id.* at 825.

Further, in *City of Fairfax v. Shanklin*, the Supreme Court concluded that a taxpayer lacked standing to challenge certain zoning ordinances because he did not suffer an actual injury. 205 Va. 227, 228, 230-31 (1964). The taxpayer alleged that the zoning ordinances improperly conferred authority to the Board of Zoning Appeals to approve certain special exception permits. *Id.* at 228. However, at the time the Court reviewed the case, no special exceptions permits had been requested in the taxpayer’s neighborhood, the Board had not exercised the power the taxpayer challenged, and no potential opportunity for the Board to exercise the challenged power existed. *Id.* at 230-31.

Preliminarily, the Taxpayers fail to identify “any discrete appropriation or payment . . . in support of the policy or actions they seek to prohibit” with their general allegations that salaried county staff members implemented the approved Z-Mod. Compl.

¶ 34; see *McClary*, 848 S.E.2d at 825. Thus, the staff salaries alleged are insufficient to support standing without further specificity.

The issue of the Online Expenditures poses a slightly different question. The Taxpayers challenge as illegal the planned \$67,000 initial expenditure to put the Z-Mod online and the \$7,000 yearly costs thereafter to maintain the platform. Compl. ¶¶ 35-36, 60. As fairly inferred from the Complaint and the *Berry* March 9 Hearing, the alleged illegality of the expenditures appears to arise from the approval of the Z-Mod without the proper notice or in-person quorum and in-person public comment. Compl. ¶¶ 37-97. While the BOS submitted evidence that showed that the County executed a contract and already paid part of the cost of the Online Expenditures, it did not provide evidence that this expenditure was approved by an unchallenged process. MTD Br. Exs. A-D. Therefore, the BOS failed to provide evidence demonstrating that the facts the Taxpayers alleged to support standing were untrue. Cf. *Project Vote/Voting For America, Inc. v. Long*, 752 F. Supp. 2d 697, 701 (E.D. Va. 2010).

This direct challenge to the expenditures themselves, without evidence sufficient to overcome the allegations, encompasses Counts I and II in that the expenditures were purportedly approved through the approval of the Z-Mod. *Id.* ¶¶ 37-97; *Berry* March 9 Hearing Transcript 37-38. As a result and in line with *Gordon v. Bd. of Supervisors*, 207 Va. 827, 831 (1967), the Taxpayers have sufficiently alleged standing as to Counts I and II only in so far as they relate to the legality of the \$67,000 initial and \$7,000 yearly expenditures.<sup>2</sup>

Yet, other aspects of the present case closely resemble *McClary* and *Shanklin*. The Taxpayers fail to allege any connection between Online Expenditures and the Taxpayers' challenges to the Z-Mod in Counts III through V.<sup>3</sup> Compl. ¶¶ 35, 98-128; MTD Br. Ex. E. An expenditure to put a new zoning ordinance online is not a "discrete appropriation . . . in support of" a new ordinance which allegedly improperly delegates legislative authority, impermissibly increases zoning district density, and unlawfully expands use waiver and modification approvals. *McClary*, 848 S.E.2d at 825; Compl. ¶¶ 98-128. The expenditure is for a system that merely promulgates, rather than enforces, the new zoning ordinance. Extending the Taxpayers' standing to encompass an expenditure wholly unconnected to these allegations would permit the Taxpayers to launch an attack that the Virginia Supreme Court has not afforded other similar litigants. See *McClary*, 848 S.E.2d at 825; *Lafferty*, 293 Va. at 363-65. Doing so would allow a local taxpayer to challenge any local policy at any time if the taxpayer merely pointed to

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<sup>2</sup> Notably, the Taxpayers fail to request any relief related to the expenditures. Compl. Conclusion. The County's argument that the failure to allege relief associated with the expenditures is more appropriate for their demurrer arguments. Nothing in this Opinion Letter or associated order will preclude the County from raising any of their arguments previously raised in their Demurrer and Plea in Bar which have not been noticed for a hearing.

<sup>3</sup> The Complaint's notable lack of requested relief regarding the expenditures bolsters this Court's conclusion that the expenditures are not connected to the challenged ordinances. Compl. Conclusion.

a “nominal cost[] of implementation” such as the amount spent to write and print that policy on paper or post it online. *Lafferty*, 293 Va. at 363.

Contrary to the Taxpayers’ argument, a finding that they lack standing does not immunize the Z-Mod from review. The Taxpayers may challenge the policies at any time the Taxpayers can “show direct injury, pecuniary or otherwise, resulting from the enforcement” of the challenged Z-Mod. *Goldman v. Landsidle*, 262 Va. 364, 372 (2001). Additionally, they could challenge the Z-Mod if they specifically identified expenditures connected to each of the challenged policies in Counts III through V.

B. Taxpayers’ Request for Additional Discovery

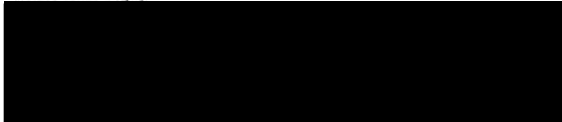
As the Taxpayers have alleged sufficient facts to maintain standing, their request for additional discovery to establish standing is denied.

V. **CONCLUSION**

A plaintiff that pays local taxes cannot create a controversy simply “by taking a position and then challenging the government to dispute it.” *City of Fairfax v. Shanklin*, 205 Va. 227, 231 (1964). Instead, a taxpayer must allege a particular expenditure is illegal or unauthorized or that a challenged policy is connected to an expenditure. Here, the Taxpayers sufficiently stated standing to challenge the Online Expenditures, but failed to connect those expenditures to the challenged policies in Counts III through V. As to Counts I and II, they have alleged standing to challenge the expenditures associated with Z-Mod but have failed to allege standing to generally challenge the zoning ordinances in dispute.

For the foregoing reasons, the BOS’s Motion to Dismiss is DENIED as to Counts I and II insofar as the claims are associated with the expenditures attached to Z-Mod and GRANTED as to the remaining relief associated with Counts I and II. It is further GRANTED as to Counts III, IV, and V in their entirety.

Sincerely,



Daniel E. Ortiz  
Circuit Court Judge

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CLYDE A. MILLER, *et al.*

Plaintiffs,

v.

BOARD OF SUPERVISORS OF FAIRFAX,

Defendant.

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Case No. CL-2021-0006071

**ORDER**

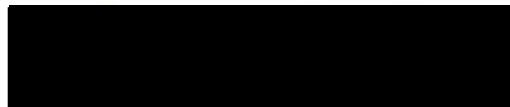
**THIS CAUSE** came to be heard on May 28, 2021, on Defendant Board of Supervisors' Motion to Dismiss Complaint.

**IT APPEARING** that for the reasons set forth in the Court's Opinion Letter dated August 23, 2021, the Plaintiffs, Clyde A. Miller and Carol A. Hawn, have alleged standing as to parts of Counts I and II but failed to allege standing as to Counts III, IV, and V; it is therefore

**ORDERED** that Defendant Board of Supervisors' Motion to Dismiss Complaint is DENIED as the Counts I and II insofar as the claims are associated with the expenditures attached to Z-Mod and GRANTED as to the remaining relief associated with Counts I and II. It is further GRANTED as to Counts III, IV, and V in their entirety.

THIS CAUSE CONTINUES.

**ENTERED** this 23<sup>rd</sup> day of August 2021.



JUDGE DANIEL E. ORTIZ