NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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January 22, 2024

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Deputy County Attorney
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Nicholas V. Albu
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Re: *NS Reston, LLC* v. *Board of Supervisors of Fairfax County, Virginia, et al.*, CL 2019-15831

Dear Mr. Stoner and Mr. Albu:

This matter is before the court on Defendant's Demurrer, which was initially heard by the court on November 9, 2023.[1] Defendant demurred to all four counts of the *First Amended Complaint* ("*FAC*")[2] on the ground that, because other parcels of land were approved for high density development, all available density for Part 5 of the *Approved Development*

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[1] On demurrer, the court "accept[s] as true all factual allegations expressly pleaded in the complaint and interpret[s] those allegations in the light most favorable to the plaintiff." *Coward v. Wellmont Health System*, 295 Va. 351, 358 (2018). Further, as a motion craving oyer of the Board of Supervisors and the Planning Commission record was granted, that record may be considered by the court. *See Byrne v. City of Alexandria*, 298 Va. 694 (2020).

[2] Count I is styled *Unlawful Denial of The NS Reston Plan*. The remaining counts, Count II (*Denials Based On Unconstitutional Conditions*), Count III (*Inverse Condemnation*), and Count IV (*Appeal From Disallowance of Claim*) appear to be alternative counts if the denial of the NS Reston Plan is lawful.

OPINION LETTER

Plan for RZ 86-C-121 was exhausted. Defendant also demurred to all four counts on a variation of the first ground, *i.e.*, that Plaintiff was bound by previous unchallenged decisions regarding allocation of density. With respect to Count II specifically, Defendant demurred based on another variation of the first ground, *i.e.*, that, because all available density was exhausted, no unconstitutional condition was imposed and there was no unconstitutional taking. In short, Defendant's entire demurrer hinged on one issue: whether all available density for Part 5 of the *Approved Development Plan* for RZ 86-C-121 was exhausted.[3]

Following the hearing on November 9, 2023, the court requested supplemental briefing, which the parties provided on November 27, 2023. In response to a question from the court, the parties provided additional responses on December 12, 2023.

After careful review of the parties' memoranda and the documents from the Board and the Planning Commission, the court OVERRULES the Demurrer for the reasons set forth below.

BACKGROUND

Since December 15, 2011 (*FAC*, ¶ 19), Plaintiff has been, and continues to be, the fee simple owner of a parcel of real property, identified as Tax Map Parcel 17-1 ((17)) 4, which is located in Part 5 on the *Approved Development Plan*, dated November, 1986, and revised January, 1987; Part 5 comprises approximately 14.92 acres. *FAC*, ¶¶ 5, 16. The *Approved Development Plan* covers approximately 145 acres. *FAC*, ¶ 15, *Planning Commission Record* ("PC") 115.[4] The parcel is zoned for high density residential development under Section 6-308(3)(C) of the Fairfax County Zoning Ordinances, which permits residential development at a maximum density of fifty (50) dwelling units per acre. *FAC*, ¶ 18. The parcel is part of the development plan for RZ 86-C-121 that was proffered by the developer in a proffer dated February 27, 1987 and approved by the Board of Supervisors (hereafter "Board") on March 9, 1987 as part of four concurrent rezonings. *FAC*, ¶¶ 12-13. The Board's approval also included RZ 85-C-088, RZ 86-C-119, and RZ 86-C-118. PC 193.

In or around July-August, 2018, Plaintiff submitted combined Conceptual Plan and PRC Plan applications for a 58 unit high-rise residential building and park in substantial conformance with the

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[3] *See* the following pages of Defendant's *Brief In Support of Demurrer*: 1 ("exhausting all available density in the area designated as Part 5"), 5 ("all available residential density in Part 5 had been allocated to other properties"), 6 ("allotted all available residential density to other properties in Part 5"), 8 ("after the density was gone"), 10 ("the lack of available density"), 12 ("leaving no available density"), 13 ("there was no remaining density in Part 5"), and 14 ("required density that simply was no longer available in Part 5").

[4] The *Approved Development Plan* shows that the acreage is 144.63883 acres.

Approved Development Plan. *FAC*, ¶ 58. On or around June 19, 2019, the Planning Commission denied the Conceptual Plan and recommended that the Board deny the PRC Plan. *FAC*, ¶ 72. The denial by the Planning Commission was based upon Plaintiff's purported failure to conform to the *Approved Development Plan* (*FAC*, ¶ 74), in particular, that Plaintiff's plans exceeded the allowable density, *i.e.*, fifty (50) dwelling units per acre. *FAC*, ¶ 76. On October 29, 2019, the Board denied Plaintiff's appeal of the Planning Commission's decision to deny the Conceptual Plan and denied Plaintiff's PRC Plan. *FAC*, ¶ 90. The Board's denial was based upon the density which would result from building the proposed additional dwelling units. Currently, only 2,638 total dwelling units have been built or approved for the properties subject to the *Approved Development Plan*. *FAC*, ¶ 66.

On December 2, 2019, Plaintiff served a claim on the Board seeking relief from the Board's and the Planning Commission's unlawful actions. *FAC*, ¶ 95. On February 11, 2020, the Board denied Plaintiff's claim. *FAC*, ¶ 99. This action was filed on February 28, 2020.

THE ISSUE

As the Board's counsel aptly stated at the demurrer hearing on November 9, 2023: "The question is what is the area that one is to consider being the denominator for calculating the 50 dwelling units per acre . . . . Is it Part 5, or is it something larger?" *Tr.* 117:5-13. Thus, the Board did not dispute that the applicable density is 50 dwelling units per acre. Plaintiff agreed, stating that the issue is "how . . . the 50 dwelling-unit-per-acre cap for high density residential is calculated . . . . Is that calculation based on only the acreage of Part 5, which is 14.92 . . . or is it a greater land area?" *Tr.* 126.[5]

Further, the Board conceded that the *Approved Development Plan* does

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[5] That the appropriate density is 50 dwelling units per acre is consistent with a letter from Barbara A. Byron, Director, Zoning Evaluation Division, Department of Planning and Zoning, dated February 14, 2005 in which she addressed Part 11 of RZ 86-C-121, noting that it "is zoned PRC, with a Town Center designation." PC 306. As with Part 5 of RZ 86-C-121, "no residential density was designated on the approved development plan for RZ 86-C-121 . . . ." *Id.* Director Byron explained, however, that "the Comprehensive Plan [2003 Edition, at page 36] states":

> The proposed Town Center development will also include hospital uses and a minimum of 1,400 dwelling units, incorporating a mixture of multi-family and single-family housing unit types at up to 50 dwelling units per acre.

Director Byron concluded that, because "[o]ther residentially developed properties within the Town Center have been designated 'high-density residential,' . . . this property would also include a designation of "high-density residential." PC 306.

not "specifically designate the maximum residential density" for the area known as Part 5. *Tr.* 107-108. Indeed, the only specific designation for density on the *Approved Development Plan* is for Part 13: "PRC High Density Residential." The *Approved Development Plan* does not specify the area to be considered "the denominator for calculating" density.

ANALYSIS

As far as the court can determine, based upon the Record before the Planning Commission and the Board, the only instance where the County has expressed "the denominator for calculating" density was a letter dated October 11, 1999 from Director Byron concerning RZ 85-C-088 (one of the four rezoned areas -- which also included RZ-C-121 -- that was a subject of the Board Ordinance Amendment approved on March 9, 1987). PC 301. Notably, RZ 85-C-088 and RZ-C-121 were both part of the "Town Center Study Area" in the proffer of February 27, 1987 (*see* Appendix A-6), which was approved by the Board on March 9, 1987 and both RZ 85-C-088 and RZ-C-121 were rezoned to "PRC Town Center." See Appendix A-4.[6] Further, the "Development Plan" for both RZ 85-C-088 and RZ-C-121 was for "a variety of high density urban housing . . . ." PC 289.

In her letter, Director Byron was responding to a request for, *inter alia*, "an interpretation of . . . [w]hether the residential density proposed within the designated residential landbays as shown on the approved development plan may be calculated on the entire 84.25 acres subject to RZ 85-C-088." PC 301. As with the parts of the *Approved Development Plan* for RZ 86-C-121 (PC 115-117), "no residential density was designated on the approved development plan associated with RZ 85-C-088 . . . ." PC 302.

In response, Director Byron stated:

> The maximum density, as set forth in the Zoning Ordinance [§ 6-308(3)(C)], in areas designated as high density development, is limited to a maximum of 60 persons/acre of gross residential area based on all of the areas within the PRC District designated as high density residential and a maximum of 50du/ac in any one high density area. For purposes of calculating density for the Town Center Core Area, it is my determination that the *density should be based on the entire land area subject to RZ 85-C-088* (84.25 acres) . . . ."

PC 302 (emphasis added).

While Director Byron did not explain the basis for her determination that "the density should be based on the entire land area subject to RZ

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[6] The Proffer included in the record (PC 268-291) does not include Appendix A. Plaintiff provided the Appendix as an exhibit to its *Second Supplemental Memorandum In Opposition To Demurrer.*

85-C-088," the court observes that all three paragraphs of subsection (3) of Zoning Ordinance § 6-308 refer to "overall density within the *entire area* of a PRC District" and "per acre of *gross residential area*." (Emphasis added). Director Byron apparently based her determination on this language.

The only other interpretation related to RZ 86-C-121 by a director of the Zoning Evaluation Division, Department of Planning and Zoning, is a determination set forth in a letter of May 15, 2009 by Regina C. Coyle, who had become the Director after Director Byron. Director Coyle was requested to determine the "development potential currently available regarding Tax Map Parcel 17-1 ((17)) 4 (which is part of Part 5) "pursuant to . . . RZ 86-C-121 and the associated Development Plan approved by the Board of Supervisors on March 9, 1987, as subsequently amended." PC 201.

In response, Director Coyle stated, *inter alia*, that "[t]he use and intensity limitations depicted on the approved Development Plan for Part 5 are as follows: . . . (2) a maximum residential density of 50 dwelling units per acre or a total of 746 residential units." PC 201. In fact, there is no maximum residential density depicted on the *Approved Development Plan* for Part 5. The only maximum residential density depicted on the *Approved Development Plan* is for Part 13 ("PRC High Density Residential").[7] Based on her erroneous statement, Director Coyle concluded that "the overall development within Part 5 of RZ 86-C-121 as shown on the approved Development Plan is limited to a maximum of 746 dwelling units . . . ." Because there was no maximum residential density depicted on the approved Development Plan for Part 5, this conclusion, of necessity, is erroneous.

On September 14, 2009, the Board considered an appeal from Director Coyle's determination: "Appeal of a Proffer Interpretation for Rezoning Application RZ 86-C-121, Reston Town Center (Hunter Mill District)," an "appeal of a proffer interpretation that determined the available development potential for Part 5 of Rezoning Application RZ 86-C-121." PC 185. A motion to "reaffirm" the interpretation failed, followed by a motion to "reverse the director's proffer interpretation," which carried. PC 185. Thus, Director Coyle's erroneous conclusion, *i.e.*, that "the overall development within Part 5 of RZ 86-C-121 as shown on the approved Development Plan is limited to a maximum of 746 dwelling units," was reversed, and thus nullified, by the Board and is of no force or effect.

After 2009, there were no further efforts to interpret the *Approved Development Plan* for Part 5, until the denial of Plaintiff's Conceptual Plan and PRC Plan by the Board on October 29, 2019.

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[7] On the second page of her letter, Director Coyle repeated her erroneous view, stating: "The Development Plan for Part 5 as approved by the Board of Supervisors sets forth the use and intensity limitations for the 14.92 acre land area." PC 202.

CONCLUSION

The court agrees with Director Byron's determination that the density of residential development for RZ 85-C-088 should be based on the entire land area subject to RZ 85-C-088 because the court believes that her determination was based upon an unarticulated interpretation of Zoning Ordinance § 6-308(3), which requires the calculation of the denominator for calculating the 50 dwelling units per acre is its entire area (or its gross residential area) or, in Director Byron's words, its entire land area.

The court further holds that Director Byron's interpretation in her letter of October 11, 1999 applies equally to RZ 86-C-121 as both RZ 85-C-088 and RZ-C-121 were part of the "Town Center Study Area" in the proffer of February 27, 1987, both RZ 85-C-088 and RZ-C-121 were rezoned to "PRC Town Center," and the "Development Plan" for both RZ 85-C-088 and RZ-C-121 was for "a variety of high density urban housing . . . ." PC 289. Hence, the court concludes that, for the purpose of calculating the residential density of Part 5, the density should be based on the entire land area subject to RZ 86-C-121, *i.e.*, 144.63883 acres. PC 115. As the parties agree that the density is 50 dwelling units per acre, there could be up to 7,232 dwelling units within the land area subject to RZ 86-C-121. In light of the fact that only 2,638 dwelling units have already been built or approved, all available density for Part 5 of the *Approved Development Plan* for RZ 86-C-121 is not exhausted and Plaintiff's proposed 58 dwelling unit building would not exhaust the available density.

Because the Board demurred to all four counts on the ground that, because other parcels of land were approved for high density development, all available density for Part 5 of the *Approved Development Plan* for RZ 86-C-121 was exhausted, or some variation thereof, and the court has concluded that all available density is not exhausted, the court need not, and does not, rule individually on Count II (*Denials Based On Unconstitutional Conditions*), Count III (*Inverse Condemnation*), and Count IV (*Appeal From Disallowance of Claim*) as they each appear to be alternative counts if the denial of the NS Reston Plan was lawful.

For the reasons set forth above, Defendant's Demurrer is OVERRULED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

NS RESTON LLC	)	
	)	
Plaintiff	)	
	)	
v.	)	CL 2019-15831
	)	
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, et al.	)	
	)	
Defendants	)	

ORDER

THIS MATTER came before the court on Defendant's Demurrer to all four counts of the *First Amended Complaint*.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby OVERRULES the Demurrer.

ENTERED this 22nd day of January, 2024.

[redacted]
Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

T. David Stoner
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