

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF SURRY

MICHAEL H. DREWRY,)
)
HELEN C. EGGLESTON,)
)
JOHN A. POND,)
)
and)
)
WILLIE E. RICHARDSON, JR.,)
)
Plaintiffs,)
)
v.)
)
THE TOWN COUNCIL FOR THE)
TOWN OF DENDRON, VIRGINIA,)
)
OLD DOMINION ELECTRIC)
COOPERATIVE,)
)
and)
)
MUSSEL FORK FARM, LLC,)
)
Defendants.)
_____)

CASE NO.: CL10-019

MEMORANDUM OPINION

The parties, by counsel, came before the Court on October 19, 2011, on the Defendants’ joint demurrer to Plaintiffs’ Amended Complaint. Having considered the arguments presented and all applicable law, the Court OVERRULES the demurrer.

I. Summary of Facts

Plaintiffs have filed a declaratory judgment action against the Town Council for the Town of Dendron, Virginia (“Town Council”), Old Dominion Electric Cooperative (“ODEC”), and Mussel Fork Farm, LLC (“Mussel Fork”), claiming that the Town

Council did not provide adequate notice to the public before it adopted amendments to the Town's comprehensive plan and zoning ordinance, and approved ODEC's applications to amend the zoning map and for a conditional use permit.

The public hearing notice at issue, which appeared in the *Sussex-Surry Dispatch* on January 20 and 27, 2010, announced that the Town Council would hold a public hearing in order to receive public comments on proposed amendments to the comprehensive plan and local zoning ordinance, on a rezoning application, and on a conditional use permit application:

PUBLIC NOTICE

**TOWN OF DENDRON
NOTICE IS HEREBY GIVEN THAT THE
TOWN COUNCIL OF THE TOWN OF DENDRON, VIRGINIA**

WILL HOLD A PUBLIC HEARING AT ITS REGULARLY SCHEDULED MEETING ON MONDAY, FEBRUARY 1, 2010 AT 7:30 P.M., AT THE DENDRON VOLUNTEER FIRE DEPARTMENT BUILDING, 3325 ROLFE HIGHWAY, DENDRON, VIRGINIA TO RECEIVE PUBLIC COMMENTS ON THE FOLLOWING APPLICATIONS FOR THE TOWN OF DENDRON, VIRGINIA:

Comprehensive Plan Amendment No. 2009-01: Proposed amendment to the Town of Dendron, Virginia's Comprehensive Plan:

- i. to amend the Goals, Objectives and Policies for Land Use to provide for industrial uses and larger scale commercial uses and to guide the development of commercial and industrial uses;
- ii. to amend the Land Use Plan for areas designated for Commercial and Industrial uses to recommend for development vacant land within the Town's growth area located south and east of Rolfe Highway/S.R. 31 and Railroad Avenue, for a range of uses including industrial and larger scale commercial uses and transportation improvements necessary to support such uses;
- iii. to amend the Land Use Plan for areas currently designated for Conservation to provide for mitigation where limited uses in these areas are permitted; and

iv. to modify the Map of Land Use Plan to change the planned land use designation of vacant land from Agricultural and Open Space to Commercial/Industrial Uses. The property proposed to be redesignated for Commercial/Industrial Uses is a portion of the area bounded by Rolfe Highway/S.R. 31 and Railroad Avenue to the north, the Town's municipal boundary line and Cypress Swamp to the east, and the Blackwater River to the south and southeast, and the Town's municipal boundary line to the west.

Zoning Ordinance Text Amendment No. 2009-01: Proposed Amendment to the Town of Dendron, Virginia's Zoning Ordinance: to modify Article 1, Definitions, to include definitions for "Power Plant" and "Public Utilities"; to add Article(s) to include one or more new zoning districts to allow commercial and industrial uses with regulations for uses permitted by right, uses permitted under conditional use permits including the use of "Power Plant," performance standards, and dimensional restrictions; and to amend Article 11, Amendments, to include provisions to allow conditional zoning, proffered conditions and conditional use permits.

Zoning Map Amendment Application No. 2009-01: Application by Old Dominion Electric Cooperative to rezone, potentially with proffers, property described more particularly below, from Low Density Residential (R-1) and Medium Density Residential (R-2) to one or more new zoning districts (as proposed in Zoning Ordinance Text Amendment 2009-01). The property proposed to be rezoned is a portion of the area bounded by Rolfe Highway/SR. 31 and Railroad Avenue/T-1106 to the north, the Town's municipal boundary line and Cypress Swamp to the east, to the south and southwest by an existing powerline, and by the Town's municipal boundary line to the west. The property consists of parcels and portions of parcels owned by Mussel Fork Farm LLC comprised of Tax Map Parcel 57-35A (portion), currently zoned (R-1); Tax Map Parcel 57-36 (portion), currently zone *[sic]* (R-1) and (R-2); Tax Map Parcel 49A2-5-26, currently zoned (R-2); Tax Map Parcel 57-35 (portion), currently zoned (R-1); and Tax Map Parcel 49-72 (portion) currently zoned (R-1); and a parcel owned by D. Mason, containing 9.8 acres, more or less, located on the south side of Railroad Avenue/T-1106 (west of the intersection of Rolfe Highway/S.R. 31 and Park Avenue/T-1104), known as Tax Map Parcel 49A2-3-59 and currently zoned (R-2).

Conditional Use Permit CUP No. 2009-01: Application by Old Dominion Electric Cooperative to permit commercial and industrial uses, including a power generating plant and its supporting accessory uses as permitted under one or more new zoning districts (as proposed in Zoning Ordinance Text Amendment 2009-01), on property presently zoned Low Density Residential (R-1) and Medium Density Residential (R-2). The proposed Conditional Use Permit includes conditions addressing transportation and traffic management, construction, structures, lighting, landscaping, landfills, project reports and other conditions that are intended to address and mitigate potential impacts of the proposed power

plant. The subject property is a portion of the area bounded by Rolfe Highway/S.R. 31 and Railroad Avenue/T-1106 to the north, the Town's municipal boundary line and Cypress Swamp to the east, to the south and southwest by an existing powerline, and by the Town's municipal boundary line to the west. The subject property is comprised of parcels and portions of parcels owned by Mussel Fork Farm LLC known as Tax Map Parcel 57-35A (portion), Tax Map Parcel 57-36 (portion), Tax Map Parcel 49A2-5-26, Tax Map Parcel 57-35 (portion), and Tax Map Parcel 49-72 (portion); and a parcel owned by D. Mason, containing 9.8 acres, more or less, located on the south side of Railroad Avenue/T-1106 (west of the intersection of Rolfe Highway/S.R. 31 and Park Avenue/T-1104), known as Tax Map Parcel 49A2-3-59 and currently zoned (R-2).

Copies of the applications, including maps illustrating the property proposed to be rezoned and subject to the Conditional Use Permit, are available for review and inspection by the public in the Town of Dendron Municipal Building, 2855 Rolfe Highway, Dendron, Virginia, telephone (757) 267-2508; or in the office of the Department of Planning, Surry County Government Center, 45 School Street, Surry, Virginia. The Department of Planning's office hours are 9:00 a.m. to 4:30 p.m. Monday – Friday, telephone (757) 294-5210 or TDD 711.

If assistance or special accommodations are needed by any person in order for them to participate in the hearing, please contact the Clerk of the Town at least seven days before the hearing.

Yvonne Pierce, Mayor

Thereafter, the Town Council held a public hearing on February 1, 2010, at which the Town Council received numerous comments from the public. At the close of the public comment period, the Town Council voted to approve all four measures.

In their Amended Complaint, Plaintiffs assert that the notice failed to comply with the requirements of Va. Code §§ 15.2-2204(A) and -2285(C), and as a result, they seek an order declaring that the Town Council's vote passed pursuant to the notice is void *ab initio*.

Defendants have filed a joint demurrer to the Amended Complaint, asserting that Plaintiffs failed to state a claim upon which the relief demanded can be granted, and they argue that the case should be decided on the merits at the demurrer stage, since the notice

was adequate as a matter of law. Relying on the Supreme Court's recent holdings in *Glazebrook v. Board of Supervisors*, 266 Va. 550, 587 S.E.2d 589 (2003), and *Gas Mart Corp. v. Board of Supervisors*, 269 Va. 334, 611 S.E.2d 340 (2005), Defendants contend that the notice satisfied each of the elements contained in Code §§ 15.2-2204(A) and -2285(C), and as a result, they seek an order dismissing the Amended Complaint with prejudice.

II. Standard of Review

A demurrer alleges “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.” Va. Code § 8.01-273. “A demurrer admits the truth of all material facts that are properly pleaded. All reasonable factual inferences fairly and justly drawn from the allegations must be considered in aid of the pleading. But a demurrer does not admit the correctness of the pleader's conclusions of law.” *Moore v. Maroney*, 258 Va. 21, 23, 516 S.E.2d 9, 10 (1999).

III. Analysis

1. *Standing*

As an initial matter, the Court addresses the issue of standing. Defendants argue that some or all of the Plaintiffs have failed to allege sufficient legal standing to bring this action.

The Court rejects Defendants' claim, and finds that Plaintiffs do have standing to institute this declaratory judgment proceeding. In order to have standing to bring a claim, a plaintiff must bear some direct effect of the conduct, transaction, or occurrence that is to be the subject of a lawsuit. Here, the subject matter of the lawsuit is whether a local

governing body complied with statutory notice requirements before it voted to approve certain land use applications. Statutory notice serves “to generate informed public participation by providing citizens with information about the context of the proposed amendments and the forum for debate concerning those amendments.” *Glazebrook*, 266 Va. at 555, 587 S.E.2d at 592. “Publication requirements involve substantive rights of the public to be heard on matters affecting constitutionally protected property interests.” *In re Zoning Ordinance Amendments enacted by the Loudoun County Board of Supervisors on January 6, 2003*, 67 Va. Cir. 462 (2005) (Loudoun County) (citations omitted).

As concerned citizen landowners, Plaintiffs have demonstrated a justiciable interest in the adequacy of the public notice, and the Court finds that the Amended Complaint sufficiently alleges Plaintiffs’ standing.

2. *Code § 15.2-2204(A)*

The Court agrees with Defendants that the merits of the case can be decided at the demurrer stage, because the sole issue is whether the advertisement for the public hearing complied with the statutory notice requirements. First, the Court considers whether the notice satisfied Code § 15.2-2204(A), which provides, in pertinent part, as follows:

Plans or ordinances, or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a descriptive summary of the proposed action and a reference to the place or places within the locality where copies of the proposed plans, ordinances or amendments may be examined.

The local planning commission shall not recommend nor the governing body adopt any plan, ordinance or amendment thereof until notice of intention to do so has been published once a week for two successive weeks in some newspaper published or having general circulation in the locality. . . .

“In sum, this statute provides that public hearing notices must contain three specific elements: (1) a descriptive summary of the proposed amendments; (2) a reference to the place within the locality where the proposed amendments may be examined; and (3) notice of the governing body's intention to adopt the proposed amendments.” *Gas Mart*, 269 Va. at 345, 611 S.E.2d at 345.

Plaintiffs’ first point of contention is that the Town Council failed to notice its intention to adopt the proposed amendments, because the notice merely stated that the Town Council would “receive public comments” at the public hearing. Citing *Gas Mart*, Defendants argue that no “magic words” are required to validate a notice, and instead claim that the notice is sufficient so long as someone reading the notice could “reasonably infer” that the Town Council “intended to take some action with respect to the proposed amendments at some point following the receipt of public comment.”

In *Gas Mart*, the public hearing notices stated that the board of supervisors would hold public hearings to “consider” proposed amendments to the local zoning ordinance. The complainants in that case asserted that Code § 15.2-2204(A) required the board to publish notice of its intention to “adopt,” not merely to “consider,” the proposed amendments. The Supreme Court rejected that argument, however, agreeing instead with the trial court, which concluded that

the use of the word “consider”, when read with the remaining provisions of the publication, denotes the same deliberative process as acting upon the proposed amendments. No particular words are required to satisfy the statute. It may be reasonably inferred that the Board intended to take some action as to the proposed amendments and that action would be favorable to the adoption of the amendments.

Id. at 348, 611 S.E.2d at 347.

Here, however, the notice simply stated that the Town Council would “receive public comments” on the four land use applications. That is markedly different from a notice stating an intention to consider the applications. Even when read with the remaining provisions of the notice, the use of the words “receive public comments” in no way denotes a deliberative process similar to acting upon the applications. Moreover, it is not reasonably inferable from a reading of the notice that the Town Council intended to take any further action on the applications at the February 1 meeting beyond receiving public comments, least of all a vote on whether to approve them.

Therefore, the Court finds that the notice published by the Town Council did not satisfy the third element of Code § 15.2-2204(A). By proceeding to a vote on the proposed land use applications after noticing its intent merely to receive public comments, the Town Council acted beyond the authority granted to it by the General Assembly. Consequently, the land use applications approved at the February 1, 2010 meeting are void *ab initio*. See *Glazebrook*, 266 Va. at 554, 587 S.E.2d at 591 (“If the notice published by the Board did not meet the requirements of Code § 15.2-2204, the Board acted outside the authority granted by the General Assembly and the amendments are void *ab initio*.”).

Based on the above ruling, the Court need not address the remaining issues presented in the demurrer, as the notice has already been found insufficient as a matter of law.

CONCLUSION

Because the public hearing notice failed to satisfy the third element of Code § 15.2-2204(A), the Town Council acted outside the authority granted to it by the General

Assmebly when it voted to approve the four land use applications at the February 1, 2010 meeting, and those zoning amendments are void *ab initio*.

Plaintiffs' counsel is directed to prepare and circulate an order consistent with the Court's decision.

11-16-11



Sam Campbell, Judge