VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: APRIL 15, 2015 DECISION OF THE
BOARD OF ZONING APPEALS OF
FAIRFAX COUNTY, VIRGINIA
(BZA Appeal Application A 2012-HM-020)

CASE NO. 201506455

Serve:
RN GOLF MANAGEMENT, LLC
c/o Francis A. McDermott, Esquire
Hunton & Williams LLP
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102

Serve:
THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA
c/o David P. Bobzien, County Attorney
Office of the County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035

PETITION FOR WRIT OF CERTIORARI AND APPEAL

The Petitioners, Michael and Susan Hurley, John and Ruth Ann Pinkman, Arthur and Karen Hass, Elmer and Esin Reinhardt, Richard and Robin Hogan, Julie Bitzer, John and Trudy McCrea, Jay Szlamowicz and Laurie Ironside, Jeffrey and Jennifer Manuszak, and Thomas and Mercedes Barton (collectively, "the Adjacent Landowners"), and the Hunters Green Cluster Association and Golf Course View Cluster Association (collectively, "the Cluster Associations"), by counsel, pursuant to Va. Code § § 15.2-2314, petition this Court for a writ of certiorari to review the April 15, 2015, decision of the Board of Zoning Appeals of Fairfax County, Virginia ("the BZA"), in Appeal Application A 2012-HM-020 ("the Appeal Application"). The Adjacent Landowners and the Cluster Associations collectively will be referred to herein as "the Petitioners."

Introduction

1. This appeal challenges the BZA's April 15, 2015, decision overturning in part the June 20, 2012, zoning information letter of the Fairfax County Zoning Administrator outlining zoning regulations applicable to the Reston National Golf Course ("the golf course property") and what zoning actions that would be required to redevelop the golf course property with residential uses. (Exhibit 1.) The golf course property is owned by RN Golf Management, LLC ("RN Golf"). A map showing the location of the golf course property is attached. (Exhibit 2.) [1]

The Parties

2. Petitioners Michael and Susan Hurley own and reside at the property located at 2176 Golf Course Drive, Reston, Virginia ("the Hurley property"). The Hurley's purchased their townhouse property in June 1986. The Hurley property is adjacent to the golf course property, specifically the portion designated as County tax map parcel number ("TMP") 26-2((5))4.

3. Petitioners John and Ruth Ann Pinkman own and reside at the property located at 2188 Golf Course Drive, Reston, Virginia ("the Pinkman property"). The Pinkmans purchased their townhouse property in October 1992. The Pinkman property is adjacent to the golf course property, specifically TMP 26-2((5))4.

4. Petitioners Arthur and Karen Hass own and reside at the property located at 2120 Golf Course Drive, Reston, Virginia ("the Hass property"). Arthur Hass purchased their townhouse property in October 1973. The Hass property is adjacent to the golf course property, specifically TMP 26-2((5))4.

5. Petitioners Elmer and Esin Reinhardt own and reside at the property located at 11621 Golf Course Square, Reston, Virginia ("the Reinhart property"). The Reinhardts purchased their

[1] All colored numbers, labels and markings on exhibits hereto were added by Petitioners' counsel.

townhouse property in August 2004. The Reinhardt property is adjacent to the golf course property, specifically TMP 26-2((5))4.

6. Petitioners Richard and Robin Hogan own and reside at the property located at 1955 Weybridge Lane, Reston, Virginia ("the Hogan property"). The Hogans purchased their property with its single-family detached house in May 2001. The Hogan property is adjacent to and shares a property line with the golf course property, specifically TMP 26-2((2))8.

7. Petitioner Julie Bitzer owns and resides at the property located at 2020 Peppermint Court, Reston, Virginia ("the Bitzer property"). Ms. Bitzer purchased her property with its single-family detached house in September 1994. The Bitzer property is adjacent to and shares a property line with the golf course property, specifically TMP 26-2((2))8.

8. Petitioners John and Trudy McCrea own and reside at the property located at 11413 Great Meadow Drive, Reston, Virginia ("the McCrea property"). The McCreas purchased their property with its single-family detached house in February 1998. The McCrea property is adjacent to and shares a property line with the golf course property, specifically TMP 26-2((2))8.

9. Petitioners Jay Szlamowicz and Laurie Ironside own and reside at the property located at 1959 Weybridge Lane, Reston, Virginia ("the Szlamowicz-Ironside property"). Mr. Szlamowicz and Ms. Ironside purchased their property with its single-family detached house in May 1994. The Szlamowicz-Ironside property is adjacent to and shares a property line with the golf course property, specifically TMP 26-2((2))8.

10. Petitioners Jeffrey and Jennifer Manuszak own and reside at the property located at 2021 Peppermint Court, Reston, Virginia ("the Manuszak property"). The Manuszaks purchased their property with its single-family detached house in June 2012. The Manuszak property is adjacent to and shares a property line with the golf course property, specifically TMP 26-2((2))8.

11. Petitioners Thomas and Mercedes H. Barton own and reside at the property located at 2162 Glencourse Lane, Reston, Virginia ("the Barton property"). The Bartons purchased their

townhouse property in November 1999. The Barton property is adjacent to the golf course property, specifically TMP 26-2((5))4.

12. All of the Adjacent Landowners purchased their properties with the belief, and in many cases based upon representations, that the golf course property would remain in golf course and open space use only. Each of the Adjacent Landowners bought their respective properties based upon the picturesque and pastoral views from their homes of the golf course and open space settings and of wildlife using and traversing the golf course. All of the Adjacent Landowners bought their respective properties because of the additional privacy of their lots, with no homes or developments behind theirs, and no noise, traffic, and light caused by such uses. Furthermore, all of the Adjacent Landowners paid premium prices for their properties based upon their locations adjacent to the golf course, and they stand as much as 15% of the value of their properties if the golf course property is replaced with uses other than a golf course or open space. Most or all of the Adjacent Landowners also purchased their respective properties with knowledge of and in reliance on the Reston Master Plan and zoning documents showing the adjacent golf course as both intended and approved for golf course and open space uses. Residential development on the golf course property would thus negatively impact the Adjacent Landowners' views, privacy, quality of life, schools and property values. As well, all of the Adjacent Landowner's properties are shown on and controlled by the C-135, C-203 or C-281 development plans. In addition, the Adjacent Landowners are all aggrieved by the BZA's decision, which violates Zoning Ordinance provisions and would allow residential development on the golf course property without the property owner, RN Golf, having to go through all of the applicable and required governmental reviews and approvals.

13. The Hunters Green Cluster Association and the Golf Course View Cluster Association ("the Cluster Associations") own and maintain common open space properties adjacent to the golf course property. These properties include TMP 17-4((11))(1)99 [aka 0174 11010099] (Hunters Green Cluster Association) adjacent to the golf course property, specifically the portion

designated TMP 17-4((11))4A, and 26-1((20))(7B)(B) [aka 0261 207B B] (Golf Course View Cluster Association) adjacent to the golf course property, specifically TMP 26-2((5))4.

14. Cluster associations are homeowners associations for the groups of homes within clusters in the planned community of Reston, Virginia. The purposes of the cluster associations are to own, manage, maintain, improve and beautify cluster common area, to promote the peace, health, comfort, safety and general welfare of the owners and occupants of the cluster, and to collect and disburse assessments and charges for maintaining the cluster common area and operating the association.

15. The Cluster Associations are aggrieved by the BZA's decision because the associations' open space was laid out to be in harmony with the golf course and changes to open space configurations, drainage patterns, plantings and buffering, and safety measures will be needed; use of associations' open space (e.g., playgrounds, trails) will be disrupted during any construction; easements will be closed or blocked due to development, causing damage to adjacent common property and neighborhood unity; the golf course area has been a wildlife habitat and home to several wildlife species such as fox, deer and raccoons and if that area is reduced, wildlife will be squeezed on to the smaller green spaces of the residential cluster properties, causing damage and litter; and dues are paid for maintenance of common property (landscaping, snow plowing, road maintenance/parking areas), so reductions in property values will hurt the associations' ability to raise dues or special assessments, creating a downward spiral in associations' finances. In addition, , the Cluster Associations' properties are shown on and controlled by the C-135, C-203 or C-281 developments plans at issue in this case.

16. Each of the Petitioners owns property adjacent to the golf course property and has a direct, immediate, pecuniary and substantial interest in the BZA's decisions in this matter. As a result of the BZA's decisions, each of the Petitioners will suffer particularized harm to their property rights and be subject to burdens and obligations different from that of the public generally.

17. According to the real estate tax records of Fairfax County, Virginia, RN Golf is the owner of the golf course property. RN Golf filed the Appeal Application with the BZA in this matter. Pursuant to Va. Code § 15.2-2314, RN Golf is a necessary party to this proceeding.

18. The Board of Supervisors of Fairfax County, Virginia ("the Board of Supervisors") is the duly elected governing body of Fairfax County, Virginia, with the power to adopt the Fairfax County Zoning Ordinance ("the Zoning Ordinance") to secure and promote the health, safety, and general welfare of the County and its citizens, and to administer, interpret, and enforce the Zoning Ordinance. *See, e.g.,* Va. Code §§ 15.2-2280, -2283, -2285, -2286. Pursuant to Va. Code § 15.2-2314, the Board of Supervisors is a necessary party to this proceeding.

The Golf Course Property

19. The golf course property is generally situated east of Reston Parkway, south of Sunrise Valley Drive and north of South Lakes Drive in Reston, Virginia. (*See* Exhibit 2.) According to the Appeal Application, the golf course property is 116 acres in size and consists of three Fairfax County tax map parcels: 17-4((11))4A ("Parcel 4A""), 26-2((2))8 ("Parcel 8"), and 26-2((5))4 ("Parcel 4").[2] Addresses for the golf course property include 11875 Sunrise Valley Drive, Reston, Virginia, and 2018 Soapstone Road, Reston, Virginia.

20. The golf course property was zoned to the Residential Planned Community (RPC) zoning district in three separate rezoning actions in 1971. The Board of Supervisors approved rezoning applications C-135 and C-203 on February 17, 1971, and rezoning application C-281 on September 29, 1971.

21. Pursuant to the Zoning Ordinance in effect at the time of all three of the 1971 rezoning approvals ("the 1965 Zoning Ordinance"), *all* RPC zoning applications were required to be

[2] Tax map parcels 26-1((6))96, 26-1((6))97 and 26-2((3))8B are also part of the property comprising the golf course property, but they were not mentioned in the April 20, 2012, letter from RN Golf's attorney to the Zoning Administrator, nor were they identified in the Appeal Application.

"in accordance with the comprehensive plan"[3] and include a "development plan" showing, among other things, "the general location and the types of land uses, [and] the proposed densities of population in residential areas." 1965 Zoning Ordinance §§ 30-2.2.2(A)(last paragraph), -2.2.2(B)(2)(last paragraph). 1965 Zoning Ordinance § 30-2.2.2(E)(6) also stated that "[u]ses in the RPC District shall be permissible *only* in those areas as designated on the development plan." (Emphasis added.); *see also* 1965 Zoning Ordinance § 30-2.2.2(E)(1). 1965 Zoning Ordinance § 30-2.2.2(B)(2) prohibited any significant modifications to a development plan without first going back through the public hearing process before the Planning Commission and the Board of Supervisors "in the same manner as the original application." Thus, the development plans approved in 1971 defined and limited how the rezoned properties could be developed and used.

22. In 1977, the RPC zoning district regulations were amended by ZO Amendment #324, but continued to mandate requirements essentially the same as 1965 Zoning Ordinance § 30-2.2.2.

23. In the current Zoning Ordinance ("the Zoning Ordinance" or "the 1978 Zoning Ordinance"), the PRC (Planned Residential Community) zoning district was adopted to replace the prior RPC district. The PRC district regulations contain virtually the same requirements as did the prior RPC district. Zoning Ordinance § 16-101 states that planned developments "shall substantially conform to the adopted comprehensive plan with respect to the type, character, intensity of use, and public facilities. Planned developments shall not exceed the density or intensity permitted by the adopted comprehensive plan." Zoning Ordinance § 6-301 states that "rezoning to and development under this [PRC] district will be permitted only in accordance with the comprehensive plan and development plan." Section 6-305(2) mandates that "[u]ses in the PRC shall be permitted only in those areas as designated on the approved development plan." Further, § 16-202(9) requires that

[3] Unlike conventional zoning districts in which by-right uses may or may not be in conformance with the adopted Comprehensive Plan, in the RPC (and PRC) districts *all uses* are required to conform with the Comprehensive Plan. *See, e.g.*, 1965 Zoning Ordinance § 30-2.2.2(A)(last paragraph); Zoning Ordinance § 6-301(last paragraph).

"once a development plan has been approved, all subsequent approvals, uses and structures shall be in substantial conformance with the development plan. Should there be cause for amendment to the development plan or any portion thereof, such amendment shall be processed as a new submission."

24. The Reston Master Plan has been incorporated by reference into the Fairfax County Comprehensive Plan. The golf course property is shown on the current Land Use Plan of the Reston Master Plan as "Open Space" and on the current Community Facilities Plan in the Reston Master Plan as "Major Open Space: Parks, Golf Courses, Nature Center." (*See* Exhibits 2A & 2B.) The Reston Master Plan map from 1971 shows the golf course property planned for open space use. (*See* Exhibit 2C.) Thus, from the 1971 to the present, the golf course property has always been intended and designated to be used as open space and golf course uses. Even the most recently proposed draft update to the Reston Master Plan shows the golf course property planned for recreational open space use and "specifically to remain" as a golf course.

25. The Fairfax County Zoning Administrator has all necessary authority to administer, interpret, and enforce the Zoning Ordinance. *See, e.g.,* Va. Code § 15.2-2286; Zoning Ordinance § 37. Cathy Belgin is a Senior Assistant to the Fairfax County Zoning Administrator and wrote the June 20, 2012, zoning information letter which RN Golf appealed to the BZA. The Zoning Administrator and Ms. Belgin are collectively referred to herein as "the Zoning Administrator."

26. At the time the Zoning Administrator issued her June 20, 2012, letter, copies of the actual development plans for the three rezoning approvals had not been located. However, the Zoning Administrator had the C-135, C-203 and C-281 rezoning application files, staff reports, rezoning statements of justification, legal notices, prior zoning information letters, development plan sheets from the Clerk to the Board of Supervisors, and other County zoning documentation to establish that the golf course property had been designated on the respective development plans as authorized for golf course and open space uses.

27. The rezoning applications for C-135, C-203, and C-281 all referenced including golf course and open space uses.

28. Additionally, the legal advertisements for C-135, C-203, and C-281 all referenced golf course and open space use as being proposed by the applications. Va. Code § 15.1-493, as in effect in 1971, mandated that "no land may be zoned to a more intensive use classification than was contained in the public notice without an additional public hearing after notice required by § 15.1-431."[4] Thus, even back in 1971, the Board of Supervisors could not have rezoned these properties with the golf course and open space uses reduced or removed from the development plans in favor of residential uses without additional public advertising and hearings, as to do so would have been to intensify the usage in violation of Va. Code § 15.1-493. No such additional public hearings (or advertisements) ever took place.

29. Statements of justification for the rezoning applications specifically recognized that any residential use was only to occur *outside* the golf course property.

30. Zoning information letters for the golf course property issued in August 2002 and January 2005 recognized that the golf course use was depicted on the development plans.

31. Prior to the BZA's January 21, 2015, hearing on the Appeal Application, copies of the C-135, C-203, and C-281 development plans were located and retrieved from the County's zoning archives. The development plans for C-203 and C-281 have handwritten notations identifying them as "final" versions. The Zoning Administrator certified to the BZA that these were the approved development plans for C-203 and C-281. The development plan located for C-135 included a stamp showing it had been submitted to the County for review and also was certified by the Zoning Administrator.

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[4] Va. Code § 15.2-2285(C) now states that "no land may be zoned to a more intensive use classification than was contained in the public notice without additional public hearing after notice required by § 15.2-2204."

32. The development plans for C-135 and C-203 (approved by the Board of Supervisors on the same day in February 1971) and C-281 all show the golf course property as authorized for "SOUTH GOLF COURSE" and "PERMANENT OPEN SPACE" "GOLF COURSE." (Exhibits 3, 4 & 5, respectively, sheets 2 and 3 of 5.) Other areas on the same three development plans show locations where various residential uses were allowed, but *not* on the golf course portions of the property. For example, on Exhibit 4 (the approved Development Plan for C-203), areas *outside* the golf course property were approved for "61 SINGLE FAMILY LOTS, APPROX. LOT SIZE 10,000-20,000 [sf]" uses at one location, and "120 T.H., PATIO or GARDEN COURT HOUSES" at another location. Similar residential use designations are found on the development plans for C-135 and C-281—but, again, *not* on the golf course property. (*See* Exhibits 2 & 4, sheet 3 of 5.) *None* of the three development plans shows residential uses on the golf course property. RN Golf never produced any development plans to the Zoning Administrator or the BZA, let alone ones showing residential uses allowed on the golf course property.

33. Records of the Clerk to the Board of Supervisors for the three rezoning applications (C-135, C-203, and C-281) contain the first sheet of each of the approved development plans. Each of these first sheets matches the first sheet of each development plan located by the Zoning Administrator for C-135, C-203 and C-281.

34. At the BZA hearing, the BZA did not make findings or conclusions that the development plans presented by the Zoning Administrator were not the approved and controlling development plans for the golf course property.

The Zoning Administrator's Letter and RN Golf's Appeal to the BZA

35. On April 20, 2012, Mark Looney, an attorney for RN Golf, sent a letter to the Fairfax County Zoning Administrator asking for information about, among other things, the golf course property's existing zoning approvals as well as the steps required to redevelop the golf course property with residential uses. No actual plan was submitted to the Zoning Administrator showing

whether or how RN Golf proposed to redevelop the golf course property. Further, there was no zoning or subdivision application pending at the time proposing the redevelopment of the golf course.

36. On June 20, 2012, the Zoning Administrator responded in writing to the April 20, 2012, Looney letter. (Exhibit 6.) In her response letter, the Zoning Administrator confirmed, among other things, that the golf course property was rezoned by the Board of Supervisors to the Residential Planned Community (RPC) zoning district in 1971 pursuant to the three rezoning applications (C-135, C-203, and C-281) and that based upon a review of staff reports, zoning application files, legal notices, and other County zoning records pertaining to the properties, the development plans approved with the applications showed golf course and open space use for the golf course property portion. Her letter further stated that according to applicable Zoning Ordinance provisions, redevelopment of the golf course property for residential use (which would be inconsistent with the approved golf course and open space uses shown in the development plans) would require approval by the Board of Supervisors of an amendment to the Reston Master Plan, which is incorporated by reference into the Fairfax County Comprehensive Plan, as well as the approval of development plan amendments and a PRC plan by the Board of Supervisors.

37. On or about July 20, 2012, RN Golf appealed the Zoning Administrator's June 20, 2012, letter to the BZA.

38. The BZA is a creature of statute authorized to, among other things, hear and decide appeals from decisions of the Zoning Administrator in the administration and enforcement of the Zoning Ordinance. *See* Va. Code § 15.2-2309; Zoning Ordinance § 19-209(1). The BZA is not authorized to amend or disregard provisions of the Fairfax County Zoning Ordinance.

39. A public hearing before the BZA on RN Golf's Appeal Application was originally scheduled for October 24, 2012, but RN Golf requested a deferral of the hearing. After four additional deferrals at RN Golf's request, a public hearing before the BZA on the Appeal Application was set for January 21, 2015.

40. Prior to the BZA hearing, written statements and petitions opposing RN Golf's appeal were submitted to the BZA by the citizens' group Rescue Reston, the Reston Association and members of the public. At the January 21, 2015, public hearing, numerous speakers opposed RN Golf's appeal.

41. At the conclusion of the public hearing, the BZA announced that it would make its determination at its April 15, 2015, meeting. The BZA also expressly requested and allowed additional written information to be filed regarding the appeal up until April 1, 2015. RN Golf, the Zoning Administrator, individual citizens, and citizens groups submitted additional materials to the BZA.

The BZA's Decision

42. On April 15, 2015, the BZA voted to overturn-in-part and to uphold-in-part the Zoning Administrator's June 20, 2012, letter. The statements, motions, decisions, and finding of facts and conclusions of law of the BZA were not clearly stated at the meeting.

43. On April 22, 2015, the Clerk to the BZA issued a decision letter purporting to reflect the BZA's decisions on April 15, 2015. In that letter, the Clerk stated, in pertinent part as to this appeal:

> The Board overturned the Zoning Administrator's determination that a Comprehensive Plan Plan Amendment is a prerequisite for the filing of a development application on the subject property.
>
> The Board also overturned the Zoning Administrator's determination that a Development Plan Amendment would always be required, without prejudice to a later determination on that issue under 16-202, at such time as a specific application is filed.
>
> * * *

> The Board further found that the March 30, 1993 letter from Melinda Artman was a determination that the property was "in the PRC district within an area designated as Residential Uses on an approved preliminary site plan," to confirm the golf course was a permitted use.
>
> The Board's findings of fact and conclusions of law were stated on the record at the April 15, 2015 meeting. If you have questions, please refer to the recording of the meeting, on the Fairfax County website.

(Exhibit 7.)

44. Based upon the BZA's decisions, the Petitioners have filed this action.

Certiorari Review

45. As a threshold matter, at the time of the Zoning Administrator's June 20, 2012, letter, there was no pending application or plan showing any proposed redevelopment of the golf course property. As such, the Zoning Administrator's letter was merely advisory and RN Golf was not aggrieved by the letter. Therefore, RN Golf had no right to file, and the BZA had no jurisdiction to review, the Appeal Application. *See Vulcan Materials Co. v. Bd. of Supervisors,* 248 Va. 18, 24 (1994).

46. Should the Court somehow conclude that the Zoning Administrator's June 20, 2012, letter was nonetheless appealable to the BZA, the April 15, 2015, decisions of the BZA are subject to judicial review as provided in Va. Code § 15.2- 2314, and a writ of certiorari should be granted. This Court is respectfully requested to direct the BZA to return the records of its proceedings to the Court in order to facilitate its review of the BZA's decisions.

47. In rendering its decisions, the BZA applied erroneous principles of law.

48. The BZA's decisions were erroneous, plainly wrong and in violation of the purpose and intent of the Zoning Ordinance.

49. The BZA's decisions effectively and unlawfully rezone a portion of the golf course property to allow possible residential use never approved by the Board of Supervisors, and without the owner's having to go through all of the applicable and required governmental reviews and

approvals. The BZA does not have the legal authority to rezone property or to authorize uses not legislatively approved for the property. The BZA also does not have the authority to allow landowners to skip applicable review and approval processes in the Zoning Ordinance or to decide the legality of applicable Zoning Ordinance provisions.

50. In voting to overturn the Zoning Administrator, the BZA usurped the Board of Supervisor's legislative zoning function.

51. The BZA's record pertaining to the Appeal Application fails to support the BZA's decisions.

52. In its decisions, the BZA overstepped the bounds of its authority by substituting its discretion and judgment for that of the Zoning Administrator, thereby failing to accord the proper weight and presumption of correctness to the Zoning Administrator and her interpretation.

53. The April 22, 2015, letter from the BZA Clerk states that the BZA "overturned the Zoning Administrator's determination that a Comprehensive Plan Amendment is a prerequisite for the filing of a development application on the subject property." (*See* Exhibit 1 at 1.) The Zoning Administrator's June 20, 2012, letter addressed the procedural steps that would be needed pursuant to the Zoning Ordinance to authorize residential use of the golf course property rather than the approved golf course and open space uses, not just any "development application." Thus, the BZA's decision addressed a different question than was the subject of the Appeal Application. Further, it is unclear what the BZA means or meant by the term "development application." Unlike terms such as rezoning application or site plan application, "development application" is not a term of art in a zoning context. To the extent that the BZA's ruling could possibly be considered a determination that no comprehensive plan amendment could ever be required before residential use could be allowed on the golf course property, such a determination would be erroneous and would expressly violate Zoning Ordinance provisions including as §§ 6-301, 16-101(1), 16-201, 16-202, and 16-301 as well as the rezoning approvals and development plans for C-135, C-203, and C-281.

54. Further, at the April 15, 2015, hearing, a BZA member questioned the legality and enforceability of a PRC zoning requirement that uses and developments in that district must comply with the Comprehensive Plan. To the extent that the BZA as a body adopted this position and/or concluded that the BZA could disregard requirements in the Zoning Ordinance, the BZA was plainly wrong and exceeded the scope of its authority.

55. The BZA Clerk's April 22, 2015, letter also states that the BZA "overturned the Zoning Administrator's determination that a Development Plan Amendment would always be required, without prejudice to a later determination on that issue under 16-202, at such time as a specific application is filed." (*See* Exhibit 1 at 1.) This purported decision also was unclear and addressed a different question than was the subject of the Appeal Application. Again, the Zoning Administrator's June 20, 2012, letter addressed the issue raised by RN Golf's attorney in the April 20, 2012, letter: what steps would be needed pursuant to the Zoning Ordinance to authorize residential use of the golf course property. The Zoning Administrator's letter did not determine "what would always be required." Further, it is unclear what is meant by the BZA's statement that its ruling is "without prejudice to a later determination on that issue under 16-202, at such time as a specific application is filed."

56. This decision by the BZA, even with its "without prejudice" language, is erroneous—both factually and legally—to the extent that it means anything other than that the Zoning Administrator and/or the Board of Supervisors can review any future proposal to develop all, or a portion, of the golf course property for any use other than golf course and open space uses and decide whether such a proposed development needs a development plan amendment. The development plans for C-135, C-203 and C-281 clearly depict the golf course property approved only for "SOUTH GOLF COURSE" and 'PERMANENT OPEN SPACE" uses. Pursuant to 1965 Zoning Ordinance § 30-2.2.2(B)(last paragraph) and 1978 Zoning Ordinance § 16-202(9), changing the use of the golf course property to a use such as residential, would be a significant modification

that would increase the density/intensity and require a development plan amendment before such other uses could be authorized.

57. Furthermore, there is no dispute that the Reston Master Plan, incorporated into the County's Comprehensive Plan, has always designated the golf course property for open space and golf course uses. It was erroneous and unreasonable to conclude that in 1971, when the Reston Master Plan called for open space on the golf course property, and the Zoning Ordinance required that any rezoning to and use of PRC-zoned property had to comply with the Comprehensive Plan, the Board of Supervisors would have authorized residential use of the golf course property. The BZA's decision was erroneous in this regard as well.

58. The BZA did not make a finding that the development plans located and submitted by the Zoning Administrator were not the versions approved by the Board of Supervisors in 1971. Despite this, the BZA improperly failed to rely upon the development plans and incorrectly gave no deference to the Zoning Administrator's certification and submission of the development plans.

59. The BZA Clerk's April 22, 2015, letter also states that the BZA found that "the March 30, 1993 letter from Melinda Artman "was a determination that the property was 'in the PRC district within an area designated as Residential Uses on an approved preliminary site plan,' to confirm the golf course was a permitted use." (*See* Exhibit 1 at 1.) This finding is erroneous. The quoted text misstates and takes out of context the actual language in Ms. Artman's letter. Her letter actually states "[a]s you can see by the PRC district regulations a commercial golf course is a permitted use in the PRC district within an area designated as Residential Uses on an approved preliminary site plan."

60. As well, in a statement by Ms. Artman submitted to the BZA in conjunction with Appeal Application, she explained that

> My March 30, 1993 letter is simply a zoning compliance letter confirming that the use of a golf course on the property was legal under its approved PRC rezonings and district regulations. My letter was in no way intended

> to imply that any use other than the golf course use was allowed on the property. Furthermore, in no way was my letter ever intended to imply that development or redevelopment of the golf course property with residential use was allowed without the approval of a Comprehensive Plan amendment and development plan amendments from the Board of Supervisors.

(Exhibit 8.) The BZA erroneously ignored Ms. Artman's clear statement regarding her March 1993 letter to reach a contrary finding.

61. The BZA's finding also is contradicted by two other zoning information letters for the golf course property issued in August 2002 and January 2005. Both stated that "the approved development plan[s] depict a golf course" use of the property. Neither mentioned anything about allowed residential uses. In fact, the January 2005 letter was for RN Golf, the contract purchaser at that time, in response to a November 2004, letter from LeClair Ryan requesting the zoning compliance letter asking for verification that "the current use of the golf course is permitted under the current zoning ordinance." Unlike the August 2002 and January 2005 zoning information letters, Ms. Artman's March 1993 letter makes no reference to the approved rezoning development plans, which are not the same as a "preliminary site plan" mentioned in Artman's letter. The BZA recognized that it was speculating as to whether Ms. Artman even reviewed the development plans when writing her 1993 letter. Upon information and belief, the development plans were stored in the zoning archives at the time of the March 1993 letter.

62. The BZA's interpretation of Ms. Artman's March 1993 letter is also totally undermined by the development plans for C-135, C-203 and C-281, which all depict the golf course property only approved for "SOUTH GOLF COURSE" and "PERMANENT OPEN SPACE."

63. At the April 15, 2015, meeting, a BZA member raised the issue that the March 1993 letter was never appealed. Even assuming *arguendo* that the letter was not simply advisory and properly could have been appealed, *cf. Vulcan See Vulcan Materials Co. v. Bd. of Supervisors,* 248 Va. 18, 24 (1994), the March 1993 letter did not even reach the conclusion for which the BZA

appears to rely upon it. If this statement of a BZA member were somehow considered a finding of fact by the BZA, it too was erroneous.

64. If the March 1993 zoning compliance letter was appealable, so too were the August 2002 and January 2005 zoning compliance letters (including the letter for RN Golf). Neither was appealed and both confirmed that the approved development plans for the golf course property depict golf course use.

65. In the discussion prior to their vote, a few BZA members raised the issue of a deed applicable to Section 44, Block 8 (FxCo DB3597/PG343) and suggested that it somehow helped to show that the golf course property was in actuality approved for residential uses.[5] In a tabulation chart on the plat attached to that deed, for Block 8 it states:

FxCo DB/PG	Parcel	Acreage	Type Density	Type Use	Units Proposed	Persons Proposed	Persons Per Acre
3597/357	Block 8	36.0139	Medium	Rec-Golf Course	[left blank]	[left blank]	[left blank]

66. To the extent that the BZA relied upon this tabulation chart to support any of its findings of fact or conclusions of law contrary to the Zoning Administrator's June 20, 2012, letter, the BZA was erroneous. The chart shows no residential units proposed for Block 8. The "Type Density: Medium" entry is ambiguous at best. To the extent that the entry referred to medium density residential use, the plat entry was clearly a mistake. Block 8 is shown on the approved C-203 development plan as only authorized for "SOUTH GOLF COURSE" and "PERMANENT OPEN SPACE," not medium-density residential use. (*See* Exhibit 3, sheet 3 of 5.) The C-203 development plan has been certified by the Zoning Administrator as being the approved development plan for that rezoning application. The BZA erroneously and improperly disregarded the Zoning Administrator's certification of the development plans.

[5] Block 8 is now designated as TMP 26-2((2))8.

67. Further, as to the 36 acres in Block 8 of Section 44, the approved C-203 development plan shows a total of 257 possible approved residential units, all of them *outside* the golf course property (Block 8). The tabulation chart on the deed's plat reflects the approval of 255 residential units (FxCo DB 3597/PG357), *none* within Block 8.

68. In addition, other deeds applicable to the golf course property properly show that the parcels containing the golf course property were approved for "Open Space" density and "Golf Course" use, with no residential units proposed or allowed:

FxCo DB/PG	Parcel	Acreage	Type Density	Type Use	Units Proposed	Persons Proposed	Persons Per Acre
3596/43	Block 4-A	48.2170	Open Space	Golf Course	[left blank]	[left blank]	[left blank]
3753/204–05	Block 4	81.8827	Open Space	Golf Course	[left blank]	[left blank]	[left blank]

69. Therefore, while the "Density Type" entry on the tabulation chart at DB3597/PG357 may state "Medium," no residential units were proposed or approved in Block 8. This "Medium" entry on the tabulation chart was in error, and any reliance upon it by the BZA to support its decisions was erroneous.

70. Further, nothing in the Code of Virginia or the Zoning Ordinance allows a deed of dedication or a deed of subdivision—the types of deeds relied upon by RN Golf in the Appeal Application—to control the zoning uses of properties. *See Reston Inn and Conference Center Venture v. Bd. of Supervisors*, 28 Vir. Cir. 301 (1992). In the RPC/PRC District, as noted repeatedly above, it is the legislatively-approved development plan that controls such uses. Anything in a deed or its attached plat that conflicts with an approved development plan is ineffectual. *See Foster v. Geller*, 248 Va. 562, 568 (1994); *Hurt v. Caldwell*, 222 Va. 91, 97 (1981).

71. At the April 15, 2015, meeting, a BZA member also commented that based upon the "Density Type: Medium" entry for Block 8 on the tabulation chart at DB3597/PG357, the landowner had a vested right to medium density residential development on Block 8. As a matter of law, no

vested right could exist unless there had been a significant affirmative governmental act approving a specific project, the landowner had relied in good faith on the significant affirmative governmental act, and the landowner incurred extensive obligations or substantial expenditures in diligent pursuit of the significant affirmative governmental act. *See* Va. Code § 15.2-2307. Here, there was never a significant affirmative governmental act approving a specific medium density residential project (the development plans show golf course and open space uses for the golf course property), and the property has been continuously and profitably used as a golf course for over 40 years. Further, the landowner has not relied in good faith on a significant affirmative governmental act for any specific medium density residential use (as none ever took place). In addition, the landowner has not incurred extensive obligations or substantial expenditures in diligent pursuit of the significant affirmative governmental act for medium-density residential development. To the extent that BZA's decisions were based at all upon this ground, they were erroneous as a matter of law and fact.

72. At least one member of the BZA also mentioned a note on certain subdivision or dedication plats recognizing that the golf course property may not be subdivided, built upon, or modified until all steps under 1965 Zoning Ordinance § 30-2.2.2 have been approved by appropriate Fairfax County officials, including approval of a final plat. To the extent that the BZA relied upon that or similar plat notes to support its finding or conclusions, it was erroneous. Any such note would be inconsistent with the development plans and Zoning Ordinance provisions which mandate that only uses shown on the approved development plans are allowed. Only the Board of Supervisors, the "governing body," has the power to allow or change zoning uses. Va. Code § 15.2-2285(C); *Krisnathevin v. Board of Zoning Appeals*, 243 Va. 251 (1992).

73. Further, examining the 1965 Zoning Ordinance in effect in the 1971–74 timeframe, after the approval of a rezoning to the RPC District with its corresponding development plan, the applicant first had to submit "a preliminary plat" to the Director of County Development for review and approval, and then submit "a final plat." 1965 Zoning Ordinance § 30-2.2.2(B)(3). The only

"plan" ever referenced in § 30-2.2.2 is "a development plan." *See, e.g.*, 1965 Zoning Ordinance § 30-2.2.2(B)(2) & (3). Considering the plat note in light of the Zoning Ordinance in effect at the time of the plats' approvals, "amended final plan" meant an amended final development plan. The note is simply a statement reflecting that before the identified area could be subdivided and built upon with a different (non-golf course or open space) use, the change in use had to be reflected on a final amended version of a development plan. Again, to the extent that the BZA relied upon the plan note in any way to support its finding or conclusions, its decision was erroneous.

74. At the April 15, 2015, hearing, at least two members of the BZA suggested in their remarks that neither they, nor the BZA, could consider certain documents and arguments raised after the issuance of the Zoning Administrator's June 20, 2012, letter. Just as one example, the development plans for C-135, C-203 and C-281 were located by the Zoning Administrator and submitted to the BZA *before* the public hearing. The BZA never made any finding that those development plans were not authentic copies. In fact, at least one BZA member mentioned that in the future these same development plans could properly be used by the Zoning Administrator and the County to make decisions on future development proposals. However, the BZA member erroneously stated that because the development plans were not in the Zoning Administrator's possession when her decision letter was issued, the BZA could not consider them and she could not properly rely upon them. The issuance of the June 20, 2012, letter did not "stop the clock" on the Zoning Administrator's, or a citizen's, ability to submit evidence that supported the Zoning Administrator's June 20, 2012, letter. In fact, the BZA itself kept its record open from January 24, 2015, to April 1, 2015, supposedly to allow additional evidence to be submitted. The BZA erred in failing to consider all of the evidence presented to it and in concluding that it could not consider evidence available after June 20, 2102.

75. At the April 15, 2015, BZA meeting, at least one member of the BZA also expressed his opinion that the RPC (now PRC) district only allows five types uses. This position is not

supported by either § 30-2.2.2 of the 1965 Zoning Ordinance or Articles 6 or 16 of the 1978 Zoning Ordinance and is contradicted by what actually is shown on PRC development plans, including those for C-135, C-203 and C-281. To the extent that the BZA made findings of fact and/or conclusions of law relying upon this position, its decisions were erroneous.

76. Finally, the Clerk to the BZA's April 22, 2015, letter (Exhibit 1) states that "findings of fact and conclusions of law were stated on the record at the April 15, 2015 meeting. If you have questions, please refer to the recording of the meeting, on the Fairfax County website." (*See* Exhibit 1 at 2.) As noted above, the discussion of the BZA at its April 15, 2015, meeting was unclear and disjointed. There was no clear or concise motion by the BZA. There was no clear explanation of the bases for the BZA's rulings. And there were no clear findings of fact and conclusions of law made by the BZA, other than the erroneous finding above regarding Ms. Artman's March 30, 1993 letter. No one, including the Petitioners, should be required to watch and listen to a lengthy video, or sift through over 50 pages of a written transcript, to try to determine whether statements made by individual BZA members were even findings of fact or conclusions of law, let alone determine whether they were the findings of fact or conclusions of law of the entire BZA as a body. The Petitioners have attempted to incorporate any possible erroneous findings and conclusions from the BZA's April 15, 2015, decisions, but hereby incorporate by reference any others identified by other petitioners.

77. At a minimum, a preponderance of the evidence will support the Petitioners' position that the BZA's decisions were erroneous.

Requested Relief

WHEREFORE the Petitioners respectfully request that the Court:

A. Issue a writ of certiorari to be served upon the BZA requiring that, within 30 days, the BZA make a verified return consisting of the originals or certified copies of all papers and other materials contained in the BZA's records pertaining to the foregoing matter, including any

recordings and accurate transcripts of the BZA proceedings on January 21, 2015, and April 15, 2015, and any other dates that the BZA addressed the Appeal Application. A Writ of Certiorari is attached hereto.

B. Schedule a hearing on this matter, at which testimony and evidence should be received to ensure the proper disposition of this matter.

C. Limit the BZA to its decisions, findings and conclusions stated in its April 22, 2015, letter (Exhibit 1).

D. Reverse the decisions of the BZA not to uphold the Zoning Administrator's June 20, 2012, letter.

E. Rule that the C-135, C-203 and C-281 development plans submitted by the Zoning Administrator control the use and development of the golf course property.

F. Grant the Petitioners such other and further relief as the Court may deem appropriate.

Respectfully submitted,

MICHAEL AND SUSAN HURLEY, JOHN AND RUTH ANN PINKMAN, EDWARD AND KAREN HAAS, ELMER AND ESIN REINHART, RICHARD AND ROBIN HOGAN, JULIE BITZER, JOHN AND TRUDY MCCREA, JAY SZLAMOWICZ AND LAURA IRONSIDE, JEFFREY AND JENNIFER MANUSZAK, THOMAS AND MERCEDES BARTON, HUNTERS GREEN CLUSTER ASSOCIATION AND GOLF COURSE VIEW CLUSTER ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May 2015, a copy of this document was mailed, first class postage prepaid, to:

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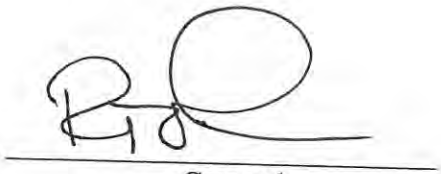


Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: APRIL 15, 2015 DECISION OF THE
BOARD OF ZONING APPEALS OF
FAIRFAX COUNTY, VIRGINIA
(BZA Appeal Application A 2012-HM-020)

CASE NO. _____

WRIT OF CERTIORARI

TO: BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, VIRGINIA

UPON PRESENTATION of a Petition for Writ of Certiorari and Appeal ("the Petition") by Petitioners, Michael and Susan Hurley, John and Ruth Ann Pinkman, Arthur and Karen Hass, Elmer and Esin Reinhardt, Richard and Robin Hogan, Julie Bitzer, John and Trudy McCrea, Jay Szlamowicz and Laurie Ironside, Jeffrey and Jennifer Manuszak, Thomas and Mercedes Barton, the Hunters Green Cluster Association, and the Golf Course View Cluster Association, pursuant to Va. Code § 15.2-2314, challenging the April 15, 2015, decision of the Board of Zoning Appeals of Fairfax County, Virginia ("the BZA") in Appeal Application A 2012-HM-020 regarding the property located at County tax map parcels 17-4((11))4A, 26-2((2))8, and 26-2((5))4, with addresses of 11875 Sunrise Valley Drive, Reston, Virginia, and 2018 Soapstone Road, Reston, Virginia;

IT APPEARING TO THE COURT that papers and other records from the BZA's proceedings in Appeal Application A 2012-HM-020 ("the Appeal Application") are relevant and intrinsically related to the BZA's April 15, 2015 decision and the Petition field herein; and

IT APPEARING TO THE COURT that the Court should issue a writ of certiorari to the BZA as provided for in Va. Code § 15.2-2314; now, therefore

IT IS ORDERED that within 30 days of service of this Writ of Certiorari, the BZA shall make a verified return to this Court and also to serve it on the undersigned Petitioners and counsel. The verified return shall consist of certified or sworn copies of the papers constituting the full and complete record of the BZA's proceedings regarding the Appeal Application ("the proceedings"), including but not limited to the following:

1. The Appeal Application, including all supporting documents and exhibits filed with the application.

2. The minutes of any hearings or meetings in any and all of the proceedings.

3. Any audio or video recordings of any and all of the proceedings.

4. Verbatim transcripts of any and all of the proceedings.

5. Any staff report(s), memoranda, correspondence, or other documents to or from the BZA, the Zoning Administrator or other County staff regarding the Appeal Application or the proceedings.

6. Any written submissions, reports, correspondence, or other documents from other persons or entities to the BZA, the Zoning Administrator or County staff regarding the Appeal Application or the proceedings.

7. All photographs, resolution letters, reports, plats, correspondence, electronic mail, exhibits and other documents or things filed before, during and after the proceedings.

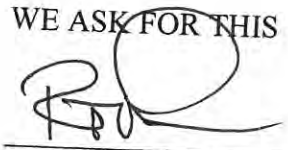
8. A verified statement of such other facts as may be pertinent and material to show the grounds of the BZA's decision.

THIS CAUSE IS CONTINUED.

ENTERED this _____ day of _____ 2015.

_____
JUDGE
FAIRFAX COUNTY CIRCUIT COURT

WE ASK FOR THIS



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