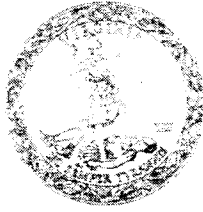


# Commonwealth of Virginia

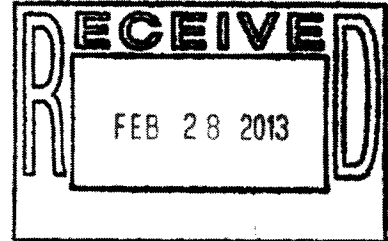
W. Revell Lewis III  
Resident Judge

Accomack County  
Northampton County



Second Judicial Circuit

Court Green  
Post Office Box 126  
23312 Courthouse Rd.  
Accomac, Virginia 23301  
(757) 787-5783



February 27, 2013

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Re: Old School Cape Charles, LLC, et al  
v, Cape Charles Town Council, et al  
Northampton Circuit Court  
Case No.: CL12-184

Dear Counsel:

In this action, plaintiffs filed an appeal and complaint for declaratory and injunctive relief challenging two specific actions of the Cape Charles Town Council ("Council"). The first action was taken by the Council on June 14, 2012,

Kevin E. Martingayle, Esq.  
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as Ordinance 20120614 which, among other things, authorized the Mayor to execute the sale of the former Cape Charles School Property ("Property") to Echelon Resources, Inc. ("Echelon"), in accordance with the terms of the sale and purchase contract attached to the Ordinance, which action was passed unanimously by the Council. The second action was taken by the Council on June 28, 2012, as Resolution 20120628 resolving that the issue of amending the zoning map to rezone the Property from Open Space to R-1 be referred to the Planning Commission for appropriate recommendation following a public hearing and for it to make a recommendation as to a proposed conditional use permit relative to the Property.

Council and Echelon have filed demurrers, and the parties have filed memorandums in support of and opposed to the demurrers, all of which have been reviewed by the Court, and a hearing was held thereon on January 25, 2013. The Court has reviewed and considered the pleadings filed herein, and the exhibits attached thereto and considers as true all material facts that are properly pled, facts which are impliedly alleged and facts which may be fairly and justly inferred from the facts alleged.

Plaintiffs recite in their pleading that this matter is filed pursuant to Va. Code Ann. §15.2-2100, 2106 and 2285 and other applicable provisions of law. The only provision of the cited statutes that authorizes an action contesting a decision of a local governing body is Va. Code Ann. §15.2-2285(F), and this provision is only applicable to decisions of a local governing body relative to zoning ordinances and special use permits, neither of which is an issue in this action.

Va. Code Ann. §15.2-1800 authorizes Council to sell real estate owned by the Town of Cape Charles provided that no such real property shall be sold or disposed of until Council has held a public hearing concerning such sale or disposal. Such sale or disposition is subject to applicable requirements of Article VII, Section 9 of the Constitution of Virginia, which provide that any such sale shall be by an ordinance or resolution passed by a recorded affirmative vote of three-fourths of all members elected to the governing body. This statute contains

Kevin E. Martingayle, Esq.  
Michael S. Sterling, Esq.  
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no provision authorizing an action contesting a decision of a local governing body to sell or dispose of its real estate or an appeal thereof to this Court. Ordinance 20120614 was passed by all members elected to Council after a public hearing as evidenced by the exhibits attached to Plaintiffs' Complaint.

Va. Code Ann. §15.2-2285(B) provides that no zoning ordinance shall be amended unless the governing body has referred the proposed amendment to the local planning commission for its recommendations. There is no provision in this statute or any other statute for the appeal of such a referral to this Court.

The recent Virginia Supreme Court opinion in the cases of Charlottesville Area Fitness Club Operators Association, et al v. Albemarle County Board of Supervisors, et al, record No. 110741 and Charlottesville Area Fitness Club Operators Association, et al v. Charlottesville City Council, et al, addresses issues associated with Declaratory Judgment actions challenging decisions made by local governing bodies. In this opinion, the Supreme Court, citing previous decisions, reaffirmed that Va. Code Ann. §8.01-184 (the Declaratory Judgment statute) may not be used to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized. The Court further reaffirmed previous decisions that the Declaratory Judgment statute does not create or alter any substantive rights or bring any other additional rights into being, and the intention of the statute is not to give parties greater rights than those which they previously possessed but to permit the declaration of those rights before they mature.

In this matter, there is no statutory authority for Plaintiffs' challenges to Council's actions. Consequently, such challenges are not appropriate actions for declaratory judgment relief because to do so would give the Plaintiffs greater rights than they previously possessed. In consideration whereof, the demurrers are sustained, and this matter is dismissed with prejudice.

On February 20, 2013, Plaintiffs filed a Motion for Leave to Amend and Add a Party Defendant in this matter. The motion is denied.

Kevin E. Martingayle, Esq.  
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February 27, 2013

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Mr. Sterling will prepare an order, circulate it for endorsement by counsel and forward it to the Court for entry.

Very truly yours,

A handwritten signature in cursive script, appearing to read "W. Revell Lewis, III".

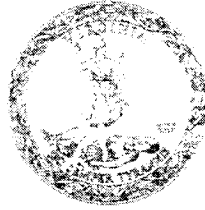
W. REVELL LEWIS, III, JUDGE

WRL,III/nh

# Commonwealth of Virginia

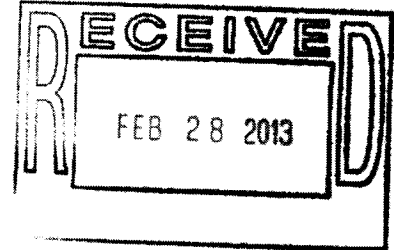
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Re: Old School Cape Charles, LLC, et als  
v. Cape Charles Town Council, et als  
Northampton Circuit Court  
Case No.: CL12-239

Dear Counsel:

In this action, plaintiffs filed an appeal and complaint for declaratory and injunctive relief challenging two specific actions of the Cape Charles Town Council ("Council") on August 23, 2012. The first such action is ordinance No. 20120823, a zoning map amendment, and the second action is ordinance No.

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20120823A, granting a conditional use permit. Copies of these ordinances are attached to the Complaint as Exhibits B and C. The property that is the subject of the said ordinances is the former Cape Charles School Property ("Property"), as more specifically described in the complaint and the exhibits attached thereto.

Each of the Defendants filed a Plea in Bar, Demurrer, and Motion Craving Oyer. The parties have filed memorandums in support of and opposed to the responsive pleadings, all of which have been reviewed by the Court, and a hearing was held on January 25, 2013. The Court considered as true all material facts properly pled, facts implicitly alleged and facts which may be fairly and justly inferred from the facts alleged.

The Plaintiffs in this matter are Old School Cape Charles, LLC ("OSCC"), Wayne Preston Creed ("Creed"), Laura Hickman McSpedden ("McSpedden") and John L. ("Jack") Hickman ("Hickman"). OSCC alleges it has a stated interest in protecting and preserving the Property, that it previously submitted two proposals to rehabilitate and use the Property as a community center and that neither proposal received any meaningful consideration by the Town or Council. Creed resides in close proximity to the Property and has objected to the ordinances. McSpedden and Hickman own property across the street from the Property and are considered adjacent property owners. They claim they did not receive proper notification of the August 23, 2012, public hearing or special meeting and that they also object to the ordinances.

Plaintiffs allege that Council's actions in passing the ordinances were legally and constitutionally defective because: There was improper notice; application documents were defective and incomplete; the ordinances violate zoning requirements and the Town's Comprehensive Plan; the votes for the ordinances constitute unlawful "contract zoning"; the votes were arbitrary and capricious; the votes are the product of a contract resulting from agreements to discriminate based on socio-economic considerations, which unlawfully constitutes intentional economic discrimination and has a disproportionate input on racial and ethnic minorities; and the procedures and votes violate equal protection and due process

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and do not meet the “fairly debatable” standard. The relief requested by Plaintiffs is that the Court find and declare that the ordinances are unlawful, invalid, void, and violative of legal and Constitutional rights, and that any further actions taken in furtherance of the subject ordinances are unlawful, invalid, void, and legal prohibited.

Plaintiffs’ Complaint makes specific reference to the Town of Cape Charles Comprehensive Plan and actions of the Historic Review Board. The 2011 Real Estate Tax Assessment records and the August 23, 2012, public hearing and special meeting minutes are implicit in allegations made by Plaintiffs. Therefore, the Defendants’ Motions Craving Oyer are granted as to the following documents:

1. Town of Cape Charles 2011 Real Estate Tax Assessment Records
2. Town of Cape Charles Comprehensive Plan
3. Council’s August 23, 2012, Public Hearing and Special Meeting Minutes
4. Historic District Review Board July 17, 2012, meeting minutes

The Defendants’ Pleas in Bar raise the issue of Plaintiffs’ standing in this declaratory judgment proceeding . In the recent case of Deerfield v. City of Hampton, 283 Va. 759 (2012), the Virginia Supreme Court revisited standing issues in declaratory judgment proceedings. The Court indicates that under well-settled principles, “[a] plaintiff has standing to institute a declaratory judgment proceeding if it has a ‘justiciable interest’ in the subject matter of the proceeding, either in its own right or in a representative capacity.” W. S. Carnes, Inc., et al v. Board of Supervisors of Chesterfield County, et al, 252 Va. 377,383, 478 S.E.2d 295,299 (1996). (citing additional authority) To establish such an interest at the pleading stage, the plaintiff must allege facts “demonstrat[ing] an actual controversy between the plaintiff and the defendant, such that [plaintiff’s] rights will be affected by the outcome of the case.” *Id.* (citing Code §8.01-184; Cupp v. Board of Supervisors, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984)). Thus, when the complaint is challenged by a demurrer raising the issue of standing, a plaintiff has no legal standing to proceed in the case if its factual allegations fail to show

that it actually has a “substantial legal right” to assert. Kuznicki v. Mason, 273 Va. 166, 171, 639 S.E.2d 310 (2007) (quoting Cupp, 227 Va. At 589, 318 S.E.2d at 411).

The recent Virginia Supreme Court opinion in the cases of Charlottesville Area Fitness Club Operators Association, et al v. Albemarle County Board of Supervisors, et al, record No. 110741 and Charlottesville Area Fitness Club Operators Association, et al v. Charlottesville City Council, et al, addresses issues associated with Declaratory Judgment actions challenging decisions made by local governing bodies. In this opinion, the Supreme Court, citing previous decisions, reaffirmed that Va. Code Ann. §8.01-184 (the Declaratory Judgment statute) may not be used to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized. The Court further reaffirmed previous decisions that the Declaratory Judgment statute does not create or alter any substantive rights or bring any other additional rights into being, and the intention of the statute is not to give parties greater rights than those which they previously possessed but to permit the declaration of those rights before they mature.

Council’s actions that are the subject of this proceeding were legislative actions, and none of the Plaintiffs is an owner of the Property, nor possesses any contract interest or any other legal interest in the Property. Plaintiffs, Creed, McSpedden and Hickman assert that they objected to Council’s actions but allege no legal rights that would be affected by the outcome of this case. OSCC alleges that Council failed to give its proposals for the preservation and use of the Property meaningful consideration but alleges no legal rights that would be affected by the outcome of this case. The Plaintiffs do not have a stake in the alleged controversy. Such objections and disagreements do not constitute an actual controversy as contemplated by the declaratory judgment statutes, and therefore, there is no justiciable interest. Consequently, the Plaintiffs do not have legal standing to pursue their claims against the Defendants, and the Pleas in Bar are sustained, and this matter is dismissed with prejudice.



Kevin E. Martingayle, Esq.  
John A. Conrad, Esq.  
Collin J. Hite, Esq.  
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The Court will ask Mr. Conrad to prepare an appropriate order reflecting this ruling, circulate for endorsement and present to the Court for entry.

Very truly yours,

A handwritten signature in black ink, appearing to read "W. Revell Lewis, III". The signature is written in a cursive, flowing style.

W. REVELL LEWIS, III, JUDGE

WRL,III/nh