VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

3221 COLVIN STREET PARTNERSHIP, LLC, *et al.*,	:	
Plaintiffs,	:	**Case No.: CL19001869**
v.	:	
CITY OF ALEXANDRIA, *et al.*,	:	
Defendants.	:	

MOTION TO DISMISS BY RESPONDENTS CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

Defendants City of Alexandria and City Council of the City of Alexandria (collectively "Defendants"), by and through undersigned counsel, and pursuant to Rule 4:15 of the Rules of Supreme Court of Virginia, respectfully move this Court to dismiss the Complaint filed by Plaintiffs[1] in the above-captioned matter for lack of standing, and state as follows:

The Complaint fails to allege harms that are sufficiently particularized as to confer standing on Plaintiffs. Indeed, Virginia courts routinely dismiss complaints challenging land use decisions for lack of standing where, as here, the plaintiffs only allege generalized harms that would also be shared by the general public. *See, e.g., Friends of the Rappahannock v. Caroline County Bd. of Supervisors,* 286 Va. 38 (2013).

[1] The plaintiffs in this action are 3221 Colvin Street Partnership, LLC, McClelland Press, Incorporated, National Capital Flag Company, Incorporated, Simply Doors & Closets, LLC, Fabulous Interior Designs, LLC, Wholesome Baked, LLC, Eugene Stein, Thomas Hohenthaner, Diann Hohenthaner, Mary Ann Hollis, and WBC Alexandria, LLC.

BRIEF IN SUPPORT OF MOTION TO DISMISS

Pursuant to Rule 4:15 of the Rules of Supreme Court of Virginia, Defendants will file a memorandum of law in support of this Motion to Dismiss at least fourteen (14) days prior to the hearing to be scheduled for this Motion to Dismiss.

CONCLUSION

WHEREFORE, Defendants City of Alexandria and City Council of the City of Alexandria respectfully request that the Court grant their Motion to Dismiss and dismiss the Complaint filed in the above-captioned action with prejudice.

Dated: May 20, 2019

Respectfully submitted,

CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

By Counsel,

Amy Miller (VA Bar No. 70698)
Martin J. Amundson (VA Bar No. 86735)
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Counsel for Defendants City of Alexandria and City Council of the City of Alexandria

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May, 2019, a true and correct copy of the foregoing was served via First-Class U.S. Mail and email upon:

Elizabeth M. Seltzer
DRISCOLL & SELTZER, PLLC
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Counsel for Plaintiffs

Martin J. Amundson

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MOTION CRAVING OYER OF DEFENDANTS CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

Defendants City of Alexandria and City Council of the City of Alexandria (collectively "Defendants"), by and through undersigned counsel, and pursuant to Rule 4:15 of the Rules of Supreme Court of Virginia, hereby submit this Motion Craving Oyer to the Complaint filed by Plaintiffs[1] in the above-captioned matter, and state as follows:

1. The Complaint relies upon, and repeatedly references, the contents of the legislative record regarding the City Council's approval of Special Use Permit No. 2018-0117 ("Application"), which is the subject of this lawsuit. Despite Plaintiffs' reliance on these documents, Plaintiffs did not attach the documents nor otherwise make the documents a part of the Complaint.

2. Because the City Council's decision to approve the Application is a land use decision, the Court must consider the record the City Council had before it when it voted on the

[1] The plaintiffs in this action are 3221 Colvin Street Partnership, LLC, McClelland Press, Incorporated, National Capital Flag Company, Incorporated, Simply Doors & Closets, LLC, Fabulous Interior Designs, LLC, Wholesome Baked, LLC, Eugene Stein, Thomas Hohenthaner, Diann Hohenthaner, Mary Ann Hollis, and WBC Alexandria, LLC.

Application, as well as the processes and procedures the City Council followed in making its decision to approve the Application. *See, e.g., EMAC, LLC v. County of Hanover,* 291 Va. 13 (2016); *Alexandria Coalition of Responsible Stewardship, et al. v. City of Alexandria, et al.*, No. CL18001681 (Alex. Cir. Ct. Mar. 19, 2018); *Hardaway v. City Council,* No. CL16001064 (Alex. Cir. Ct. Apr. 29, 2016); *Peck v. City Council,* 2012 WL 6554148, at *1 (Alex. Cir. Ct. Sept. 4, 2012); *Resk v. Roanoke Cty.,* 73 Va. Cir. 272 (Roanoke Cir. Ct. 2007).

BRIEF IN SUPPORT OF MOTION CRAVING OYER

Pursuant to Rule 4:15 of the Rules of Supreme Court of Virginia, Defendants will file a memorandum of law in support of this Motion Craving Oyer at least fourteen (14) days prior to the hearing to be scheduled for this Motion Craving Oyer.

CONCLUSION

WHEREFORE, Defendants City of Alexandria and City Council of the City of Alexandria respectfully requests that its Motion Craving Oyer be sustained to the documents identified in its forthcoming memorandum of law.

Dated: May 20, 2019

Respectfully submitted,

CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

By Counsel,

[redacted]

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Counsel for Defendants City of Alexandria and City Council of the City of Alexandria

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Counsel for Plaintiffs

Martin J. Amundson

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Defendants.	:	

DEMURRER OF DEFENDANTS CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

Defendants City of Alexandria and City Council of the City of Alexandria (collectively "Defendants"), by and through undersigned counsel, and pursuant to Va. Code Ann. § 8.01-273 and Rule 4:15 of the Rules of Supreme Court of Virginia, hereby submit this Demurrer to the Complaint filed by Plaintiffs[1] in the above-captioned action. Plaintiffs have failed to state a viable cause of action in their Complaint, and this Court should sustain Defendants' Demurrer without leave to amend for the following reasons:

GROUNDS FOR DEMURRER

In their Complaint, Plaintiffs seek a declaration that: (1) the City Council's decision to approve Special Use Permit No. 2018-0117 ("Application") submitted by "DC Poultry Market Corporation/Abdulsalem Mused" (the "Applicant") was unreasonable, arbitrary, capricious, an abuse of power, and *ultra vires* (Count I); (2) the approval of the Application deprived Plaintiffs

[1] The plaintiffs in this action are 3221 Colvin Street Partnership, LLC, McClelland Press, Incorporated, National Capital Flag Company, Incorporated, Simply Doors & Closets, LLC, Fabulous Interior Designs, LLC, Wholesome Baked, LLC, Eugene Stein, Thomas Hohenthaner, Diann Hohenthaner, Mary Ann Hollis, and WBC Alexandria, LLC.

of their procedural rights and property interests without due process (Count II); (3) the approval of the Application denied Plaintiffs equal protection of the laws (Count III); and (4) the approval of the Application constituted illegal spot zoning (Count IV). Plaintiffs further allege that they are entitled to compensatory damages under Va. Code § 15.2-2208.1 for "any losses" that arise from the approval of the Application, including recovery of attorneys' fees and costs (Count V). Each of these arguments fails to state a claim for which relief may be granted.

First, as to Count I, the City Council's legislative acts, such as approval of the Application, are presumed to be valid and reasonable. *See City Council v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 14 (1996). If a plaintiff introduces facts challenging the presumed validity of a legislative act, the Court must uphold the legislative act so long as there are other facts that make the reasonableness of the act "fairly debatable." *City Council of Virginia Beach v. Harrell,* 236 Va. 99, 101-02 (1988).

Here, Plaintiffs allege, *inter alia*, that the decision to approve the Application was arbitrary, capricious, *ultra vires*, and an abuse of power because the master plan was allegedly outdated, the Application contained various deficiencies, and slaughterhouses are considered an "offensive use."[2] However, the legislative record and/or other publicly available materials conclusively establishes that the master plan was appropriately reviewed and updated, that the Application was complete, and that the City Council took steps to ensure that the approval of the Application would (1) not adversely affect the health or safety of persons residing or living in the surrounding neighborhood, (2) not be detrimental to the public welfare or injurious to the property or improvements in the neighborhood, and (3) substantially conform to the master plan, which was appropriately reviewed and updated. Further, while Plaintiffs note that the City

[2] Plaintiffs also allege that the City Council misapplied the Religious Land Use and Institutionalized Persons Act (the "Act"), 42 U.S.C. § 2000cc-5(7)(B). Whether the Act was erroneously considered or misapplied presents a pure question of law, which may properly be resolved on demurrer.

Charter suggests that slaughterhouses may be considered "offensive business uses," Plaintiffs have not identified any authority that prohibits the establishment of a butchery with live poultry.

Second, as to Count II, Plaintiffs' argument that they were denied due process of law fails because the legislative record is replete with evidence that conclusively refutes the allegations of bias against Plaintiffs, as well as the alleged "unduly favorable treatment" conferred on the Applicant for religious reasons or otherwise. Further, Plaintiffs cannot establish they did not receive proper notice concerning the nature of the Applicant's business. To the contrary, proper written notice was sent to all required parties, and Plaintiffs had more than sufficient opportunity to express their objections to the Application. In addition, the posted placards were not deficient in any way.

Third, as to Count III, Plaintiffs cannot establish that they were denied equal protection of the laws because the legislative record negates any suggestion of disparate treatment and establishes that a rational basis existed for the City Council's decision to approve the application. Indeed, the legislative record contains sufficient facts to make the City Council's approval of the Application fairly debatable. In any event, the legislative record makes clear that Plaintiffs and the Applicant were not similarly situated as to necessitate equal treatment by the City Council.

Fourth, as to Count IV, Plaintiffs' claim that the City Council's decision to approve the Application constituted illegal spot zoning fails as a matter of law because they have not adequately pleaded that the legislative purpose of approving the Application was solely to serve the private interests of a few landowners. Further, Plaintiffs' spot zoning claim also fails because the property that is the subject of this action was not rezoned; rather, the City Council simply approved a special use permit.

Lastly, as to Count V, Plaintiffs are not entitled to compensatory damages under Section 15.2-2208.1 of the Virginia Code. Section 15.2-2208.1 provides that "any ***applicant*** aggrieved by the grant or denial by a locality of any. . .special use permit. . .shall be entitled to an award of compensatory damages. . .and may be entitled to reasonable attorney fees and court costs." Va. Code Ann. § 15.2-2208.1 (emphasis added). As Plaintiffs are not the applicants of the special use permit, Section 15.2-2208.1 does not apply to them. Accordingly, they are not entitled to any compensatory damages.

BRIEF IN SUPPORT OF DEMURRER

Pursuant to Rule 4:15 of the Rules of Supreme Court of Virginia, Defendants will file a memorandum of law in support of this Demurrer at least fourteen (14) days prior to the hearing to be scheduled for this Demurrer.

CONCLUSION

WHEREFORE, Defendants City of Alexandria and City Council of the City of Alexandria respectfully request that the Court sustain their Demurrer and dismiss the Complaint filed in the above-captioned action with prejudice.

Dated: May 20, 2019

Respectfully submitted,

CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

By Counsel,

[redacted]

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