

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED  
COUNTY SERVICES  
2019 AUG 14 3:28  
JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA  
Civil Action No.: 2019-9712

SUNRISE DEVELOPMENT, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
TOWN COUNCIL OF THE )  
TOWN OF VIENNA, VIRGINIA, )  
 )  
Defendant. )

**MOTION CRAVING OYER AND DEMURRER**

COMES NOW defendant, Town Council of the Town of Vienna, Virginia ("Council"), by counsel, and files its Motion Craving Oyer and Demurrer to the Complaint filed herein and, in support states as follows:

**MOTION CRAVING OYER**

1. Plaintiff, Sunrise Development, Inc. ("Sunrise"), has initiated this land use case to challenge the Council's June 17, 2019 decision denying Sunrise's rezoning application, conditional use permit, and modification request ("Rezoning Application").
2. Sunrise contends that Council's denial of its Rezoning Application was discriminatory, arbitrary and capricious, violated Town Code section 18.2-249 and the Virginia Fair Housing Law.
3. In order to evaluate Sunrise's claims, the court necessarily must review and evaluate the legislative record which Council considered, said record being central to the

claims brought by Sunrise.

4. In the context of land use cases, it is common for the court to grant oyer and mandate that appellant/plaintiff file the legislative record so that it may be made part of the pleadings. *See, e.g., Resk v. Roanoke County*, 73 Va. Cir. 272 (Cir. Ct. 2007).

5. This is because, unlike most civil actions, land use challenges to a governing body's legislative decisions can be – and are – often decided on demurrer. *Eagle Harbor, L.L.C. v. Isle of Wright City*, 271 Va. 603 (2006); *EMAC, L.L.C. v. Cnty. of Hanover*, 291 Va. 13 (2016); *Resk v. Roanoke Cnty*, 73 Va. Cir. 272 (Va. Cir. Ct. 2007); *I. G. S., LLC v. Bd. of Sup'vrs of Fairfax Cnty*, Case No. CL2017-00197 (Va. Cir. Ct., Sep. 8, 2017).

6. Council, therefore, requests that the court grant its motion craving oyer and require Sunrise to file the complete legislative record in this matter with the court which may include, among other things:

- A. Conditional Use Permit Application;
- B. MAC Rezoning Application and checklist;
- C. Rezoning Affidavit;
- D. Audio from Town Council, Planning Commission, Board of Architectural Review, Board of Zoning Appeals' work sessions, meetings and hearings;
- E. Minutes from Town Council, Planning Commission, Board of Architectural Review, Board of Zoning Appeals' work sessions, meetings and hearings;
- F. Proffers;

G. Staff Reports and Attachments from public meetings, hearings, and work sessions of Town Council, Planning Commission, Board of Architectural Review, Board of Zoning Appeals;

H. Staff reviews of submitted plans;

I. Transportation studies and parking assessments;

J. Internal memoranda from Town employees regarding the Rezoning Application;

K. Public correspondence or emails regarding the Rezoning Application;

L. Plans related to the Rezoning Application;

M. Presentations by Town staff related to the Rezoning Application;

N. Documents denying the Rezoning Application; and

O. Such other records as may constitute the legislative record in this case, if any.

### **DEMURRER**

1. The Complaint fails to state a claim upon which relief can be granted as Sunrise fails to allege facts, as opposed to conclusions which are not supported by the record, which establish that Council's decision to deny the Rezoning Application was arbitrary, capricious, or unreasonable.

2. The Complaint further fails to state a claim for which relief can be granted to the extent that it alleges that Council's decision was arbitrary and capricious. Denial of the Rezoning Application was a legislative action, review of which is subject to the "fairly

debatable” standard. An issue is "fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Bd. of Supervisors v. Williams*, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975). The Complaint does not allege sufficient facts on its face to overcome the fairly debatable standard, and the legislative record itself demonstrates that Council’s action was fairly debatable. Further, the fact that the Rezoning Application was denied on a 3-4 vote, in and of itself, establishes that the decision was fairly debatable.

3. With regard to Count II, Sunrise maintains that Council failed to comply with Town Code § 18-249 and, in doing so, acted unlawfully, arbitrarily, capriciously, and without reason, such that its decision in denying the Rezoning Application is invalid, void and must be vacated. On its face, this claim lacks merit and fails to set forth a claim upon which relief may be granted. The Town Code section cited states:

In determining what, if any, amendments to this chapter are to be adopted, the Town Council shall give due consideration to the proper relationship of such amendments to the entire comprehensive plan for the Town, with the intent to retain the integrity and validity of the zoning districts herein described, and to avoid spot zoning changes in the zoning map.

Sunrise’s complaint is that Council “did not offer any summary or findings as to how it” complied with Town Code § 18-249. Inasmuch as no such summary or findings were allegedly provided, Sunrise jumps to the conclusion that there was no compliance with the Town Code. Such a conclusion, without a factual basis, is insufficient as a matter of law to state a claim. Further, the record will amply demonstrate that the unsupported, conclusory allegations are meritless. In addition, the Town Ordinance

does not require that a summary or findings be made by Council to establish that it complied with the Town Code, so Sunrise's complaint that no summary or findings were provided does not, under any circumstance, give rise to a cause of action.

4. With regard to Count IV – alleged violation of the Virginia Fair Housing Law – the claim fails as Sunrise is not, as a matter of law, an aggrieved person under the Virginia Fair Housing Law. To be an “aggrieved person,” “means any person who (i) claims to have been injured by a discriminatory housing practice or (ii) believes that such person will be injured by a discriminatory housing practice that is about to occur.” Va. Code § 36-96.1:1. Sunrise does not fall within this definition as written or applied.

5. Further, Sunrise lacks standing to assert a claim for violation of the Virginia Fair Housing Law.

6. In addition, the Virginia Fair Housing Law is inapplicable given the facts asserted in the Complaint. The claim also fails as a matter of law as the decision denying the Rezoning Application was a proper legislative decision which was fairly debatable and not made for any discriminatory purpose, as demonstrated by the record.

WHEREFORE, the foregoing considered, defendant, Town Council of the Town of Vienna, Virginia, by counsel, respectfully requests that the court grant its motion craving over, sustain its demurrer and dismiss this case with prejudice.

**TOWN COUNCIL OF THE  
TOWN OF VIENNA, VIRGINIA  
By Counsel**

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### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion Craving Oyer and Demurrer was mailed, first-class, postage prepaid on this 14<sup>th</sup> day of May, 2019 to:

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