

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ARGOS PROPERTIES II, LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY COUNCIL FOR THE CITY OF	)
VIRGINIA BEACH, and	)
THE CITY OF VIRGINIA BEACH, VIRGINIA,	)
	)
Defendants,	)

CASE NO.: \_\_\_\_\_

SERVE: Mark D. Stiles, City Attorney  
Municipal Center  
2401 Courthouse Drive  
Virginia Beach, VA 23456

and

Louis R. Jones, Mayor  
Municipal Center  
2401 Courthouse Drive  
Virginia Beach, VA 23456

**PETITION FOR REVIEW AND COMPLAINT**

NOW COMES plaintiff Argos Properties II, LLC (“Argos”), by counsel, pursuant to §§ 8.01-184 and 15.2-2285 of the Code of Virginia, and brings this Petition for Review and Complaint (“Petition”), moving this Court for entry of a declaratory judgment and further relief that the decision by the City of Virginia Beach (the “City”) and the City Council of Virginia Beach (the “Council”) was arbitrary, capricious, unreasonable, *ultra vires* and contrary to statutory mandates. In support of its Petition, Argos states the following:

## PARTIES

1. Argos is a Virginia limited liability company located in Virginia Beach, Virginia. The primary business of Argos is the development of a particular parcel of property located on Princess Anne Road, GPIN Number 24042459260000, in the City of Virginia Beach (the “Property”).

2. The City is an independent city chartered by the General Assembly of Virginia.

3. The Council is the legislative branch of the government of the City.

## JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to §§ 8.01-184, 15.2-2285, and 17.1-500 of the Code of Virginia because this Petition seeks a declaratory judgment based on actions that took place in the City of Virginia Beach, Virginia, and contesting a zoning decision of the Council.

5. Venue is proper in this court pursuant to §§ 8.01-185, 8.01-261, and 8.01-262 of the Code of Virginia.

## GENERAL ALLEGATIONS

### *A. Background*

6. The Property consists of 50.84 acres of land. It is currently, and during all times relevant to this action, was owned by Argos.

7. The Property is currently zoned AG-1 and AG-2.

8. According to Article 4, Section 400 of the City’s Zoning Ordinance, the purpose of AG-1 and AG-2 zoning is to “protect and preserve agricultural lands for agricultural functions.”

9. AG-1 and AG-2 zoning does not permit high- or medium-density residential use—only one dwelling unit is permitted per 15 acres of land.

10. The Property is not used for agricultural purposes and has not been for many years.

11. The Property is located on the north side of Princess Anne Road, south of the Nimmo Parkway, between Princess Anne Road's intersections with Holland Road and Seaboard Road. The Property is located north of the City's "Green Line," which is the restrictive identifier of where real property zoning characteristics change in Virginia Beach; property south of the "Green Line" is generally intended to be kept for agricultural use.

12. Princess Anne Road is a public two-lane suburban arterial road in the City.

13. Argos has never had control over the design or maintenance of Princess Anne Road.

14. Although portions of the land along Princess Anne Road retain an agricultural character, several residential developments have also been constructed along the road, including immediately adjacent to the Property.

15. In fact, the Property is close by other residential developments.

16. Some of these residential developments were built recently, after being granted rezoning to allow for residential use.

17. For example, on April 19, 2016, the Council approved a rezoning application filed by Ashdon Builders Inc. and the estate of Bertha H. Caffee that permitted the construction of a 17-home development near the intersection of Princess Anne Road and Holland Road (the "Ashdon Development").

18. The Ashdon Development is directly adjacent to the Property, on the same (North) side of Princess Anne Road.

19. The Ashdon Development required the conditional rezoning of approximately nine (9) acres of land from AG-1 and AG-2 zoning to R-10 zoning.

20. Under the City's Zoning Ordinance, R-10 zoning allows for medium-density residential use in the manner of single-family homes.

21. The conditional rezoning approved for the Ashdon Development included a single point of ingress and egress from the development, connected to Princess Anne Road.

22. There are no material differences in soil type, elevation or road access between the Ashdon Development and the Property.

23. The Ashdon Development is and will be located directly adjacent to the Princess Anne Quarter neighborhood—another residential development on Princess Anne Road that was approved in 2001—and is in fact sometimes referred to as “Princess Anne Quarters East.”

*B. Argos' Rezoning Application*

24. The Property's current zoning classification is unreasonable for a number of reasons, including the current use of the surrounding property, changing character of the locality, geography, and other factors.

25. Argos submitted its initial rezoning application (the “Application”) for the Property on May 1, 2016—less than two weeks after the Council's approval of the Ashdon Development.

26. The Application requested a rezoning of 50.84 acres of property from AG-1 and AG-2 to R-10.

27. The Application was complete and satisfied all of the City's submittal requirements that existed for that rezoning as of May 1, 2016.

28. The purpose of the rezoning was to permit the development of a 38-lot single family residential subdivision. Those 38 lots would be constructed on approximately 16 acres of the Property, leaving the approximately 34 acre remainder as open space.

29. At the time the Application was filed, the City did not require that a preliminary stormwater analysis be included as part of a rezoning application.

30. At the time the Application was filed, the City's Stormwater Management Ordinance and controlling state regulations effectively regulated stormwater management for construction related activities.

31. After the Application was filed, the Comprehensive Plan was amended to recommend the completion of a preliminary stormwater engineering analysis ("SW Analysis"), in conjunction with an application for a rezoning in the Southern Rivers watershed (the area of the City where the Property is located).

32. In approximately June/July 2016, the City (through a representative of its Planning Department) informed Argos that it would be required to complete a SW Analysis as part of the Application, even though the City had not developed final criteria for the SW Analysis, and the City admitted in a written communication on or about July 27, 2016, "we realize that the Argos rezoning application was submitted prior to the update to the Comprehensive Plan... [.]"

33. Thereafter, on September 28, 2016, the City informed Argos that it would be required to provide nine additional engineering criteria as part of its SW Analysis, including, but not limited to, items such as average elevation, soil analysis, and stormwater management facility outfall design and location. These criteria are not required by the City's Stormwater Management Ordinance or the state's controlling regulations.

34. On or about May 19, 2017—over a year after its Application was filed—Argos was advised of yet another item related to the treatment of stormwater management facilities located in the AE floodzone (for a total of ten new engineering criteria) that was required in the SW Analysis (even though this criteria was also not required by the City's Stormwater Management Ordinance or the state's controlling regulations).

35. On or about August 4, 2017, the creation of the Storm Water Engineering Center (the “SWE Center”) was publicly announced. The SWE Center was tasked with the review of preliminary stormwater engineering analyses.

36. In a memorandum he wrote to the Council on or about August 4, 2017, City Manager Dave Hansen stated the City would consider the conclusions of its engineers in the SWE Center “definitive” with respect to stormwater management.

37. The SWE Center and its review of stormwater management was not in place at the time that Argos submitted its rezoning Application. This new process was not enacted until more than a year after Argos’ initial submission.

38. On or about September 1, 2017, the City informed Argos that its SW Analysis was insufficient under these new procedures.

39. On or about September 27, 2017—16 months after its initial submittal—the City informed Argos of yet additional stormwater-related requirements that would be imposed on its Application. These new criteria (the “Ad Hoc Criteria”) were listed and set forth in an unsigned memorandum. Only on May 4, 2018 were the “official” Ad Hoc Criteria formally announced in a “DSC Information Notice” from the Planning Department.

40. The Ad Hoc Criteria differed from the existing criteria that was required pursuant to the Stormwater Management Ordinance and state regulatory requirements in several important respects. For example, although the City’s “Public Works Standards and Specifications”, by which the City implemented local and state stormwater criterion (the “City Standards”), define a “10-year storm” as depositing 5.98 inches of rain, the Ad Hoc Criteria define this same storm as depositing 6.77 inches of rain.

41. Another of the Ad Hoc Criteria required analysis of stormwater system performance assuming a 1.5 foot rise in the starting tailwater to account for sea level rise.

42. The application of the Ad Hoc Criteria for site design would result in a project site that included significantly more area being utilized for stormwater management than is legally required under the Stormwater Management Ordinance and other controlling state regulations.

43. The increase in stormwater management features on site required by the Ad Hoc Criteria would also reduce the buildable area and mean less residential density could be approved for the Property (32 homes as opposed to the 36 originally proposed).

44. However, as the Ad Hoc Criteria were not actual requirements of either state or local law, and because, by law, the site *must* be designed in accordance with controlling stormwater management criteria, the only result of the application of the Ad Hoc Criteria would be to reduce permitted density based on stormwater management features that would never be installed on site. Even if the Application had been approved, the more stringent stormwater management criteria could not be approved because they are inconsistent with state law.

45. From May 2016 to January 2018, Argos submitted several rounds of amendments to the Application, plans, engineering documents, and analyses, in an attempt to keep up with the ever-changing requirements imposed on it by the City.

46. As a result of these efforts, a City planning department representative confirmed in a January 3, 2018 email to Argos's engineer the City's expectation that Argos would base its stormwater analysis on an anticipated 1.5 foot sea level rise. However, that same email stated that the City's Development Services Center and Department of Public Works "have agreed to a favorable recommendation on the preliminary stormwater strategy based on the analyses you've provided over the last several months."

47. The Department of Planning also recommended approval of Argos's rezoning Application.

48. Nevertheless, on February 14, 2018, the Planning Commission, on a 7-3 vote with one abstention, recommended denial.

49. A letter from City Manager Dave Hansen, dated March 30, 2018, indicated that the reasons for the Planning Commission's denial were "that the single ingress/egress connection from the subdivision would be flooded from time-to-time because that section of Princess Anne Road floods from time-to-time" and that "[t]here were also concerns surrounding overall stormwater performance."

50. Related to the latter, the letter noted that Argos had "declined to provide" an analysis of its stormwater performance accounting for a 1.5 foot sea level rise, *i.e.*, had declined to provide an analysis not required by law. The letter also acknowledged that the Planning Department recommended approval of the application because it met all of the current requirements and criteria existing at the time of application.

51. Despite the fact that Argos's Application concededly met all stormwater performance standards legally required at the time it was filed, the Planning Commission voted to recommend denial, in part, on the basis of criteria that were not legally required, and were not even developed until well after the Application was filed.

52. Mr. Hansen's letter was transmitted to the City Council and Mayor prior to their hearing on Argos's application.

#### *C. The Council's Decision*

53. The Council heard Argos's Application on April 17, 2018.



54. Councilwoman Barbara Henley, who represents the district where the Property is located, spoke against the application, indicating concerns about stormwater management and the flooding of Princess Anne Road.

55. Councilwoman Henley and an Argos-related company (Argos Properties LLC) were previously involved in a contentious zoning-related dispute related to the development of a property, in the same district. That dispute resulted in a lawsuit, in which Argos Properties LLC prevailed and was able to proceed with the construction of what is now known as Foxfire Square.

56. Individuals connected with Argos—certain members of the Galitos family—actively and publicly campaigned against Councilwoman Henley and in favor of her opponents during the 2002 and 2006 election cycles.

57. Those prior battles affected Councilwoman Henley's position on Argos' Application. Indeed, prior to Argos' even filing its Application, during a Council meeting on April 19, 2016, Councilwoman Henley indicated that she intended to oppose any rezoning of the Property to allow for further residential development. Almost two years later, in a Council meeting on April 3, 2018, notwithstanding a recommendation from City Staff and an agreement by Council to defer a vote on the Application, Councilwoman Henley again spoke out against the Application, and moved to have the Application denied.

58. At the hearing on April 17, 2018, at which a vote was taken, Councilwoman Henley again spoke against the Application. The Council voted to deny the Application.

59. Based on the minutes, no other Council member voiced concerns with any aspect Argos's rezoning request.

60. This action timely followed.

## COUNT ONE—ARBITRARY AND CAPRICIOUS LEGISLATIVE ACT

61. Argos realleges and incorporates the allegations of ¶¶ 1-63 of this Petition as if set forth herein in their entirety.

62. Under established Virginia law, a locality may not undertake a legislative act arbitrarily, capriciously, unreasonably, or contrary to statute. *Town of Leesburg v. Long Lane Assocs. Ltd. P'ship*, 284 Va. 127 (2012); *W. Lewinsville Heights Citizens Ass'n v. Bd. of Supervisors*, 270 Va. 259 (2005).

63. From the legislative record, the only reasons Council denied Argos's rezoning Application were based on i) there being a single ingress/egress connection to Princess Anne Road which floods in that area from "time-to-time" and ii) Argos's failure to provide an analysis of its stormwater performance accounting for a 1.5 foot sea level rise.

64. With regard to Princess Anne Road, other developments with a single ingress/egress to Princess Anne Road have been approved, including, but not limited to, the Ashdon Development and Princess Anne Quarters East.

65. The City of Virginia Beach Comprehensive Plan (last updated on May 17, 2016) designates this area of the City along Princess Anne Road for growth of residential development.

66. Indeed, to deny residential development on Princess Anne Road based on past flood events would necessarily preclude growth as anticipated by the Comprehensive Plan.

67. Council's denial of Argos's rezoning Application for reasons based on a single ingress/egress connection and the potential flooding of Princess Anne Road is therefore arbitrary and capricious.

68. With regard to the Ad Hoc Criteria, it is undisputed that the Application met all of the state and local stormwater management requirements in effect at the time.

69. Denial of the Application based on Argos's failure to assess higher water elevations resulting from an anticipated sea level rise does not protect public health, safety or the general welfare, because the site would not have been engineered to this standard even if it had been approved.

70. Other projects—including the Ashdon Development which was approved just weeks before Argos's Application was filed—were not subjected to the Ad Hoc Criteria and were approved by Council.

71. Council's denial of Argos' rezoning Application for reasons based on its failure to provide all of the Ad Hoc Criteria, when the Application met all state and local stormwater legal requirements, is arbitrary and capricious, and must be set aside.

**COUNT TWO—CLAIM UNDER 42 U.S.C. § 1983  
(VIOLATION OF EQUAL PROTECTION)**

72. Argos realleges and incorporates the allegations of ¶¶ 1-74 of this Complaint as if set forth herein in their entirety.

73. Section 1983 of Title 42 of the United States Code provides, in relevant part, that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

74. The City is a person for purposes of § 1983 and is liable in that respect for the legislative acts of the Council.

75. The City denied Argos's Application under the color of the law of the Commonwealth of Virginia and the City of Virginia Beach—including, but not limited to, various

sections of Chapter 22, Title 15.2 of the Code of Virginia, which grant municipalities certain authority to enact and enforce zoning ordinance and conditional zoning, as well as various sections of the City's Zoning Ordinance and/or Comprehensive Plan.

76. Imposing conditions and denying Argos's Application when the similarly-situated Ashdon Development and other applicants did not suffer those conditions or denials violated Argos's right to Equal Protection under the Fourteenth Amendment to the United States Constitution.

77. The City and Council's treatment of Argos differently than those similarly-situated has no rational basis or relation to the health, safety, or welfare of the City.

78. Indeed, it appears that the City and Council's actions were based, at least in part, on the personal animus of one Councilwoman.

79. The facts set forth herein indicate the existence of a discriminatory motive in the denial of Argos's application.

80. Argos was injured as a result of the unconstitutional denial of its rezoning application in the form of, among other things, incurring substantial out-of-pocket expenses for the application and related engineering work, delay in developing its property, and lost profits.

**COUNT THREE—CLAIM UNDER VA. CODE ANN. § 15.2-2208.1**

81. Argos realleges and incorporates the allegations of ¶¶ 1-83 of this Complaint as if set forth herein in their entirety.

82. Section 2208.1.A of Title 15.2 of the Code of Virginia states that:

Notwithstanding any other provision of law, general or special, any applicant aggrieved by the grant or denial by a locality of any approval or permit, however described or delineated, including a special exception, special use permit, conditional use permit, rezoning, site plan, plan of development, and subdivision plan, where such grant included, or denial was based upon, an unconstitutional condition pursuant to the United States

Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs.

83. As described above, the City and Council imposed conditions on Argos's rezoning application that violated its Equal Protection rights under the Fourteenth Amendment to the United States Constitution.

84. On April 17, 2018, Argos, by counsel, transmitted a letter by email to the City and Council, through the City Attorney, objecting to the imposition of this unconstitutional requirement.

85. Pursuant to Va. Code Ann. §15.2-2208.1, Argos is entitled to compensatory damages for its above losses and expenses, and an order directing City Council to reconsider Argos's rezoning application consistent with the Court's determinations, and recovery of its court costs and attorneys' fees.

#### **COUNT FOUR— ULTRA VIRES ACT**

86. Argos realleges and incorporates the allegations of ¶¶ 1-87 of this Complaint as if set forth herein in their entirety.

87. The Dillon Rule provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.

88. With regard to the regulation of stormwater runoff, the Virginia General Assembly confers upon the State Water Control Board (the "SWCB"), the authority to "permit, regulate, and control stormwater runoff in the Commonwealth." Va. Code Ann. § 62.1-44.15:25.

89. The Virginia Stormwater Act, Va. Code Ann. §§ 62.1-44.15:24, *et seq.*, requires that any locality that operates a regulated “Municipal Separate Storm Sewer System” (aka an “MS4”) must adopt a “Virginia Stormwater Management Program” (“VSMP”) for land-disturbing activities “consistent with the provision of [the Stormwater Management Act]”. Va. Code Ann. § 62.1-44.15:27.

90. A VSMP is defined by state law as a program approved by the SWCB that has been established by a “VSMP authority” to manage the quality and quantity of runoff resulting from land-disturbing activities. Va. Code § 62.1-44.15:24.

91. A “VSMP authority” (aka a “Virginia Stormwater Management Program authority”) means an authority (including a locality) approved by the SWCB to operate a VSMP. Va. Code § 62.1-44.15:24.

92. The VSMP “shall include such items as local ordinances, rules, permit requirements, annual standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, enforcement, *where authorized in [the Stormwater Management Act], and evaluation consistent with the requirements of this [Act] and associated regulations.*” Va. Code Ann. § 62.1-44.15:24 (emphasis added).

93. Localities that are VSMP authorities, including the City, are only authorized to adopt more stringent stormwater management ordinances than those necessary to ensure compliance with the Board's minimum regulations if strict procedures are followed. More stringent ordinances must:

be based upon factual findings of local or regional comprehensive watershed management studies or findings developed through the implementation of a MS4 permit or a locally adopted watershed management study and are determined by the locality to be necessary to prevent any further degradation to water resources, to address TMDL requirements, to protect exceptional state waters, or to address specific existing water pollution including

nutrient and sediment loadings, stream channel erosion, depleted groundwater resources, or excessive localized flooding within the watershed... Va. Code Ann. § 62.1-44.15:24.

94. Prior to adopting a more stringent ordinance, a public hearing must be held after giving due notice. *Id.*

95. Localities that are VSMP authorities (including the City) must submit a letter report to the Department of Environmental Quality (“DEQ”) when more stringent stormwater management ordinances or more stringent requirements authorized by such ordinances, such as may be set forth in design manuals, policies, or guidance documents developed by the localities, are determined to be necessary, pursuant to [the procedures in ¶ 95 above] within 30 days after adoption thereof. *Id.* Any such letter report shall include a summary explanation as to why the more stringent ordinance or requirement has been determined to be necessary. *Id.*

96. The Stormwater Management Act further provides:

upon the request of an affected landowner or his agent submitted to [DEQ] with a copy to be sent to the locality, within 90 days after adoption of any such ordinance or derivative requirement, localities shall submit the ordinance or requirement and all other supporting materials to the Department for a determination of whether the requirements [set forth above] have been met and whether any determination made by the locality...is supported by the evidence. [DEQ] shall issue a written determination setting forth its rationale within 90 days of submission. Such a determination, or a failure by the [DEQ] to make such a determination within the 90-day period, may be appealed to the Board. Va. Code § 62.1-44.15:24 (emphasis added). *Id.*

97. The City operates an MS4, has been issued an MS4 permit, and is required to adopt and administer a VSMP consistent with state law.

98. Pursuant to state law and its approved MS4 permit, the City has adopted the latest Virginia Stormwater Management Program Regulations (9 VAC 25-8700) and adopted an updated Stormwater Management Ordinance which became effective on July 1, 2014. The Stormwater Management Ordinance is codified as Appendix D of City Code. The City’s Standards were prepared to implement the applicable state stormwater management requirements.

99. The Standards state that “all storm sewer drainage systems will be designed according to the Stormwater Management Ordinance” and “developed flows must conform to current criteria.” Standards at page 8-2.

100. The Ad Hoc Criteria, however, require site design criteria for stormwater management that are more stringent than state law.

101. The City did not comply with the provisions of the Stormwater Management Act, including, but not limited to, the provisions of Va. Code Ann. § 62.1-44.15:24, before imposing the Ad Hoc Criteria on Argos.

102. Council was not authorized by state law to require that Argos comply with the Ad Hoc Criteria, and its denial of Argos’s rezoning Application for reasons based on its failure to provide all of the Ad Hoc Criteria constitutes an action that is *ultra vires* and unauthorized by state law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Argos Properties II, LLC prays that the Court:

- (1) Enter a declaratory judgment in its favor declaring that the Council’s decision to deny Argos’s requested rezoning is void, on the grounds that it was arbitrary, capricious, unreasonable, unconstitutional, and *ultra vires*;
- (2) Order the City and the Council to reconsider Argos’s Application for rezoning, consistent with the Court’s determination;
- (3) Award Argos its court costs and attorneys’ fees expended in this cause pursuant to, among other sources, 42 U.S.C. § 1988 and Va. Code Ann. § 15.2-2208.1;
- (4) Award Argos compensatory damages caused by the City and Council’s improper and unconstitutional denial of its Application for rezoning, pursuant to 42 U.S.C. §



1983, in the amount of \$1,000,000 or other such sum as determined by the Court;  
and,

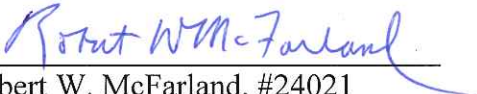
- (4) Grant such other relief as the Court deems appropriate.

Respectfully submitted,

ARGOS PROPERTIES II, LLC,

By Counsel

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