.STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-947



LUKE M. CHARDE, JR. and wife, MAUREEN CHARDE, MACDONALD SNOW BOWDEN, and wife, ANNA C. BOWDEN, CLIFTON H. HAMMOND, HILDA P. HEATH, ANNIE MILDRED LOWERY, TONY M. PARTON, and wife, CAROLYN B. PARTON, ERIC D. SCHNEIDER, and wife, VICTORIA CARPENTER, JEANNE C. SLOAN, individually and as Trustee of THE JEANNE C. SLOAN TRUST dated 8/29/1994, and husband, JERRY L. SLOAN, EVELYN T. THARP, THOMAS D. WORKMAN, and wife, ANN WORKMAN, BRUCE WRIGHT, and wife, PENELOPE WRIGHT, HELMUT G. BRACKE REVOCABLE DECLARATION OF TRUST dated 5/10/02, HELGA C. BRACKE REVOCABLE DECLARATION OF TRUST, dated 5/10/02, DAISY M. RAEFORD, JOSEPH C. KONEN, and wife, JOAN KONEN, and MARK S. HARRIS,

Plaintiffs,

v.

The TOWN OF DAVIDSON, a North Carolina body politic and corporate, DAVIDSON EAST CONDOMINIUM ASSOCIATES, LLC, a North Carolina Limited Liability Company, BEACON IMG., INC., a North Carolina corporation, and NISHITH G. PATEL,

Defendants.

**COMPLAINT**
**FOR DECLARATORY JUDGMENT;**
**MOTION FOR EXCEPTIONAL CASE DESIGNATION**

COME NOW the Plaintiffs, Luke M. Charde, Jr. and wife Maureen Charde, MacDonald Snow Bowden and wife Anna C. Bowden, Clifton H. Hammond, Hilda P. Heath, Annie Mildred Lowery, Tony M. Parton and wife Carolyn B. Parton, Eric D. Schneider and wife Victoria Carpenter, Jeanne C. Sloan, individually and as Trustee of The Jeanne C. Sloan Trust dated 8/29/1994, and husband, Jerry L. Sloan, Evelyn T. Tharp, Thomas D. Workman, and wife, Ann Workman, Bruce Wright, and wife, Penelope Wright, Helmut G. Bracke Revocable Declaration of Trust dated May 10, 2002, Helga C. Bracke Revocable Declaration of Trust dated May 10, 2002, Daisy M. Raeford, Joseph C. Konen and wife, Joan Konen, and Mark S. Harris, (hereinafter collectively referred to as "Plaintiffs"), seeking, *inter alia*, a declaratory judgment, pursuant to N.C. GEN. STAT. § 1-253, *et. seq.*, that ordinance 2017-16, known as the Davidson Commons East Hotel Conditional Master Plan Amendment (hereinafter the "Rezoning"), purportedly approved by Defendant Town of Davidson (hereinafter the "Town" or "Davidson") on 14 November 2017 is void and of no legal effect. In support thereof, Plaintiffs allege and state as follows:

## I. PARTIES

**1.** Plaintiffs **Luke M. Charde, Jr.**, and wife **Maureen Charde** (the "**Chardes**") are citizens and residents of Mecklenburg County, North Carolina. The Chardes own approximately .225 acres of real property and the residence situated thereon described in that deed recorded at Book 30886 and Page 783 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 255 Spinnaker Court, Davidson, North Carolina 28036 (the "Charde Property"). The Charde Property has been the residence of the Charde family since 2015. The Charde Property is in close proximity to the Rezoned Parcels at issue.

2. Plaintiffs **MacDonald Snow Bowden** and wife **Anna C. Bowden** (the "**Bowdens**") are citizens and residents of Mecklenburg County, North Carolina. The Bowdens own approximately .248 acres of real property and the residence situated thereon described in that deed recorded at Book 6049 and Page 0112 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 410 Windward Drive, Davidson, North Carolina 28036 (the "Bowden Property"). The Bowden Property has been the residence of the Bowden family since 1989. The Bowden Property is in close proximity to the Rezoned Parcels at issue.

3. Plaintiff **Clifton H. Hammond** ("**Hammond**") is a citizen and resident of Mecklenburg County, North Carolina. Hammond is part owner of approximately .220 acres of real property and the residence situated thereon described in that deed recorded at Book 07632 and Page 0479 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 417 Windward Drive, Davidson, North Carolina 28036 (the "Hammond Property"). The Hammond Property has been the residence of the Hammond family since 1994. The Hammond Property is in close proximity to the Rezoned Parcels at issue.

4. Plaintiff **Hilda P. Heath** ("**Heath**") is a citizen and resident of Mecklenburg County, North Carolina. Heath owns approximately .266 acres of real property and the residence situated thereon described in that deed recorded at Book 8184 and Page 164 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 638 Westside Terrace, Davidson, North Carolina 28036 (the "Heath Property"). The Heath Property has been the

residence of Ms. Heath since 1995. The Heath Property is in close proximity to the Rezoned Parcels at issue.

**5.** Plaintiff **Annie Mildred Lowery** ("**Lowery**") is a citizen and resident of Mecklenburg County, North Carolina. Lowery owns approximately .276 acres of real property and the residence situated at 621 Westside Terrace, Davidson, North Carolina 28036 (the "Lowery Property"). The Lowery Property has been the residence of the Lowery family since approximately 1967. The Lowery Property is in close proximity to the Rezoned Parcels at issue.

**6.** Plaintiffs **Tony M. Parton** and wife **Carolyn B. Parton** (the "Partons") are citizens and residents of Mecklenburg County, North Carolina. The Partons own approximately .156 acres of real property and the residence situated thereon described in that deed recorded at Book 9601 and Page 30 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 310 Jib Court, Davidson, North Carolina 28036 (the "Parton Property"). The Parton Property has been the residence of the Parton family since 1998. The Parton Property is in close proximity to the Rezoned Parcels at issue.

**7.** Plaintiffs **Eric D. Schneider** and wife **Victoria Carpenter** ("**Schneider and Carpenter**") are citizens and residents of Mecklenburg County, North Carolina. Schneider and Carpenter own approximately .245 acres of real property and the residence situated thereon described in that deed recorded at Book 27263 and Page 567 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 241 Lakeside Avenue, Davidson, North Carolina 28036 (the "Schneider and Carpenter Property"). The Schneider and Carpenter

Property has been the residence of the Schneider and Carpenter family since 2012. The Schneider and Carpenter Property is in close proximity to the Rezoned Parcels at issue.

**8.** Plaintiffs **Jeanne C. Sloan**, individually and as **Trustee of The Jeanne C. Sloan Trust**, dated August 29, 1994 ("**Sloan**"), and husband, **Jerry L. Sloan** are citizens and residents of Mecklenburg County, North Carolina. Jeanne C. Sloan as Trustee, owns approximately .181 acres of real property and the residence situated thereon described in that deed recorded at Book 13445 and Page 955 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 441 Windward Drive, Davidson, North Carolina 28036 (the "Sloan Property"). The Sloan Property has been the residence of the Sloan family since 2002. The Sloan Property is in close proximity to the Rezoned Parcels at issue.

**9.** Plaintiff **Evelyn T. Tharp** ("**Tharp**") is a citizen and resident of Mecklenburg County, North Carolina. Tharp owns approximately .169 acres of real property and the residence situated thereon described in that deed recorded at Book 2246 and Page 157 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 449 Windward Drive, Davidson, North Carolina 28036 (the "Tharp Property"). The Tharp Property has been the residence of the Tharp family since the 1980s. The Tharp Property is in close proximity to the Rezoned Parcels at issue.

**10.** Plaintiffs **Thomas D. Workman** and wife, **Ann Workman** are citizens and residents of Mecklenburg County, North Carolina. Thomas D. Workman owns approximately .171 acres of real property and the residence situated thereon described in that deed recorded at Book 10308 and Page 980 of the Office of the Register of Deeds

for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 320 Jib Court, Davidson, North Carolina 28036 (the "Workman Property"). The Workman Property has been the residence of the Workman family since 1999. The Workman Property is in close proximity to the Rezoned Parcels at issue.

**11.** Plaintiffs **Bruce Wright** and wife **Penelope Wright** (the "**Wrights**") are citizens and residents of Mecklenburg County, North Carolina. The Wrights own approximately .179 acres of real property and the residence situated thereon described in that deed recorded at Book 20167 and Page 895 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 409 Windward Drive, Davidson, North Carolina 28036 (the "Wright Property"). The Wright Property has been the residence of the Wright family since 2006. The Wright Property is in close proximity to the Rezoned Parcels at issue.

**12.** Plaintiffs **Helmut G. Bracke Revocable Declaration of Trust dated May 10, 2002** and **Helga C. Bracke Revocable Declaration of Trust dated May 10, 2002** (the "**Bracke Trusts**") are North Carolina Trusts owning property in Mecklenburg County, North Carolina. The Bracke Trusts own approximately .153 acres of real property and the residence situated thereon described in that deed recorded at Book 28490 and Page 187 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 440 Windward Drive, Davidson, North Carolina 28036 (the "Bracke Property"). The Bracke Property has been the residence of the Bracke family since 1987. The Bracke Property is in close proximity to the Rezoned Parcels at issue.

**13.** Plaintiff **Daisy M. Raeford** ("**Raeford**") is a citizen and resident of Mecklenburg County, North Carolina. Raeford owns approximately .212 acres of real property and the residence situated thereon described in that deed recorded at Book 2883 and Page 377 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 305 Lakeside Avenue, Davidson, North Carolina 28036 (the "Raeford Property"). The Raeford Property has been the residence of the Raeford family since 1967. The Raeford Property is in close proximity to the Rezoned Parcels at issue.

**14.** Plaintiffs **Joseph C. Konen** and wife **Joan Konen** (the "**Konens**") are citizens and residents of Mecklenburg County, North Carolina. The Konens own approximately .164 acres of real property and the residence situated thereon described in that deed recorded at Book 22961 and Page 512 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 130 Spinnaker Court, Davidson, North Carolina 28036 (the "Konen Property"). The Konen Property has been the residence of the Konen family since 2007. The Konen Property is in close proximity to the Rezoned Parcels at issue.

**15.** Plaintiff **Mark S. Harris** ("**Harris**") is a citizen and resident of Mecklenburg County, North Carolina. Harris owns approximately .156 acres of real property and the residence situated thereon described in that deed recorded at Book 32275 and Page 601 of the Office of the Register of Deeds for Mecklenburg County, North Carolina ("Mecklenburg County Registry"), and more commonly known as 240 Spinnaker Court, Davidson, North Carolina 28036 (the "Harris Property"). The Harris Property has been the

residence of the Harris family since 2017. The Harris Property is in close proximity to the Rezoned Parcels at issue.

**16.** Defendant **Town of Davidson**, (the "**Town**" or "**Davidson**"), is a North Carolina body politic and corporate, duly chartered by the North Carolina General Assembly, whose Clerk is Carmen Clemsic, and whose official address is P.O. Box 579, 216 S. Main Street, Davidson, North Carolina 28036. The Town has adopted and enforces The Planning Ordinance of the Town of Davidson (hereinafter the "DPO"), including a Planning Ordinance Map (hereinafter the "Zoning Map"), which regulates the development and use of land and the location of zoning boundaries within the Town limits. The Town has also adopted land use plans (hereinafter the "Land Use Plans"), which apply to the property at issue and the surrounding area.

**17.** Defendant **DAVIDSON EAST CONDOMINIUM ASSOCIATES, LLC**, ("**DECA**") is, upon information and belief, a North Carolina Limited Liability Company, duly organized and existing under the laws of the State of North Carolina, with its principal place of business in Mecklenburg County, North Carolina. Defendant DECA, owns the two (2) parcels of real property at issue in this dispute, consisting of approximately 2.1 acres, being described in the deed recorded at Book 23923, Page 428 of the Mecklenburg County Registry, and being further described as tax parcels #003-23-190 and 003-23-191, and more commonly known as 131 Davidson Gateway Drive (hereinafter referred to as the "Davidson Commons East – Lots 4AB" or "Subject Properties").

**18.** Defendant **Beacon IMG., Inc.,** ("**Beacon**"), is, upon information and belief, a North Carolina Corporation, with its principal place of business in Mecklenburg County, North Carolina, engaged in private real estate investment, acquisitions, and development.

Defendant Beacon is named as the Applicant for the Rezoning, and upon information and belief, is under contract to purchase the Subject Properties.

**19.** Defendant **Nishith G. Patel**, ("**Patel**"), is, upon information and belief a resident of North Carolina, and is named as an Applicant for the Rezoning.

## II. JURISDICTION AND VENUE

**20.** Pursuant to the North Carolina General Statutes, jurisdiction is proper in Mecklenburg County for all causes of action alleged herein, and venue is proper, pursuant to N.C. GEN. STAT. § 1-82, in the Superior Court of Mecklenburg County, for the following causes of action contained herein:

a. **First Claim**: Statutory and Ordinance Procedural Violations; Inadequate Notice and Opportunity to be Heard;

b. **Second Claim**: Spot Zoning;

c. **Third Claim:** Noncompliance with DPO;

d. **Fourth Claim:** Arbitrary and Capricious and *Ultra Vires;*

e. **Fifth Claim:** Violation of Procedural Due Process: Failure to Hold a *Quasi-Judicial* Hearing;

f. **Sixth Claim:** Violation of N.C. GEN. STAT. §160A-383: Failure to Approve a Proper Statement of Consistency; and

g. **Seventh Claim:** Violation of Separation of Power and Procedural Due Process.

**21.** Pursuant to N.C. GEN. STAT. §§ 1-267.1, 1A-1, Rule 42(b)(4), and 1-81.1, venue is proper in the Superior Court of Wake County for the Plaintiffs' challenge on separation of powers and procedural due process grounds to the facial constitutionality of N.C. GEN. STAT. §160A-383, which is an act of the North Carolina General Assembly, if, after all other matters presented herein have been resolved, a determination of this claim must be made in order to completely resolve any matters in this case.

**22.** This Court has personal jurisdiction over the Defendants pursuant to N.C. GEN. STAT. § 1-75.4.

**23.** This action has been filed within the applicable statutes of limitation, as set forth in N.C. GEN. STAT. §§ 160A-364.1, 1-54.1, and 1-56. All conditions precedent to the filing of this Complaint have been complied with.

## FACTUAL BACKGROUND

**24.** Upon information and belief, Defendants submitted a first "Application for Conditional Planning Area Amendment" on or about 26 August 2016 (hereinafter referred to as the "**First Application**"). The First Application requested that the Town rezone the Subject Properties in order to accommodate the construction and operation of a hotel (the "**Proposed Development**"). The customary application fee was paid with the First Application.

**25.** In accordance with the DPO, the Planning Director determined the proposed rezoning required a Public Input Session pursuant to § 14.4 of the DPO. A Public Input Session was held on 3 October 2016 for the First Application.

**26.** Public opposition to the application was such that the applicant, upon information and belief, withdrew or abandoned the First Application.

**27.** On 31 May 2017, a second application (the "Second Application") for rezoning of the subject properties was submitted to the Town by the same applicant. The customary fee was paid on 31 May 207. Nowhere in the Second Application was there any indication that this Second Application was an "amended application". The project name of the First Application and Second Application was different. The Second Application was deemed complete on 7 July 2017. The Second Application contained substantial and material changes from the First Application; however, the Planning Director failed to require a second Public Input Session for the Second Application. Having already determined that the proposed development and operation of a hotel on the subject properties was a matter requiring a Public Input Session, the failure of the Planning Director to hold a second Public Input Session was a violation of the DPO. In the alternative, the failure to hold a second Public Input Session was an abuse of discretion on the part of the Planning Director tainting the rezoning process.

**28.** In violation of state law and the DPO, the Second Application was not filed by the property owner and the ordinance authorizing the Rezoning is therefore null and void.

**29.** The Town scheduled a public hearing on the rezoning application as required by state law and the DPO. However, in violation of the DPO, the Planning Board for the Town did not issue its written recommendation until *after* the public hearing, rather than before the public hearing. This was a material and substantial violation of the DPO because the Planning Board ultimately recommended 10-0 against the proposal, but their recommendation was not before the Board of Commissioners ("BOC") or the public *prior* to the public hearing as required by the DPO.

**30.** The Planning Director is required by the DPO to only conduct a *technical review* of any proposed amendment to the conditional planning area pursuant to §13.5 of and §14.5.4 of the DPO and to submit the same to the *Planning Board*. The Planning Director conducted a *technical review* of the rezoning application, but exceeded his authority under the DPO by ultimately making a *recommendation* in favor of the rezoning application, which recommendation is the sole province of the Planning Board under the DPO. The Planning Director also erroneously submitted the recommendation to the BOC rather than the Planning Board. This set up the intolerable scenario of having two (2) town actors, one a board and one staff, submitting recommendations to the ultimate decision maker, the BOC, when **only** the Planning Board's recommendation was warranted and proper under the DPO.

**31.** The public hearing on the rezoning application was conducted without the benefit of the Planning Board's recommendation in violation of the eight (8) clearly enumerated steps set forth at the end of §14.5.7.1 of the DPO, and with the recommendation in favor of the application by the Planning Director, in violation of his authority under the DPO.

**32.** These egregious violations the DPO strangely tainted and perverted the rezoning application process as dictated by the DPO, and consequently the approval of the Rezoning Application is null and void.

**33.** The BOC approved Ordinance 2017-16 on 14 November 2017, approving the Master Plan Amendment to the Conditional Planning Area for Davidson Commons East-lots 4 A and B.

**34.** Most of the Plaintiffs participated in the rezoning process for the subject properties from the very beginning, through the 14 November 2017 meeting of the BOC in which the rezoning was approved. Plaintiffs, and many others, voiced strong opposition to the proposed rezoning and continue to oppose it as their property values and the use and enjoyment of their properties will be significantly harmed by the development and operation of the hotel approved by Ordinance 2017-16.

## STANDING

**35.** Plaintiffs, as owners of property adjacent to, or in close proximity to the Subject Properties, will imminently suffer harm caused by the approval of the Rezoning, due to, *inter alia*:

**a.** A material reduction in property values due to the use of the Subject Property as a hotel, which is entirely inharmonious with the residential, low density use of Plaintiffs' Properties; and

**b.** The proposed development of the Subject Properties will cause Plaintiffs to suffer increases in intolerable noise, light, pollution, and traffic; diminution of the peaceful residential character of their neighborhoods; loss of privacy; and loss in the use and enjoyment of Plaintiffs properties as single family residential properties.

**36.** As set forth above, Plaintiffs have a specific legal and personal interest in the Plaintiffs' Properties, which are directly and adversely affected by the BOC's approval of the requested rezoning for the Proposed Development. In addition, most Plaintiffs have been actively and continuously involved throughout the Rezoning process, in ways including, but not limited to, communicating with representatives of the developer,

Beacon, and the Town's Planning Staff, by attending and speaking at meetings before the Planning Board and BOC Commissioner, the Public Input Session and neighborhood meetings.

**37.** The Rezoning is an invasion of Plaintiffs' protected interests and their injury from the Rezoning is concrete and particularized, and actual and imminent. A favorable decision in the current action will redress Plaintiffs' injury.

**38.** Plaintiffs have standing as interested parties to bring this action for declaratory judgment, pursuant to N.C. GEN. STAT. § 1-254, *et seq.* and Rule 57 of the North Carolina Rules of Civil Procedure, to resolve the justiciable controversy which exists and arises from, *inter alia*, the Rezoning, approved by the BOC on 14 November 2017.

## FIRST CLAIM FOR RELIEF
### PROCEDURAL VIOLATIONS:
### INADEQUATE NOTICE AND OPPORTUNITY TO BE HEARD

**39.** Plaintiffs refer to and incorporate by reference the allegations of the preceding paragraphs as if fully set forth herein.

**40.** As described in greater detail hereinabove, the Town violated Plaintiffs' procedural rights in various ways, including the following:

**a)** Failure to conduct a Public Input Session on the separate and distinct Second Application in violation of the DPO;

**b)** Failure to provide the public an opportunity to be heard at a Public Input Session was in violation of the DPO and the North Carolina General Statutes;

**c)** Failure to provide adequate notice of the Public Input Session or public hearing by adequate signage. This signage was deficient because it failed

to provide the specific information necessary to constitute adequate notice in accordance with §14.5.7 of the DPO and N.C.G.S §160A-384;

**d)** Failure of the Planning Board to have their recommendation available for distribution to the public, including the Plaintiffs.

**41.** The failure of the Town to provide Plaintiffs and the public with adequate notice and opportunity to be heard, as set forth above, was in violation of Plaintiffs' procedural rights, and as a result Plaintiffs are entitled to a declaratory judgment that the Rezoning is invalid and void *ab initio*.

## SECOND CLAIM FOR RELIEF

### Spot Zoning

**42.** Plaintiffs refer to and incorporate by reference the allegations of the preceding paragraphs as if fully set forth herein.

**43.** The Subject Properties constitute a relatively small tract of land, surrounded by a larger, nearly uniformly zoned area, and the Rezoning relieves the Property from restrictions to which the rest of the area is subjected. Therefore, the Rezoning constitutes spot zoning, as defined by North Carolina jurisprudence.

**44.** Because the Rezoning is spot zoning, the Town has the burden of showing the reasonableness of the decision to rezone the Property.

**45.** The North Carolina Supreme Court has set forth the following factors as relevant to a determination of the reasonableness of spot zoning:

> [T]he size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and the

relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

*Chrismon v. Guilford Cnty.*, 322 N.C. 611, 628, 370 S.E.2d 579, 589 (1988).

**46.** Based on the evidence before the BOC on 14 November 2017, the Town cannot carry their burden of showing the reasonableness of its decision to approve the Rezoning, for reasons including, *inter alia*:

**a)** The Subject Properties consist of approximately 2.1 acres, which is small compared to the acres surrounding the Subject Properties that are almost entirely uniformly zoned for residential or institutional purposes;

**b)** The Rezoning is not compatible with adopted Land Use Plans; and

**c)** The benefits that applicants Beacon and Patel receive from the Rezoning far outweigh those received by the neighbors and surrounding community.

**47.** For the reasons set forth above, the Rezoning constitutes illegal spot zoning, and is void *ab initio*, and of no effect.

## THIRD CLAIM FOR RELIEF

## Noncompliance with DPO

**48.** Plaintiffs refer to and incorporate by reference the allegations of the preceding paragraphs as if fully set forth herein.

**49.** In adopting the Rezoning, the Town failed to comply with numerous requirements of the DPO, including the following:

**a)** The underlying zoning category, Lakeside Planning Area, does not list as one of its permitted uses "hotel". Hotels, in that zone were previously a

permitted use but was reversed by an amendment to the DPO sometime after 2006 when the schools opened in the vicinity;

**b)** Failure to hold Public Input Session for the second application;

**c)** The Planning Board's recommendation was not prepared or received until after the public hearing;

**50.** Because the Town and the Defendants failed to follow the requirements of the DPO in approving the Rezoning, Plaintiffs are entitled to a declaratory judgment that the Rezoning is void *ab initio* and of no effect.

## FOURTH CLAIM FOR RELIEF

## Arbitrary and Capricious and *Ultra Vires*

**51.** Plaintiffs refer to and incorporate by reference the allegations of the preceding and following paragraphs as if fully set forth herein.

**52.** By approving the Rezoning, the Town acted in an arbitrary and capricious manner, patently in bad faith, whimsically, and in a manner that is lacking in fair and careful consideration and impartial, reasoned decision making, as follows:

**a)** The BOC approved the Rezoning without considering the various approval criteria articulated in the DPO. Specifically, DPO § 14.19.5 states that the "Board of Commissioners should consider...four (4) different questions when 'reviewing an application for a rezoning." Nothing in the minutes from the 14 November 2017 meeting demonstrates that *Board of Commissioners* ever considered these criteria;

**b)** The BOC failed entirely to meaningfully consider the criteria set forth in DPO § 14.19.5, which weigh strongly *against* the Rezoning and the Proposed Development. By way of illustration only, and not limitation:

**i.** The Proposed Development is not in conformance with and does not further the policies and goals of the DPO, or other adopted plans;

**ii.** The use of the Proposed Development as a hotel is prohibited within the underlying zoning, while hotels are a specific *permitted* use in seven (7) of the sixteen (16) Planning Areas set forth in the DPO;

**iii.** The Proposed Development is entirely incompatible with the character of the surrounding areas, which include two (2) schools, and Plaintiffs' Properties;

**iv.** The Proposed Development *would* cause adverse effects on the capacity and/or safety of the area affected by the Rezoning, due to and an influx of traffic, and transient persons in a highly pedestrian area of school children from grades K through 12;

**v.** The environmental impacts generated by the new use will be substantial and highly detrimental;

**vi.** The Rezoning is *not* compatible with the adjacent neighborhood, especially residential neighborhood stability and character, including the character of Plaintiffs' Properties; and

**vii.** An adequate supply of alternative land is available in the surrounding community to accommodate the Proposed Development, which is far more appropriate for the uses proposed than the Subject Properties. Specifically, inconsistency statement #1 from the Planning Board sets forth a 20-year plan for a hotel on a different site next to I-77.

**c)** Negative information and evidence recommending against approval of the Rezoning and/or the Proposed Development was intentionally withheld from the Planning Board, BOC, and the public, by the Defendants.

**53.** The *ultra vires* acts of the Town, as set forth above and hereinbelow, include, by way of example only, and not limitation:

**a.** Engaging in illegal spot zoning, as set forth above;

**b.** Approving the Rezoning for a hotel, notwithstanding that hotel uses are prohibited within the underlying zoning (Lakeside Planning Area), as set forth above;

**c.** Failing to provide proper notice and opportunity to be heard, as set forth in greater detail above;

**d.** Failing to hold a *quasi-judicial* proceeding for the Rezoning, in disregard of the provisions of the DPO and Plaintiffs' constitutional right to procedural due process, as set forth in greater detail below; and

**e.** Failing to approve a proper Statement of Consistency, as set forth below.

**54.** For the reasons set forth above, the Rezoning was arbitrary and capricious, patently in bad faith, whimsical, and lacking in fair and careful consideration and impartial, reasoned decision-making, and/or was *ultra vires* and outside the scope of the Town's zoning authority, and as a result, is invalid, null, and void *ab initio.*

## FIFTH CLAIM FOR RELIEF

## Violation of Procedural Due Process: Failure to Hold a *Quasi-Judicial* Hearing

**55.** Plaintiffs refer to and incorporate by reference the allegations of the preceding paragraphs as if fully set forth herein.

**56.** By adopting DPO, discussed further above, which require considerations of the questions and criteria set forth therein, the Town was required to engage in the two (2) key elements of quasi-judicial decisions: (1) finding facts regarding the specific proposal; and (2) the exercise of some discretion in applying general policies. As a result, the Town bound itself to hold quasi-judicial proceedings, with all attendant procedural protections, to comply with due process.

**57.** The nature of the decision being made, and *not* the label assigned to it, controls the procedure that is owed. Because, in reality, the DPO requires a *quasi-judicial* inquiry, rather than a legislative hearing, due process mandates that the Town hold a *quasi-judicial* hearing and comply with all fair trial standards.

**58.** The failure of the Town to hold a *quasi-judicial* hearing violated Plaintiffs' right to procedural due process, and as a result, Plaintiffs are entitled to a declaratory judgment that the Rezoning is invalid and void *ab initio*. In the alternative, Plaintiffs are, at a minimum, entitled to an order remanding the matter for a *quasi-judicial* proceeding.

## SIXTH CLAIM FOR RELIEF

## Violation of N.C. Gen. Stat. § 160A-383: Failure to Approve a Proper Statement of Consistency

**59.** Plaintiffs refer to and incorporate by reference the allegations of the preceding paragraphs as if fully set forth herein.

**60.** Pursuant to N.C. Gen. Stat. § 160A-383, the Town was required to approve a separate statement describing whether their action was consistent with adopted comprehensive plans, and a statement explaining why the Town considered the amendment to be reasonable and in the public interest (the "**Statement of Consistency**").

**61.** The Statement of Consistency adopted by the Town fails to adequately address the requirements of the statutory provision above. First, the Statement of Consistency fails to *describe* how its approval of the requested rezoning was consistent with adopted land use plans. Additionally, the Statement of Consistency fails to *explain* how it is reasonable and in the public interest and fails to adequately address the seven (7) enumerated "General Planning Principles" set forth in the Preface to the DPO.

**62.** The Planning Board issued a negative recommendation to the BOC on 25 September 2017, including therein six (6) clearly enumerated inconsistency statements. On 14 November 2017, the BOC approved the Rezoning and issued a Consistency Statement with two (2) enumerated "consistencies". At a minimum, it was incumbent on the BOC to address the Planning Board's inconsistencies and explain why the BOC saw it differently on those six (6) enumerated issues. The BOC failed to do that.

**63.** The failure to adopt a proper Statement of Consistency, in compliance with N.C. Gen. Stat. § 160A-383, and §14.5.7.1 of the DPO, renders the BOC's approval of Ordinance 2017-16 invalid, null, and void, and Plaintiffs are entitled to a declaratory judgment that approval of the Rezoning is void *ab initio*.

**SEVENTH CLAIM FOR RELIEF**
**Violation of Separation of Powers and Procedural Due Process: N.C. Gen. Stat. § 160A-383**

**64.** Plaintiffs refer to and incorporate by reference the allegations of the preceding paragraphs as if fully set forth herein.

**65.** Article I, § 6 of the North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const., Art. I, § 6.

**66.** Article I, § 18 of the North Carolina Constitution provides that "[a]ll courts shall be open; every person for an injury done him in his *lands*, goods, person, or repudiation *shall have remedy by due course of law*; and right and justice shall be administered without favor, denial, or delay." N.C. Const., Art. I, § 18 (emphasis added).

**67.** Article IV, Section 1 of the North Carolina Constitution provides, in pertinent part, that "[t]he General Assembly *shall have no power* to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government[.]"N.C. Const., Art. IV, § 2 (emphasis added).

**68.** These provisions of the North Carolina Constitution make it clear that the North Carolina General Assembly does not have the authority to impede on the province of the judiciary by unconstitutionally limiting access to the courts for aggrieved citizens.

**69.** In violation of this clear mandate, N.C. Gen. Stat. § 160A-383, as amended by Session Law 2005-426, requires that in adopting or rejecting a rezoning amendment, a governing board "adopt a statement describing whether its action is consistent with an adopted comprehensive plan and explaining why the board considers the action taken to

be reasonable and in the public interest. ***That statement is not subject to judicial review***." (Emphasis added).

**70.** N.C. Gen. Stat. § 160A-383 violates Article I, §§ 6, 18 and Article IV, § 1 of the North Carolina State Constitution in that it attempts to deprive the judicial department of its power and jurisdiction over legislative acts.

**71.** Plaintiffs are entitled to a declaratory judgment that N.C. Gen. Stat. § 160-383 is unconstitutional, as inappropriately invading the province of the judiciary, and wrongfully attempting to deprive the Plaintiffs of open access to the courts, in violation of the North Carolina Constitution

**MOTION FOR EXCEPTIONAL CASE DESIGNATION**

COME NOW the Plaintiffs, and pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts Supplemental to the North Carolina Rules of Civil Procedure, respectfully move the Court to designate this matter as an exceptional civil case. In support thereof, Plaintiffs refer to and incorporate by reference the allegations of the preceding paragraphs as if fully set forth herein, and further show unto the Court that the circumstances of this case and the factors set forth in Rule 2.1 warrant designation of this matter, as follows:

**72.** This matter involves numerous parties, many of whom have diverse and divergent interests.

**73.** Complex and novel legal questions are presented by this matter, concerning whether procedural due process requires *quasi-judicial* or legislative proceedings when an ordinance authorizes the exercise of discretion in applying specific enumerated factors to generally adopted land use policies in considering a proposed rezoning.

**74.** Extensive discovery will likely be required, and judicial oversight will likely be necessary throughout the discovery process. A judge with a thorough knowledge of the history of the case and the legal and factual issues involved would more expeditiously and efficiently handle discovery disputes and rule upon issues as they arise among the many parties.

**75.** This case is likely to involve, and be resolved, at least in part, by dispositive motions, which will be supported and opposed by extensive briefing and oral argument, and may require significant court time to resolve.

**76.** Designation of this case as exceptional will promote the efficient administration of justice, promote scheduling flexibility, and prevent an undue imposition on the Court's regular presiding judges and normal case docket.

**77.** Plaintiffs agree to waive venue for hearings on pre-trial motions.

**WHEREFORE**, Plaintiffs respectfully pray the Court grant them relief as follows:

**1.** For recommendation to the Chief Justice that this case be designated as an exceptional civil case, pursuant to the provision of Rule 2.1 of the General Rules of Practice, and for entry of such other orders as are appropriate;

**2.** That the Court enter a declaratory judgment in Plaintiffs' favor, that the Rezoning is invalid and void *ab initio*;

**3.** In the alternative, to remand this matter to the Board of Commissioners with instructions to hold a duly noticed, *quasi-judicial* hearing;

**4.** For a declaration that N.C. Gen. Stat. § 160A-383 unconstitutionally violates the separation of powers doctrine, and is therefore, unconstitutional, null, and void;

**5.** For trial by jury on all issues of fact;

**6.** That the Court tax costs of this action to Defendants, including Plaintiffs' reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.7 and other applicable law; and

**7.** For such other and further relief as this Court may deem just and proper.

THIS, the 16th day of January, 2018.

THE LAW OFFICE OF KENNETH T. DAVIES, P.C.

Kenneth T. Davies
N.C. Bar No. 9190
kendavies@kdavies.com

Samantha Simpson
N.C. Bar No. 52399
ssimpson@kdavies.com

2112 East Seventh Street
200 The Wilkie House
Charlotte, North Carolina 28205
Telephone: (704) 376-2059
Facsimile: (704) 499-9872
*Attorneys for Plaintiffs*