

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH
OCEAN SHORE CONDOMINIUM ASSOCIATION,
SHIPS WATCH CONDOMINIUM OWNERS' ASSOCIATION, INC.,
RICHARD D. NORRIS,

and

PAUL TERKELTAUB
Petitioners.

v.

CASE NO.: _____

VIRGINIA BEACH CITY COUNCIL,
SERVE: Bobby Dyer, Mayor
Office of the Mayor
2401 Courthouse Dr., #234
Virginia Beach, VA 23456

CITY OF VIRGINIA BEACH,
SERVE: Mark D. Stiles, City Attorney
2401 Courthouse Dr.
Virginia Beach, VA 23456

and

WESTMINSTER-CANTERBURY ON CHESAPEAKE BAY
SERVE: Hugh L. Patterson, Registered Agent
Wilcox & Savage, PC
440 Monticello Ave., Suite 2200
Norfolk, VA 23510

Defendants.

PETITION

COME NOW the Petitioners, SHIPS WATCH CONDOMINIUM OWNERS'
ASSOCIATION, INC., OCEAN SHORE CONDOMINIUM ASSOCIATION,
RICHARD D. NORRIS and PAUL TERKELTAUB, and for their Petition for

Declaratory Judgment and for additional relief against the Defendants state as follows:

PARTIES

1. The Petitioner OCEAN SHORE CONDOMINIUM ASSOCIATION (hereinafter "Ocean Shore CA") is the duly constituted owners' association pursuant to Virginia Code 55.1-1900 et seq. for OCEAN SHORES CONDOMINIUM in Virginia Beach, VA.

2. The Petitioner SHIPS WATCH CONDOMINIUM OWNERS' ASSOCIATION, INC. (hereinafter "Ships Watch CA") is the duly constituted owners' association pursuant to Virginia Code 55.1-1900 et seq. for SHIPS WATCH CONDOMINIUM in Virginia Beach, VA.

3. RICHARD D. NORRIS is a resident of Ships Watch Condominium and a property owner in the B-4 Mixed Use District in the City of Virginia Beach. Petitioner owns and occupies real property located on Ships Watch Ct. in the B-4 District.

4. PAUL TERKELTAUB is a resident of Ocean Shore Condominium and a property owner in the B-4 Mixed Use District in the City of Virginia Beach. Petitioner owns and occupies real property located on Ocean Shore Crescent in the B-4 District.

5. Defendant VIRGINIA BEACH CITY COUNCIL is the executive organ and zoning authority formed pursuant to the laws of the Commonwealth of Virginia and is the legislative branch of the government of the City.

6. Defendant CITY OF VIRGINIA BEACH is an independent city chartered by the General Assembly of Virginia.

7. Defendant WESTMINSTER-CANTERBURY ON CHESAPEAKE BAY is a nonstock corporation formed pursuant to the laws of the Commonwealth of Virginia.

8. OCEAN SHORE CA and SHIPS WATCH CA are associations of condominium owners created at the inception of the respective subdivisions pursuant to the Virginia Condominium Act, having among their responsibilities the administration of the affairs of the community and enforcing rights and obligations under the recorded documents creating the condominium and representing the collective and individual interests of the owners as they may exist.

9. Pursuant to Virginia Code §55.1-1956, the condominium associations are charged with representing and advocating for the common areas in the condominiums.

JURISDICTION AND VENUE

10. This is a declaratory judgment action brought pursuant to Virginia Code §8.01-184, et seq., Code of Virginia 1950, as amended. This court also has jurisdiction over this action pursuant to Va. Code§ 8.01-184, 15.2-2285, and 17.1-500.

11. There is an actual controversy related to the legality of the actions of Defendants and how it has, and may be applied, to Petitioners.

12. Petitioners have standing to bring this action, as they now, and may in the future, be injured by the acts of Defendants in obtaining and granting a Conditional Use Permit and Modification (“CUP”) in derogation of the Virginia Code and the City of Virginia Beach Zoning Ordinances (“CZO”). Petitioners are suffering now, and may suffer in the future, a deprivation of rights as an aggrieved party under Virginia law.

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

HISTORICAL BACKGROUND

14. Defendant City Council (“City Council”) is the governing body for the Defendant City of Virginia Beach. In that capacity, Defendant Council enacted a zoning ordinance, codified as Appendix A to the Virginia Beach City Code (“Code”).

15. Further, the City of Virginia Beach and City Council are required to adhere to the Comprehensive Plan, last updated on May 17, 2016, with regard to zoning determinations.

16. In 1977, a Conditional Use Permit (“CUP”) was granted by the City Council to WC to operate a Continuing Care Retirement Community on Parcel # 1. (See Exhibit 1 for parcel identifications.)

17. Parcel 1 is located at the intersection of Shore Drive and Starfish Road, is bounded in part by the Chesapeake Bay, and at all times relevant hereto was zoned B-4, a mixed-use business and residential district.

18. The Virginia Beach zoning laws are contained in Appendix A of the Ordinances. Article 1 describes the purpose for the City's Zoning Laws; Article 2 describes generally the procedure and process to address zoning issues; while Article 3- Article 22 identify the substantive aspects of the various Districts like Residential, Agricultural Business Districts.

19. The Articles regarding the various District types follow a common pattern of enactment, with the first section of each such Article numbered _00 and entitled "Legislative Intent." Thereafter, Section _01 is entitled "Use Regulations," Section _02 is entitled "Dimensional Requirements," Section _03 is entitled "Landscaping" and Section _04 is "Height Regulations."

20. The "Legislative Intent" section is intended to provide an overview of the particular district and how it fits into the comprehensive plan as a guidance tool for decision-making related to that particular district.

21. Section _01 "Use Regulations" identifies the various types of activities and structures which are permitted as a matter of right or which may be permitted on a conditional basis. If the use is not listed as "principle (p)" or "conditional(c)" for the particular district, then it is prohibited.

22. As all other district Use Regulations mandate, Section 901(a) of the applicable Business District zone provides: "**NO USES OR STRUCTURES OTHER THAN AS SPECIFIED SHALL BE PERMITTED.**"

23. In 1988, the laws of the City of Virginia Beach included §901 of the Zoning Appendix and provided that housing for seniors and disabled persons

was permitted as a conditional use provided that “the maximum height shall not exceed one hundred and sixty-five (165) feet.”

24. The 165-foot height limitation in the §901 Use Regulation was in full force and effect in 1998 when a modification of the CUP by City Council was granted to WC allow the construction of a 165- foot tall (14 story) home for the aged, disabled and handicapped on Parcel 1.

25. In 1998, the City Planning Staff, Planning Commission and City Council, incident to review and approval of the application, all noted the binding effect of the Use Regulation in §901 which required WC to limit the height of the facility even though there were no applicable §904 Height Regulations which limited the structure to 165 feet.

26. Shortly thereafter, the City Council, upon the request of the City of Virginia Beach, amended the City Zoning Ordinance Sections, 111, 235 401, 501, 601, 801, 901, 1110, 1125, 1511, 1521 and 1531 to provide for clarity in the many ordinances “...re definition of, and standards pertaining to, housing for seniors and disabled persons.”

27. Section 901 was amended on June 23, 1998, and in effect on September 22, 2020, to provide as follows:

“Homes Housing for the aged, seniors and disabled persons or handicapped, including convalescent or nursing homes; maternity homes; child care centers other than covered under permitted principal uses hereinabove, ~~when not operated by a public agency~~, provided that ~~the maximum density for homes for the aged shall be sixty (60) dwelling units per acre and the maximum height shall not exceed one hundred and sixty five (165) feet~~, provided, however

that no structure shall exceed the height limit established by section 202(b) regarding air navigation.

28. In 2008, a modification of the CUP of WC was granted to allow the construction of an additional parking structure on Parcel 1.

THE WESTMINSTER CANTERBURY EXPLOSION

29. In 2019, Westminster tendered an application for modification of its CUP to the City Planning Director, the "WC Expansion."

30. The property affected by the WC Expansion is subject to the CZO, and the Shore Drive Corridor Overlay.

31. The application for modification includes 6 additional parcels of land acquired by WC and Parcels 2-7 are not part of the previous WC Conditional Use Permit and modifications thereto.

32. Parcels 5-7 in the proposed WC Expansion application, which are neither adjoining or contiguous, are separated from the main campus by Starfish and Ocean Shore roads.

33. The application proposes the new construction of a 22-story independent living tower joined in a "U" shape to another new healthcare building and residence on Parcels 2-4.

34. A seven- story building is proposed on Parcels 5-7 which are separated from the main campus.

35. Parcels 2 through 7 are separate tax parcels and have not previously received a conditional use permit for any of the proposed construction.

36. In addition, two elevated (air) pedestrian bridges are proposed over Ocean Shore Avenue and Starfish Road to provide connections between the proposed buildings and the facilities on the existing WC campus.

37. The WC Expansion also proposes to close the existing 20-foot wide public beach access easement which currently runs the length of Parcel 1 from Shore Drive to the Chesapeake Bay.

38. The WC Expansion proposed a new public beach access easement on the northeastern property line immediately next to OCEAN SHORE CA, with an 8-foot solid wall to be installed immediately behind buildings 1 and 2 of Ocean Shore.

39. The project also calls for the demolition of existing buildings on Parcels 2-4 where the proposed Tower is to be erected.

40. The WC Expansion is located immediately adjacent to OCEAN SHORE Condominiums and Terkeltaub, and SHIPS WATCH Condominiums and Norris are separated from the Tower only by the OCEAN SHORE Condominiums.

41. As approved, the 270-foot Tower will be erected within approximately 50 feet of the Ocean Shore Condominiums.

42. As approved, the 270-foot Tower and the WC expansion will place Ocean Shore Condominium buildings 1 and 2 entirely in shade for approximately 5 hours per day, where there is currently sunlight and a clear view, with the remaining buildings in OCEAN SHORE CA and SHIPS

WATCH CA impacted to a slightly lesser degree for shade and shadow but with a significantly impacted view and sight line.

43. As approved, the 270-foot Tower and the WC expansion constitute a substantial detriment to the flight paths of migratory birds.

44. Upon information and belief, WC has done soil borings which indicate that the current property cannot bear a 270-foot Tower in a safe manner.

45. The Petitioners are aggrieved persons.

46. The individual Plaintiffs own and occupy real property in close proximity to the property subject to the land use determination and are adversely affected by the WC construction in a manner not experienced by the general citizenry.

47. The Plaintiff condominium associations are legally charged with representing the common areas of real property in close proximity to the property subject to the land use determination and are adversely affected by the WC construction in a manner not experienced by the general citizenry.

48. The Petitioners have a direct, immediate, pecuniary, and substantial interest in the decision.

49. The Petitioners allege the following facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the Petitioners different from that suffered by the public generally, including but not limited to:

- a. loss of scenic view by obstruction from the 270-foot tower;
- b. loss of view from the 8-foot wall proposed at the property line shared with OCEAN SHORE CA and WC;
- c. increased pedestrian traffic upon establishment of the new beach access easement;
- b. shade and shadows depriving Petitioners of rights to light and air;
- c. decreased property values during the period of construction based upon the noise, vibration, noxious odors, construction debris and reduced air quality;
- d. damage to property caused by reflective exterior components of the proposed land use;
- e. increased traffic as a result of the increasing residential density and additional employment required by the new facilities;
- f. increased traffic as a result of the new beach access;
- g. loss of vested rights in the 165-foot limitation;
- h. risk of injury to person and property based upon a construction height which exceeds that permitted by soil borings.

50. As approved, the 270-foot Tower and the WC expansion will have a substantial negative visual impact on the surrounding neighborhood and a substantial negative effect on the value of the surrounding properties.

51. The 8-foot solid wall proposed to adjoin the new beach access as proposed would be located approximately 15 feet from Buildings 1 and 2 in OCEAN SHORE CA.

52. As approved, the 270-foot Tower and the WC expansion would be located approximately 67 feet from Buildings 1 and 2 in OCEAN SHORE CA.

53. The 270-foot Tower would be the first of its kind in the area and would rise in excess of 200 feet above the tree line in the neighborhood.

54. The WC Expansion and 270-foot Tower would have significant negative impacts on the aesthetics and overall integrity of the neighborhood.

55. The WC Expansion and 270-foot Tower would render the immediate neighborhood owned by Petitioners less desirable and there would be a detrimental impact on local homeowners.

56. The WC Expansion and 270-foot Tower would adversely affect the resale value of the homes surrounding it, including those of Petitioners.

57. The 270-foot Tower would become increasingly visible as one moved farther away from the site or if one viewed the Tower from the local roads.

58. The 270-foot Tower would be in plain sight from neighborhood homes and the Tower's visibility would increase during the winter months as the local, deciduous trees lost their leaves.

59. Petitioners would suffer negative impacts on their everyday use and enjoyment of their units and common areas because the Tower would be taller and wider than any existing structure.

60. The WC Expansion and 270-foot Tower are incongruous with the existing neighborhood, including the existing structures owned by WC on Parcel 1.

61. The City Council failed to attach any conditions to the proposed development to deal with any of the significant negative impacts caused to Petitioners and others.

62. WC was not required to undertake any changes to its original plans despite the substantial objection from Petitioners and the immediate community.

64. Among the conditions requested by Petitioners, which would serve to ameliorate a number of impacts, include:

- a. Mandate low reflective glass;
- b. Move the Tower to the far west property line or to Parcels 5-7;
- c. Require the current beach access area to remain in its current location;
- d. Reduce the height from current request to 165 feet, the same as other structures in the immediate area;
- e. Reconfigure the “U” shaped building to place the shorter tower on the eastern side;
- f. Mandate the type of boring and foundation development;
- g. Require soil borings to verify the safety and suitability of Parcels 2-4 for the proposed 270-foot Tower; and
- h. Require study of reflectivity of all materials and mandate that the lowest reflectivity be employed.

65. The current conditions imposed by the CUP would be inadequate to protect the Petitioners’ property rights and interests.

66. On September 22, 2020, the City Council approved the application for the WC Expansion and 270-foot Tower.

67. The City Council used impermissible criteria, including the profit margin of WC, in making its decision to allow the height in excess of 165 feet.

68. The City Council used impermissible criteria in preferring the views and comfort of occupants of WC’s current facilities, who have no legal interest in the real property, in making its decision to allow the WC Expansion.

69. The City Council abandoned its own criteria in failing to obtain the endorsement of the Senior Housing Advisory Committee (SHAC), which has been mandated to approve all such senior housing projects.

70. Planning Staff of the City of Virginia Beach who sit on the SHAC have complained that they were expressly enjoined from making negative comments about the WC Expansion or having their objections and requests heard.

71. WC falsely represented to the Planning Commission and City Council that SHAC had approved its project.

72. WC falsely represented to the Planning Commission and City Council that the Shore Drive Coalition had approved its project.

73. City Council failed to adhere to the use prohibition in §901 of the 165-foot limit for senior and disabled housing.

74. City Council engaged in preferential treatment of WC by having the Mayor and members of City Council engage in meetings at the offices of WC's counsel, corresponding with and maintaining a dialogue with WC Counsel in an effort to support the WC expansion and forwarding correspondence received by the Planning Department and City Council to alert WC and urging WC to prepare for objections to the project.

75. While providing improper assistance to WC to obtain approval of the proposed expansion, the Mayor and City Council steadfastly refused to meet

with, discuss or otherwise entertain the concerns of Petitioners, their counsel and all objecting parties.

76. At all relevant times, the Height Regulations found in §904 did not prescribe a maximum height for buildings in B-4 mixed use districts for senior and disabled housing.

77. At all relevant times, §221(i) of the CZO, which is the general statement on CUP procedures, grants City Council the authority to deviate from certain aspects of the various district requirements including (1) required setbacks, (2) required landscaping (3) height restrictions (4) minimum lot area and (5) required lot coverage. The permitted deviations correspond to each of the districts statutory scheme as required setbacks are found in section 02 of each Article, landscaping is found in section 03 of each Article, and height restrictions are found in section 04 of each Article.

78. Section 221(i) does not allow deviation from the “Use Regulations” of the Business District even when terms involving density and height are at issue.

79. As with all statutory interpretation, the specific component of §901 controls the more general practice and procedure contained in §211.

80. As with all statutory interpretation, the express prohibition in §901 which states **NO USES OR STRUCTURES OTHER THAN AS SPECIFIED SHALL BE PERMITTED,** controls the more general permissions contained in §211.

81. Pursuant to Section 221(a) entitled “Application for conditional use permit” “Any property owner... may file with the planning director an application for a conditional use permit, provided that the conditional use sought is permitted in the particular district.”

82. There is no conditional use for any senior or disable housing in excess of 165 feet. The height limitation is an integral part of the Use Regulation, not a waivable Height Regulation.

83. Under a Section 221(i) determination, the City has failed to address the significant detrimental effects on surrounding properties.

84. Article VII, Sec. 9. of the Virginia Constitution provides in pertinent part:

No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three-fourths of all members elected to the governing body.

No franchise, lease, or right of any kind to use any such public property or any other public property or easement of any description in a manner not permitted to the general public shall be granted for a longer period than forty years, except for air rights together with easements for columns of support, which may be granted for a period not exceeding sixty years. Before granting any such franchise or privilege for a term in excess of five years, except for a trunk railway, the city or town shall, after due advertisement, publicly receive bids therefor. Such grant, and any contract in pursuance thereof, may provide that upon the termination of the grant, the plant as well as the property, if any, of the grantee in the streets, avenues, and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation therefor, become the property of the said city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise.

85. Virginia Code 15.2-2201 similarly requires adherence to supermajority approval.

86. City Council has approved the WC expansion with regard to the pedestrian bridges without complying with the Virginia Constitution's requirements.

87. City Council has approved the WC expansion, which would extinguish the existing public access easement without a supermajority of 75% of the Council, or nine members of the eleven-member Council.

88. Prior to approval of the CUP, counsel for some of the Petitioners noted the constitutional infirmities to the City, City Council and the City Attorney, explaining:

An opinion of the Virginia Attorney General construing the easement relocation issue as one requiring a supermajority. The legal research also makes it clear that abstention does not reduce the supermajority to one of "eligible votes." Both the Virginia Constitution and § 15.2-2100 of the Virginia Code refer to "a recorded affirmative vote of three-fourths of all the members elected..."

89. At the time of approval, September 22, 2020, there were not nine members of the City Council who were eligible to vote and who have not recused themselves.

90. City Council cannot approve a CUP which defies compliance with the Virginia Constitution.

91. City Council cannot approve a CUP which defies compliance with Virginia Code § 15.2-2100.

92. Approval of the WC Expansion by City council constitutes a violation of the constitutional rights of Petitioners.

93. Council established the B-4 district regulations because such regulations have a substantial impact on limiting development activities which protect the residential character of and thereby improve property values in such districts.

94. The VB Comprehensive Plan recognizes this fact. The City of VB has represented that the district regulations in the Code are a positive component in improving property values in the B-4 districts.

95. The VB comprehensive plan adopted by the governing body shall control the general or approximate location, character and extent of each feature shown on the plan.

96. The proposed WC Expansion is not a feature already shown on the adopted Comprehensive Plan and shall not be constructed, established, or authorized, unless and until the general location or approximate location, character, and extent thereof has been submitted to and approved by the City Council as being substantially in accord with the adopted Comprehensive Plan.

97. The approval of Conditional Use Permits is strictly limited by Virginia law. Va. Code § 15.2-2309; Cochrane v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 59 S.E.2d 571 (2004).

98. The good zoning practices required for the approval of special exceptions, under whatever name, are those factors specifically enumerated in

Va. Code§ 15.2-2309.2 and elucidated in case law.

99. The "authorized variation" in Code§ 211 and the special exception under Va. Code§ 15.2-2201 are one and the same thing.

100. City Council acted on such illegal conditional use permits without the public notice and comment required by Virginia law. Va. Code§§ 15.2-2309-2312.

101. There is no rational basis for the unequal treatment of similarly situated residential property owners in the HC Districts as is perpetrated by Code §; 9-1.8.

102. Code § 221, on its face and as applied, deprives residents of Business Districts, such as Petitioners, of the equal protection of the laws in violation of the United States Constitution.

103. Code § 221, on its face and as applied, deprives residents of Business Districts, such as Petitioners, of procedural due process in violation of the Virginia Constitution.

104. Code § 221, on its face and as applied, deprives residents of Business Districts, such as Petitioner, of substantive due process in violation of the United States Constitution.

105. With the approval by City Council of the WC Expansion, WC is free to apply for demolition and building permits for the WC Expansion.

106. CZO §211(c), and all other provisions which permit the City or City Council to approve conditional use permits in derogation of the permitted

and conditional uses in §904, are void.

107. All illegal conditional use permits premised upon the application of §211 and thereafter approved by the City or City Council, including the decision to approve such a CUP for the WC Expansion, are void.

108. Petitioners are aggrieved parties of the illegal CUP granted by City Council for the WC Expansion.

COUNT ONE - INJUNCTIVE RELIEF

109. As owners of, and those charged with administration of the real property, in the immediate vicinity of the CUP, the Petitioners have standing as aggrieved parties under Virginia law to challenge the CUP.

110. An actual justiciable controversy ripe for adjudication exists between the Petitioner and the Defendant.

111. The Petitioners have no adequate remedy at law to resolve this matter.

112. Petitioners have suffered direct, immediate, substantial, and pecuniary harm from the lawless action of City Council in approving an illegal CUP for the WC Expansion.

113. Petitioners have been deprived of their constitutional rights under the Virginia and United States Constitutions by the lawless action of Council in approving an illegal CUP for the WC Expansion.

114. Petitioners will suffer direct, immediate, substantial, and pecuniary harm from all future lawless actions of Council and Commission that approve

illegal CUPs.

115. Petitioners will suffer future deprivations of their constitutional rights under the Virginia and United States Constitutions from all future illegal acts of City Council and the City that approve unlawful CUPs on the WC Campus and in the B-4 District.

116. Temporary, preliminary, and permanent injunctive relief against Defendants is necessary to prevent action during the pendency of this litigation by WC acting pursuant to the illegal action of City Council in granting an illegal CUP for the WC Expansion.

COUNT TWO-ARBITRARY AND CAPRICIOUS LEGISLATIVE ACT

117. Petitioners realleges and incorporates the allegations of Paragraphs 1-116 of this Petition as if set forth herein in their entirety.

118. 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).

119. From the legislative record, the City Council failed to address the copious adverse negative impacts which will be suffered by Petitioners.

120. From the legislative record, City Council failed to follow the requirements of the zoning ordinance to permit a defacto amendment of §901 in granting the CUP.

121. The legislative record establishes that City Council has not evaluated the factors included in §221(e) including "...where the area or dimensions of the subject site or existing structures on the site fails to meet the minimums established by this ordinance, the city council shall not approve such application unless it finds that conditions attached to its approval satisfactorily offset the negative effects inherent in the area or dimensional deficiency."

122. The legislative record establishes that City Council made no finding that the WC Expansion will be compatible with the neighborhood in which it is to be located, both in terms of existing land uses and conditions and in terms of proposed land uses and uses permitted by right in the area.

123. The legislative record establishes that City Council made no finding that the WC Expansion did not negatively impact traffic flow and control; access to and circulation within the property; off-street parking and loading; refuse and service areas; utilities; screening and buffering; signs, yards and other open spaces; height, bulk and location of structures; location of proposed open space uses; hours and manner of operation; and noise, light, dust, odor, fumes and vibrations.

124. The legislative record establishes that City Council failed to comply with §221(i) requiring good cause to abrogate the 165-foot limitation.

125. The legislative record establishes that City Council failed to comply with 221(i) requiring a finding that there will be no significant detrimental effects on surrounding properties by granting the CUP.

126. Because the parcels are separate and there has been no requirement that the lot lines be vacated, the City Council has impermissibly aggregated the property to avoid density, signage, height and other requirements.

127. The action of the City Council abrogates all requirements for Parcels-7 which have no existing CUP to modify as each parcel will independently carry forward the entitlement to the CUP.

128. City Council failed to follow its own criteria to require the approval of all senior housing projects from the Senior Housing Advisory Commission.

129. City Council failed to follow its own criteria in applying the Shore Drive Overlay criteria in granting the application for WC expansion.

130. City Council failed to follow its own criteria in applying § 235 of the CZO in granting the application for WC expansion.

131. With regard to the failure to enforce the provisions of 901's Use Regulation requiring that senior housing in B-4 district be no more than 165 feet in height, City Council has engaged in an impermissible amendment to the CZO without proper notice.

132. With regard to the failure to enforce the express prohibition in 901(b) City Council has violated the CZO and has acted outside of and in derogation of the CZO.

133. Council's approval of WC's Application is therefore arbitrary and capricious.

COUNT THREE-CLAIM UNDER 42 U.S.C. § 1983
(VIOLATION OF EQUAL PROTECTION)

134. Petitioners reallege and incorporate the allegations of Paragraphs 1-133 of this Complaint as if set forth herein in their entirety.

135. 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[.]

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

137. The City's approval of WC's Petitioners' 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.

138. Failing to impose appropriate conditions and granting WC's application when the similarly-situated residents of Thalia did not suffer those conditions or approvals has violated Petitioners' right to Equal Protection under the Fourteenth Amendment to the United States Constitution.

139. The failure to hold WC to the same standards as other projects in the City of Virginia Beach violated Petitioners' right to Equal Protection under the Fourteenth Amendment to the United States Constitution.

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

141. Indeed, it appears that the City and Council's actions were based primarily on the consideration of the City's tax revenues and not the impact on the Petitioners and those similarly situated.

142. The facts set forth herein indicate the existence of an improper motive in the denial of Petitioners' request for denial of the WC application.

143. Petitioners were injured as a result of the unconstitutional acts of the City Council.

COUNT FOUR-CLAIM UNDER VA. CODE ANN. § 15.2-2208.1

144. Petitioners realleges and incorporates the allegations of 1-143 of this Complaint as if set forth herein in their entirety.

145. 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.

146. As described above, the City and City Council's grant of a CUP violated Petitioners' rights to Equal Protection rights under the Fourteenth Amendment to the United States Constitution.

147. Petitioners, by counsel, have repeatedly requested reconsideration of the grant of the WC Expansion to the City and Council, through the City Attorney, objecting to the unlawful actions.

148. Pursuant to Va. Code Ann. §15.2-2208.1, Petitioners are entitled to an order directing City Council to reconsider WC's Expansion application consistent with the Court's determinations, and recovery of its court costs and attorneys' fees.

COUNT THREE-CLAIM UNDER VA. CODE ANN. § 15.2-2285

149. Petitioners reallege and incorporate the allegations of 1-148 of this Complaint as if set forth herein in their entirety.

150. Section 2285 of Title 15.2 of the Code of Virginia states that: "Every action contesting a decision of the local governing body adopting or failing to adopt a proposed zoning ordinance or amendment thereto or granting or failing to grant a special exception shall be filed within thirty days of the decision with the circuit court having jurisdiction of the land affected by the decision."

151. As described above, the City and City Council's grant of a CUP violated Petitioners' rights to Equal Protection rights under the Fourteenth Amendment to the United States Constitution.

152. Petitioners, by counsel, have repeatedly requested reconsideration of the grant of the WC Expansion to the City and Council, through the City Attorney, objecting to the unconstitutional actions.

COUNT FIVE- ULTRA VIRES ACT

153. Petitioners realleges and incorporates the allegations of Paragraphs 1-152 of this Complaint as if set forth herein in their entirety.

154. 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.

155. With regard to the failure to enforce the provisions of §401k's Use Regulation requiring that senior housing in B-4 district be no more than 165-feet in height, City Council has engaged in a defacto amendment to the CZO without notice required to amend the zoning code.

156. With regard to the failure to enforce the provisions of §901's Use Regulation requiring that senior housing in B-4 district be no more than 165-feet in height, City Council has exceeded its authority.

157. With regard to the approval of a modification request of a CUP to WC for separate parcels that had no prior CUP approval, with no requirement that such parcels be re-subdivided or aggregated, City Council has exceeded its authority.

158. With regard to approval of the WC CUP to create pedestrian bridges and remove or relocate a public beach access without supermajority approval, City Council has exceeded its authority.

159. Petitioners request that the illegal and ultra vires acts of City Council be enjoined and invalidated.

COUNT SIX - DECLARATORY JUDGEMENT

160. Petitioners reallege and incorporate the allegations of 1-159 of this Complaint as if set forth herein in their entirety.

158. There is an actual controversy related to the legality of the actions of Defendants.

159. Petitioners have standing to bring this action, as they now and may in the future be injured by the acts of Defendants in obtaining and granting a Conditional Use Permit and Modification ("CUP") in derogation of the Virginia Code and the City of Virginia Beach Zoning Ordinances ("CZO"). Petitioners are suffering now and may suffer in the future a deprivation of rights as an aggrieved party under Virginia law.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray the Court:

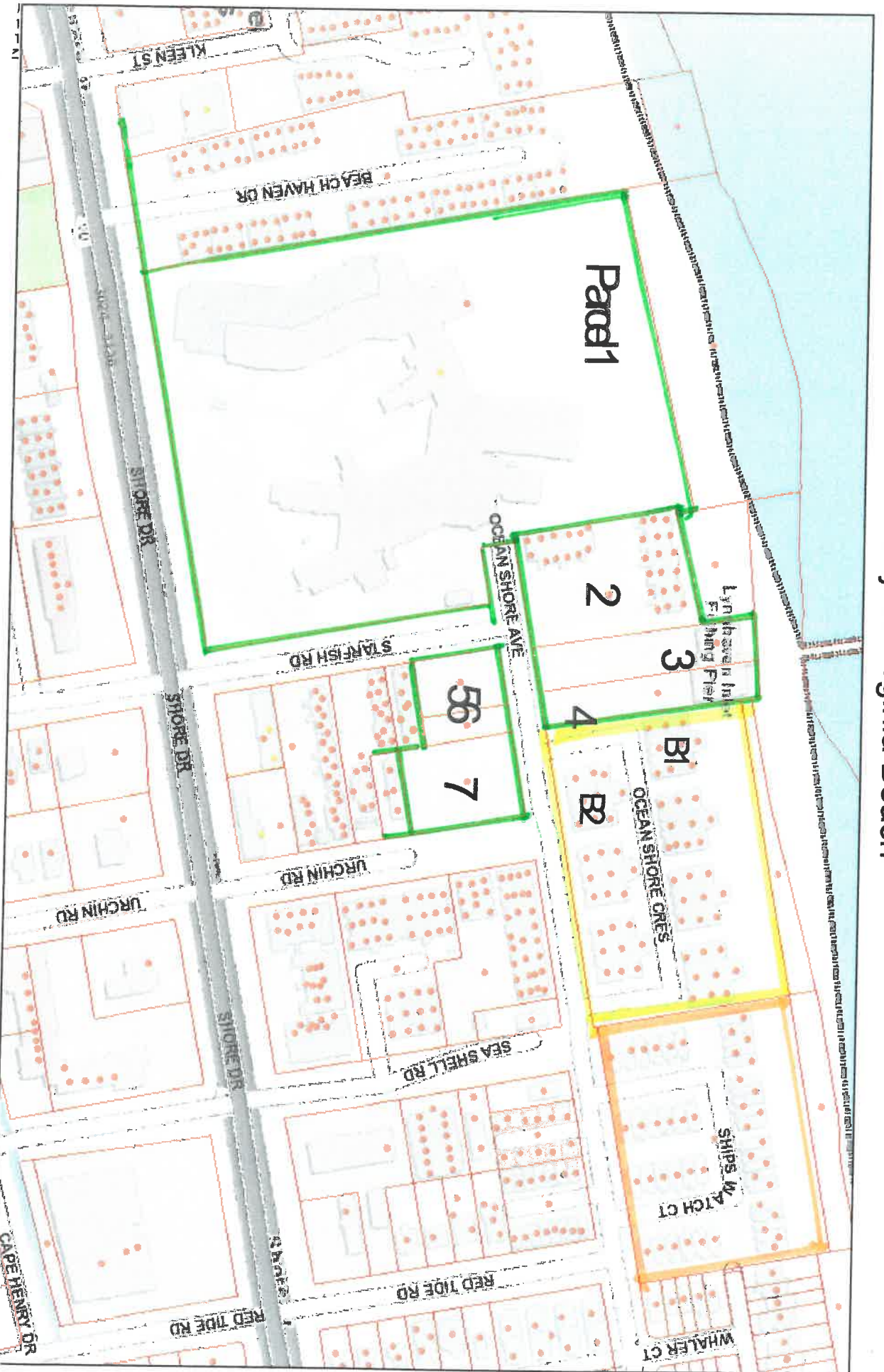
1. That City Council be temporarily, preliminarily, and permanently enjoined from approving an unlawful CUP or modification to a CUP;
2. That the City be temporarily, preliminarily, and permanently enjoined from from approving an unlawful CUP or modification to a CUP;
3. For a declaration that City Council has no authority to approve illegal special exceptions or "conditional use permits" of Use Regulations within zoning districts in the City of Virginia Beach;
4. For a declaration that Code Section 221 is void to the extent it purports to allow the City Council to approve conditional use permits in derogation of Use Regulations,
5. That the Director of the Department of Planning and Community Development be temporarily, preliminarily, and permanently enjoined from issuing any permit of any kind for the WC Expansion;
6. That the Director of the Department of Planning and Community Development be temporarily, preliminarily, and permanently enjoined from issuing any permit of any kind for any project in the B-4 District calling for the erection of any structure for senior or disabled housing that exceeds 165 ft. or otherwise violates the provisions of the law, including the CZO and Virginia Code;
7. That Petitioners recover their costs, including a reasonable attorney's fee, in this matter; and
8. For such other and further relief as the Court deems appropriate.

SHIP WATCH CONDOMINIUM OWNERS' ASSOCIATION, INC.
OCEAN SHORE CONDOMINIUM ASSOCIATION
RICHARD D. NORRIS
PAUL TERKELTAUB
By Counsel



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Westminster
EXHIBIT 1



OCEAN SHORE



SHIPS WATCH

