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The Newsletter of the Virginia State Bar Real Property Section

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www.vsb.org/sections/rp/index.htm

VOLUME XXXI, NUMBER 2 MAY 2011

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NIMBY! THE VIEWS AT CLARENDON PROJECT AND LITIGATION 2004-2011

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I. INTRODUCTION

The Views at Clarendon project is a Smart Growth project bringing affordable housing to the center of urbanized Arlington County, at a location next to the Clarendon Metrorail station on the Orange Line. The project was fought by some nearby residents, ultimately unsuccessfully, for several years. This article details the litigation that took place between 2004 and 2011, including a trial, two trips to the Virginia Supreme Court, and one trip to the U.S. Court of Appeals for the Fourth Circuit. The article summarizes and discusses some of the more pertinent legal issues that arose in the litigation.

II. STATEMENT OF MATERIAL FACTS

The First Baptist Church of Clarendon ("FBCC") was established in 1909, at the center of Arlington County, not far from the Courthouse. It holds worship services, houses a large child care center and conducts mission activities on a triangular parcel at 1210 N. Highland Street ("Property"), which is located ½ block from the Clarendon Metrorail station. The parcel of 42,667 square feet is bounded by North Highland Street to the east, North Hartford Street to the west, North 13th Street to the north and a point north of the intersection of Wilson Boulevard to the south. The FBCC's church sanctuary, with a traditional steeple, was constructed in 1950, replacing an earlier sanctuary, and was complemented by an educational wing added in 1962. At that time, most of the Property was zoned "C-3," which allowed a by right building height of 75 feet. The remainder was zoned "R-5," which allowed a by right building height of 55 feet.

In 2003, the church wanted to renovate its aging sanctuary, but it lacked the funds to meet the high cost of construction in the rapidly expanding urban core of Arlington. The church engaged architects and reviewed its options. The church realized that while a number of high-rise luxury apartments and condos were being constructed nearby, what the community lacked was Affordable Housing, which is a stated priority for the local government and a widely-supported goal throughout the county. The local government was especially interested in promoting rental apartment developments with a mixture of market rent and subsidized rent units in the heart of the county's urban Metrorail corridor. The congregation had advocated more Affordable Housing in its urban neighborhood as part of its social missions to the community, but the church now realized it had an opportunity to contribute directly and tangibly to this mission goal.

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* The opinions expressed herein are those of the authors and not necessarily those of the First Baptist Church of Clarendon, 1210 North Highland Street-Clarendon, LP and the Views at Clarendon Corporation.

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The FBCC explored the availability of federal, state and local government programs that provide financing to private developers to promote the construction of Affordable Housing, and worked with consultants and counsel on a plan to develop the Property for mixed use. By leveraging its fee simple ownership of the Property, essentially selling its air rights for 75 years, the church could afford to pay its share of a new mixed use development on a portion of the Property, and also pay for the renovation of other existing facilities. After assessing the opportunities and risks, the FBCC voted to demolish the church sanctuary and provide for a mixed-use development of that part of the Property while retaining the steeple and the church's educational building.

In 2004, the FBCC requested approval of a specific Site Plan, a form of special exception, that rezoned the entire property to the C-3 zoning classification and authorized the erection of a 102.8 foot tall building, of which the first two floors would consist of a new church sanctuary and the remaining eight floors would consist of residential housing. The C-3 zoning request was consistent with neighboring sites, and the new building's density and height were consistent with a luxury building one block away.

Arlington County, in an effort to protect the nearby community, rezoned the Property to C-R, rather than C-3, effectively reducing a future building's by-right height from 75' to 55'. *Cf.* Arlington Zoning Ordinance §§ 27(B)(1), 27A(D)(1). However, either ordinance permitted a maximum height of 125 feet, with County approval. Under the approved Site Plan, the new building's first two floors would house a church sanctuary and the next eight floors would consist of 116 apartments, including 70 affordable housing ones and a building height of 96.5 feet.

Several neighbors opposed the project, filed suit to stop the project in 2004, and ultimately the Virginia Supreme Court rejected the C-R rezoning.[1] Rather than rezone the Property to C-3, Arlington amended the C-R district text, rezoned most of it to C-R, and re-approved the Site Plan. The neighbors filed suit again, in 2007, but this time the Supreme Court denied the petition for appeal.[2] In the meantime, the project's cost increased. To meet the increasing costs, Arlington's County Board approved a $4.5 million loan in 2004, increased the loan to $6.6 million in February 2007, and then to $13.1 million in 2008.

Another neighbor, Peter Glassman, publicly objected to the February 2007 loan request. He filed suit to stop the project on November 6, 2009.[3] While his original complaint sought to enjoin Arlington County's loan knowing that construction on the site would begin "imminently, as soon as this month," Glassman did not seek interim injunctive relief. Demolition on the Property began in November 2009. Work on the project continues to this date, and it is expected that the project will be completed by December 2011.

On December 14, 2009, the FBCC sold the Property to a non-profit developer, 1210 North Highland-Clarendon, LP ("1210 NHCLP") for the sum of $5,643,115. This sum was $1,723,485 less than the Property's tax assessed value. To finance the project, 1210 NHCLP used: 1) Arlington County's $13.1 million loan; 2) a $14.5 million loan from the Virginia Housing Development Authority ("VHDA"); and 3) a federal grant of $18,696,192, that is administered by VHDA.

The building under construction will consist of two condominiums. Condo A is the church. sanctuary and steeple. 1210 NHCLP will deed it to the FBCC upon the project's completion. The FBCC bears all Condo A construction costs. To finance Condo A's construction, it will use the sales proceeds plus its own resources. Condo B is the apartments and garage. While some of the projects costs are shared, the project's cost allocations were approved by an independent accountant, which speaks to the propriety of the cost-sharing. Additionally, the FBCC can purchase Condo B in 75 years for the

[1] *Renkey v. County Bd.*, 272 Va. 369 (2006) ("*Renkey I*").

[2] *Renkey v. County Bd.*, Record No. 072138 (2008). ("*Renkey II*").

[3] *Glassman v. Arlington County*, Case No. 1:09-cv-1249 (E.D. Va. Nov. 6, 2009).

outstanding loan's value, and costs. Moreover, after 65 years, 1210 NHCLP cannot place any mortgage exceeding a loan to value ratio of 60%.

At closing, the Views at Clarendon Corporation ("Views") was 1210 NHCLP's general partner. The Views is an independent non-profit, not controlled by the FBCC, though three of its seven board members were also FBCC members. In addition, one of its board members is appointed by the County.

The residential and church condo units will be physically and financially separate. Tenant management is a third party's responsibility, pursuant to a VHDA regulatory agreement. Residents will not have to cross FBCC property to access their apartments. There are separate entrances for the church property, Condo A, and the residences, Condo B.

Ultimately, the District Court dismissed Glassman's complaint,[4] the Fourth Circuit affirmed,[5] and the deadline for Glassman to file a petition for writ of certiorari with the U.S. Supreme Court expired on March 23, 2011, without Glassman filing any petition.

III. LITIGATION REGARDING THE REZONING OF THE PROPERTY

The *Renkey I* litigation began with the filing of a five count complaint. Count I asserted that the Site Plan was illegal because the property did not qualify for rezoning to C-R. Count II asserted that an Arlington County ordinance that authorized the County to modify certain height requirements was illegal.[6] Count III asserted that the plan lacked good zoning practices.[7] Count IV argued that the County's approval was arbitrary and capricious.[8] Finally, Count V asserted that the Site Plan approval constituted illegal contract zoning.[9] In *Renkey I*, the Virginia Supreme Court reversed the trial court and granted relief to the plaintiffs on Count I. Issues regarding that decision are discussed below.

A. Standing

Generally, only an "aggrieved" person may appeal a zoning decision.[10] The meaning of "aggrieved" is settled in Virginia.[11] To summarize, Virginia law recognizes three classes of aggrieved persons: 1) those directly involved such as the applicant and the local authority; 2) adjacent property

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[4] *Glassman v. Arlington County*, 2010 U.S. Dist. Lexis 35745 (E.D. Va. 2010).

[5] *Glassman v. Arlington County*, 628 F.3d 130 (4th Cir. 2010).

[6] However, the ordinance was upheld previously in *U.S. v. Arlington*, 611 F.2d 1367 (4th Cir. 1979)

[7] *See Cole v. City Council of the City of Waynesboro*, 218 Va. 827, 241 S.E.2d 765 (1978) ("an ordinance restricting the use of property should not admit of the exercise, or the opportunity for the exercise, of any arbitrary action by the municipal authority between citizens, or of any action by such authority which does not comport with good zoning practices.").

[8] Essentially, Count IV asserted the same cause of action as Count I.

[9] *See Pima Gro Systems, Inc. v. Board of Supervisors of King George County*, 52 Va. Cir. 241 (King George Cty Cir. Ct. 2000) (Local government has no authority to enter into a private agreement with a property owner to amend the zoning ordinance, thereby contracting away its police power. An agreement made to zone or rezone for the benefit of an individual landowner is generally illegal. It is an *ultra vires* act bargaining away the police power. Zoning must be governed by the public interest and not by benefit to a particular landowner.).

[10] VA. CODE § 15.2-2285 (30 days to appeal); § 15.2-2301 (appeal of zoning administrator determination); § 15.2-2314 (appeal of BZA decision).

[11] *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419, 344 S.E.2d 899, 902-03 (1986).

owners; and 3) those persons who own property within or in "close proximity" *and* who suffer a land use impact that is different than the public at large.[12] In the *Renkey* cases, the plaintiffs lived within a few houses of the property, could see the property, could hear construction efforts or other uses on the property, and would be affected by traffic and/or parking changes. Moreover, the shadow of the new structure would arguably fall on one of the plaintiffs at various times during the year. Thus, the plaintiffs' standing as "aggrieved" persons was not challenged.

B. Analyzing Zoning Disputes

Interpretations of zoning ordinances, like any statute, are pure questions of law.[13] The *Snell* case sets forth the framework for analyzing zoning ordinances.[14] *Snell* discussed the broad purposes of Virginia's zoning statutes and noted that "'this chapter is intended to encourage local governments to improve public health, safety, convenience or welfare and to plan for the future development of communities . . . and that the growth of the community be consonant with the efficient and economical use of public funds.'" *Id.* at 657 (quoting VA. CODE ANN. § 15.1-427 (1973)). *Snell* continued that "one purpose of zoning ordinances is 'to encourage economic development activities that provide desirable employment and enlarge the tax base.'" *Id.* at 658. *Snell* then expounded on the general principles relevant to judicial review of zoning ordinances.

Snell's principles are best summarized in *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d. 126 (2004), namely that:

> "When a governing body of any locality reserves unto itself the right to issue special exceptions, the grant or denial of such exceptions is a legislative function." Such legislative actions are presumptively correct. We have often acknowledged this presumption in cases involving applications for "deviations" from zoning regulations. The city council's legislative action regarding Norton's application for a certificate of appropriateness is analogous and subject to the same presumption and standard of review.
>
> Legislative action is reasonable if the matter in issue is fairly debatable. An issue may be said to be fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare.

Norton, 268 Va. at 409 (numerous citations omitted).

Additionally, in *Snell*, the Virginia Supreme Court stated:

> Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance "must be sustained." If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained.

Snell, 214 Va. at 659.

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[12] *Carolinas Cement Co. v. Zoning Appeals Bd.*, 52 Va. Cir. 6 (2000).

[13] *Alexandria v. Mirant*, 273 Va. 448, 455, 643 S.E.2d 203, 207 (2007).

[14] *Board of Supervisors of Fairfax County v. Snell*, 214 Va. 655, 202 S.E.2d 889 (1974).

One example of what constitutes a fairly debatable subject is the case of *City of Covington v. APB Whiting, Inc.*, 234 Va. 155, 360 S.E.2d 205 (1987). The appellee, APB Whiting, applied to rezone his parcel from residential to commercial, which the Covington City Council denied. The trial court ruled that the Council's denial "bears no reasonable or substantial relation to the public health, safety, moral or general welfare." *Id.* at 159-60. However, the Virginia Supreme Court reversed the decision. Based on the presumption and burden of proof, the Supreme Court concluded that "this was a classic case of a fairly debatable issue." *Id.* at 161.

Similarly, in *Downham v. City Council of Alexandria*, 58 F.2d 784 (E.D. Va. 1932), the Eastern District of Virginia took the view most favorable to the complaining landowner, but still found that "this court cannot say as a matter of law that the question as to how plaintiff's property should be zoned is not debatable. It is fairly debatable, and the court may not arbitrarily substitute its judgment for that of the legislative body of the city on a question so vitally affecting the public safety and welfare." *Id*. at 787.

In summary, under Virginia law: (a) The County's rezoning decision and Site Plan approval were zoning decisions and, thus, legislative acts; (b) the legislative acts were presumptively correct; (c) the acts were "reasonable" if the matter was fairly debatable, meaning reasonable people could reach differing conclusions; (d) the burden of proof was on the plaintiffs to show that the County's zoning decision was unreasonable; (e) assuming the plaintiffs demonstrated that probative evidence of unreasonableness existed, the burden would shift to the County to show "some" evidence of reasonableness; (f) if the County could show "some" evidence of reasonableness, the matter was fairly debatable and the Court should sustain the County's zoning decision; (g) if the County could not show "some" evidence of reasonableness, the plaintiffs' evidence of unreasonableness would defeat the presumption of reasonableness and the Court could strike the zoning decision.

C. The *Renkey I* Litigation

In Count I of their complaint, the plaintiffs contended that the County's approval of the FBCC's zoning application violated the County ordinances because the property did not qualify for a site plan (or special exception) because, among other reasons, the County Board improperly rezoned some of the property from R-5 to C-R, when the ordinance only allowed the County Board to use the C-R ordinance when a property was first zoned C-3.

The Preamble to former Section 27A of the Arlington County Zoning Code began:

> The purpose of the "C-R" classification is to encourage medium density mixed use development; to recognize existing commercial rights; and to provide tapering of heights between higher density office development and lower density residential uses. The district is designed for use in the vicinity of the metrorail stations and to be eligible for the classification, *a site shall be located within an area designated "medium density mixed use" and zoned "C-3*.
>
> The following regulations shall apply to all "C-R" Districts:

(italics added).

In response, the defendants argued that Virginia follows the well settled rule that a statutory preamble is not a substantive or even an operative part of the statute,[15] that the statute's first paragraph was a preamble, and that the only regulations that applied to C-R districts were those that followed after the second paragraph. However, the Supreme Court determined that the use of the word "shall" rendered the second sentence's second paragraph into an eligibility requirement and that the entirety of the first paragraph was merely "akin to a preamble." Therefore, the Supreme Court reversed the trial court,

[15] *Commonwealth v. Ferries Company*, 120 Va. 827, 831, 92 S.E. 804 (1917).

invalidated the rezoning of the property to C-R, and voided the Site Plan. This concluded the *Renkey I* litigation.

D. The *Renkey II* Litigation

After *Renkey I* ended, rather than rezone the Property to C-3, the County amended the C-R district text to remove the language that created an eligibility requirement, rezoned most of the property to C-R, and re-approved the Site Plan. In *Renkey II*, the plaintiffs challenged the County Board's efforts to fix the ordinance and save the project.

The plaintiffs filed a seven count complaint. Count I asserted that the rezoning of the property constituted illegal spot zoning.[16] Count II asserted that the rezoning was arbitrary and capricious due to the County's motives.[17] Count III asserted that the rezoning violated the local sector plan.[18] Count IV asserted that there was an impropriety in the time lines for public hearings because Arlington had customarily followed a longer procedure referred to as "the Arlington Way" and that the vote was predetermined because a press release was issued announcing the approval of the rezoning prior to the actual vote.[19] Counts V through VII asserted arguments that were rejected in the prior litigation regarding the illegal approval of the site plan, the illegality of the County's ordinance allowing modifications to height, and the lack of good zoning practices. For the reasons summarized in the footnotes, the Circuit Court dismissed *Renkey II* on demurrer,[20] and the Virginia Supreme Court then denied the plaintiffs' petition for appeal, thus ending the zoning litigation.

V. LITIGATION REGARDING THE LOAN

As mentioned previously, the conclusion of the zoning litigation did not end this dispute. Another neighbor, Peter Glassman, challenged the County's ability to financially support the project with a $13.1 million loan. Glassman's amended complaint asserts that the County violated the U.S. Constitution's Establishment Clause ("Count I") and the Virginia Constitution's Establishment Clause ("Count II"),[21] that all of the defendants conspired to violate Glassman's constitutional rights in violation

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[16] *Barrick v. Board of Supervisors*, 239 Va. 628, 391 S.E.2d 318 (1990). The doctrine applies if an ordinance's purpose is solely to serve the private interests of one or more landowners and the ordinance represents an arbitrary and capricious exercise of legislative power, constituting illegal spot zoning**;** but if the legislative purpose is to further the welfare of the entire county or city as a part of an overall zoning plan, the ordinance does not constitute illegal spot zoning even though private interests are simultaneously benefited. Here, the ordinance's purpose was to promote affordable housing, not solely to serve the landowner.

[17] This claim was barred because it is improper to consider a legislative body's motives. *Ames v. Town of Pointer*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990).

[18] However, comprehensive plans are only guidelines and their violation does not provide the plaintiffs with a cause of action. *Board of Supervisors v. Safeco Ins. Co. of America*, 226 Va. 329, 335, 310 S.E.2d 445, 448 (1983); *Board of Supervisors v. Lerner*, 221 Va. 30, 37, 267 S.E.2d 100, 104 (1980).

[19] The minimum requirements for public hearings are set forth in VA. CODE §§ 15.2-2204 and -2285, which were met. Moreover, even if the press release was released early, the County Board acts only by ordinance adopted at an open meeting after public hearing, not through errant press releases or the statements of individual members. *Board of Zoning Appeals v. Caselin Systems, Inc.*, 256 Va. 206, 213, 501 S.E.2d 397, 401 (1998).

[20] By *Renkey II*, the Court had a greater familiarity with the other counts as a result of the *Renkey I* litigation.

[21] The Virginia Supreme Court recognizes and interprets Article I, section 16 of the Virginia Constitution as a parallel provision to the federal Establishment Clause. *Virginia College Building Authority v. Lynn*, 260 Va. 608, 626 (2000).

of 42 U.S.C. § 1983 ("Count III"), and that all of the defendants were unjustly enriched through the violation of Glassman's rights under the Virginia Constitution ("Count IV").

A. Standing

Standing was a topic of inquiry before the Fourth Circuit, but the courts did not make any express rulings on this issue. Essentially, the defendants argued that Glassman had no direct standing to bring this case. He was not under threat of suffering a concrete and particularized "injury in fact" that is fairly traceable to the loan.[22] But, Glassman might still have had municipal taxpayer standing. In general, a municipal taxpayer has standing to challenge the wrongful acts of his municipality. The municipal taxpayer standing doctrine in federal courts arises from dicta in *Frothingham v. Mellon*, 262 U.S. 447, 487-89 (1923) (rejecting federal taxpayer standing, but commenting on municipal taxpayer standing). The leading case on the doctrine in the Fourth Circuit is *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (taxpayer plaintiff had standing to challenge Maryland statute's providing for an Easter Holiday).

While the doctrine of municipal taxpayer standing exists, the defendants argued that it only extended to afford plaintiffs standing in federal court to seek prospective injunctive relief; it did not afford plaintiffs standing to right past wrongs or seek restitution in an Establishment Clause suit. The Seventh Circuit had reached a similar result in *Laskowski v. Spellings*, 546 F.3d 822 (7th Cir. 2008) ("Laskowski II") (federal taxpayers have no standing to seek restitution).[23] The Laskowski II court held specifically that, "[p]ermitting a taxpayer to proceed against a private grant recipient for restitution to the Treasury as a remedy in an otherwise moot Establishment Clause case would extend the Flast exception beyond the limits of the result in *Flast*." *Laskowski II*, 443 F.3d at 827.

The logic behind this ruling was explained previously by the dissent in *Laskowski I*,

> adapting the common law doctrine of restitution to fashion a remedy in a taxpayer suit for an alleged Establishment Clause violation is like trying to pound the proverbial square peg into a round hole. Restitution is a private law equitable doctrine that orders liability and remedies between private individuals based on unjust enrichment; it has no application in a suit by taxpayers raising an Establishment Clause challenge to a congressional appropriation. It certainly cannot operate as the sole basis for standing in an otherwise moot taxpayer suit.

Laskowski I, 443 F.3d at 941 (dissent).

The dissent also explained that allowing a restitution claim flies in the face of decisions such as *Lemon v. Kurtzman*, 411 U.S. 192, 208-09 (1973) ("*Lemon II*") and *Roemer v. Board of Public Works*, 426 U.S. 736, 767 n.23 (1976). For example, in *Lemon II*, the Supreme Court concluded that the prior ruling, in *Lemon I*, *infra*, should not be applied retroactively to prohibit reimbursement for educational expenses already incurred, but not yet paid, in reliance on the unconstitutional state statute. *Lemon II* was not about whether the plaintiff was entitled to retroactive restitution of monies already paid in violation of the Establishment Clause, but rather whether the state could continue to reimburse individuals for expenses incurred before *Lemon I* deemed those reimbursements unconstitutional. Under *Lemon II*, the payments continued. Accordingly, given that the County had already extended the loan to 1210 NHCLP, the defendants argued that Glassman had no standing in federal court to unwind the loan.[24]

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[22] *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009).

[23] In *Notre Dame v. Laskowski*, 127 S. Ct. 3051 (2007), the U.S. Supreme Court summarily vacated the 7th Circuit's decision in *Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006) ("Laskowski I") (reversing the trial judge's dismissal for lack of standing).

[24] Since *Laskowski I*, two circuit courts have allowed municipal or state taxpayers to seek restitution over the objections of the private party, but reversed the district judges for actually awarding

B. Establishment Clause

According to the amended complaint, the County's $13.1 million loan to the Views violated the Establishment Clause of the First Amendment to the U.S. Constitution. Through the Fourteenth Amendment, the Establishment Clause prohibits states from making any law respecting an "establishment" of religion. U.S. CONST., AMEND. I. "Establishment" connotes sponsorship, financial support and active involvement of the sovereign in religious activity.[25] However, this nation's history has not been one of entirely sanitized separation between Church and State, and it has never been either possible or desirable to enforce a regime of total separation.[26] For example, the Supreme Court has never accepted the argument that "all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."[27] Instead, the government must draw a line between benevolent neutrality and permissible accommodation, because anything less would establish a religion of secularism.[28]

To draw the line between the two, the Fourth Circuit has used the three-part *Lemon* test articulated by the U.S. Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) ("*Lemon I*").[29] Under the *Lemon Test*, in reviewing government action, a court must determine: (1) whether a legislative act has a secular purpose; (2) whether the primary effect is one that neither advances nor inhibits religion; and (3) whether the act fosters excessive government entanglement with religion.

To determine whether the County's loan to the Views had a secular purpose, Glassman had to show that the County "abandoned neutrality and acted with the intent to [promote] a particular point of view in religious matters." *Ehlers-Renzi*, 224 F.3d at 288. However, here, the County's loan to 1210 NHCLP was a non-religious activity. The loan's secular purpose was to fund the erection of 116 residential units. 1210 NHCLP was not a religious entity and did not intend to conduct any religious activity. In response, Glassman asserted the County's secular purpose was secondary to the primary purpose of "saving and funding" the FBCC. However, this argument failed because Glassman's assertions did not allege "sufficient factual matter" that would state a "plausible" claim.[30] Essentially, even assuming the County was willing to go a long way to build affordable housing in the Clarendon neighborhood, Glassman presented no facts in the amended complaint that supported the concept that the County would have acted any differently if the Property was owned by the American Red Cross and the Red Cross wanted to build affordable housing units over its offices.

Next, Glassman argued that the primary effect of the loan was to advance religion. An unconstitutional effect may occur when the government itself has advanced religion through its own activities and influence. *Ehlers-Renzi*, 224 F.3d at 291. To show that the County was advancing religion in this case through its own activities and influence, Glassman had to show that 1210 NHCLP or its general partner, the Views, was a religious organization. If he could not, then, because all of the County's interactions were with 1210 NHCLP and the Views and none were with the FBCC, Glassman could not

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restitution. *American Atheists v. City of Detroit*, 567 F.3d 278 (6th Cir. 2009) (City of Detroit was paying all property owners within a certain zone to clean up their properties); *Americans United v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007).

[25] *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

[26] *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

[27] *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

[28] *Ehlers-Renzi v. Connelly Sch.*, 224 F.3d 283, 287-288 (4th Cir. 2000).

[29] *Id.*; *see also Agostini v. Felton*, 521 U.S. 203 (1997).

[30] *Bell Atl. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955 (2007); *Francis v. GIacomelli*, 588 F.3d 186, 192-93 (4th Cir. 2009).

prevail. Here, Glassman's principal argument was that these entities were the FBCC's shadow corporations because some of the Views' board members were also members of the FBCC. Glassman's argument failed for two reasons. Again, he failed to present sufficient factual material to support this contention. Second, the Fourth Circuit adopted the view expressed in *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899) that the court should not presume someone's intent is improper just because someone is an adherent to a particular religion, even if their religion's influence is powerful.[31]

Glassman also argued that "a reasonably informed observer would view a government-funded housing project with a Baptist steeple on it as a governmental endorsement of religion." Certainly, it was accurate that the steeple would remain on the property. However, it was unclear how one could make this observation, because the steeple would sit on private land, not public land. More importantly, the steeple had been "posted high in the sky" for at least the last sixty years, so no reasonably informed observer could think the County's loan funds were used to post the steeple, let alone that the FBCC and County worked together to "post the Church's overtly sectarian symbol on the most prominent part of the . . . building," as Glassman argued. To the contrary, as part of Condo A, the FBCC paid for the steeple's renovation, albeit partially using funds it received from selling the Property to the Views. The Establishment Clause is not violated when state contributions to secular activities free a church to reallocate its money away from secular services to religious activities.[32]

Finally, for the third prong of the *Lemon* test, Glassman argued that the loan fostered excessive entanglement with religion. To assess entanglement, a court examines the character and purposes of the institutions that are benefitted, the nature of the state aid, and the resulting relationship between the government and religious authority.[33] Here, Glassman asserted that the "government" fostered an excessive entanglement with religion in two ways, one financial and the other non-financial. Financially, he posited that the government loan to the non-profit developer financially benefitted the FBCC. However, the loan to 1210 NHCLP was not an entanglement with religion; it was a non-religious activity. Non-financially, Glassman argued that the appointment of a County representative to the Views' board and the County's future monitoring of the use of the County's loan by 1210 NHCLP was excessive entanglement. However, while the County may appoint a board member to the Views' board, and may also monitor and restrict the Views' activities, the County's actions essentially did not support a claim of excessive entanglement as a matter of law.

C. Other Issues

Count III purported to state a claim against the Views and the FBCC for conspiracy to deprive Glassman of a constitutional right under 42 U.S.C. § 1983. To state such a claim, Glassman had to allege that the defendants: (1) "acted jointly in concert" and (2) performed an overt act (3) "in furtherance of the conspiracy" that (4) resulted in the deprivation of a constitutional right.[34]

Count IV purported to state a claim for unjust enrichment under Virginia law. To prevail, Glassman had to satisfy three elements: "(1) a benefit conferred on the defendant by the plaintiff; (2) knowledge on the part of the defendant of the conferring of the benefit; and (3) acceptance or retention of the benefit by the defendant in circumstances that render it inequitable for the defendant to retain the benefit without paying for its value."[35]

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[31] In *Bradfield*, the U.S. Supreme Court allowed the support of secular organizations even when the entity's board was composed of members of a Roman Catholic religious order.

[32] *Committee for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 658 n.6 (1980).

[33] *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

[34] *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996).

[35] *Centex Constr. v. Acstar Ins. Co.*, 448 F. Supp. 2d 697, 707 (E.D. Va. 2006).

While these counts were dismissed when the Court resolved the issue of whether the Establishment Clause was violated, the defendants also argued that the *Noerr-Pennington* doctrine barred the application of these claims against the defendants. Citizens have a First Amendment right to "petition the Government for a redress of grievances."[36] Consequently, individuals may petition the government for official action favorable to their interests, even if the efforts harm the interests of others, and still be immune from suit.[37] This is called *Noerr-Pennington* immunity. *Id.* The *Noerr-Pennington* doctrine was originally applied in antitrust cases.[38] However, its reach has been extended to other causes of action, including alleged civil rights violations under § 1983.[39]

Under the *Noerr-Pennington doctrine*, a petitioner is immune from the injuries which result from the petitioning itself, *see Noerr*, 365 U.S. at 143 (finding trucking industry plaintiffs' relationships with their customers and the public were hurt by the railroads' petitioning activities, yet the railroads were immune from liability), and importantly, a petitioner is immune from liability arising from the injuries caused by government action which results from the petitioning. *Pennington*, 381 U.S. at 671 (holding plaintiffs could not recover damages resulting from the state's actions). And, there is no conspiracy exception to Noerr-Pennington immunity.[40] The First Amendment right to petition is "absolutely privileged from attack."[41] Although the courts never addressed this affirmative defense, the defendants argued that to hold the defendants liable for their successful petitioning effort in obtaining a $13.1 million loan from the County would violate their First Amendment rights under the Right to Petition clause.[42]

V. CONCLUSIONS AND RECOMMENDATIONS

Redevelopment of property owned by religious organizations is being encouraged by urban planners, especially in densely populated areas. This property is especially conducive to development because these situations can be a win-win for the religious entity, the local governing body and any private partners. But, these projects can be controversial to surrounding residents for a variety of reasons. Those who opposed the Views at Clarendon project used every available zoning and constitutional argument. Future developers need to be aware of the potential arguments available to opponents and to plan their projects to protect themselves. Before embarking on a project, they should know whether the zoning ordinances prohibit their activity, even if the governmental body is in favor of the project. Redevelopment of property in which a religious entity is involved and government funds will be used is a particularly tricky situation. The developer must ensure that there is separation between the religious entity and any secular entity that is created to own or operate the project.

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[36] *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) (citing U.S. Const. Amend. 1).

[37] *Id.* (citing *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965)).

[38] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[39] *Knology, Inc. v. Insight Communs. Co., L.P.*, 393 F.3d 656, 658 (6th Cir. 2004); *Tarpley*, 188 F.3d 788, 794 (7th Cir. 1999); *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988); *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892 (D. Md. 1985), *aff'd*, 786 F.2d 202 (4th Cir. 1986).

[40] *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383 (1991).

[41] *Reichenberger v. Pritchard*, 660 F.2d 280, 288-89 (7th Cir. 1981) (holding that the *Noerr-Pennington* doctrine bars Section 1985(3) claims arising from private lobbying efforts).

[42] Similarly, like the U.S. Constitution, the Virginia Constitution's Article I, Section 12 also guarantees the right to petition. "[T]he protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Bennefield v. Commonwealth*, 21 Va. App. 729, 739-40 (1996).