VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of April, 2020.

Present: Goodwyn, Mims, Powell, Kelsey, McCullough and Chafin, JJ., and Russell, S.J.

The Fox Spring Farm Limited Partnership, et al., Appellants,

against Record No. 181276
Circuit Court No. CL18000122-00

Caroline County Board of Supervisors, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Caroline County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

Fox Spring Farm Limited Partnership ("FSF") owns 230 acres in Caroline County (the "Fox Spring property"). The Fox Spring property is zoned Rural Preservation ("RP"). Under the Caroline County zoning ordinance, sand and gravel mining and sales is permitted in RP districts as a special exception use. Since 2008, the Caroline County Board of Supervisors (the "Board") has granted special exceptions for sand and gravel mining to four other properties also zoned RP. Of these four properties, three of them were also located within a Resource Sensitive Area Overlay ("RSA") that overlays the RP zoning district and imposes additional restrictions on the use of the properties. The Fox Spring property is not located within the RSA.

On December 30, 2014, Bardon, Inc. t/a Aggregate Industries ("Aggregate"), in conjunction with FSF, submitted a special exception application packet to the Caroline County Department of Planning and Community Development (the "Planning Commission") seeking to conduct sand and mining gravel operations on the Fox Spring property. After two public hearings on the matter, the Planning Commission recommended that the Board deny the special exception. The Board subsequently denied the special exception application by a vote of 4-2.

Aggregate and FSF appealed the decision of the Board to the circuit court. In their complaint, Aggregate and FSF claimed that the Board's action was "arbitrary and capricious." They supported this allegation by pointing to the four prior occasions when the Board had

granted such special exceptions. Aggregate and FSF specifically alleged that the Board's "denial of the Fox Spring SPEX-01-2015 is inconsistent, incompatible, and conflicts with its prior approvals of other similar special exception permits for sand and gravel operations that are, in fact, more impactful than the Fox Spring SPEX-01-2015." They went on to assert that

> Sand and gravel extraction and sales is permitted by special exception in RP Districts. This fact, combined with the [Board's] lengthy history of approval such special exception permits, renders its refusal to approve Fox Spring SPEX-01-2015 as arbitrary and capricious.

Aggregate and FSF further noted that the Caroline County Zoning Ordinance established nine standards for special exceptions.[1] They went on to assert that:

[1] Article XVII § 13(D) of the Caroline County Zoning Ordinance states:

> All use permits shall satisfy the following general standards:
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> 1. The use shall not adversely affect the character and established pattern of development of the area in which it wishes to locate.
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> 2. The use shall be in harmony with the uses permitted by right under a zoning permit in the zoning districts and shall not affect adversely the use of neighboring properties.
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> 3. The location and height of buildings, the location, nature and height of walls and fences, and the nature and extent of landscaping on the site shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and buildings or impair the value thereof.
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> 4. The use shall not adversely affect the health or safety of persons residing or working in the neighborhood of the proposed use.
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> 5. The use shall not be detrimental to the public health, safety or welfare or injurious to property or improvements in the neighborhood.
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> 6. The use shall be in accordance with the purposes of the zoning regulations contained in this Ordinance and the Comprehensive Plan of Caroline County.
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> 7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided.

> The [Board] based its decision not on these nine standards, but instead on the perceived sentiment that citizens of Caroline County do not want sand and gravel mining operations in the County. Of course, perceived public sentiment is not one of the general standards that the Fox Spring SPEX-01-2015 must satisfy. Moreover, the [Board's] perception of the public sentiment certainly does not align with the many letters and signatures in support of the Fox Spring SPEX-01-2015 that the BOS received and that are a part of the record.

Additionally, Aggregate and FSF pointed out that, on the four prior occasions when the Board had granted special exceptions for sand and gravel exceptions, the "permits were approved subject to conditions, and Aggregate was likewise amenable to imposition of reasonable conditions to mitigate any adverse impacts from its operations."[2] However, according to Aggregate and FSF, the Board "denied the Fox Spring SPEX-01-2015 on the basis of 'potential detriments,' yet it failed to consider imposing conditions that could address these potential detriments. Instead, the BOS arbitrarily and capriciously denied the Fox Spring SPEX-01-2015."

The Board demurred. In its brief in support of the demurrer, the Board relied primarily on the fact that Aggregate failed "to allege that the existing RP zoning classification or the uses permitted by right at Fox Spring Farm are unreasonable." The Board also discounted the fact that it had previously granted special exceptions to other properties, stating that the composition of the Board had changed since those special exceptions had been granted. According to the

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> 8. The use shall be such that air quality, surface and groundwater quality and quantity, are not degraded or depleted to an extent that would hinder or discourage the appropriate development and/or use of adjacent or nearby land and/or buildings or impair the value thereof.
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> 9. The use shall be such that pedestrian and vehicular traffic generated will not be hazardous or conflict with the existing and anticipated traffic in the neighborhood and on roads serving the site.

[2] Indeed, the record demonstrates that the Planning Commission had proposed to the Board that it impose the same conditions as had been imposed for the most recent granted permit.

Board, the fact that the vote against granting the special exception was not unanimous established that the decision was fairly debatable and, therefore, presumptively reasonable.

In response, Aggregate and FSF asserted that their complaint contained "factual allegations of unreasonableness and discriminatory treatment." They noted that their complaint established this discriminatory treatment by alleging that the Board had previously approved special exceptions for sand and gravel operations on other similarly situated properties but denied their request for a special exception. According to Aggregate and FSF, when viewed in conjunction with the previous approvals, the Board's denial of their special exception was inconsistent and, therefore, discriminatory.

The circuit court sustained the demurrer. In a letter opinion, the circuit court explained:

> There is no issue regarding the procedural aspects of the [Board's] decision. This exemption request was reviewed by the Planning Commission, subject to public comment and debate, and taken under advisement by the [Board]. The fact that prior Boards, with other applicants have previously granted permits cannot support the claim of discrimination given the passage of time, the composition of the [Board] and planning commission, public attitudes, the debatable nature of this subject, and the uniqueness of each individual property and application.

"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." *Board of Supervisors v. McDonald's Corp.*, 261 Va. 583, 589 (2001). As a legislative function, a presumption of reasonableness attaches to the Board's decision. *Id.* at 590. However, "if a landowner alleges that a zoning decision impermissibly discriminated against it, it has implicitly alleged that the decision was unreasonable." *EMAC, L.L.C. v. County of Hanover*, 291 Va. 13, 22–23 (2016). This is due to the fact that "impermissible discrimination in zoning actions is unreasonable, arbitrary, and capricious." *McDonald's Corp.*, 261 Va. at 591.

On appeal, Aggregate and FSF argue that the circuit court erred in sustaining the demurrer because their complaint sufficiently alleged that the Board had impermissibly discriminated against them by denying them a land use that it had granted to four other similarly situated landowners. "When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory." *Board of Supervisors v. Rowe*, 216 Va. 128, 140 (1975). Thus, the Court has held that "[t]o sustain a claim of impermissible discrimination,

the party contesting the zoning action must show that 'a land use permitted to one landowner is restricted to another similarly situated.'" *McDonald's*, 261 Va. at 591 (quoting *Rowe*, 216 Va. at 140).[3] Accepting as true the facts pled in their complaint and drawing "all reasonable and fair inferences that may be drawn from those facts," *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554 (2003), it is apparent that Aggregate and FSF sufficiently made such a showing.[4] Their complaint alleges that the Board had granted special exceptions similar to the one sought by them to four other properties located in the same zoning district as the Fox Spring property.[5] Further, unlike this Court's decision in *EMAC*, 291 Va. at 23, there is no evidence in the record that rebuts this allegation. Thus, Aggregate and FSF sufficiently challenged the presumptive reasonableness of the Board's decision by offering probative allegations of impermissible discrimination.

The Board's reliance on the fairly debatable standard is premature. This Court's jurisprudence is clear that the fairly debatable standard applies only *after* evidence of reasonableness has been offered to rebut a showing of impermissible discrimination. *See Board of Supervisors v. Williams*, 216 Va. 49, 58 (1975) (recognizing that, to be sufficient to meet the fairly debatable standard, "*the evidence offered in support of the opposing views* . . . must meet

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[3] Thus, contrary to the circuit court's ruling, the fact that prior Boards with other applicants had previously granted permits *can*, and in fact does, support a claim of discrimination, regardless of the passage of time and the composition of the Board or the Planning Commission. Indeed, as discussed below, such factors are not even considered in determining whether the Board's actions were discriminatory.

[4] Contrary to the Board's assertion, both at the trial level and on appeal, Aggregate and FSF were not required to challenge the reasonableness of the existing zoning designation. *See EMAC*, 291 Va. at 22 ("An impermissibly discriminatory decision is unreasonable regardless of whether the existing zoning ordinance is reasonable as applied to an applicant's land.").

[5] Although Aggregate and FSF do not specifically allege that these properties and/or landowners are substantially similar to the Fox Spring property, their reliance on the similarities in the special exception they sought and those previously granted by the Board allows for the inference that the other four properties were substantially similar to the Fox Spring property. Further, there is nothing in the record that would undermine this inference. The only differences in the properties that can be discerned from the record is the acreage of the properties. It should be noted that the acreages of the other properties range from 60.82 acres to 544 acres. Thus, at 230 acres, the Fox Spring property falls squarely within the range of acreage established by the other properties.

not only a quantitative but also a qualitative test; it must be evidence which is not only substantial but relevant and material as well") (emphasis added). Further, in the context of zoning decisions, "a 'rational basis' is synonymous with 'reasonableness.'" *McDonald's Corp.*, 261 Va. at 591. Thus, a claim of impermissible discrimination may be rebutted by showing that "'there is a rational basis for the action alleged to be discriminatory.'" *McDonald's Corp.*, 261 Va. at 591 (quoting *County Board of Arlington v. Bratic*, 237 Va. 221, 229–30 (1989)). In other words, there must be some showing that the Board's decision had a "reasonable or substantial relation to the public health, safety, morals or general welfare." *Board of Supervisors v. Allman*, 215 Va. 434, 445 (1975); *see also Rowe*, 216 Va. at 140 (holding that a discriminatory land use restriction "not substantially related to the public health, safety, or welfare, constitutes a denial of equal protection of the laws.").[6]

Given the posture of the present case, the Board had no opportunity to present any evidence to establish any basis for its decision, much less one related to the public health, safety, morals or general welfare. Nor can a rational basis for the Board's decision be gleaned from the very limited record before the Court. Notably, the only evidence relating to public health, safety, morals or general welfare that can be found in the record is the Planning Commission's determination that granting the special exception would have significant positive economic effects for Caroline County and no traffic impact.

It is further worth noting that, contrary to the Board's argument, the mere fact that the vote to deny the special exception was not unanimous does not establish that the matter was fairly debatable. As previously noted, it is the evidence that undergirds the vote that renders the

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[6] For example, an action is irrational if it is based on racial discrimination, board members' personal animus towards a particular developer, or an applicant's political affiliations. *See, e.g.*, *Olech v. Vill. of Willowbrook*, 160 F.3d 386 (7th Cir. 1998) (government action is irrational if it is based on personal spite or ill will). On the other hand, a decision based on a desire to preserve the character of an area is rational. *Bratic*, 237 Va. at 230 ("county board's effort to preserve the single-family character of the interior of a neighborhood provide[d] a rational basis for the denial of a landowner's application for a permit to build a duplex."). Thus, the fact that a locality has granted a special exception permit in the past does not compel it to continue granting such permits to all similarly situated applicants. Rather, it merely requires that the locality have a rational basis for denying the subsequent permits.

matter fairly debatable, not the vote itself.[7] Given that, at this point in the proceedings, there was no evidence showing a rational basis for denying the special exception, the Court does not reach the issue of whether the matter is fairly debatable.[8]

As Aggregate and FSF presented sufficient evidence to make a prima facie showing of impermissible discrimination and in the absence of any evidence rebutting that showing, the circuit court erred in sustaining the demurrer. Accordingly, the circuit court's decision to sustain the demurrer is reversed and the matter is remanded for further proceedings.

This order shall be certified to the Circuit Court of Caroline County.

A Copy,

Teste:

Clerk

[7] The Board's logic on this matter raises a curious point. Under the Board's logic only unanimous decisions could be challenged as discriminatory. In other words, even if the evidence unequivocally established that the majority of a legislative body had impermissibly discriminated against an individual, the fact that at least one member of that body chose not to engage in such discrimination would essentially insulate the discriminatory decision from any judicial review.

[8] For similar reasons, the circuit court's consideration of the change in composition of the Board was improper. The fact that the present Board differs from the previous Boards that made other decisions does not inform as to whether the present Board's actions were reasonable.