

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF CAROLINE

CARL S. HEFLIN, )  
 )  
 KATHY BULLOCK, )  
 )  
 GILBERT L. SHELTON, )  
 )  
 JUDY L. SHELTON, )  
 )  
 W. ANGUS MUIR, )  
 )  
 BARBARA P. MUIR, )  
 )  
 JOSEPH W. PARKER, )  
 )  
 PATRICIA PARKER, )  
 )  
 JOHN G. GARRETT, )  
 )  
 LOIS GARRETT, )  
 )  
 MARVIN THOMAS DUNCAN CROMER, )  
 )  
 and )  
 )  
 AMBER CROMER )  
 )  
 )  
 Plaintiffs, )  
 )  
 )  
 v. )  
 )  
 BOARD OF SUPERVISORS, )  
 )  
 CAROLINE COUNTY )  
 )  
 Serve on : M. Ann Neil Cosby, County Attorney )  
 )  
 Sands, Anderson, Marks & Miller, PC )  
 )  
 Wytestone Plaza )  
 )  
 801 East Main Street, Suite 1800 )  
 )  
 Post Office Box 1998 )  
 )  
 Richmond, Virginia 23218-1998 )  
 )



Case No. **C1080594**



COUNTY OF CAROLINE )  
 Serve on : M. Ann Neil Cosby, County Attorney )  
 Sands, Anderson, Marks & Miller, PC )  
 Wytestone Plaza )  
 801 East Main Street, Suite 1800 )  
 Post Office Box 1998 )  
 Richmond, Virginia 23218-1998 )  
 )  
 Clark’s Cut II, LLC )  
 Serve on : George Snead, Registered Agent )  
 701 Kenmore Avenue, Suite 100 )  
 Fredericksburg, Virginia 22401 )  
 )  
 Emmett C. Snead, III )  
 Serve on : Emmmett C. Snead, III )  
 18294 Tidewater Trail )  
 Fredericksburg, Virginia 22408 )  
 )  
 Defendants. )

**COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF**

COMES NOW your Plaintiffs in support of this Motion for Declaratory Judgment, and Other Relief against Defendants, Caroline County Board of Supervisors , the County of Caroline, Clark’s Cut II, LLC, and Emmett C. Snead, III, and state as follows:

**Case**

1. The Plaintiffs challenge the November 13, 2008 grant by the Board of Supervisors of Caroline County of a Special Exception for “Sand & Gravel Extraction Operations” (the “Sand and Gravel Facility”) for the property known as Tax Map Parcels 4-1-3 & 4-1-4 (“the Property”).

**Parties**

2. Plaintiff, Carl S. Heflin, is the owner of property in Caroline County, Virginia, including the properties known as Tax Map Parcels 4-1-1 and 4-1-2, which parcels are located contiguous to and adjoin the Property, and is a party aggrieved, and damaged by the acts complained of herein.

3. Plaintiff, Kathy Bullock, resides as a lawful tenant on the property owned by Carl S. Heflin, and is a party aggrieved, and damaged by the acts complained of herein.

4. Plaintiffs, Gilbert L. Shelton, and Judy L. Shelton, are the owners of property in Caroline County, Virginia, including the property known as Tax Map Parcel 4-A-11, which parcel is located in close proximity to the Property, and they are parties aggrieved, and damaged by the acts complained of herein.

5. Plaintiffs, W. Angus Muir and Barbara P. Muir, are the owners of property in Caroline County, Virginia, including the properties known as Tax Map Parcels 3-A-5B, 3-1-A, 3-1-A1, and 3-1-B, which parcels are located in close proximity to the Property, and they are parties aggrieved, and damaged by the acts complained of herein.

6. Plaintiffs, Joseph W. Parker and Patricia Parker, are the owners of property in Caroline County, Virginia, including the property known as Tax Map Parcel 4-A-18, which parcel is located in close proximity to the Property, and they are parties aggrieved, and damaged by the acts complained of herein.

7. Plaintiffs, John G. Garrett and Lois Garrett, are the owners of property in Caroline County, Virginia, including the properties known as Tax Map Parcel 4-A-13, 4-A-14, and 4-A-15A, which are located in close proximity to the Property, and they are parties aggrieved, and damaged by the acts complained of herein.

8. Plaintiffs, Marvin Thomas Duncan Cromer and Amber Cromer, are the owners of property in Caroline County, Virginia, including the property known as Tax Map Parcel 4-A-16, which is located in close proximity to the Property, and they are parties aggrieved, and damaged by the acts complained of herein.

9. Defendant, Caroline County Board of Supervisors (“Board”), is the duly elected governing body of Caroline County, Virginia (“County”) and is the governmental entity that exercises the planning and zoning authority for the County. The Board is capable of suing and being sued in its own name.

10. Defendant, Caroline County, is a political subdivision within the Commonwealth of Virginia and is governed by the Board.

11. The terms “County” and “Board” also refer to and include all of the elements of County government, including without limitation, the agencies, commission, employees and agents of the Board of Supervisors of Caroline County, Virginia, and the County of Caroline, Virginia.

12. At all times relevant to this case, the Board was acting under color of law, ordinance, policy, custom or usage.

13. Defendant, Clark’s Cut II, LLC, is a Virginia Limited Liability Corporation, organized under the laws of the Commonwealth of Virginia and authorized to do business therein and was the applicant for the Special Exception challenged by this suit.

14. Defendant, Emmett C. Snead, III, is the owner of the Property.

### **The Property**

15. The Property consists of approximately 60.82 acres of real property located on the north side of Tidewater Trail (U. S. Route 17) and to the south of the Rappahannock River. The Property is presently zoned Rural Preservation, District RP. The purpose of the RP District is

... to recognize the predominant rural character of Caroline County, much of which is devoted to open space type uses, such as, but not limited to, crop farms, non-intensive agricultural operations and forests. This district is established for the specific purposes of maintaining the rural character and facilitating existing and future crop farms and non-intensive agricultural operations, the conservation of natural resources and discouraging suburban sprawl. This district encompasses

generally rural areas where urban services such as water and sewer are not planned.

It is further recognized that some areas of the County are planned for future development but do not yet have public facilities, utilities or the transportation system in place. In areas as designated, this district shall serve as a holding zone, until such areas are appropriate for development.

16. The adopted comprehensive plan for Caroline County (“Comprehensive Plan”) designates the Property as being “Agricultural Preservation” and as being “Resource Sensitive Area.” Under the Agricultural Preservation designation agricultural uses including forestry should be protected, additionally “[I]and use regulation should protect and give preference to agricultural/forestry uses over other uses.” Under the Resource Sensitive Area designation development should be limited and agricultural and forestall land should be preserved, including having development that strives to preserve the existing terrain, vegetation and other natural features. Additionally, the Comprehensive Plan extols the goals of protecting agriculture and natural resources in Caroline County.

17. The current Comprehensive Plan was drafted to encompass the development period from 2006 to 2026, and was amended as recently as March 11, 2008. However, the provisions sections concerning areas designated as Agricultural Preservation and Resource Sensitive Area were unaffected by the amendment.

18. Upon information and belief the Resource Sensitive Area designation was added to the Comprehensive Plan for properties along the Tidewater Trial corridor to prevent new projects such the Sand and Gravel Facility from locating therein.

### **The Special Exception Application**

19. On April 8, 2008 an application for a special exception was filed by Clark's Cut II, LLC, seeking a special exception in order to operate "Sand and Gravel Extraction" on the Property (the "Application").

20. On October 28, 2008, the Board conducted a public hearing to consider the Application. At the hearing, evidence was presented to the Board demonstrating negative impacts accruing from the proposed Sand and Gravel Facility. These negative impacts included but were not limited to: (1) the extensive and dangerous truck traffic that would incur on Tidewater Trail as a result of the proposed use; (2) the lack of financial benefit to the County for taxes and other revenue sources; (3) loss of the peaceable enjoyment of the adjoining property; (4) the potential for the destruction and damage to the natural environment including runoff into the Rappahannock River, and (5) the loss of property value for properties in the Tidewater Trail corridor, including those owned by the various Plaintiffs.

21. Additionally, there was no demonstration of the positive effects of the Special Exception, including any positive tax versus service outlay, or the need for the Sand and Gravel Facility in addition to two similar, but grandfathered, facilities currently operating in the Tidewater Trail Corridor to service the sand and gravel requirements of the County.

22. The Board voted 3-2 to grant the Special Exception without making any formal findings of fact that the standards for granting the Special Exception, specified in the Caroline County Zoning Ordinance (the "Zoning Ordinance") had been met, or that all negative impact of the Sand and Gravel Facility had been mitigated. An accurate copy of the approved Special Exception, as recorded in the land records for Caroline County, is attached as Exhibit "A" to this Complaint.

### **2001 Special Exception Application**

23. In 2001, the Board heard a similar special exception request for a Sand and Gravel Operation, also located in the Tidewater Trail Corridor, zoned RP and designated Agricultural Preservation under the Comprehensive Plan (the “Fox Spring Farm Application”). However, unlike the present Property, the Fox Spring Farm property was not located within the Resource Sensitive Area, and was located further from the Rappahannock River.

24. The Fox Spring Farm Application was denied by the Board, by a vote of 5-0 due to its negative impact on the County and prosperities in the Tidewater Trail corridor and in close proximity thereto. Three present Board members voted against the Fox Spring Farm Application, two of whom supported the present application. Reasons given by the some board members in the Board’s 5-0 denial in 2001 included but were not limited to: (1) the extensive and dangerous truck traffic that would incur on Tidewater Trail as a result of the proposed use; (2) the lack of financial benefit to the County for taxes and other revenue sources; (3) loss of the peaceable enjoyment of the adjoining property. Since 2001, truck traffic on the 2-lane corridor highway has increased approximately 50%, and the proposed mine would put the total truck traffic increase over 70% from 2001 levels.

25. No factors have changed since the denial of the Fox Spring Farm Application which would increase the desirability, or legal appropriateness of such operations in the County. In fact given the current Property’s inclusion in the Resource Sensitive Area, and its location significantly closer to the Rappahannock River, has much greater negative impacts.

### Count I- Violation of Zoning Ordinance

26. The allegations made in paragraphs 1 through 25 above, are restated and incorporated into this Count by reference.

27. The use “Sand and Gravel Extraction and Sales” is provided for in the RP Zoning District as a use permitted by special exception under §4-5-3 of the Zoning Ordinance.

28. The use “Sand and Gravel Operations” and “Crushed Stone Operations” are provided for in the Industrial District (M-1), Manufacturing Zoning District as uses permitted by special exception under §10-3-5 and §10-3-3 of the Zoning Ordinance, respectively.

29. Accordingly, any processing of sand and gravel, or sand and gravel operations, including the sorting of sand and gravel or the crushing of stone, is provided for only in the M-1 Zoning District.

30. Condition number 14 of the approved conditions for the Special Exception provides that “...[a]t no time shall more than 30 acres, including the *processing and operations* area, be mined.” (Emphasis added).

31. Sand and Gravel processing and operations are not permitted in the RP District.

32. Thus, the Board was without Authority to approve a Special Exception that included any processing of the sand and gravel, or sand and gravel operations for the Property as it is currently zoned.

WHEREFORE, the Plaintiffs seek a Declaratory Judgment that the approval of the Special Exception was void *ab initio*, and of no further force or effect.



## **Count II- Violation of Zoning Ordinance II**

33. The allegations made in paragraphs 1 through 32 above, are restated and incorporated into this Count by reference.

34. Section 17-13-D of the Caroline County Zoning Ordinance sets out the requirements for the approval of a Special Exception. Section 17-13-D states:

All use permits shall satisfy the following general standards:

1. The use shall not adversely affect the character and established pattern of development of the area in which it wishes to locate.
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.
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.
4. The use shall not adversely affect the health or safety of persons residing or working in the neighborhood of the proposed use.
5. The use shall not be detrimental to the public health, safety or welfare or injurious to property or improvements in the neighborhood.
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.
7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided.
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.
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.

35. The approval of the Special Exception fails to meet the requirements of §17-13-D of the Caroline County Zoning Ordinance for the approval of a special exception.

36. The Sand and Gravel Facility adversely effects the character and established pattern of development of the area in which it is proposed. The Tidewater Trail Corridor in which the Facility sought to locate is an area that is overwhelmingly rural in nature. A more intensive and industrial use, such as the Sand and Gravel Facility, is out of character with the established pattern of development in such area and adversely impacts thereon. As a result the requirements of §17-13-D(1) of the Zoning Ordinance are not met.

37. The Sand and Gravel Facility is not in harmony with the uses permitted by right under a zoning permit in the zoning district and adversely affects the use of neighboring properties. The uses permitted by right in the RP are crop farms, silviculture and non-intensive agricultural operations, detached single family dwellings, places of worship, nurseries and greenhouses (wholesale), game preserves, wildlife sanctuaries and conservation areas, public facilities (excluding landfills), public utilities (transmission and distribution), manufactured houses, family cemeteries , and family divisions. Such uses are of a non-intensive, and non-industrial nature and the more intense and industrial Sand and Gravel Facility are not in harmony with them. Additionally, the Sand and Gravel Facility will adversely affect the adjoining property owned by Mr. Heflin upon which Ms. Bullock resides through the increased truck traffic, noise, pollution (including runoff) and scenic disturbance generated by such use. As a result the requirements of §17-13-D(2) of the Zoning Ordinance are not met.

38. The Sand and Gravel Facility will adversely affect the health or safety of persons residing or working in the neighborhood of the proposed use, through the increased truck traffic, noise, and pollution (including runoff) generated by such use. As a result the requirements of §17-13-D (4) of the Zoning Ordinance are not met.

39. The Sand and Gravel Facility will be detrimental to the public health, safety or welfare or injurious to property or improvements in the neighborhood through the increased truck traffic, noise, pollution (including runoff) generated by such use, and decreased property values. As a result the requirements of §17-13-D(5) of the Zoning Ordinance are not met.

40. The Sand and Gravel Facility is not in accordance with the purposes of the zoning regulations contained in this Ordinance and the Comprehensive Plan of Caroline County. Both the statements of intent for the RP District and the Comprehensive Plan designation for the Property extol the preservation of agricultural and rural nature of the area. The establishment of the more intensive and industrial Sand and Gravel Facility is in direct contradiction to the preservation values extolled by the statement of intent for the RP District and the Comprehensive Plan. As a result the requirements of §17-13-D(6) of the Zoning Ordinance are not met.

41. The Sand and Gravel Facility is such that air quality, surface and groundwater quality and quantity, will be 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. Damage to the environment from the Sand and Gravel Facility including the runoff from the Facility will impair the value, and use of the adjacent properties as well as properties in close proximity to the Sand and Gravel

Facility. As a result the requirements of §17-13-D(8) of the Zoning Ordinance are not met.

42. The increased vehicular truck traffic generated by the Sand and Gravel Facility will be hazardous to existing and anticipated traffic in the neighborhood and on roads serving the Facility. The Facility will generate an additional 120 vehicle trips per day, which will degrade the existing poor performance and level of service of Tidewater Trail and present an increased safety hazard to everyone residing or traveling on Tidewater Trail. As a result the requirements of §17-13-D(9) of the Zoning Ordinance are not met.

43. The approval of the special exception in this matter thus fails to meet the requirements of the Caroline County Zoning Ordinance for the approval of a special exception, and therefore its approval was without authority, improper, arbitrary, capricious and unreasonable.

WHEREFORE, the Plaintiffs seek a Declaratory Judgment that the approval of the Special Exception was improper, and of no further force or effect.

### **Count III - Violation of Virginia Law**

44. The allegations made in paragraphs 1 through 43 above, are restated and incorporated into this Count by reference.

45. In addition to the negative impact previously detailed there has been no demonstration of any positive effects accruing to the County or the County residents, instead the benefits of the the Special Exception accrue solely to the Clark's Cut, II, LLC, and to Mr. Snead.

46. The Board's grant of the Special Exception was contrary to accepted planning and zoning principles in the Commonwealth of Virginia and was unreasonable, arbitrary, and capricious, and fails to advance a legitimate public purpose and bears no reasonable or substantial relation to the public health, safety, morals, or welfare.

47. The grant of the Application does not further the objectives contained within §15.2-2200 of the Code of Virginia.

48. As applied to the parcels in close proximity to, or in the vicinity of the Property, the grant of the Application is unreasonable, arbitrary, and capricious in that, *inter alia*, it is contrary to any reasonable interpretation of the recommendations, objectives, and standards contained in the Comprehensive Plan of Caroline County.

49. The grant of the application endangers the health, safety, morals or welfare of the public and impedes the reasonable development of the parcels in close proximity of, or in the vicinity of the Property.

WHEREFORE, the Plaintiffs seek a Declaratory Judgment that the approval of the Special Exception was improper, and of no further effect.

#### **Count IV - Violation of Virginia Law**

50. The allegations made in paragraphs 1 through 49 above, are restated and incorporated into this Count by reference.

51. Under Virginia Law there must be a nexus between lawful conditions required with the approval of a special exception and a negative impact of the proposed use the locality seeks to mitigate see Cupp v. Board of Supervisors, 227 Va. 580, 318 S.E.2d 407(1984).

52. Condition number nine of the approved conditions for the Special Exception provides that, “[t]his Special Exception Permit is issued exclusively to Clarks [sic] Cut II, LLC and is not transferable to any other party or entity.”

53. Condition number ten of the approved conditions for the Special Exception provides that, “[t]his Special Exception Permit is subject to a review by the Board of Supervisors one (1) year from the date of commencement of the mining operation on the property and every five years thereafter.”

54. The negative impacts of a Sand and Gravel Facility are unrelated to the ownership thereof and to the reviewability of the permit. Accordingly, the required nexus is absent, and the conditions are invalid, as is the Special Exception.

WHEREFORE, the Plaintiffs seek a Declaratory Judgment that the inclusion of invalid conditions rendered the approval of the Special Exception invalid, improper, and of no further effect.

**Count V – Failure to Comply with §15.2-2204 of the Code of Virginia**

55. The allegations made in paragraphs 1 through 54 above, are restated and incorporated into this Count by reference.

56. Michael Finchum, Director of Planning & Community Development caused to be published a notice of a public hearing on the Application to be held before the Caroline County Planning Commission on July 16, 2008. An accurate copy of the Planning Commission’s Public Hearing Notice is attached as Exhibit “B” to this Complaint.

57. Thereafter, Percy C. Ashcraft, County Administrator, caused to be published a notice of a public hearing on the Application to be held before the Board on October 28, 2008. An accurate copy of the Board’s Public Hearing Notice is attached as Exhibit “C” to this Complaint.

58. Both the Planning Commission's and the Board's Public Hearing Notices identify the proposed use of the Property as a "Sand & Gravel Extraction Operation."

59. Given that "Sand & Extraction Operation" is not listed as use in the Caroline County Zoning Ordinance, but rather appears to be a combination of uses permitted in separate zoning districts (Sand and Gravel Extraction and sales in the RP, and Sand and Gravel Operations in the M-1) the notices are deficient under §15.2-2204(A) of the Code of Virginia (1950), as amended.

60. Both Public Hearing Notices fail reasonably to apprise the public of the nature of the activities proposed under the Application. A citizen would have to conduct his or her own legal research in order to ascertain what was involved and whether the special exception was of interest to him or her. As a result, the notices do not satisfy the "descriptive summary" requirements of §15.2-2204(A) of the Code of Virginia (1950), as amended, and the case law interpreting such.

61. Because both the Planning Commission Public Hearing Notice and the Board Public Hearing Notice fail to comply with the requirements of §15.2-2204(A) of the Code of Virginia (1950), as amended, the Board never acquired the legal authority necessary to approve the Special Exception.

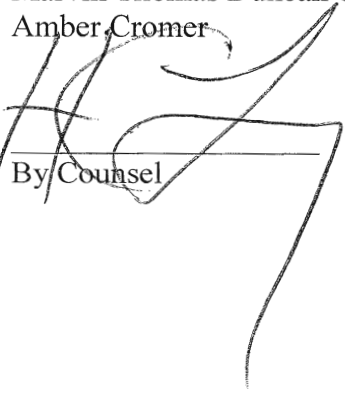
WHEREFORE, the Plaintiffs seek a Declaratory Judgment that the approval of the Special Exception was void *ab initio*, and of no further effect

**Prayer for Relief**

WHEREFORE, for the reasons set forth herein, the Plaintiffs pray that this Court grant the following relief:

- A. Declare the Special Exception to be void *ab initio*, and of no further effect.
- B. Declare the Board's approval of the Application to be unreasonable, irrational, arbitrary, capricious, discriminatory, confiscatory, and ultra vires, in violation of Virginia law.
- C. Declare that the approval of the Special Exception was improper, and of no further effect.
- D. Grant such other and further relief as the merits of this cause and the interests of justice may require.

Carl S. Heflin  
Kathy Bullock  
Gilbert L. Shelton  
Judy L. Shelton  
W. Angus Muir  
Barbara P. Muir  
Joseph W. Parker  
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