IN THE SUPREME COURT OF VIRGINIA

Record No. _____

OWEN W. McGUIRE,

Plaintiff-Appellant,

v.

CITY OF ROANOKE, VIRGINIA,

and

FISHBURN PERK, LLC

Defendant-Appellees.

PETITION FOR APPEAL

ON APPEAL FROM THE COURT OF APPEALS OF VIRGINIA

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1. Statement of the Case.

Fishburn Park is a 51.3-acre public park in the center of a leafy residential neighborhood in southwest Roanoke City. The Blackwell house, a 200-year-old[1] cottage that was long the home of the park caretaker, is in a corner of the park.

Owen McGuire has lived across the street from the historic caretaker's cottage for nearly forty years. Clifford Street, a short lane, separates his property from the corner of the park where the cottage stands. McGuire has formed a special, protective, relationship with the cottage and wants it preserved. A majority of Roanoke City Council and members of the community have also publicly expressed their desire to preserve it.

Fishburn Perk LLC (hereinafter "Fishburn Perk") wants to operate a coffee shop on the park property where the cottage now stands. The City agreed to sell the park property to Fishburn Perk LLC for $10.00. City Council approved the original Contract, which was negotiated by the City Attorney and the owners of Fishburn Perk (Keri and Justin vanBlaricom), after a public hearing on November 21, 2022.

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[1] Henry Gendreau, "City Agrees to Sell Fishburn Park Cottage, Land to Couple Proposing Coffee Shop, *The Roanoke Rambler*, Dec. 20, 2022, https://www.roanokerambler.com/city-agrees-to-sell-fishburn-park-cottage-land-to-roanoke-couple-proposing-coffee-shop/ (accessed May 24, 2024).

The original Contract stated that the vanBlaricoms can eventually sell the cottage but it may not be torn down without prior consent of the "Seller," which meant the City Manager could consent to its demolition. The original Contract did not give the City Council a say in whether the cottage would be preserved. After this became understood, Council killed the deal by refusing to rezone the property to allow Fishburn Perk to operate a coffee shop.

Fishburn Perk then reapplied for zoning permission. At the August 21, 2023 public hearing on Fishburn Perk's second rezoning application, the City Attorney and Fishburn Perk's attorney told City Council, in public session, that the Deed would contain a covenant prohibiting the destruction of the cottage without a *prior majority vote* by Council approving its destruction. Only then did Council approve Fishburn Perk's zoning application to operate a coffee shop. That was a change to the original deal because it allowed Council to veto any demolition of the cottage.

But the City and Fishburn Perk changed the deal again when the property was conveyed on September 29, 2023. The Deed that the City delivered to Fishburn Perk allows demolition of the cottage with only the prior *written approval* of City Council, which is different from the promise that the City Attorney and Fishburn Perk's attorney made to Council that the cottage could not be demolished unless Council first *voted* to allow its destruction. And the "written

approval" language in the Deed covenant is meaningless because Council may not give "*written approval*": under the City Charter, it must act only through the enactment of ordinances and resolutions by majority *vote*.

McGuire was guaranteed by Va. Code § 15.2-1800(B) the right to speak at a public hearing "concerning such disposal" before the City conveyed the cottage to Fishburn Perk on terms different from those disclosed to Council and the public. But McGuire had no chance to speak at a public hearing on the changed deal, and to say that: (1) allowing demolition of the cottage with only "*prior written approval*" by City Council was contrary to the promise the City Attorney and Fishburn Perk's attorneys made to induce Council to approve Fishburn Perk's second rezoning application; and (2) the "prior written approval" language in the Deed is meaningless. The sale of the property was therefore void because it was made before a public hearing was held "concerning [the] disposal" that actually occurred.

The terms of the Deed covenant were not disclosed to the public and were not discoverable by the public until after the Deed was delivered and recorded. And, by then, City Council was powerless to rescind the Deed, even though its terms were different from the terms disclosed to the public.

McGuire sued the City and Fishburn Perk to declare the Deed invalid

because a public hearing "concerning such disposal" that actually occurred was never held. The City and Fishburn Perk demurred on three grounds--that the public hearing on the original deal was all that was required (even though the deal was later killed and then changed), that McGuire lacks standing to sue, and that his suit was untimely if he is challenging the rezoning decision. The Circuit Court granted the Demurrer on all grounds, including the City's allegation that McGuire's suit was untimely, even though both sides acknowledged that he is not challenging the rezoning decision. It did not rule on McGuire's motion for leave to file his Second Amended Complaint. The Court of Appeals affirmed the Circuit Court.

2. Material Proceedings Below.

Appellant Owen McGuire (Plaintiff below) filed his Complaint on September 7, 2023 against Appellees City of Roanoke (hereinafter "the City"), Keri vanBlaricom, and Justin vanBlaricom (Rec. 1). On October 11, 2023, the City and the vanBlaricoms filed a Joint Demurrer (Rec. 53) and a Joint Motion to Stay Discovery (Rec. 111).

On November 3, 2023, the Court entered a consent Order staying discovery and granting McGuire leave to file an Amended Complaint, which dropped the vanBlaricoms as defendants and added Fishburn Perk, LLC (the vanBlaricoms' limited liability company) in the vanBlaricoms' place (Rec. 115). McGuire filed his

Amended Complaint on November 27, 2023 (Rec. 118). On December 12, 2023, the City and Fishburn Perk filed a Joint Demurrer to the Amended Complaint (Rec. 228).

On February 7, 2024, McGuire filed a Second Motion to Amend his Complaint (Rec. 253). A hearing on the defendants' Joint Demurrer and McGuire's second motion to amend his Complaint was held on February 9, 2024.

On February 15, 2024, the Court entered its Final Order sustaining the Demurrer (Rec. 388). It did not rule on McGuire's motion for leave to file his Second Amended Complaint. McGuire timely noted his Appeal on February 26, 2024 (Rec. 395), posted the Appeal Bond on March 12, 2024 (Rec. 395), and filed the Transcript (Rec. 399).

On May 27, 2025, the Court of Appeals issued a Memorandum Opinion (referred to herein as "Mem. Op.") affirming the Circuit Court. It denied McGuire's petition for rehearing on June 11, 2025. McGuire timely filed a Notice of Appeal on June 17, 2025.

ASSIGNMENTS OF ERROR

I. The Circuit Court erred by granting the Joint Demurrer because the November 21, 2022 and August 21, 2023 public hearings were not hearings "concerning such disposal" of the Fishburn Park property that actually occurred, as required by Va. Code § 15.2-1800(B), since an essential term of the sale (as to who has the authority to approve demolition of the caretaker's cottage) that was the subject of those hearings was substantively changed after the hearings, and no public hearing was held on the changed term of the sale (preserved at Rec. 390; 423:14-432:18).

II. The Circuit Court erred by granting the Joint Demurrer because McGuire has standing to challenge the disposal of the Fishburn Park property (on the grounds that no public hearing was held concerning the disposal of the property that actually occurred) since he had the right to speak, and would have spoken, at such a public hearing if one had been held and he has a direct personal stake in preventing demolition of the cottage (preserved at Rec. 390; 419:8-423:1).

III. The Circuit Court erred by granting the Joint Demurrer on "all grounds" (which included the grounds that McGuire's lawsuit was an untimely appeal of a zoning decision) since he did not challenge a zoning decision and his Declaratory Judgment action was not time-barred (preserved at Rec. 417:17-418:3; Rec. 390 (the portion of the Final Order that preserved oral argument objections)).

STATEMENT OF FACTS

1. The Amended Complaint alleged that the November 21, 2022 and August 21, 2023 public hearings were not hearings "concerning such disposal" of the Fishburn Park property that actually occurred since the Deed changed an essential term of the sale (as to who has the authority to approve demolition of the cottage and how that approval must be given) and no public hearing was held about the Deed's provision that the cottage may be demolished with the "written approval" of City Council.

a. The Amended Complaint alleged that City Council held a November 21, 2022 public hearing on the Contract (which allowed the City Manager to approve demolition of the cottage).

The facts relevant to this appeal are the allegations of McGuire's Amended Complaint and proposed Second Amended Complaint. Accordingly, this Statement of Facts will spotlight the allegations in those two pleadings that support McGuire's claim for a Declaratory Judgment.

Paragraph 2 of the Amended Complaint alleged that the City Manager signed an agreement with the vanBlaricoms to sell them the corner of Fishburn Park containing the cottage for $10.00 (Rec. 119). The "purpose of the sale was to preserve and restore the historic Building" by allowing the vanBlaricoms to renovate the cottage and operate a coffee shop in it (Rec. 119). The Contract stated the "Seller" was "the City of Roanoke, Virginia, a Virginia municipal corporation" (Rec. 133). Paragraph 3 of the Amended Complaint alleged that the Contract stated

that the cottage could not be "razed, demolished or removed" "without the prior approval of *Seller*" (Rec. 119) (emphasis added), which meant that the City Manager could approve demolition of the cottage. Paragraph 4 stated that the "Contract was approved by a majority of City Council after a public hearing on November 21, 2022" (Rec. 119-120).

b. The Amended Complaint adequately alleged that the deal substantively changed after November 21, 2022, when the City Attorney told Council that the cottage could not be demolished without a "majority vote" by Council to approve demolition.

The Amended Complaint alleged that the terms of the conveyance of the cottage property substantively changed after the November 21, 2022 public hearing. City Council killed the deal (by denying the vanBlaricoms' request to rezone the property to allow them to operate a coffee shop) on May 15, 2023 after Council members realized that the Contract allowed the City Manager, acting alone, to approve demolition of the cottage.

Paragraph 6 stated that "a condition precedent" to Fishburn Perk's "obligation to purchase the Property" was City Council rezoning the park property to allow Fishburn Perk to operate a coffee shop (Rec. 121). Council denied the vanBlaricoms' rezoning request on May 15, 2023, precluding the satisfaction of the

condition precedent to the closing of the Contract and killing the deal.[2]

Paragraph 7 alleged that the vanBlaricoms then amended their second zoning application and reapplied, that Council held a public hearing on the vanBlaricoms' rezoning application on August 21, 2023, and that "Council's consideration of the vanBlaricoms' rezoning application was tantamount to a vote for or against the closing of the sale of the Property because a condition precedent to closing (that the vanBlaricoms were required to obtain rezoning of the Property) would have been unsatisfied if City Council had voted against the rezoning application" (Rec. 121).

Paragraph 8 (Rec. 122 (emphasis added)) alleged that City Attorney Spencer told City Council the following, at the August 21, 2023 public hearing, to obtain Council's approval of the zoning decision:

> Mr. Mayor, before we start the public hearing, if I could address perhaps some issues that I think we've heard previously that might clarify some things. I just want to make clear to the public that the Contract places restriction on the building and it shall not be razed, demolished, or removed in whole or in part without the prior approval of the seller which is the city. To make it perfectly clear that would require Council, I've spoken with Mr. Biddle [the vanBlaricoms' attorney] and he's agreed that within the Deed itself we will say ***City Council*** as opposed to just ***seller*** or ***City***. Therefore making it extremely clear that it won't be demolished unless the ***Council*** or ***the Council sitting at the time of the request*** approves it. That would be just a simple majority but it would still require ***council*** to take action.

[2] *See* paragraph 6 of proposed Second Amended Complaint (Rec. Addendum 7).

Paragraph 9 alleged that "City Council would not have adopted the Ordinance (approving the vanBlaricoms' second rezoning application) if City Attorney Spencer had not told Council that the Deed would require *City Council* to approve any demolition of the Building" by a majority *vote* (emphasis added) (Rec. 122).

In this way, the Amended Complaint adequately alleged that the terms of the conveyance of the cottage property substantively changed after the November 21, 2022 public hearing because the vanBlaricoms obtained Council's approval of their rezoning application by promising that the cottage would not be demolished unless a majority of Council *votes* to approve such demolition.

c. The Amended Complaint adequately alleged that the Deed contains a covenant that the cottage may be demolished if Council gives "written approval" of the demolition.

The Amended Complaint also alleged that the terms of the actual conveyance are different from the terms described at the August 21, 2023 public hearing. Paragraph 10 states that the Deed delivered by the City Manager to the vanBlaricoms on September 29, 2023 required the vanBlaricoms to covenant that the cottage would not be demolished until they first obtained "written approval" from City Council; it does not require that Council *vote* to approve any demolition of the cottage (Rec. 121). Paragraph 19 alleged that the Deed delivered by the City

Manager to the vanBlaricoms was a change to the deal because it contains an essential term (specifically, that only "prior written approval" of Council is required before the cottage can be razed, demolished, or removed) that was not a term of the sale approved by Council, and adopted by ordinance, after public hearing; and it is impossible for the City and Fishburn Perk to comply with the Covenant because the City Charter states that ". . . council shall act only by ordinance or resolution . . ." and does not authorize City Council to act by giving "written approval" (Rec. 126).

d. The Amended Complaint alleged that no public hearing was held on the disposal of the property that actually occurred, allowing the cottage to be demolished with Council's "written approval."

Paragraph 17(c) of the Amended Complaint (Rec. 125) alleged that no public hearing was held on this changed term of the deal, even though (as alleged in Paragraph 5 (Rec. 119)) the City had previously followed the practice of submitting to City Council for approval by a three-fourths majority vote (as required by Va. Const. Art. VII, § 9) other changes to the deal that City Council had approved at the November 21, 2022 public hearing. The City disposed of the property before Council held a public hearing on, or enacted an ordinance approving, an essential term of the disposal that actually occurred: requiring only "*prior written approval*" of Council, instead of a *vote* by Council, to approve any

demolition of the cottage (Rec. 122-123).

e. The proposed Second Amended Complaint adequately alleged that the November 21, 2022 and August 21, 2023 public hearings were not hearings about whether the sale would be subject to demolition with Council's "written approval."

The proposed Second Amended Complaint alleged (¶ 4 (Rec. 371)) that the version of the Contract that was available for review in the City Clerk's office before the November 21, 2022 public hearing stated that the cottage could not be demolished without the "Seller['s]" approval, meaning the City Manager's approval (Rec. 370) (emphasis added).

The November 21, 2022 public hearing was a hearing on the Contract that would have allowed demolition of the property if the City Manager approved it. City Council approved the Contract immediately after the hearing. But Council later killed that deal by refusing Fishburn Perk's rezoning application (Rec. 121).

The Amended Complaint also alleged that the August 21, 2023 public hearing was on the vanBlaricoms' amended rezoning application. At that hearing, the City Attorney and the attorney for Fishburn Perk told Council that the Deed would contain a covenant that would prohibit any demolition of the cottage unless a majority of Council *voted* to approve such demolition (Rec. 122).

But contrary to Council's wishes (its wishes were clear: it killed the deal

when it discovered that it would not be allowed to *vote* to prevent demolition of the cottage and only approved the vanBlaricoms' rezoning application after their attorney and the City Attorney promised Council that the Deed would contain a covenant prohibiting demolition of the cottage unless Council *voted* to allow it), the Deed that was actually delivered to Fishburn Perk does not prohibit demolition of the cottage unless a majority of Council *votes* for demolition. Instead, the Deed contains the nonsensical provision that Fishburn Park may not demolish the cottage "without the prior *written approval*" of Council, even though, as argued below, City Council may act only through ordinances and resolutions (not "written approvals").

Thus, the Amended Complaint adequately alleged that the November 21, 2022 and August 21, 2023 public hearings were not meaningful public hearings "concerning such disposal" of the park property that actually occurred because neither McGuire nor anyone else could not have known to say at those hearings that the Deed covenant was meaningless since the terms of the Deed covenant were not disclosed to the public before or at the hearings (Rec. 370).

2. The Amended Complaint and Second Amended Complaint established McGuire's standing.

McGuire's Complaint (Rec. 6) sought a declaratory judgment that:

The City was prohibited by Va. Code § 15.2-1800(B) from disposing

> of the Property at private sale to [defendant] Fishburn Perk [, LLC] because:
>
> . . .
>
> (c) City Council did not adopt an Ordinance, ***after public hearing***, approving the [Deed] Covenant (specifically: the Contract that was approved by City Council did not include the Covenant; and City Attorney Spencer's August 21, 2023 speech to City Council describing what the Covenant would say is materially inconsistent with what the Covenant actually says).

Paragraph 12 (Rec. 122-123) of the Amended Complaint alleged McGuire's stake in obtaining this declaratory relief. Over two pages (which are not recited verbatim here for brevity), McGuire alleged that he owns the real property immediately across Clifford Street from the cottage and that Clifford Street is the route of ingress and egress from his property (Rec. 122). He alleged that the cottage is so structurally unsound that Fishburn Perk will have to demolish it to operate a coffee shop (Rec. 125). And he alleged that he will suffer the concrete injuries of increased noise and light from, and traffic incident to, the razing, demolition, or removal of the cottage; the decrease in aesthetic enjoyment of his property when a coffee shop structure that is not the cottage is erected on the Property; and reduction of his property value when the new commercial structure is erected next door to his home (Rec. 123).

Paragraph 21 (Rec. 123) further explained his stake in seeking a declaratory

judgment:

> The plaintiff McGuire's rights will be affected by the outcome of the case because a declaratory judgment that Fishburn Perk does not own the Property will preclude it from razing, demolishing, or removing the Building and causing him the injury of increased noise on his property and reduced property value.

The proposed Second Amended Complaint alleged (in paragraph 15(e) (Rec. Addendum 11)) that:

> McGuire had a right to say to the City Council at a public hearing, before the property was sold, and would have said if a public hearing had been held, that: (1) the Covenant makes it impossible for the defendants to comply with the Covenant; (2) specifically, he had a right to say, and would have said, at a public hearing that the phrase "prior written approval of the Council of the City of Roanoke" is meaningless because the City Charter states that ". . . council shall act only by ordinance or resolution. . ," and does not authorize City Council to act by giving "written approval;" and (3) his property rights are affected by the sale of the property subject to the meaningless Deed Covenant.

Thus, the Complaints before the Circuit Court adequately alleged McGuire's standing to seek a declaratory judgment that the conveyance of the Fishburn Park cottage property to Fishburn Perk was void or voidable because he was denied his legally-guaranteed right to be heard at a public hearing on the actual terms of the conveyance before the property was conveyed.

3. Neither the Amended Complaint nor Second Amended Complaint challenge a zoning decision.

There are no allegations of the Amended Complaint or Second Amended

Complaint challenging a zoning or rezoning decision and McGuire did not seek relief from a zoning or rezoning decision. He seeks a declaratory judgment adjudicating that the Deed conveying the Property to the vanBlaricoms is void or voidable because it was conveyed before City Council held a public hearing "concerning such disposal" as actually occurred, not the reversal of a zoning decision (Rec. 129).

AUTHORITIES AND ARGUMENT

STANDARD OF REVIEW

The *de novo* standard of review applies to this Court's review of a decision sustaining a demurrer. *Abi-Najm v. Concord Condominiums, LLC*, 280 Va. 350, 356-357, 699 S.E.2d 483, 486-487 (2010).

DISCUSSION OF ISSUES

I. (Assignment of Error 1) The Amended Complaint adequately alleged that the conveyance of the property was void because the November 21, 2022 and August 21, 2023 public hearings were not hearings "concerning such disposal" of the Fishburn Park property that actually occurred, as required by Va. Code § 15.2-1800(B), since an essential term of the sale (as to who has the authority to approve demolition of the cottage) that was the subject of those hearings was substantively changed after the hearings and no public hearing was held on the changed term of the sale (preserved at Rec. 390; 423:14-432:18).

A. Roanoke City Council was required to hold a public hearing "concerning [the] disposal" of the park property that actually occurred when the Deed, that allows demolition of the cottage if Council gives "written approval," was delivered.

The Court of Appeals erred by accepting the Appellees' argument that the November 21, 2022 and August 21, 2023 public hearings satisfied the public hearing requirement of Va. Code § 15.2-1800(B). The statute required a public hearing "concerning such disposal" of the property that *actually* occurred, but no hearing was held about an essential term of the disposal: about who has the

authority to approve demolition of the cottage and whether the cottage may be demolished with only the "written approval" of the City Council instead of a majority vote by Council. The Deed that was delivered by the City to Fishburn Perk substantively changed that essential term *after* both public hearings occurred and no public hearing was held about conveying the cottage to Fishburn Perk subject to the restriction that it could be demolished with the "written approval" of Council.

Va. Code § 15.2-1800(B) states that: "any locality may sell . . . at private sale . . . real property . . . provided that no such real property . . . shall be disposed of until the governing body has held a public hearing concerning ***such*** disposal" (emphasis added). This statute codifies Article VII, Section 9, of the Virginia Constitution, which requires a governing body to pass an ordinance or resolution by a three-fourths majority vote approving the disposal of any public park property, and explicitly adds to the Constitutional provision the requirement of a public hearing "concerning such disposal" of property before the locality disposes of public park property.[3]

[3] Article VII, § 9 states, in relevant part: "No rights of a city . . . to its . . . parks . . . 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." Va. Const. Art. VII, § 9.

The public hearing that is required must be a hearing on the terms of the sale that will actually occur. A hearing about terms of sale that are different from the terms on which the property will be sold is not a hearing "concerning *such* disposal" as will actually occur. When this Court interprets a statute, it "ha[s] but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature, the true intent and meaning of the statute, which are to be gathered by giving to *all* the words used their plain meaning." *Lucy v. Cnty. of Albemarle*, 258 Va. 118, 129-30, 516 S.E.2d 480, 485 (1999). "This Court 'construe[es] all statutes in *parimateria* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.'" *Id.* at 129-30, 516 S.E.2d at 485.

The meaning of the words "***such*** disposal" is unambiguous. It means the particular disposal proposed. *Black's Law Dictionary* 1284 (5th ed. 1979). Not simply the disposal of the property to any seller on any terms. In the context of this case, the "such disposal" to which the statute refers is the delivery by the City to Fishburn Perk of the September 29, 2023 Deed that contains the following Deed covenant: "the Building shall not be razed, demolished or removed, in whole or in part (other than removal of portions of the existing structure set forth in Grantee's Proposal), without the prior written approval of the Council of the City of

Roanoke." No public hearing was held on *this* disposal (subject to the meaningless covenant that the cottage could not be demolished without Council's prior written approval).

The Court of Appeals concluded that the public hearing requirement of Va. Code § 15.2-1800(B) was satisfied because a hearing was held on disposal of the property on different terms, even though no public hearing was held on the disposal of the property that actually occurred. The defect in that interpretation of the statute is that it ignores the word "such" and attributes no meaning to it. The word "such," which Black's Law Dictionary identifies as "a descriptive and relative word," links the public hearing that is required to the particular disposal that the locality intends to make and prevents the absurd results that would occur if the word "such" was not in the statute.

A simple hypothetical illustrates that the public hearing required by the statute must be a hearing about the disposal of the property that actually occurs, even if a public hearing was held, when the disposal of the property that actually occurs is different from the disposal of the property that was the subject of the public hearing. If, hypothetically, the City Manager entered into a contract to sell a parcel of park property to Mr. Black, a public hearing was held on the contract and City Council approved the sale, but the City Manager then delivered a Deed to

Dr. White conveying the parcel of park property to her, the Deed would be invalid because no public hearing was held "concerning such disposal" of the property by Deed to White—even though a hearing "concerning disposal of the same parcel to Black had been held.

The Court of Appeals' interpretation of the statute, ignoring the word "such" and leading to absurd results, violates the principles that meaning must be given to all words in a statute and requiring reconciliation of all the words to preserve harmonious and just operation of the body of the laws.

Indeed, the Court of Appeals acknowledged that there can be situations in which Va. Code § 15.2-1800(B) would require a new public hearing even after one public hearing concerning disposal of the property has been held. The Court of Appeals identified in its Memorandum Opinion two such situations: when a substantive change occurs or when fraud occurred at the first hearing (Mem. Op. at 19-20 n.11).

McGuire complains that the Deed conveying the caretaker's cottage constituted a substantive change and is invalid for the reason illustrated by the hypothetical situation. He seeks a declaratory judgment that the Deed conveying the property is invalid because: (1) the demolition covenant in the Deed was a substantive change from both the demolition covenant in the Contract approved by

City Council (which allowed the City Manager to approve demolition) and the demolition covenant that the City Attorney told City Council the Deed *would* contain when Council approved the sale (the City Manager said that the Deed would allow demolition only after approval by majority vote of Council); (2) that a hearing was required under Va. Code § 15.2-1800(B) before the City could validly convey the property subject to the demolition covenant in the Deed; and (3) no hearing was held before the property was conveyed subject to the changed demolition covenant. Specifically, he claimed in his Amended Complaint:

> "the purpose of the sale was to preserve and restore the historic [Fishburn Park caretaker's] Building by allowing the vanBlaricoms to renovate the cottage and operate a coffee shop" (Rec. 119);
>
> City Council approved the sale because the City Attorney told Council at th[e] August 21, 2023 public hearing that even though the Contract said that the Building could be demolished with the consent of the "City" (meaning the City Manager), the Deed would state that the Building could be demolished only after a majority of Council voted for such demolition (Rec. 122);
>
> Council approved the sale based upon the City Attorney's representation and would not have otherwise approved it (Rec. 122);
>
> but the City Manager then executed and delivered to Fishburn Perk a Deed that required only Council's "prior written approval" before the Building may be demolished (Rec. 121);
>
> the demolition language in the Deed is meaningless because it is now impossible for Council to give "written approval" because it may only act through ordinances or resolutions (Rec. 126);

> the language in the Deed was a substantive change to the disposal of the property that Council approved because it does not require that demolition of the Building be approved by a majority vote of Council (Rec. 126); and
>
> a public hearing "concerning disposal" under the terms of the Deed was required by Va. Code § 15.2-1800(B) because the language in the Deed was substantively different from what Council approved (about whether, and how, approval can be given to demolish the building) (Rec. 122-123).

McGuire's argument is that the Deed is invalid because no public hearing concerning disposal of the property subject to the covenant in the Deed (that makes it impossible for Council to approve demolition of the property even though its intent was that it could approve demolition of the property by majority vote) was held. In the context of this case, the "such disposal" to which the statute refers is the delivery by the City to Fishburn Perk of the September 29, 2023 Deed that contains the following Deed covenant: "the Building shall not be razed, demolished or removed, in whole or in part (other than removal of portions of the existing structure set forth in Grantee's Proposal), without the prior written approval of the Council of the City of Roanoke." No public hearing was held on *this* disposal (subject to the meaningless covenant that the cottage could not be demolished without the prior written approval of City Council).

And there is no practical reason that an ordinance could not have been proposed, and a public hearing held, after the City Manager agreed with Fishburn

Perk to include the words "prior written approval" in the Deed covenant but before the Deed was conveyed. There was ample time for notice of the ordinance, a public hearing, and a City Council vote on such an ordinance: the Contract required closing to occur no later than September 30, 2023 (Rec. 179-183); the Appellees had agreed upon the Deed covenant language no later than August 21, 2023, when City Attorney Spencer announced that he and the attorney for Fishburn Perk had agreed to change the Deed covenant, causing Council to approve the vanBlaricoms' second rezoning application; and Council met every week in the five weeks between August 21 and September 30, 2023. The Appellees knew the words were controversial because Council revived the deal (that it had previously killed) on August 21, 2023 only because the Appellees' attorneys promised Council that the wording of the Deed covenant would be changed so that Council could veto demolition of the cottage. Appellees' attorneys alone knew that the "prior written approval" words they added to the Deed covenant were meaningless and contrary to the "simple majority" words used by City Attorney Spencer at the August 21, 2023 public hearing. Indeed, the Appellees do not dispute in their brief McGuire's contention that the "prior written approval" words are meaningless: they conceded on page 2 of their Court of Appeals brief that Council can act only through ordinances and resolutions and not by giving "written approval."

Moreover, McGuire pleaded (in Paragraph 5 of his Amended Complaint (Rec. 119)) that the City had previously followed the practice of submitting to City Council for approval by a three-fourths majority vote (as required by Va. Const. Art. VII, § 9) other changes to the deal, including extensions of the vanBlaricoms' deadline for closing. The Appellees did not dispute McGuire's allegation of this fact.

The reasonable inferences to be drawn are: (1) the City Manager and City Attorney did not disclose the Deed covenant to City Council; (2) no public hearing was held on this new term of the deal, even though the City had previously followed the practice of submitting to Council for its approval (after public hearing) other changes to the deal, because they knew that Council had previously killed the deal, had agreed to the vanBlaricoms' second rezoning request only because City Attorney Spencer led Council to believe that the Deed covenant would say that it could veto any demolition of the cottage by a majority vote; and (3) the actual terms of the Deed covenant (which do not provide for the majority-vote veto City Attorney Spencer had promised) was surreptitiously slipped by Council and the public to dodge the public hearing requirement of Va. Code § 15.2-1800(B) and preclude a meaningful public discussion about how permission could be given to demolish the cottage.

B. The changes to the original deal were significant enough to require a new public hearing because the City of Roanoke and Roanoke City Council are substantively different from each other and it is now unclear who has the authority to approve demolition of the cottage and how such authority may be given.

The original deal was discussed only at the November 21, 2022 hearing. The August 21, 2023 hearing was not formally a hearing on the sale of the property; it was a hearing only on the vanBlaricoms' rezoning application. But the change (allowing demolition if Council gives prior written approval of demolition) was a sufficiently substantive and material change to the original deal to require a public hearing on the change. It was a substantive change because: (1) the purpose of the sale is to preserve the cottage; and (2) the City of Roanoke and the City Council of the City of Roanoke are legally separate and different from each other and it is unclear how City Council may give "written approval" to demolish the cottage.

In *Marsh v. Roanoke City*, 301 Va. 152, 873 S.E.2d 86 (2022), this Court accepted the City of Roanoke's argument that the City of Roanoke and the City Council are distinct from each other, noting that: "[a] 'locality' and its 'governing body' are not interchangeable terms but have separate legal identities that must be observed in initiating an action against either as a party defendant in a legal action." *Id.* at 154, 873 S.E.2d at 88 (citing *Miller v. Highland Cnty.*, 274 Va. 355,

650 S.E.2d 532, 537 (2007)).

Moreover, the Roanoke City Charter states that ". . . council shall act only by ordinance or resolution. . ," and does not authorize Council to act by giving "written approval." Roanoke City Charter § 12.

So the changes to the terms of the deal (removing the City Manager's authority (as "Seller") to approve the demolition of the cottage and replacing his authority with Council's, whose authorization of demolition would require a majority vote on an ordinance; and, second, delivering the Deed allowing demolition of the cottage if Council somehow gives "prior written approval") were substantive changes to the terms of the deal. These were substantive changes because Council is not allowed under the City Charter to give written approvals but must act through votes on ordinances; and if the Deed means that City Manager may give written approval on behalf of Council, the meaning of the Deed is contrary to the plain terms of the deal that the City Attorney explained to Council and the public on August 21, 2023.

And these changes materially change the political process that will apply to the demolition of the cottage. The Constitution requires the members of a governing body to record their votes on any proposal to sell public park property and the governing body must adopt by a three-fourths supermajority an ordinance

or resolution approving such sale. The General Assembly added the requirement that a public hearing be held before any such sale to allow public comment and discussion of any ordinance or resolution to sell public park property.

The General Assembly's addition of the public hearing requirement recognizes that public hearings are "critical institutions for public voice" and "give citizens a chance to contribute to the discussion over decisions made by the officials." Karpowitze, *Context Matters: A Theory of Local Public Talk and Deliberative Reform* (Sept. 1, 2005).[4] Public hearings create legitimacy even in cases where the public's opinion is not reflected in the final decision. Kemp, *Planning Public Hearings, and the Politics of Discourse*, in Forrester, ed., Critical Theory and Public Life (1988) at 179.

The City Council is a separate and distinct legal entity from the City, is governed by much more structured procedural decision-making rules than the City Manager (such as the requirement of public notice of a proposed ordinance and majority adoption of such ordinance after allowing public comment), Council's deliberations and decision-making are subject to more transparency and public scrutiny than the City Manager's decision-making, and Council is directly

[4] https://research.allacademic.com/one/apsa/apsa05/index.php?click-Key2#search_top (accessed on January 24, 2024).

accountable to the citizens of Roanoke City through the electoral process. There is now a live controversy as to whether the Deed covenant allows Fishburn Perk to demolish the cottage even if Council does not enact by majority vote, after public notice and public hearing, an ordinance or resolution approving its demolition because the "written approval" language of the Deed covenant is incongruent with Council's process.

The conduct of the City Attorney and Fishburn Perk's attorney is strong evidence of the significance of the changes. As McGuire alleged in paragraph 8 of his Amended Complaint, the Appellees' attorneys agreed to change the terms of the deal (to require City Council to approve any demolition of the cottage by majority vote) *only after* Council had denied the vanBlaricoms' rezoning application and killed the deal but *immediately before* the May 22, 2023 public hearing and Council vote on the vanBlaricoms' amended rezoning application (Rec. 121-122). The lawyers would not have changed the deal, and the City Attorney would not have announced the change to Council at the May 22 meeting, if they did not think it was necessary to obtain Council's approval of the amended rezoning application. The change to the deal was essential to obtain Council's approval of the conveyance to the vanBlaricoms--but the language in the Deed does not match what the lawyers told Council it would say, because it does not say a majority of Council must approve any demolition.

The Court of Appeals misapprehended or mischaracterized McGuire's claim. The major premise of its' decision--*which is a false premise*--is that McGuire claims "that the City was required to hold a public hearing pertaining to ***the amendments*** made to the contract *after* it was approved by City Council following the November 21, 2022 public hearing" (emphasis to "the amendments" added) and "to hold a public hearing every time a change is made to the contract in order to comply with Code § 15.2-1800" (Mem. Op. at 14).

Instead, McGuire claims that the Deed conveying the property is invalid because: (1) the demolition covenant in the Deed was a substantive change from both the demolition covenant in the Contract approved by City Council and the demolition covenant that the City Attorney told Council the Deed *would* contain when Council approved the sale; (2) that a hearing was required under Va. Code § 15.2-1800(B) before the City could validly convey the property subject to the demolition covenant in the Deed; and (3) no hearing was held before the property was conveyed subject to the changed demolition covenant.

McGuire does not advocate a ruling that Council was required to hold a public hearing before it approved every non-material contract amendment or every non-material change to the contract. His argument is that the Deed is invalid because no public hearing "concerning such disposal" of the property subject to the

covenant in the Deed (that makes it impossible for Council to approve demolition of the property even though its intent was that it could approve demolition of the property by majority vote) was held.

The Court of Appeals correctly concluded that "[p]er the use of the term 'concerning' in Code § 15.20-1800(B), it is conceivable that there may be cases where after the public hearing in question, a locality may alter such a material term or change the contract to the point it is not of the same substance that the public hearing concerned . . . . further analysis may be needed to determine whether an additional public hearing may be required under Code § 15.2-1800(B), focusing on what the original transaction *concerned*" (Mem. Op. at 19-20 n.11). But the Court of Appeals erred when it failed to recognize that *this is such a case*.

The Circuit Court's Demurrer must be reversed so that the court can "further analy[ze]": (1) whether the demolition clause in the Deed is substantively different from the Contract and what that the City Attorney told Council the Deed would contain; and (2) if it is, whether a public hearing was held "concerning such disposal" that was made by the Deed, taking into account the reasonable inference from McGuire's Amended Complaint that the Appellees' attorneys intentionally dodged the public hearing requirement by inserting language in the Deed that was never disclosed to Council or the public.

II. (Assignment of Error 2) McGuire has standing because he was aggrieved by the denial of his right to be heard at a public hearing to tell Council how the substantive terms of the demolition covenant in the Deed were different from the Contract that Council approved and what the City Attorney had promised the Deed *would* say.

The Court of Appeals correctly concluded that "by providing [in Va. Code § 15.2-1800(B)] that localities are required to hold a public hearing 'concerning [the] disposal' of the property in question, the General Assembly provided a public right in that hearing itself that may be asserted and enforced through declaratory relief where the locality fails to hold the hearing or where the hearing fails to comport with minimal due process requirements" (Mem. Op. at 20-21) so that a plaintiff may "vindicate his limited *public* right to such a hearing" (Mem. Op. at 22) (the word "public" was emphasized in the Court's Memorandum Opinion).

The Court of Appeals held that McGuire lacks standing in this case only because a hearing concerning the disposal on the changed terms was not required (Mem. Op. at 22). The Court's standing analysis is entirely contingent upon the false premise that this is not a case where, in this Court's words, "after the public hearing in question, a locality [has] alter[ed] . . . a material term or change[d] the contract to the point it is not of the same substance that the public hearing concerned" (Mem. Op. 19-20 n.11). ***But this is such a case.*** McGuire therefore has standing to, in the Court of Appeals' words, "vindicate his limited *public* right

to such a hearing" by seeking "declaratory relief."

III. (Assignment of Error 3) McGuire did not challenge a zoning decision and his Declaratory Judgment action was not time-barred (preserved at Rec. 417:17-418:3 and Rec. 390 (the portion of the Final Order that preserved oral argument objections)).

The Circuit Court's Order granting the Demurrer on the grounds that McGuire sought to untimely challenge a zoning decision was erroneous because he did not seek to challenge a zoning decision. Va. Code § 15.2-2285(f) requires that an action challenging a zoning decision by a governing body "be filed within thirty days of the decision . . . ." But McGuire's lawsuit did not challenge, or seek relief from, a zoning or rezoning decision. Indeed, the City Attorney did not argue to the Circuit Court at oral argument that McGuire had challenged a zoning decision, but told the Court that the defendant's zoning Demurrer was made *in case* he raised a zoning argument. The City Attorney told the Court that it made the Demurrer as "mere housekeeping," so that its objection to timeliness would be preserved "*in the event* that the Court finds any of the complaints . . . wasn't filed within the 30-day requirement" (Rec. 406:18-407:3). McGuire's counsel then reiterated to the Court at oral argument that McGuire was not challenging a zoning decision (Rec. 417:18-418:3). And the City Attorney did not argue further that McGuire sought to challenge a zoning decision.

Nevertheless, the Circuit Court erroneously granted the Appellees' Joint

Demurrer "on all grounds" (Rec. 386), which included the argument that McGuire's suit was an untimely challenge to a zoning decision. The Court of Appeals properly noted that "the circuit court's characterization of McGuire's complaint as 'an untimely appeal of a zoning decision' is irrelevant to his appeal of the sustained demurrer to his amended complaint seeking declaratory relief." But it did not otherwise address the Circuit Court's ruling granting the demurrer "on all grounds"(Mem. Op. at 14).

CONCLUSION

Plaintiff Owen W. McGuire prays that this Court will reverse the Court of Appeals' judgment affirming the Circuit Court's judgment granting the Joint Demurrer.

CERTIFICATE

(1) This brief was served on the following opposing counsel by email on 7 July 2025:

(a) Timothy R. Spencer, City Attorney, Virginia State Bar No. 26532, 464 Municipal Bldg., 215 Church Ave., Roanoke VA 24011 (timothy.spencer@roanokeva.gov);

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(c) Compton M. Biddle, Esq., Virginia State Bar No. 46187, OPN Law, 3140 Chaparral Dr., Ste. 200C, Roanoke VA 24014 (cbiddle@opnlaw.com).

(2) Appellant McGuire desires oral argument and does not waive oral argument;

(3) This brief complies with Rule 5:17(f) because it is less than 35 pages (excluding the cover, tables of contents and authorities, signature blocks, and certificate).

Respectfully Submitted,

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